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Each syllabus paragraph in this volume is marked with the topic and Key-Number section ➡ under which the point will be digested in the American Digest System.

The lawyer is thus led from that syllabus to the exact place in the Digests where we, as digest makers, have placed the other cases on the same point--*This is the Key-Number Annotation.*

NATIONAL REPORTER SYSTEM—STATE SERIES

THE PACIFIC REPORTER

VOLUME 171

PERMANENT EDITION

COMPRISING ALL THE DECISIONS OF THE
SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON
WASHINGTON, COLORADO, MONTANA, ARIZONA
NEVADA, IDAHO, WYOMING, UTAH
NEW MEXICO, OKLAHOMA
AND OF THE COURTS OF APPEAL OF CALIFORNIA
AND CRIMINAL COURT OF APPEALS
OF OKLAHOMA

WITH KEY-NUMBER ANNOTATIONS

CONTAINING A TABLE OF PACIFIC CASES IN WHICH REHEARINGS
HAVE BEEN DENIED

APRIL 1 — MAY 13, 1918

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¹ Became Associate Justice January 12, 1918.

² Became Chief Justice January 12, 1918.

³ Died February 17, 1918.

⁴ Appointed March 5, 1918, to fill out unexpired term of Chas. M. Thacker.

⁵ Resigned.

⁶ Appointed February 28, 1918, to fill out unexpired term of W. R. Bleakmore.

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*Died March 6, 1918.

*Qualified April 15, 1918.

COURT RULES

SUPREME COURT OF OKLAHOMA¹

Probate Procedure

*Rules of Procedure in Probate Matters Adopted by the Justices of the Supreme Court of Oklahoma, as Amended June 11, 1917,
Effective July 10, 1917*

Now on this 11th day of June, 1914, the Justices of the Supreme Court, pursuant to section 5347, Revised Laws of Oklahoma, 1910, meet at the capital of the state of Oklahoma for the purpose of revising their general rules and making such amendments in addition thereto as may be required for the proper and expeditious conduct of the business of said court and other courts of record of said state. After due consideration, the Justices of said Supreme Court promulgated and adopted the following rules:

DATES FOR HEARING GUARDIAN'S REPORTS.

RULE 1.—The _____ of each _____ are hereby set apart and designated as the dates on which the court will hear guardians' reports; provided that such reports have been on file and notice given, as provided in rule 3.

ANNUAL OR SEMIANNUAL REPORTS—REQUISITES, WHAT MUST SHOW—FAILURE TO MAKE.

RULE 2.—All guardians are required to make annual, or semiannual reports, unless otherwise directed, under oath, showing fully and completely the description, character, kind and value of all property held for their wards. All items of receipts and disbursements must be in detail and receipts produced and filed for sums paid out. All securities and assets should be listed in each report, and copies of deeds, mortgages, etc., evidencing same recorded and attached thereto as exhibits. Upon an approval of any order of court to invest the funds of a ward, guardians shall attach to their reports copies of evidence of title or other investment. The date and amount of guardian's bond, premium paid, if any, as well as the names, addresses, and solvency of sureties thereon, must be given. The name, age, sex, of the ward and relationship, if any, to the guardian should be stated, and the school advantages disclos-

ed. All reports must be self-explanatory. A failure or refusal to file reports as due will be grounds for removal.

NOTICE OF HEARINGS—TO WHOM GIVEN—OBJECTIONS.

RULE 3.—Upon the filing of the reports and fixing of the date for hearing thereof, the judge shall cause notice to be given of the date of such hearing to the persons having custody of the ward, the representative of the Interior Department or probate attorney, at least ten days before the date of the hearing. Any person or persons interested may appear and make objections, if so desired, to the approval of such reports, and offer evidence to support such objections.

RECEIPTS ON FINAL ACCOUNTING—HEARING, PROCEDURE.

RULE 4.—No receipts from the ward upon the final accounting of a guardian will be accepted or considered unless the ward be brought into open court, and upon the hearing of said final receipt, the stenographic notes shall be transcribed and a copy thereof filed with the papers in the case. In the consideration of any reports, annual or final, any item included in any previous reports may be reviewed.

HEARING PETITION FOR SALE OF REALTY—DATE—PROCEDURE—CERTIFIED CHECK DEPOSIT.

RULE 5.—Petitions for the sale of land of minors and incompetents will be heard _____ of each _____. On the hearing on petitions for sale, the guardian, person in custody, and the ward himself, when over fourteen years of age, must be present and must be examined as to the necessity for said sale and the truth of the allegations of the petition, and furnish such additional evidence as the court may require. The evidence offered must be taken down and transcribed and a

¹ For other rules, see 165 Pac. vii.

copy thereof filed with the papers in the case. No bid will be considered by the court unless a certified check in the amount of ten (10) per cent of the amount of the bid be deposited either in court or with the guardian offering the land for sale.

ACCOUNT BEFORE CONFIRMATION OF SALE—DATE FOR CONFIRMATION—ABSTRACT FEE.

RULE 6.—In the sale of minors' lands or minors' interest in land, the guardians shall be required to render to the court for his approval before confirmation of sale, an account of sale showing each item of expense incurred in such sale, and in no case shall abstract fees be charged against the minor's estate, except by a special agreement with the court at or prior to the time of filing bid. Confirmation will not be had except on the

ATTORNEY'S FEES ON SALE OF REALTY.

RULE 7.—Under the sale of real estate by guardian, no fees in excess of the following schedule of fees will be allowed attorneys:

On the first \$500 or less.....10 per cent.
From \$500 to \$1,500, inclusive... 5 per cent.
From \$1,500 to \$3,000, inclusive.. 2 per cent.
For all above \$3,000..... 1 per cent.

But in no case shall the fee exceed the sum of \$300. The minimum fee will be \$25, unless the court in granting the petition for the sale shall stipulate that the fee and costs incident thereto shall be borne by the purchaser.

GUARDIAN DELINQUENT—PETITION OR VOUCHER NOT CONSIDERED.

RULE 8.—No petition for the sale of ward's property, or voucher for the payment by the Interior Department of money to the guardian, will be considered if said guardian is delinquent in making reports or filing inventory as required by law.

OIL AND GAS LEASE—SALE OF—PROCEDURE—NOTICE.

RULE 9.—No oil and gas, or other mineral least five (5) days before the same are sold incompetents, will be approved except after sale in open court to the highest and best responsible bidder. All petitions for the approval of oil and gas leases shall be filed at least five (5) days before the same are sold as provided herein and notice of such sale must be given by posting and by publication where publication is practicable, and shall be on ——— of each ———.

SUPERSEDED BY STATUTE.

RULE 10.—(Note: Rule 10 of the Rules is superseded by chapter 198 of Session Laws, Okl., 1915, pp. 403-406, "An act providing exclusive procedure for the sale of interests of full-blood Indian heirs in inherited lands

and declaring an emergency," approved April 2, 1915. Also see note at end of Rules.)

EXPENDITURES—APPROVAL OF.

RULE 11.—Guardians shall not expend for or on account of their wards any sum unless first authorized by the court, except in case of sickness of the ward, or other emergency, in which event notice must be given immediately to the court.

OFFICIALS RECOGNIZED.

RULE 12.—The national attorney, or any of the probate attorneys for the Five Civilized Tribes, or the representative of the Department of the Interior (or Department of Justice in the Seminole Nation) will be recognized in any matter involving the person or property of a citizen of such Nation.

TRUST FUNDS—DEPOSIT—HOW KEPT.

RULE 13.—Trust funds must be deposited by the guardian as trustee, and not to his personal account, and where an individual is guardian for several persons or estates the accounts shall be deposited and kept separate and apart.

BOARD AND KEEP OF WARD—PARENT GUARDIAN.

RULE 14.—In the settlement of a guardian's account, where the guardian is the parent of the ward, no allowance will be made from the ward's estate for board and keep, except it is made to appear a positive injustice would result from the enforcement of such rule, and unless said parent is unable to support said ward.

FUNDS—INVESTMENT OF.

RULE 15.—All guardians shall be required to secure loans for funds in their hands belonging to their wards, with real estate first mortgage security not to exceed 50 per cent. valuation of the land approved by the county court. Such guardians may, with the approval of the court, invest said funds in bonds of the United States or of this state or any municipality thereof. (See note at end of Rules.)

WILLS OF INDIANS—PROBATE PROCEDURE.

RULE 16.—No will or other instrument purporting to be a will covering the lands of a restricted Indian of the Five Civilized Tribes, whether such land be his individual allotment or inherited land, when submitted by the allottee or other person to the proper probate court, as required under existing law, shall receive the acknowledgment of, nor be admitted to probate by such probate court until after notice shall have been given to the local probate or tribal attorneys for the Tribes or for the Department of the Interior, or a representative thereof.

RULES APPLY TO EXECUTORSHIPS AND ADMINISTRATION.

RULE 17.—These rules shall also apply to executorships and administrations insofar as they are applicable, especially inasmuch as sales of property and accountings are concerned.

ADVERTISEMENTS—BLANKS IN RULES FILLED—COURTS GOVERNED BY RULES.

RULE 18.—All advertisements not required by law may be waived with the consent of the county court upon the approval of the probate attorney or tribal attorney.

It is ordered and directed by the Supreme Court that the judge of any court wherein said rules may be applicable shall, immediately after conference with the probate attorney assigned to his county or district by the commissioner of Indian Affairs, fill in all blank spaces in said rules left vacant by the Justices of the Supreme Court, to suit the convenience of said judges and facilitate the efficient and orderly transaction of business in their respective courts.

And it is further ordered and directed that the rules so promulgated and adopted shall apply to the Supreme Court, district courts, superior courts, county courts, and all other courts of record throughout the state in

which they may be applicable, and that they shall be of full force on and after the 15th day of July, 1914.

(Note: On June 11, 1917, at the time of revising the general rules, these rules were revised):

"RULES REVISED.—And the justices at the same time, in pursuance of the authority granted by section 5347, Rev. Laws of Oklahoma 1910, have revised and amended the rules of procedure in probate matters in the following particulars, to wit:

"Rule ten (10) of rules of procedure in probate matters adopted on the 11th day of June, 1914, should be omitted as the matters therein regulated have been provided for by statute.

"Rule fifteen (15) should be amended to read as follows:"

Here is set out rule 15 as given above:

"And as revised and amended, the rules of procedure in probate matters heretofore in force are adopted and promulgated as the Rules of Procedure in such matters and as so promulgated and adopted, shall apply to the Supreme Court, district courts, superior courts, county courts, and all other courts of record throughout the state in which they may be applicable and that they shall be of full force on and after the 10th day of July, 1917."

Workmen's Compensation Law

Rules Prescribed by the Supreme Court Governing the Commencement and Trial of Actions Commenced for the Purpose of Reviewing Awards or Decisions of the Commission under the Workmen's Compensation Law.

(Adopted February 15, 1916)

ACTIONS FOR REVIEW—PETITION—REQUISITES—DESIGNATION OF PARTIES.

RULE I.—Actions for the purpose of reviewing award or decision of the Commission shall be commenced in the Supreme Court by the aggrieved party filing with the clerk thereof a petition, to which shall be attached a certified copy of the award or decision, wherein he shall make assignments or specifications as to wherein the award or decision is erroneous or illegal. All parties joining in such petition shall be designated "petitioner," and the Commission, and all parties affected by the award or decision sought to be reviewed, shall be joined therein as "respondents."

NOTICE—SERVICE—PRESUMPTION.

RULE II.—Notice of the filing of such petition shall forthwith be served upon the respondents therein, or their attorney of record, by the clerk of the Supreme Court, by mail, in the manner parties to ordinary actions pending in said court are notified of the action of the court in relation to preliminary motions and orders. In the absence of substantial evidence to the contrary, it shall be presumed that sufficient notice of the filing of said petition was given.

ANSWER, TIME FOR—REQUISITES—PLEADINGS.

RULE III.—Within ten (10) days after the issuance of the notice required by rule II,

the respondent shall file a pleading which shall be known as an "answer," wherein he shall set forth in full any and all defenses he may have against the petition of the petitioner. The petition and answer shall be all the pleadings which shall be filed in such actions in the Supreme Court.

SETTING AND TIME FOR HEARING.

RULE IV.—The clerk of the Supreme Court shall set such actions for hearing on the first court day which occurs thirty-five (35) days after the answer required by rule III is filed.

BRIEFS—TIME FOR FILING—COPIES.

RULE V.—The petitioner shall serve and file his brief within twenty (20) days after the answer of the respondent is filed, and the respondent is required to serve and file his brief within fifteen (15) days after the expiration of the time granted the petitioner. All briefs may be typewritten, and legible copies thereof shall be provided for each member of the court.

HEARING SUMMARY—RECORD—QUESTIONS OF FACT.

RULE VI.—The action shall be heard in a summary manner upon the record and proceedings had before the Commission, or as much thereof as may be necessary to present for review the questions raised by the petition and answer; and to this end, the parties may agree as to what the record and proceedings below contain, or the court, upon its own motion, or upon the motion of any of the parties affected, may, at any time before final decision, order the Commission to forthwith certify up such record and proceedings, or such part thereof, as may be necessary for the trial of such action. Upon the hearing of such action the decision of the Commission shall be final as to all questions of fact.

COUNSEL CHARGED WITH NOTICE.

RULE VII.—Prior to the completion of the trial record in the Supreme Court, in the manner provided by rule VI, counsel, in the preparation and filing of all pleadings, pre-

liminary motions, briefs, etc., shall be charged with notice of the contents of the records and proceedings below, as they appear in the records, files and archives of the Commission.

DISPOSITION OF ACTION—DISMISSAL.

RULE VIII.—Unless by agreement of the parties, no such action shall be dismissed by the Supreme Court without a full hearing upon any ground, except that the petition required by rule I was not filed within the time required by law.

MANDATE—ISSUANCE, TIME OF—PROCEDURE.

RULE IX.—Immediately after the expiration of the ten (10) days from the determination of such action by the Supreme Court, mandate shall be issued as in ordinary cases on appeal, on receipt of which the Commission shall make an order or decision in accordance with the judgment of the Supreme Court.

REHEARING—PROCEDURE.

RULE X.—No petition for rehearing decisions rendered by the Supreme Court shall be filed, except by order of the Supreme Court entered prior to the issuance of mandate wherein shall be stated the time within which such petition shall be filed.

ORAL ARGUMENT—NOTICE—SUBMISSION ON BRIEFS.

RULE XI.—Attorneys desiring to make oral argument shall file notice of such intention with the clerk, as follows: On behalf of the petitioner at the time of filing his petition; on behalf of the respondent at the time of filing his answer. If no notice is served, causes will be submitted on briefs.

ACTIONS SUBJECT TO GENERAL RULES.

RULE XII.—Such actions shall be subject to the general Rules of the Supreme Court, heretofore revised and adopted, in so far as the same may be applicable and not inconsistent with the foregoing rules.

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(102 Kan. 400)

EASTMAN v. ATCHISON, T. & S. F. RY. CO. (No. 21261.)

(Supreme Court of Kansas. Feb. 9, 1918.
Rehearing Denied March 15, 1918.)

(Syllabus by the Court.)

1. MASTER AND SERVANT \S 264(11)—**ACTION FOR INJURY—ALLEGATION AND PROOF—VARIANCE.**

The plaintiff alleged that the defendant's roadmaster directed him to board a car which it had negligently left in an unsafe condition. The jury found the negligence to consist of the direction of the roadmaster to board the car. *Held* that, as the negligence charged was not proved, the plaintiff cannot recover.

2. TRIAL \S 350(6)—**SPECIAL FINDINGS—REQUEST TO FIND ACTS OF NEGLIGENCE.**

It is proper practice to request the jury to find what the defendant's acts of negligence were.

3. TRIAL \S 351(2)—**SUBMISSION OF SPECIAL QUESTION.**

A submitted question is examined, and not found to contain any pitfall or trap for the unwary juror.

Appeal from District Court, Harper County.

Action by C. W. Eastman against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, with direction to enter judgment for defendant.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, for appellant. E. C. Wilcox and Myrtle Youngberg, both of Anthony, and H. C. Kirkendall, of Cherokee, Okl., for appellee.

WEST, J. The plaintiff, a section foreman, recovered a judgment for injuries received in boarding a passenger train. The defendant appeals.

[1] The petition alleged that, being where his duties of inspecting the track and superintending the repair thereof required him to be, he was ordered and motioned by the roadmaster, who was standing on the platform of a coach of one of defendant's trains, to get on the back end of the coach and ride with him to the depot; that the defendant had negligently failed to provide the coach with proper steps, but had permitted them to get old and worn and slanted and covered with sleet and ice, and in attempting to get on the car he slipped and fell and was dragged and injured. The jury found that the slipping of

plaintiff's hands off the handholds caused him to fall; that the train was moving about a mile an hour when the roadmaster motioned or told him to get on board, and four or five miles an hour when the plaintiff received his injury; that the roadmaster directed him to get on when to any one using ordinary prudence it was obviously of great danger for plaintiff to make the attempt; that if he had attempted to board the car where the roadmaster was standing when first told so to do, he would not have gotten on without injury; that the plaintiff was damaged \$1,300, to which he contributed \$300 by his own negligence.

"Q. 2. If you find for plaintiff, then state in what respect the defendant was negligent, at the time and place in question. A. The defendant company was negligent in that Roadmaster Carpenter requested or signaled the plaintiff to board its train."

It will be observed that there was no allegation of negligence on the part of the roadmaster, and the jury found none regarding the condition of the train. The defendant therefore invokes the rule that the charged negligence was not found, and hence there can be no recovery. To this the plaintiff responds that the found negligence is restricted to the immediate time and place of the injury and should be construed together with the general verdict, the finding meaning that the roadmaster was negligent in directing the plaintiff to board the train, and the general verdict meaning that the company was negligent in respect to the condition of the car. The trouble with this argument is that the jury had a chance and were specially requested to advise the parties what the defendant's negligence consisted of, and left out everything but the direction to get on board, something which the plaintiff had not in his petition denounced or even denominated as negligence. *McBeth v. Railway Co.*, 95 Kan. 364, 148 Pac. 621; *Spinden v. Railway Co.*, 95 Kan. 475, 480, 148 Pac. 747; *Case v. Yoakum*, 99 Kan. 253, 161 Pac. 642; *Parks v. Railway Co.*, 100 Kan. 219, 163 Pac. 1066.

[2] The plaintiff also appeals, and complains that the court permitted the jury to answer the quoted question No. 2, and also No. 9, which, with its answer, is as follows: "Q. 9. Did the roadmaster, Carpenter, direct the plaintiff to get on the train when to any

one using ordinary prudence it was obviously of great danger for plaintiff to attempt to get on? A. Yes."

The objection to No. 2 was that it was "improper to require the jury to enumerate the acts of negligence by a question so formed," and to No. 9 that it was "formed in such a way that it was liable to mislead the jury and cause an answer the reverse of their intention."

It is urged that the jury should not have been left to say what the defendant's negligence was, but should have been given a direct question which could be answered by "Yes" or "No." This very sort of question, however, was held proper in *Cole v. Railway Co.*, 92 Kan. 132, 139 Pac. 1177, and in *Adams v. Railway Co.*, 93 Kan. 475, 144 Pac. 999.

[3] Question No. 9 is referred to by counsel as one "framed by the most skilled wording of high-classed specialists, calculated to induce a miscarriage of the justice," and it is said that, if the answer is "Yes," it finds the defendant guilty of contributory negligence, and, if "No," it finds the defendant guilty of no negligence.

But this does not condemn the question, which asks for something which the parties have a right to know, and in which we fail to discover any pitfall or trap to catch the unwary juror. We have overlooked nothing suggested by either side, and fail to find in the record any error materially prejudicial to the plaintiff, but are impelled by the settled rule heretofore repeatedly announced to hold that the negligence relied on by the plaintiff was not shown, and hence that he failed in his action and cannot recover.

The judgment is reversed, with directions to enter judgment for the defendant. All the Justices concurring.

(102 Kan. 488)

RIVERSIDE PARK ASS'N v. CITY OF HUTCHINSON et al. (No. 21316.)

(Supreme Court of Kansas. Feb. 9, 1918.
Rehearing Denied March 15, 1918.)

(Syllabus by the Court.)

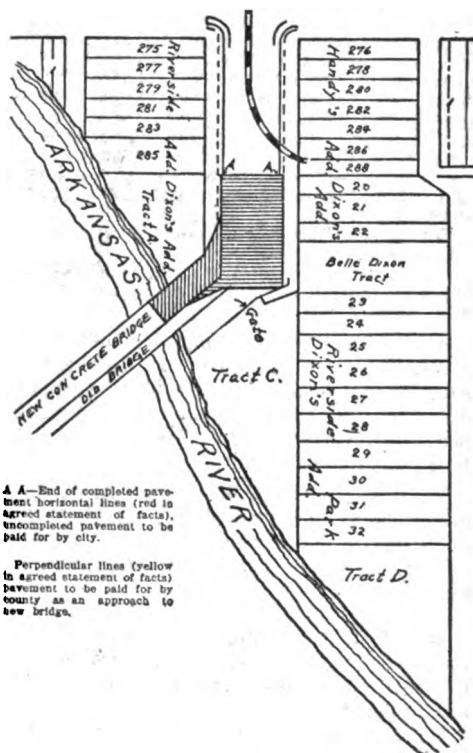
MUNICIPAL CORPORATIONS § 513(5) — SPECIAL IMPROVEMENT ASSESSMENT — ACTION FOR INJUNCTION—LIMITATIONS.

The statutory limitation that an action cannot be maintained to enjoin or contest a special assessment for the improvement of a street unless it is begun within 30 days after the amount due on each lot or piece of ground assessed is ascertained (Gen. St. 1915, § 1217) applies to invalidity as well as irregularity in the proceedings, including objections that the taxing district extends over too much ground, and also where the land assessed included abutting ground not platted, and also lots and blocks lying beyond the unplatted part which did not abut on the improved street. Invalid proceedings of the kind named, which would defeat an assessment if attacked in time, are not open to attack if the time limit has expired.

Appeal from District Court, Reno County. Suit for injunction by the Riverside Park Association against the City of Hutchinson and others. Judgment for plaintiff, and defendants appeal. Reversed and cause remanded, with instructions to enter judgment for defendants.

Walter F. Jones, of Hutchinson, for appellants. E. T. Foote, of Hutchinson, for appellee.

JOHNSTON, C. J. This was a suit to enjoin the collection of a paving tax assessed upon plaintiff's property. On July 6, 1915, the city of Hutchinson passed an ordinance providing for the paving of South Main street from the south line of Avenue F to the Arkansas river. The following plat shows the portion of the street in question and the situation of the surrounding properties.



On July 30, 1915, a contract was made for the paving, and as first drawn up it provided for the paving to extend to the river, but it was afterward changed (and according to the testimony of the city clerk, without authority for the change) to read, from Avenue F to the south line of Riverside addition and Handy's addition. On November 17, 1915, appraisers appointed by the city commissioners made an appraisal of lots 275 to 285 in Riverside addition and lots 276 to 288 in Handy's addition, but nothing south of that was included in

the report. On November 26, 1915, the city commissioners, acting as a board of equalization, made some changes in the appraisers' report, and then also included an assessment of lots 20 to 32 in Dixon's addition, tract A, tract C, and Belle Dixon tract; and in an ordinance published February 17, 1916, the assessment for all of the lots and tracts mentioned was made. Plaintiff is the owner of lots 23 to 32 and tracts C and D in Dixon's addition, and taxes upon this property, except tract D, were certified by the city clerk upon the roll, to be collected. Plaintiff's action to enjoin its collection was brought December 11, 1916.

The pavement was completed as far as the point where the horizontal lines are shown on the plat, awaiting the completion of a new bridge by the county. The pavement on the approach to the bridge, indicated on the plat by the vertical lines, is to be paid for by the county.

The injunction prayed for was granted as to lots 23 to 32 in Dixon's addition. The defendants appeal.

The only question we need to consider is one of limitation on the right of plaintiff to enjoin or contest the levy of the special assessment. Under a statutory provision the right to enjoin or contest such a levy can be exercised only within 30 days after the assessment is ascertained. Gen. Stat. 1915, §1217. Plaintiff did not commence this action until ten months after the assessment had been ascertained. It is insisted by the plaintiff that the city acted without authority, in that it assessed property not adjoining the street to be improved, and also that the assessment attempted was not made in the manner prescribed by law. The bar of the statute applies even if the defendants acted without authority in the inclusion of property that was not subject to assessment. It has already been determined that the 30-day limitation applies to void assessments as well as to irregular ones. *City of Topeka v. Gage*, 44 Kan. 87, 24 Pac. 82. In *Rockwell v. Junction City*, 92 Kan. 513, 141 Pac. 299, Ann. Cas. 1916B, 315, and the same case on rehearing, 93 Kan. 1, 142 Pac. 268, it was ruled that the limitation in question cuts off all defenses of every kind and character, including assessments fraudulently made and those which were made without jurisdiction or authority. That holding has been followed and approved in *Railway Co. v. City of Chanute*, 95 Kan. 161, 147 Pac. 836; *Arment v. Dodge City*, 97 Kan. 94, 154 Pac. 219; *Wyandotte County v. Haskell*, 97 Kan. 304, 154 Pac. 1029. No more reason can be found for excepting from the limitation a defense that the assessment is invalid because of including platted and unplatted land or land extending too far from the improved street than there was for excepting a defense that

the assessment was fraudulent and void. The Legislature manifestly intended to bar an action for every defect, whether it be for irregularity, or invalidity, if not begun within the prescribed time. Within that time the plaintiff might have contested the right of the city commissioners to make an assessment on property which the appraisers had not included in their report and also where the taxing district had extended beyond the legal limits. The intention of the Legislature was that public improvements should not be long delayed by contests of this character nor the assessment proceedings interrupted by belated litigation; and so property owners who propose to challenge an assessment for any kind of defect are required to do so promptly or not at all. The validity of such a law is beyond question.

It follows that the judgment must be reversed and the cause remanded, with instructions to enter judgment for the defendants. All the Justices concurring.

(102 Kan. 369)

**FIRST NAT. BANK OF HAYS CITY v.
STAAB et al. (No. 20887.)**

(Supreme Court of Kansas. Feb. 9, 1918. Rehearing Denied March 15, 1918.)

(Syllabus by the Court.)

1. TRIAL §251(2)—INSTRUCTIONS—ISSUES.

An instruction covering fraud and mutual mistake, not pleaded, held improper.

2. EVIDENCE §402 — PAROL EVIDENCE — NOTE.

Rule followed that the terms of a plain promissory note cannot be varied by parol.

3. REPLEVIN §71(1)—VALUE OF PROPERTY—EVIDENCE—AFFIDAVIT.

The affidavit in replevin made by the plaintiff was properly permitted to go to the jury on the question of value of the property involved.

4. CHATTEL MORTGAGES §277—ALLEGATION AND PROOF—INSECURITY.

Proof of a feeling of insecurity was sufficient to support the plaintiff's allegation that it deemed itself insecure; the reasonableness of such feeling being immaterial.

Appeal from District Court, Ellis County.

Replevin by the First National Bank of Hays City, Kan., against A. P. Staab and Jacob P. Staab. Judgment for defendants, and plaintiff appeals. Reversed, and cause remanded.

A. D. Gilkeson and C. M. Holmquist, both of Hays, and C. Monroe, of Topeka, for appellant. E. A. Rea and J. P. Shutts, both of Hays, for appellees.

WEST, J. The plaintiff bank loaned Jacob Staab \$175.25, taking his note payable on demand, which note his father was to but did not sign, secured by a chattel mortgage on some wheat and other property already mortgaged to the bank by the defendants to secure indebtedness which had been running and accumulating for a number of years,

The bank brought replevin, and in its affidavit fixed the value of the wheat at \$3,000, and the other property at \$1,730. No redelivery bond was given. The bank sold the wheat for \$600 and the other property for \$971.50. The defendants pleaded an oral agreement on the part of plaintiff's cashier when the note of Jacob Staab was given that no action would be taken on the chattel mortgages until the wheat was threshed and marketed, and prayed judgment for a return of the property or the sum of \$4,500 and costs. The defendants recovered a judgment for \$3,900, and the plaintiff appeals, assigning as errors the admission of evidence as to the alleged agreement and certain other rulings touching evidence and instructions.

[1, 2] The principal complaint is that the alleged parol agreement contradicted the terms of the note given by Jacob Staab. The latter testified: That when he gave this demand note he thought it was the same as any other, and would "give a man time; thirty days or ninety days." That he understood from the cashier from what he said that he was to pay after the wheat was threshed and marketed, and that he would not have signed these notes and chattel mortgage if he had known that the bank would demand payment within 30 days and before the wheat was threshed and marketed. On cross-examination he testified that:

The note was not to be paid until after harvest. "Q. Who told you that? A. Mr. Madden. Q. What did he say? Give us his exact language. A. 'Now,' he says, 'I want you to straighten out these notes this fall.' I says, 'I will just as soon as I thresh.' I says, 'I can't pay them before that.' Q. And that is what he said? A. Yes. Q. He didn't say he would not try to collect them before that; he had any particular time? A. No; he never said that."

The court instructed that:

"Evidence has been presented as to the agreement regarding the maturity of the note given by Jacob P. Staab and of the alleged extension of his father's note until threshing or marketing time. * * * If, at the time that the defendant Jacob P. Staab signed the notes in controversy, he and the bank made an agreement to the effect that payment thereon was not to be made nor demanded until after the wheat of the defendant was threshed and marketed, and if it was understood and agreed at such time between said defendant and the bank that said notes should not mature nor be due and payable until after threshing and marketing the wheat, such agreement, if any, would be binding upon the plaintiff as well as the defendant, even though the note taken provided that it was due and payable 'on demand,' provided that by reason either of accident or mutual mistake of both parties, or of fraud on the part of the bank, the note did not express the contract or agreement of the parties in relation to the maturity of said note."

We are compelled to hold that this instruction not only went beyond the allegations of

the answer which did not allege any fraud or mutual mistake and the evidence which in no wise indicated either, but also went counter to the rule that the plain terms of a promissory note cannot be varied by oral testimony. This rule is clearly set forth in *Stevens v. Inch*, 98 Kan. 306, 158 Pac. 43, and *Bank v. Paper Co.*, 98 Kan. 350, 158 Pac. 44. It is but fair, however, to say that both of these decisions were rendered after the trial of this action.

[3] It is complained that the affidavit was permitted to go to the jury on the question of the value of the property. The court refused an instruction that it should not be considered, and charged that while not an absolute test of the value, and while made only for the purpose of fairly approximating the value in fixing the amount of bond to be given, it might be considered so far as it threw light upon the question of a feeling of insecurity. There was no error in this of which the plaintiff can complain, for the court might have gone further and charged that the affidavit might be considered touching the question of value and the plaintiff's estimate thereof. *Crawford v. Furlong*, 21 Kan. 698, *Holsington v. Armstrong*, 22 Kan. 110, *Mills v. Mills*, 89 Kan. 455, 18 Pac. 521, and 34 Cyc. 1605.

[4] On the question as to whether the bank actually deemed itself insecure, the jury were correctly charged that if, when the property was taken, the cashier took possession with the conviction of insecurity in his mind, that was sufficient. The cashier not only testified to this feeling of insecurity, but gave cogent reasons therefor. It is complained that there was no evidence to the contrary, and that the jury were erroneously permitted to pass on the question. The court instructed that:

As the cashier had testified that he had such feeling at the time "then upon the facts of the case if you think it is at all fairly and reasonably possible to believe that he had such feeling, then you should so find, and it should be held that the bank had a right to take possession of the property."

There is nothing on the face of the record to impugn his credibility in the slightest, except the matter of value fixed in the affidavit, but this particular part of the charge is not complained of.

One of the provisions of the mortgage was that possession might be taken if the bank should deem itself insecure. It was alleged that it did so deem itself. The answer contained a general denial. It was proper, therefore, to permit proof as to such alleged feeling of insecurity; the reasonableness thereof being entirely immaterial.

The judgment is reversed, and the cause remanded for further proceedings. All the Justices concurring.

(102 Kan. 378)

COOPER v. COOPER et al. (No. 21045.)

(Supreme Court of Kansas. Feb. 9, 1918. Rehearing Denied March 15, 1918.)

*(Syllabus by the Court.)***1. HUSBAND AND WIFE ⇨325—ALIENATION OF AFFECTIONS—DUTY OF HUSBAND'S PARENTS.**

The parents of a 19 year old son owe no legal duty towards that son's wife, except not to meddle intentionally with their son's affections for his wife.

2. HUSBAND AND WIFE ⇨325—ALIENATION OF HUSBAND'S AFFECTIONS—LIABILITY.

A mother-in-law is not guilty of alienating her infant son's affections for his wife, merely because she disliked the wife and regretted her son's marriage, and expressed her belief that because of his extreme youth he was not fitted for the responsibilities and duties of a married man.

3. HUSBAND AND WIFE ⇨325—ALIENATION OF HUSBAND'S AFFECTIONS—LIABILITY.

A father-in-law is not guilty of alienating his infant son's affections for his wife, merely because he gives his son financial assistance to attend school after the wife has refused to live with the son on account of his inability to support her, and when in good faith the father sought to improve his son's earning capacity by improving his education.

4. HUSBAND AND WIFE ⇨333(9) — ALIENATION OF HUSBAND'S AFFECTIONS—EVIDENCE.

Evidence examined and held insufficient to sustain a judgment in favor of plaintiff against her parents-in-law for the alienation of her husband's affections.

Johnston, C. J., and West, J., dissenting in part.

Appeal from District Court, Allen County.

Action by Hallie Cooper against J. A. Cooper and Cynthia Cooper. Judgment for plaintiff, and defendants appeal. Reversed, and cause remanded, with instructions to enter judgment for defendants.

Cullison, Forrest & Clifford, of Iola, for appellants. F. J. Oyler, of Iola, for appellee.

DAWSON, J. The plaintiff recovered a judgment for damages against her father-in-law and mother-in-law for alienating her husband's affections.

On March 10, 1914, the plaintiff, a girl of 20, married the defendants' son, a youth who was about a month under 19 years of age. The young husband had no means of supporting his bride, so he brought her to the home of his parents, with whom they resided for some weeks. About May 1, 1914, the defendants permitted plaintiff and her husband to take up their abode on defendants' farm and to use their furniture. Early in June the plaintiff and her husband went on a month's visit to Illinois, and on their return they stayed a week on the farm, and then they moved into furnished rooms in Moran, where they resided until November 12, 1914, when the plaintiff went to Illinois to attend her invalid grandmother. Plaintiff gave birth to a child in Illinois and remained there many months. During her long absence in Illinois she and

her husband had become estranged; and he, with some financial aid from his father, had entered school at Emporia. Plaintiff returned to Moran in October, 1915, and, on demand of plaintiff, the defendant Cooper recalled his son from school, but the young people never resumed relations as husband and wife. Plaintiff caused her husband's arrest for non-support, but he was discharged by the examining magistrate. Then she instituted a suit against him for alimony, and commenced this action against the defendants. Issues were joined, and the cause was tried to a jury, which gave a verdict for plaintiff for \$5,000 against both defendants. Several unimportant questions were answered by the jury, and also the following:

"Q. 4. Before the estrangement of plaintiff and Beryl Cooper, did the defendant J. A. Cooper have or exhibit any malice against the plaintiff? A. Yes. * * *

"Q. 7. Did the defendant J. A. Cooper intentionally and maliciously speak any word or perform any act for the purpose of alienating the affections of his son from the plaintiff? A. Yes.

"Q. 8. If you answer the foregoing in the affirmative, state what he did or said. (Stricken out by court.)"

A long assignment of errors is presented, the chief of which is that there was no evidence upon which to base the verdict of the jury. To aid the court in testing the correctness of this contention, we have an abstract of 160 pages by appellant and a counter abstract of 92 pages by the appellee. Both of these bulky compilations have been studied with care. Both are cumbered with an interminable mass of more or less irrelevant matter, designed apparently to show what the defendants did and did not do towards establishing the young people in housekeeping and in business; and what the defendants did and failed to do to show their affection for plaintiff and her baby which was the offspring of this marriage and defendants' grandchild. There is also in the record a plethora of letters from plaintiff to her husband while she was in Illinois. The first of these was affectionate in tone, but her later letters were filled with faultfinding, with exasperation for the young husband's failure to pay his bills, his failure to launch himself in some sort of paying business which would enable him to support his wife and child; and between occasional terms of endearment she called him a "cad," a "calf," and a "jackass," etc. The letters contained, also, an occasional allusion to her husband's mother, whom she conceived to be the cause of her young husband's lack of enterprise. The trial court admonished counsel for both parties that much of this correspondence was inadmissible under ordinary rules of evidence, but it all went in by consent or waiver of counsel. 21 Cyc. 1625.

[1] The law does not require anything whatever from the hands of parents-in-law, except that they do not meddle with the do-

mestic felicity and affections of their son and his wife. The parents may hold aloof, decline to recognize the wife, show no interest in her or her children, cut off their son without a penny for marrying without their approval. Wise parents-in-law, of course, do none of these things. They usually consider the daughter-in-law an accession to their family, take her into their hearts and affections, and relive the joys of their own youth in the marital happiness of their children; and when grandchildren come there is commonly a continuous and delightful contest between the youthful parents and the grandparents for first place in the affections of the grandchildren. That is the way it ought to be. Happy the grandparents who view the matter in that light! But if they fail to do so, they are not to be penalized in damages, unless they are guilty of some intentional acts which tend to alienate their son's affection for his wife.

To support an action against parents-in-law for alienating their son's affections for his wife, a much stronger and clearer case is required to be established than against a stranger. *Powers v. Sumblar*, 83 Kan. 1, 5, 110 Pac. 97; *Multer v. Knibbs*, 193 Mass. 550, 79 N. E. 762, 9 L. R. A. (N. S.) 322 and note, 9 Ann. Cas. 958; *Brown v. Brown*, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 575; *Beisel v. Gerlach*, 221 Pa. 232, 70 Atl. 721, 18 L. R. A. (N. S.) 516; 13 R. C. L. 1471-1475.

[2] As to Mrs. Cooper, Sr., there was no substantial evidence that she meddled with the domestic felicity of her son and daughter-in-law. True, she admonished them against showing an excess of their affections before third parties who might talk about them or laugh at them, and there was some evidence that she disliked the plaintiff. But her relations with her daughter-in-law were very limited. She went visiting in Western Kansas and in Colorado for most of the summer and autumn, and consequently saw little of her son and plaintiff during the time they lived together. Doubtless Mrs. Cooper, Sr., greatly regretted her son's marriage because of his extreme youth and immature fitness for marital responsibilities; but what mother would do otherwise? All the evidence tends to show that the general conduct of Mr. Cooper, Sr., towards plaintiff was kindly, discreet, and tactful. Disregarding the evidence in his behalf and which tended to show that he was disposed to help make the plaintiff's and his son's marriage a success (for the jury might disbelieve that evidence), all that appellee can show is that during plaintiff's prolonged and voluntary absence in Illinois he advanced money to his son to go to school, and that because of his presence at some interviews which he arranged between her and his son on her return from Illinois she was prevented from making a private effort at reconciliation with the latter. Since the son was admitted-

ly incapable of making a satisfactory living for her and the plaintiff had a good home in Illinois and had avowed her intention to remain there until he could do so, there was certainly nothing wrong in the defendant father assisting his son to a further education which might bring the result she desired.

As to the presence of Cooper, Sr., at the interviews between plaintiff and her husband, those interviews were brought about by the defendant. It was never hinted that he should withdraw and leave the young couple to talk privately. They were disposed to quarrel, and defendant Cooper was trying to make peace and harmony between them. Plaintiff intimated very pointedly that she desired no private conference with her husband. She told him point-blank that he would need to produce a doctor's certificate before she would resume marital relations with him.

[3, 4] On January 12, 1915, plaintiff wrote to her husband:

"Beryl I am in a mighty good home and I am as welcome as I ever was before I married you and I intend to stay right where I am until you wake up and prove yourself man enough to support me. * * * Now you take that money you were going to use to come here and look up a job. Every other young fellow around there can make a decent living for his wife and if I were you I would hate to be the only cad. Of course they have to work and it is no disgrace and you are no better than the rest and a boy that has the health and strength that you have ought to be ashamed of himself if he was too indolent to try and help himself. * * * You can gallivant around and smoke your cigars and act the part of a dude but when it comes to earning you take a lay-off. * * *

"Now when you can prove to me you are capable of supporting me and my child I am ready to take up my part but I will not suffer the child to be brought up in poverty as long as I can help it. I will work for it rather than deprive it of the advantages of life. I never have had to and never will as long as I stay with my father. Now Beryl I hope you will look at this as I have written now don't wait and depend on your people any longer move for yourself."

On February 28, 1915, she wrote:

"You know I always prefer the famm when things are half-way respectable but under conditions that you hold never. Perhaps if you read your Scriptures you will find where it says something like this when a man shall take unto himself a wife he shall leave his own people and cleave unto her, if you persist in staying there I will say no more you are stubborn about it so I will stay just where I am. * * * You have had your own way since we have been married and now I will have mine for a while. * * * What a snob and sore head you were and how mean you were with me when you brought me home this summer and I paid my own fare at that yet, you think I ought to be willing to live on the doorstep with your people. No, never. You should have married a girl from common stock not Tom Peckham's daughter."

Early in May, 1915, the defendant father-in-law wrote to plaintiff urging her to return to her husband. She replied on May 11, 1915, in part, as follows:

"I fully realize Mr. Cooper that it is hard for a parent to realize the errors of their children but surely you do not think that Beryl has played the fair game with me do you.

"You have asked me to be frank with you otherwise I would not have complained.

"He has informed me that he will not stay on the farm neither will he try to do anything else yet he thinks I should return to Moran. If he is not willing to furnish support what inducement should it be for me to return.

"When Beryl is willing to act the part of a man and husband to me I am willing to do my part but until then I will stay with my father. * * *

"Now I am very sorry that this has caused you any unnecessary worry but I feel justified in my action until Beryl proves to me that he is willing to act as a man should act under similar conditions for I do not expect great things all I ask is to be treated fair. * * *

"Best regards to yourself and Mrs. Cooper. Hoping you are not offended at what I have written."

It is conceded that the affections of the young couple were unimpaired when plaintiff departed for Illinois in November, 1914. Excerpts from counsel's brief read:

"Both sides offered evidence in this trial proving that appellee and Beryl had gotten along together lovely up until November 12, 1914, when appellee left for Illinois. * * * Appellee remained with her father in Illinois until in October, 1915, about eleven months. * * * During these eleven months of absence many letters passed between Beryl and appellee, and appellant Mrs. Cooper wrote to appellee one letter just after the birth of the child. * * * These letters show a growing alienation of Beryl's affections from appellee. * * * That during these months of absence Beryl never went to see appellee or his baby, although he wrote her suggesting she could borrow the money from her father to pay her fare home. * * * The appellants never sent the baby any presents. * * * That this was the first and only grandchild the appellants had ever had, and appellants, according to their own testimony, had shown no interest in the child at all; appellant Mrs. Cooper excusing herself for this lack of interest in the fact that she had never seen it. * * * Appellee, feeling that herself and baby were abandoned by the baby's father, came back to Moran in October, 1915, to see if she could not persuade Beryl to resume his duties as husband and father. Upon her arrival at Moran she found that Beryl was attending school at Emporia, Kan., his expenses being paid by appellants, and remonstrated with appellant about their sending Beryl away to school and leaving her and her baby unprovided for; and asking them to recall Beryl, which Mr. Cooper did. * * * Beryl returned to school at Emporia almost immediately, and they brought him down from there twice afterwards; though appellant Mrs. Cooper in her testimony said that she opposed his going to school, but said she thought it was a pity that he should have to stop school now that he had begun. * * * Appellants' whole conduct toward appellee was that of cool aloofness. Appellant Mrs. Cooper never called to see appellee or the baby, never had them to her home but once, and then appellee stayed over night, and the next day when Beryl came from Emporia she hurried appellee and Beryl off uptown. Appellee told appellant Cooper and Beryl that she required that Beryl go to work to support her and her child and get a doctor's certificate that he was not affected by a venereal disease, neither of which conditions were ever complied with. Appellants met appellee and her baby on the streets of Moran and refused to see or recognize them."

This abridged statement from appellee's brief fairly indicates the situation as this court gleans it from an independent study of the abstracts. No alienation of affections existed prior to plaintiff's departure for Illinois. No malicious acts or conduct of defendants tending to cause alienation of their son's affection for his wife thereafter are disclosed to support and justify the judgment. The other errors need no consideration.

The judgment of the district court is reversed, and the cause remanded, with instructions to enter judgment for defendants.

BURCH, MASON, PORTER, and MARSHALL, JJ., concurring. JOHNSTON, C. J., and WEST, J., dissent from the holding that the evidence does not sustain the verdict and judgment.

(102 Kan. 426)

KURT v. SHUPE et al. (No. 21275.)

(Supreme Court of Kansas. Feb. 9, 1918. Rehearing Denied March 15, 1918.)

(Syllabus by the Court.)

MORTGAGES — 319(3) — PAYMENT — EVIDENCE.

The evidence abstracted has been examined, and it is held that there was sufficient evidence to sustain the judgment of the court.

Appeal from District Court, Harper County.

Action by John Kurt against B. A. Shupe and others, and J. C. Elvin and J. G. Kille, with cross-petition by defendants Elvin and Kille. Judgment for plaintiff, and for defendant Kille against defendant Elvin, and Elvin appeals. Affirmed.

Donald Muir, of Anthony, and W. W. Schwinn and W. H. Schwinn, both of Wellington, for appellant. A. L. Noble, of Winfield, James G. Washbon, of Harper, and J. N. Tincher, of Medicine Lodge, for appellee.

MARSHALL, J. The plaintiff recovered a judgment foreclosing a mortgage on real property in Harper county. That judgment is not questioned. The controversy is between the defendants J. C. Elvin and J. G. Kille. Judgment was rendered in favor of J. G. Kille and against J. C. Elvin, who appeals.

The plaintiff's mortgage was executed by B. A. Shupe and Maude Shupe, and was given to secure the payment of a note for \$2,875. After the plaintiff's mortgage had been executed, Frank Burdg became the owner of the real property, and, on October 28, 1914, executed a mortgage thereon to J. C. Elvin for the purpose of securing the payment of \$1,208.85. On January 24, 1916, Frank Burdg and wife executed another mortgage to J. G. Kille to secure the payment of a note for \$355.24. The mortgage to Kille contained the following recital:

"This mortgage is given subject to a mortgage of \$2,875 to A. A. Kurt, and a second mortgage of \$1,208.85 in favor of J. C. Elvin."

J. G. Kille filed a cross-petition, in which he set up the mortgage owned by him, and alleged that it was a valid and subsisting lien on the real property, subject only to the lien of the mortgage of the plaintiff, John Kurt. J. C. Elvin likewise filed a cross-petition, in which he set up the mortgage held by him, and alleged that it was a second lien on the real property, subject only to the mortgage of the plaintiff, and superior to the mortgage held by J. G. Kille. Elvin also alleged that the note held by him had been lost. Kille filed an answer to Elvin's cross-petition, in which Kille denied that the note had been lost, and alleged that it had been fully paid and discharged at the time the cross-petition was filed. The court found for the defendant Kille, against the defendant Elvin, and rendered judgment in favor of Kille on his mortgage. The court further found that the note sued on by Elvin as a lost note had been paid, that the mortgage held by him had been satisfied by the payment of the note, and that the mortgage was no longer a lien on the real property. The court rendered judgment that Elvin take nothing by this action.

Elvin contends that there was no evidence whatever from which the court could find that the note given to him had been paid, and that no fact was brought out on the trial which justified the court in canceling Elvin's mortgage and advancing Kille's mortgage to second place. After the mortgage by Shupe and wife had been executed, Elvin in some way became the owner of the property. Burdg bought the property from Elvin, and, in part payment therefor, gave Elvin the \$1,208.85 mortgage. Afterward, Elvin, either for himself or for Fred B. Long, repurchased the real property from Burdg. Burdg did not deal with Long in effecting the sale of the land; he dealt entirely with Elvin. The deed from Burdg and wife to Long was a general warranty deed, and it did not mention any mortgages.

Frank Burdg, the maker of the Elvin and Kille notes and mortgages, testified, in part, as follows:

"I paid one of these mortgages. I paid the \$1,200 one. * * * I received this \$1,200 note taken from Elvin. Nothing was said about the note, except that it straightened it up. That settled all I owed Mr. Elvin. * * * I gave a chattel mortgage. It was under the same note to secure the same note. I received the chattel back from Mr. Elvin. Mr. Elvin handed it to me, and said that paid it. Paid all I owed him. * * * Q. And Mr. Long was to take it subject to the mortgage, was he? A. You mean settle this mortgage? Q. Yes. A. Yes, sir. * * * Q. Three mortgages, one \$2,875, the others \$1,208.85. And those mortgages, Long was to take care of those mortgages? A. He was to take care of all but that \$355.24. Q. He was not to take care of it? A. No, sir. Q. And you were to take care of that yourself? A. No, sir; Mr. Elvin was to take care of it. I left the money there to pay it. * * * Q. I say, did Elvin ever give it to you? A. He gave me the note and gave me those papers

when I paid him the \$1,200. * * * Q. Isn't this a fact, Mr. Burdg, the way the thing was done. You didn't pay any one anything, did you? A. I paid out no money. Q. And the agreement between you and Elvin and Long was that you were to convey the land, and that Long was to take care of all your debts against the land; wasn't that the agreement—let you out? A. Why, it was this way: I did not owe Long nothing. What paper I had was to Elvin. Q. Elvin was the go-between between you and Long? A. He was the man I made the trade with; yes, sir. * * * Q. You say Jim Elvin gave you this note—where was he when he gave it to you? A. In his office. * * * Q. You were going to move out of Kansas down into Oklahoma? A. Yes, sir. Q. And you wanted Swinhart to hold that mortgage against your property until you got to Oklahoma, didn't you? A. I don't know as I have to answer that. I don't think that has anything to do with it.

"By the Court: Answer the question. Do you understand the question? A. No; I do not. Q. I asked you if you did not want Swinhart to have that mortgage assigned to him and hold it until you got moved into Oklahoma? A. Well he did that; yes, sir. Q. But Swinhart did not have any interest in the chattel mortgage, did he? A. No, sir. Q. He did not give Elvin any money? A. No, sir. Q. And you requested that assignment be made to Swinhart? A. Yes, sir. Q. Why did you want that done? A. Sir? Q. Why did you want that done? A. Well, so I could have the stock. * * * Q. Did you pay in any way except by the deed to Long? A. Why, that was the only way I paid it. I thought that was sufficient. * * * Q. I understood you, on direct examination to say, when you got the note from Jim Elvin at Harper he said something to you about the note—about squaring that mortgage. A. Well, he said this way: He said that squared up this \$1,200 that I owed him on this chattel and on this \$1,200 mortgage that includes that chattel. Q. Now, when was it that you had the conversation with him about the Kille mortgage—about paying Kille? A. It was there the day that I was dealing with him on this other land, when they traded. It was mentioned at different times. One time was out at home, and another time was in town; talked about it."

Burdg had possession of the note and produced it at the trial.

The evidence above detailed is sufficient to support the finding of the court that the note given to Elvin had been paid and the mortgage discharged. That is the only question presented. Argument concerning what the evidence proves or does not prove is unnecessary.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 422)

DRYSDALE v. WETZ et al. (No. 21272.)

(Supreme Court of Kansas. Feb. 9, 1918. Rehearing Denied March 15, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇨ 173(1)—PRESENTATION IN TRIAL COURT—SEPARATE DEFENSES.

If one defendant, who is sued jointly with other defendants on a contract of employment alleged to have been entered into with all of them, has a different defense from the others, he should present it to the trial court in the form of a request for a special instruction or by

a demurrer to the evidence, or in some manner challenging the attention of the court to his separate defense.

2. APPEAL AND ERROR \S 1001(1)—REVIEW—JUDGMENT—EVIDENCE.

There being some evidence to sustain a judgment against all of the defendants, it is affirmed.

Appeal from District Court, Barber County.

Action by James E. Drysdale against William Wetz and others. Judgment for plaintiff, and defendants appeal. Affirmed.

G. M. Martin, of Medicine Lodge, for appellants. Noble & Tinchler and Seward I. Field, all of Medicine Lodge, for appellee.

PORTER, J. The action was to recover for labor and services as a farm hand, plaintiff alleging that he had been employed by defendants to work for them for a certain period, and that they had discharged him before the expiration of the term. The verdict of the jury was in plaintiff's favor, and the defendants appeal.

[1] The main contention is that there was no evidence to sustain a judgment against William Wetz, and that the court erred in submitting to the jury the question of his liability. William Wetz is the father of the other two defendants, and owns the farm where plaintiff worked. The defendants appeared in both the justice and district court by the same attorneys, and no contention was made at either trial that the employment of plaintiff was on behalf of the sons alone, or that there was not sufficient evidence to justify the court in submitting to the jury the question of the liability of William Wetz. He neither demurred to the evidence, nor asked a special instruction upon the theory that the evidence was insufficient to hold him liable; and the contention now urged seems to be based upon the fact that the evidence showed the contract of plaintiff's employment was made with the sons. The plaintiff testified that he was employed by Fred and Herman, and that he worked for the defendants, and there was some testimony tending to show that the farm was operated jointly by all the defendants. William Wetz testified that he was not present when the boys hired plaintiff, but when informed by them of the employment, he said to them that they had done a good thing.

Complaint is made of an instruction which charged that there was no dispute between the parties over the fact that they entered into a verbal contract with the plaintiff by which he agreed to perform work for them at a certain rate per month. No objection was made to the instruction. If one of the defendants had a different theory from the others upon which he claimed he was not liable to plaintiff, he should have presented it to the court by a request for a special instruction, or in some other manner. Of its own motion, the court instructed that if the

jury found plaintiff entitled to recover from one or more of the defendants, and not entitled to recover from all, they should return a verdict accordingly. We are unable to see that William Wetz was prejudiced by this instruction.

[2] There being some evidence to sustain the judgment, it is affirmed. All the Justices concurring.

(103 Kan. 518)

SMITH v. KANSAS CITY. (No. 21514.)
(Supreme Court of Kansas. Feb. 9, 1918. Rehearing Denied March 15, 1918.)

(Syllabus by the Court.)

RELEASE \S 16 — MISTAKE — INADEQUACY OF PAYMENT — VALIDITY.

The paper relied on as a release appears to have been signed when the parties were mutually mistaken as to the extent of plaintiff's injuries, and the sum therein named being manifestly inadequate, such instrument is not binding.

Appeal from District Court, Wyandotte County.

Action by William Smith against the City of Kansas City, Kan. Judgment for plaintiff, and defendant appeals. Affirmed.

McAnany & Alden, of Kansas City, Kan., Frank L. Barry, of Kansas City, Mo., and Lee Judy and Samuel Maher, both of Kansas City, Kan., for appellant. Thompson, McCables & Gorsuch, of Kansas City, Kan., for appellee.

WEST, J. The city appeals from a judgment recovered by the plaintiff for damages caused by being trampled while in the employ of the city caring for horses uses in connection with its fire department. He alleged that he was 65 years old, and was making \$2 a day. The injury was on February 15, 1916, and on the 24th of March thereafter he drew \$33.75, and signed a paper called a final receipt, for which he alleges there was no consideration, as the amount paid him was only a part of the compensation due. He also pleaded inadequacy, fraud, and mutual mistake. The jury were charged that the only ground upon which the release could be set aside was that of mutual mistake as to the extent of his injuries and gross inadequacy. The verdict was for \$590.25. The plaintiff is an unlettered man, and spent 30 years of his life with Barnum's circus. He testified to receiving injuries on the legs and a rupture, and also injury in the back; that he wore a bandage on one leg for three or four weeks; that he was in bed off and on for ten or twelve days, then got up on crutches and walked around; that he attempted to do work at other places, and had been discharged for physical inability; that the city doctor came to see him, did nothing for one leg, and bandaged the other, "and put a little splinter on it," and said he would be up in two or three days. Eleven or

twelve days thereafter he sent for another doctor, whom he saw several times. This doctor advised him not to do work until he got better. He twice saw still another doctor, who gave him some medicine, and like the one just mentioned told him he was ruptured. He went to numerous other physicians, but appears nevertheless to have taken charge of his own case to quite an extent. He testified that he was told to go over and draw his wages, which he supposed he was doing when he signed the paper. At the time of trial he testified that he had not done anything for five or six months until the preceding week. He seems to have tried to work at numerous places, but failed on account of his inability to perform the required tasks. When he signed the paper he had not attempted to do any work, and did not know what effect his injury would have upon his ability to work. The superintendent of the waterworks testified that he went to see the plaintiff about ten days after the injury and later, when he came to the city hall, that he gave him the address of Mr. Barry, an attorney in Kansas City, Mo., who was representing the city; that the plaintiff thought he would be able to go back to work the following Monday morning. The paper recites the payment of \$33.75—

"said amount being such part of my weekly wages for the period of 4½ weeks from the 23d day of February, 1916, to the 25th day of March, 1916 (both dates included), as I am entitled to and making in all with the weekly payments already received by me, the total sum of \$33.75, such payment being the final payment of compensation under the Workmen's Compensation Law of Kansas."

It recites the release and discharge of all claims and demands, past, present, and future. Mr. Barry testified:

"Q. \$15 a week, and you allowed him \$7.50 a week? A. Yes, sir. Q. It had then been 4½ weeks that he had been off? A. No; for 4½ weeks, which would have been up to the day he said he was going to return to work. Q. Well, we will assume you figured it will be 4½ weeks, then he would actually be entitled to \$33.75 up to the date he went to work? A. Well, you can figure it. Q. You gave him what he was entitled to? A. Under the law I gave just what that says. Q. You gave him just what he was entitled to up to the day he was going to work? A. Yes, sir. Q. Then you took the release from him for the rest of the eight years, didn't you? A. No, sir; I didn't. Q. In addition to what he was entitled to you took a release of this? A. I took that document, whatever you have in your hand, and it will speak for itself."

Enough of the evidence has been recited to show that at the time the paper was signed the plaintiff thought he would be able to go to work again for the city. It is apparent from Mr. Barry's testimony that he thought likewise and intended by the use of the instrument in question to foreclose any further claim for the injury already sustained. Acting in good faith, as he seems to have done, it is but natural to assume that both he and the plaintiff believed that the ma-

terial results of the injury had disappeared, and that no substantial difficulty on account thereof would thereafter arise in plaintiff's doing his former work. It is not only fair, but reasonably clear, therefore, that both parties were acting under a misapprehension of a real condition—in other words, were mutually mistaken; and it must go without saying that in view of the real condition the amount paid was beyond all question inadequate. No reason in equity or in law appears why the mistake should not be corrected and the real injury be compensated for. Of course there is the usual dispute as to the extent of the injury and the usual conflict in the medical evidence, but these things were for the jury, and there appears in the record sufficient basis for their conclusions.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 412)

SEVERY STATE BANK v. PEOPLES' STATE BANK. (No. 21268.)

(Supreme Court of Kansas. Feb. 9, 1918. Rehearing Denied March 15, 1918.)

(Syllabus by the Court.)

APPEAL AND ERROR \Rightarrow 1022(1)—**QUESTION OF FACT—AFFIRMANCE.**

The judgment responds to findings of fact and conclusions of law stated by a referee. The findings of fact respond to the issues made by the pleadings, and the conclusions of law merely state the legal liability arising on the findings of fact. Grounds for a new trial were not presented to the district court in time, and no appeal was taken from the order overruling the motion for a new trial, which was filed. *Held*, the judgment must be affirmed.

Appeal from District Court, Montgomery County.

Action by the Severy State Bank against the People's State Bank, with counterclaim by defendant. Judgment for defendant, and plaintiff appeals. *Affirmed*.

F. S. Jackson, of Topeka, and A. F. Sims, of Howard, for appellant. Chester Stevens, of Independence, for appellee.

BURCH, J. The action was one to recover a sum of money standing to the credit of the plaintiff on the books of the defendant. The defendant counterclaimed, and was awarded judgment. The plaintiff appeals.

The case was referred to a referee, who returned findings of fact and conclusions of law, which disclose the nature of the controversy, and which follows:

"(1) That the plaintiff, the Severy State Bank, is, and was at all of the times mentioned in the pleadings and in the evidence, a banking corporation, organized and existing under and by virtue of the laws of the state of Kansas, with its bank at Severy, Greenwood county, Kan.

"(2) That the defendant, the People's State Bank, is, and was, during all of the times mentioned in the pleadings and in the evidence, a banking corporation, organized, existing, and do-

ing business under and by virtue of the laws of the state of Kansas, with its bank at Cherryvale, Kan.

"(3) That M. J. Bidwell was, during all of the times in which the transactions involved in this action arose, that is, from and prior to the beginning of the year 1913 to and including a part of December, 1913, the president and general manager of the Severy State Bank, plaintiff in this action, and during all of said time was in the active control, management, and conduct of all of its business and affairs, and duly authorized by said bank to so manage, control, and conduct its affairs.

"(4) That during the same time, and ever since, D. W. McKinley was, has been, and now is the president of the defendant bank, and in the active control, management, and conduct of its business.

"(5) The defendant bank admits that it is indebted to the plaintiff bank in the sum of \$2,435.83.

"(6) That in the early part of 1913, M. J. Bidwell wrote a letter to the defendant, stating that the plaintiff bank was about to take some good prime cattle loans, which it would like to dispose of to the defendant bank; and that the defendant bank advised plaintiff that it would handle some of the loans, and that thereafter said defendant bank handled several loans; that from the correspondence it was justified in assuming that they were dealing with the Severy State Bank, and not with M. J. Bidwell personally. As a matter of fact, some of the loans handled by the defendant bank at the time they were purchased by the said defendant bank belonged to M. J. Bidwell personally, and some belonged to the Severy State Bank.

"(7) That all of these loans that were purchased by said defendant bank, either from M. J. Bidwell or the plaintiff bank, were settled, excepting two notes which are in controversy in this action. One of these notes is known as the Flaiz note; the other is known as the Edwards note.

"(8) That the Flaiz note, at the time it was sent to the defendant bank, was the property of the plaintiff bank, and that on or about September 19, 1913, A. Flaiz, the maker of said note, delivered to said plaintiff bank two checks aggregating \$590.38, with instructions to apply them on his note; that said checks were duly cashed, but the proceeds thereof, instead of being indorsed on note as directed, were turned over to M. J. Bidwell, who appropriated it for his personal use, and that, therefore, the plaintiff is indebted to said defendant for the sum of \$590.38, with interest thereon at the rate of 6 per cent. per annum from the 19th day of September, 1913.

"(9) That the other note in controversy in this action is known as the Edwards note, and is a note dated November 1, 1913, for the sum of \$2,108.44, and signed by John Edwards; that on November 1, 1913, the said plaintiff bank accepted this note and carried it as cash item in substitution for some checks which it has been carrying as cash item for some days previous to November 1st; that after carrying this note as a cash item for a day or so, it was charged to the account of the People's State Bank, together with a letter which stated that this was a dandy good cattle loan, and was secured by a mortgage which had been recorded. As a matter of fact, there were prior mortgages on all of the cattle reported to be covered by said mortgage, and said mortgage was never recorded, and all of the property covered by said mortgage was taken possession of by the owners of the prior mortgages; that John Edwards has no other property with which to pay this note, and that because said loan was purchased by the defendant bank from plaintiff bank on the assurance that it was a dandy, good cattle loan, secured by recorded mortgage, and because these representa-

tions were false, I find that the plaintiff is indebted to the defendant bank in the sum of \$2,108.44, with interest from November 11, 1913, at 6 per cent.

"I find as conclusions of law:

"1. That the defendant is entitled to a judgment against the plaintiff for the sum of \$598.30, the amount received by plaintiff from A. Flaiz, with interest thereon at the rate of 6 per cent. per annum from the 19th day of September, 1913, to March 27, 1916, in the sum of \$90.53, or in sum as principal and interest, \$688.83.

"2. That the defendant is entitled to a judgment against the plaintiff for the sum of \$2,108.44, with interest at the rate of 6 per cent. per annum from the 11th day of November, 1913, to March 27, 1916, in the sum of \$300.99, or in the sum of principal and interest of \$2,409.43.

"3. That the aggregate judgment defendant is entitled as against the plaintiff is \$3,098.26.

"4. That the plaintiff is entitled to a credit on the judgment in favor of defendant in the sum of \$2,435.83, with interest thereon at the rate of 6 per cent. per annum from the 19th day of February, 1914, to March 27, 1916, in the sum of \$307.71, or in the sum of principal and interest of \$2,743.54.

"5. That the final judgment should be rendered in favor of the defendant and against the plaintiff after allowing the above credit of \$354.72."

The plaintiff opens its argument with the following statement:

"At the outset of the case it is well to consider, under the procedure taken, what is before this court for review."

Consideration of the procedure taken compels the conclusion there is substantially nothing before the court for review.

The report of the referee was filed on March 27, 1916. Subsequently some errors in computation were corrected on application of the referee, which did not affect the determination of the contested issues, and which are not now material. On April 4, 1916, the plaintiff filed a motion to set aside the sixth, eighth, and ninth findings of fact and the conclusions of law. The motion is not abstracted. The defendant filed a motion for judgment pursuant to the referee's report. On November 8, 1916, the court denied the plaintiff's motion, granted the defendant's motion, and rendered judgment for the defendant. Within three days following rendition of judgment the plaintiff filed a motion for a new trial, which was overruled on December 6, 1916. The appeal was taken on January 11, 1917. The notice of appeal limited the appeal to the proceedings of November 8, 1916. No appeal was taken from the order overruling the motion for a new trial. In the brief the claim is made that judgment should have been rendered for the plaintiff on the pleadings.

No motion was made in the district court for judgment on the pleadings, and no error requiring correction by reversal of the judgment has been committed with respect to rendering judgment on the pleadings.

The motion for a new trial was not filed in time. *Milling Co. v. Schreiber*, 102 Kan. 172,

169 Pac. 222. No excuse for delay in filing the motion appears, and, if it were necessary, the presumption would be the court overruled the motion because it was not filed in time. If the motion had been granted, the presumption would be the delay was excused, presumptions being indulged to uphold, but not to defeat, judgments. However, no appeal was taken from the order denying a new trial.

The motion to set aside findings of fact not being abstracted, the court is left in ignorance of what it contained. Assuming it contained matter similar to that embodied in one of the assignments of error, the motion was pro tanto a motion for a new trial, and was not filed in time. Every attack made on the findings of fact ought to have been made, and was in fact made, by motion for a new trial, the benefit of which has been waived.

The conclusions of law stated by the referee followed inevitably from the findings of fact. Additional or different conclusions of law do not appear to have been requested. So long as the findings of fact stand, the conclusions of law must stand.

Every other assignment of error raised questions which could properly be presented to the trial court only through the instrumentality of a motion for a new trial.

The plaintiff invokes the case of *Brown v. Railway Co.*, 83 Kan. 574, 112 Pac. 147. In that case all the testimony was before the court without conflict, and practically with a finding that it was all true. The referee held the testimony had no tendency to prove certain facts. The situation was the same as if the probative facts were agreed to, and the only question was what ultimate inference was warranted. It was held the court could draw the inference, and there was no occasion for a new trial. No such situation is presented here. In this instance it was necessary for the referee to choose between the testimony of different witnesses relating to material matters respecting both notes. The credibility of witnesses was involved, and probative facts tending to establish the plaintiff's theory had to be weighed against probative facts tending to establish the defendant's theory.

This opinion might well close here, but because the defendant has frankly met the plaintiff's contentions on the merits, the court has examined the merits of the controversy far enough to be satisfied the conclusions of the referee and of the district court were correct.

The major premise of the plaintiff's case is that Bidwell owned both notes when they were sent to the defendant. The plaintiff received credit for both notes. The action is brought to recover the credit, but it is claimed the transactions by which the plaintiff received the credit were personal transactions of Bidwell with the defendant, and not transactions between bank and bank. From this premise inferences of fact and conclusions

of law are derived. There was convincing evidence that both notes were the property of the plaintiff when they were purchased by the defendant.

The plaintiff says that ownership of the notes was not an issue made by the pleadings, and that evidence of ownership by the bank was improperly admitted. The importance of the fact of ownership is indicated by the space in the plaintiff's briefs devoted to argument based on the contention Bidwell owned the notes. How it came into the case, whether directly or collaterally, is not very material. But the plaintiff tendered the issue in the petition. Issue was joined by the general denial of the answer, and the plaintiff itself supplied reliable evidence that it owned the notes. Ownership of the notes was a question of fact, and the plaintiff recognizes the nature of the question when it marshals evidence indicating the notes were Bidwell's notes—the fact that the notes were payable to Bidwell, conduct with respect to other notes, the rule of the banking department, the reconciliation sheet, and other evidence. The court does not propose to debate the evidence, but it may be observed the reconciliation sheet stated the truth, and did not indicate that the defendant took the notes as Bidwell paper instead of bank paper. The notes were made payable to bearer by Bidwell's indorsement, and came to the defendant in that form. The plaintiff was not liable as guarantor or indorser, or otherwise, on the Flaiz note, and was not liable for false representation respecting that note. The Edwards note was not in existence when the reconciliation sheet was sent in.

Bidwell was the discount committee of the plaintiff, so far as it had one, and was the Severy State Bank, so far as management and control of its business were concerned. The law did not prohibit the plaintiff from acquiring title to notes which Bidwell had previously taken to himself in his private business. The regularity or irregularity of his dealings between himself as an individual and himself as the bank are not material, unless the defendant dealt with him as an individual, or had reason to believe he was using his bank for personal ends in the particular transactions involved. The evidence is quite conclusive that the defendant dealt with the plaintiff as a bank, through its president, Bidwell, and had no more knowledge or notice of his crookedness than the plaintiff's quiescent board of directors, who trusted him implicitly.

Flaiz and the cashier of the plaintiff with whom Flaiz left checks to pay his note, gave different accounts of what took place on that occasion. Accorded a liberal interpretation, and considered in connection with other evidence, the testimony of Flaiz supports the findings of the referee. There is no doubt about the terms under which the defendant bought cattle paper of the plaintiff, including the Edwards note, and if the plaintiff, by its

president, could sell the paper at all, it could bind itself, by its president, by representations respecting the character of the paper, which induced the defendant to buy.

In the motion to set aside findings, the motion for a new trial, and the assignments of error, it is charged that the findings of fact were induced by erroneous views of the law, and were contrary to law. The law contemplated is that discussed in the case of *Hier v. Miller*, 68 Kan. 258, 75 Pac. 77, 63 L. R. A. 952, and kindred cases. The charge is not supported by anything disclosed by the record. If the facts had been found as the plaintiff desired, the law referred to would have applied. The facts having been found otherwise, the law which the plaintiff invokes has no application.

It is not necessary to extend this obiter discussion of the merits further. The only proper remedy for the distress occasioned by the referee's work was by timely motion for a new trial and appeal from the order denying a new trial.

The judgment of the district court is affirmed. All the Justices concurring.

(102 Kan. 465)

FIRST NAT. BANK OF HAMILTON v. HOFFMAN et al. (No. 21289.)

(Supreme Court of Kansas. Feb. 9, 1918.
Rehearing Denied March 15, 1918.)

(Syllabus by the Court.)

1. BANKRUPTCY — 421(1), 433(5) — LIEN — PAYMENT—DISCHARGE IN BANKRUPTCY.

The maker of notes gave a chattel mortgage to secure their payment, and afterward filed a petition in bankruptcy. The holder of the notes procured their allowance as a claim against the estate of the bankrupt. All the property covered by the chattel mortgage, except certain exempt property, was sold by the trustee under an agreement between the trustee, the bankrupt, and the holder of the notes. The bankrupt was finally discharged, although the notes were not paid in full. *Held*, that the discharge released the bankrupt from further payment on the notes, and released all the unsold mortgaged property from the lien of the chattel mortgage.

2. BANKRUPTCY — 428, 431 — DISCHARGE — LIABILITY OF CODEBTOR OR SURETY.

A discharge in bankruptcy does not release a codebtor with, or surety for, the bankrupt from liability on a debt, unless that debt has been paid.

Appeal from District Court, Greenwood County.

Action by the First National Bank of Hamilton against Theodore F. Hoffman and Grace A. Hoffman. Judgment for defendants, and plaintiff appeals. Judgment as to defendant Grace A. Hoffman reversed, and judgment rendered against her in favor of the plaintiff.

Howard J. Hodgson, of Eureka, for appellant. O. C. Zwicker, of Eureka, for appellees.

MARSHALL, J. The plaintiff commenced this action to recover from Theodore F. Hoffman the possession of two horses and a cow, and to recover a personal judgment against Grace A. Hoffman for \$94.55, the balance due on a promissory note for \$268.75. Judgment was rendered in favor of the defendants, and the plaintiff appeals.

The defendants were husband and wife. They executed two notes to the plaintiff; one for \$268.75, the other for \$130.90. To secure the payment of the notes, the defendants executed a chattel mortgage on personal property owned by Theodore F. Hoffman, among which personal property were the two horses and the cow. Both notes provided for interest at 10 per cent. per annum from November 13, 1914. After the notes and chattel mortgage had been executed, Theodore F. Hoffman filed a petition in bankruptcy. The plaintiff procured the allowance of the notes as a claim against the bankrupt. The property which belonged to the bankrupt estate was advertised for sale, but the trustee was directed by the referee in bankruptcy not to sell any exempt property. All the personal property owned by Theodore F. Hoffman, including that which was exempt, was covered by the chattel mortgage held by the plaintiff. On the day that the property was advertised for sale, the plaintiff, the defendant Theodore F. Hoffman, and the trustee in bankruptcy entered into a contract which provided that the trustee should sell enough of the property to pay the full amount of the plaintiff's claim and the costs. Property was then sold from which \$468 was realized. The two horses and the cow involved in this action were not sold; they were claimed by Theodore F. Hoffman as exempt from sale under execution. The proceeds of the sale were reported by the trustee in the bankruptcy proceeding, were turned into that proceeding, and were paid out in that proceeding. The expenses were about \$160. The plaintiff received \$307 part payment on its claim.

Theodore F. Hoffman was finally discharged by the following judgment entered by the United States District Court:

"Whereas, T. F. Hoffman, of Neal, Kansas, in said district has been duly adjudged a bankrupt, under the act of Congress relating to bankruptcy, and appears to have conformed to all the requirements of the law in that behalf, it is therefore ordered by the court that said T. F. Hoffman be discharged from all debts and claims which are made probable by said act against his estate, and which existed on the 4th day of May, A. D. 1914, on which day the petition for adjudication was filed by him excepting such debts as are by law excepted from the operation of a discharge in bankruptcy."

The plaintiff received no notice of the hearing of the application for a final discharge. The defendants set up the judgment of discharge as a bar to the present action. The

judgment of the trial court in the present action contains the following:

"That the said matter has been settled in the United States court at Ft. Scott, Kan., in a proceeding in bankruptcy, heretofore had, prior to the bringing of this action, wherein the said bank, the plaintiff herein, filed its claim in that court against the defendant and received full and complete satisfaction thereon, and that the same was paid by the proceedings in bankruptcy, in case No. 755 on file in the District Court of the United States, Third Division of Kansas, and that the defendant received his final receipt or discharge from that court, No. 755, and that the court finds from the evidence herein adduced that the plaintiff sold about \$465 worth of the defendant's property under the chattel mortgage sued upon in this action, through the trustee and receiver in bankruptcy, to satisfy their claim of \$400.35 and interest, retaining the balance for their expenses under said chattel mortgage."

[1] 1. What is the effect of the judgment of discharge in the bankruptcy proceeding? The answer to this question is found in the federal statute, which reads:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts." 30 U. S. Stat. at Large, p. 550, c. 541, § 17 (U. S. Comp. St. 1916, § 9601).

In *Audubon v. Shufeldt*, 181 U. S. 575, 577, 21 Sup. Ct. 735, 736 (45 L. Ed. 1009), the court said:

"The Bankrupt Act of 1898 provides in section 1 [U. S. Comp. St. 1910, § 9585] that a 'discharge' means 'the release of a bankrupt from all his debts which are provable in bankruptcy, except such as are excepted by this act.'"

The plaintiff procured the allowance of its claim against the bankrupt, and submitted to the United States District Court its right to recover on the notes and its right to the possession of the property under the chattel mortgage. That court allowed the claim, accepted and approved the report of the trustee in bankruptcy, directed the disposition of the proceeds arising from the sale, and finally discharged the bankrupt. The plaintiff agreed that the trustee in bankruptcy should sell enough of the mortgaged property to pay the plaintiff's claim and the expenses of the bankruptcy proceeding. The proceeds of the sale were turned into the court and disbursed by the order of the court. If that was not done properly, the place to make the correction was in the bankruptcy proceeding. It may be that the discharge in bankruptcy was irregularly procured, but it is binding on the plaintiff. The plaintiff cannot question that discharge in this court. *Brandenburg on Bankruptcy*, § 1524; 7 C. J. 417; 3 R. C. L. 314.

So far as defendant Theodore F. Hoffman is concerned, the plaintiff cannot look to him for any further payment on either of the notes. The property mortgaged was owned by Theodore F. Hoffman, and his discharge released the property covered by the chattel mortgage from any lien that the plaintiff had to secure the payment of the notes. The

judgment denying the plaintiff the possession of the horses and the cow is affirmed.

[2] 2. There remains for discussion the liability of Grace A. Hoffman. She was not a party to the bankruptcy proceeding. She is not bound by the judgment rendered in that proceeding; neither is the plaintiff bound by that judgment so far as defendant Grace A. Hoffman is concerned. The federal statute reads:

"The liability of a person who is a codebtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." 30 U. S. Stat. at Large, p. 550, § 16, c. 541 (U. S. Comp. St. 1916, § 9600).

See, also, *Brandenburg on Bankruptcy* (4th Ed.) §§ 1223, 1539-1543; 7 C. J. 409; 3 R. C. L. 341; *Fallor v. Wehe*, 98 Kan. 325, 158 Pac. 74.

The trial court did not specifically find that both the notes had been paid. The court construed the discharge in bankruptcy to be a cancellation of the debt as to both the defendants. That construction was erroneous. The debt was discharged as to defendant Grace A. Hoffman so far only as the debt had been paid. It appears from the evidence abstracted that \$93.55 of the note sued on has not been paid.

The judgment as to Grace A. Hoffman is reversed, and judgment is rendered against her in favor of the plaintiff for \$123.16 (principal \$93.55 and interest \$29.61), and for one-half of the costs. All the Justices concurring.

(102 Kan. 297)

CHILLETTI v. MISSOURI, K. & T. RY. CO.
(No. 21235.)

(Supreme Court of Kansas. Jan. 12, 1918.
Rehearing Denied March 15, 1918.)

(Syllabus by the Court.)

CORPORATIONS — 507(7) — PROCESS — SERVICE ON STATION AGENT — STATUTE.

Where a railway corporation has been placed in the hands of a receiver under an order directing him to take into his possession and control all the assets and property of the corporation and to operate the railway, service of summons, in an action against the railway corporation, upon a station agent who is in the employ of the receiver, and had formerly occupied the same position for the corporation, is not good service as to the corporation.

Appeal from District Court, Cherokee County.

Action by Michael Chilletti against the Missouri, Kansas & Texas Railway Company. From an order sustaining a motion to set aside the service of summons, plaintiff appeals. Affirmed.

Charles Stephens, of Columbus, for appellant. James W. Reid and W. W. Brown, both of Parsons, and Al F. Williams, of Columbus, for appellee.

PORTER, J. The trial court sustained a motion to set aside the service of summons, and the plaintiff appeals.

The action was brought October 4, 1915, to recover against the railway company for injuries alleged to have occurred several years prior thereto. In September, 1915, by an order of the federal court a receiver was appointed for the railway company, and all the property and assets of the corporation of every kind and nature and wherever situated or found, was by the order of the court taken out of its hands and turned over to the receiver, who was ordered to operate the same.

The summons was served upon E. R. Lane and the return recites that:

"The said E. R. Lane being the general station agent and representative of said defendants and each of them in said capacity, the president, vice president, treasurer, secretary, chairman of the board of directors, or other chief officers not found in my county and the said defendants, or either of them, not having designated any person or officer upon which service of process could be made under the provision of the statute."

Section 72 of the Code (Gen. Stat. 1915, § 6963) which provides for the manner of service of summons on a railroad corporation, reads:

"Such process may be served on any local superintendent of repairs, freight agent, agent to sell tickets or station keeper of such company or corporation in such county, or such process may be served by leaving a copy thereof at any depot or station of such company or corporation in such county, with some person in charge thereof and in the employ of such company or corporation, and such service shall be held and deemed complete and effectual."

It is the contention of plaintiff that the testimony taken on the hearing of the motion conclusively establishes that E. R. Lane, at the time the summons was served, was the station agent of the defendant. He testified in substance that the duties performed by him in the office and at the station had been the same during the last five years, and that after the appointment of the receiver he had performed certain services for the railway company which consisted of looking after a number of collections for services rendered by the railway company previous to the appointment of the receiver; that he had never been discharged by the railway company, except as he was notified by a circular letter sent to all the employes at the time the receiver was appointed. There is a stipulation that after the receivership the name of the Missouri, Kansas & Texas Railway Company remained uncanceled on all stationery and forms of printed blanks just as it had been previous to the appointment of the receiver.

The findings of the court are that the receiver took charge of the property about September 28, 1915, and that E. R. Lane proceeded to look after the business under the employment of the receiver, otherwise performing practically the same duties as those he had been performing in the past; that other than by circular letter to all the employes notifying them of the receivership he

had not been formally discharged by the company; and that in the first two or three months following the receivership he collected a number of small items of freight and remitted them to the railway company as he was directed to do as general freight and ticket agent at Columbus; and that he was receipted for the same by the railway company and not by the receiver.

In our opinion the order setting aside the service must be affirmed. Whatever duties the station agent performed after the appointment of the receiver, he performed as agent of the receiver. Under the terms of the order appointing the receiver, the station agent was not in a position where, in the conduct of the same business, he could serve two masters. All the property and assets of the defendant company were taken out of its control and placed in the hands of the receiver to control and operate. If all the former employes of the railway company continued to be the agents of the company until they could be individually notified of their discharge and re-employment by the receiver, an intolerable situation would arise not contemplated by the order of the court, and one which would benefit neither the public nor the property. No formal discharge by the railway company of its former employes was required in order to sever the relation of employer and employe. That resulted immediately on the making of the order appointing the receiver. The railway corporation was not dissolved by the appointment; it still exists as a legal entity, and it may have agents for certain purposes; but no person in the employ of the receiver in operating the railway or in handling any of the assets or property of the railway company, can be regarded as the agent of the company, merely because of the duties performed by him. Whatever any servant, agent, or employe does in connection with the operation or control of any of the assets or property of the railway company is performed as agent of the receiver and not of the company.

The fact that the name of the railway company remained on the blanks used by the receiver in the conduct of the business is of no probative force any more than the fact that the name on the cars and engines of the company was not changed. In *Railway Co. v. Smith*, 59 Kan. 80, 52 Pac. 102, the question arose over the admissibility of testimony to the effect that the engine causing the injury was a Union Pacific engine, and that the employes were employes of the Union Pacific, and it was said in the opinion:

"In speaking of a railroad in the hands of receivers, it is usually designated by the name of the road, or of the corporation owning it, rather than that of the receivers. No confusion ordinarily arises, and there is none in this case. Proof that the property was Union Pacific property was competent evidence against the receivers, whose duty it was to have charge of the property. Proof that the employes were Union

Pacific employes was good proof that they were employes of the receivers, when the fact became clearly established that the receivers had entire and exclusive control of all the properties of the company and of the transaction of all its business." 59 Kan. 85, 52 Pac. 104.

In *Railway Co. v. Bricker*, 65 Kan. 321, 69 Pac. 328, the question involved was whether or not an employe of the receiver was also an employe of the corporation, the principal contention being that the corporation was not liable for an injury occasioned by the negligence of the employes of the receiver. It was said in the opinion:

"The principle of respondeat superior has no application. The receivers were the officers of the court and not the agents of the corporation, and the corporation is not, therefore, liable for the acts of the receivers or the acts of their employes." 65 Kan. 326, 69 Pac. 330.

Because the corporation could only be liable in consequence of some negligence of its own agents or employes, it was held that the company was not liable. It was said in the opinion:

"The plaintiff, when injured, was not an employe of the corporation and his injuries are not the result of the negligent act of any agent of the corporation or of the mismanagement of any engineer or employe of the corporation." 65 Kan. 327, 69 Pac. 330.

The same question involved here has arisen in a number of cases. The decisions, however, are controlled by statutes, some of which differ from our provision as to the manner of service upon a railway company. A case directly in point is *Cain v. Seaboard Air Line Railway*, 7 Ga. App. 461, 67 S. E. 127. It was there held that:

"Service of a suit against a corporation in the hands of a receiver, by serving an agent of the receiver, which agent had formerly occupied the same position for the corporation, is not good service as to the corporation (a) because, in order for service upon a corporation to be effective by reason of service upon an agent, the agent must at the time of service be in fact the agent of the corporation; and (b) because when a corporation is in the hands of a receiver who is conducting its business, the agents and employes are no longer those of the corporation, but are the agents of the receiver. *Cherry v. N. & S. Railroad Co.*, 59 Ga. 446; *Henderson v. Walker*, 55 Ga. 481; *Ocean Steamship Co. v. Wilder & Co.*, 107 Ga. 220 [33 S. E. 179]."

It is argued that the court committed error in ignoring certain presumptions. It is said in the briefs:

"That it is the legal duty of a sheriff, in serving papers, to make due inquiry as to the identity of the person on whom such papers are served, and in all cases, until the contrary is shown by a clear preponderance of the evidence, the presumption is that such officer has performed his duty and his return speaks the truth."

The sheriff made due inquiry as to the identity of the person on whom he served the papers, and there is no question as to the correctness of the return in this respect. He did, in fact, serve the papers on E. R. Lane who was the station agent; but when the order of the court appointing the receiver was introduced in evidence it was shown that

the sheriff was mistaken in stating that Lane was the agent of the railway company.

It is seriously contended that, because the court reserved the right to modify the order and to enlarge or diminish the duties of the receiver, it devolved on the defendant to show that some other order had not been made in the meantime authorizing the railway company to operate or control its property. The presumption, however, is that the order continued in force and effect until the contrary is shown. Again, it is said that:

"There is no evidence, properly admitted, even tending to overturn the presumption that the receiver acted within his authority when he permitted the railway company, through its agent, Lane, to remain" at the station and "collect for it outstanding accounts," etc.

The contention begs the question by assuming that Lane was the agent of the railway company.

The judgment is affirmed. All the Justices concurring.

HODGES v. BLYTHE. (No. 8417.)

(Supreme Court of Oklahoma. Feb. 12, 1918.)

(Syllabus by the Court.)

SALES §—374, 384(1)—BREACH OF CONTRACT—RIGHT OF ACTION—MEASURE OF DAMAGES.

Where goods are purchased upon an agreement to give promissory notes for a portion of the purchase price, payable at stipulated future times, on the refusal of the purchaser to execute and deliver such notes after the goods have been received by him, the seller may, without awaiting the expiration of the credit, maintain an action for the breach of the agreement, and the measure of his recovery will be the agreed purchase price of such goods.

Commissioners' Opinion, Division No. 3. Error from County Court, Tulsa County; J. W. Woodford, Judge.

Action by J. E. Blythe against J. F. Hodges. From a judgment for plaintiff in the county court, on appeal from a judgment for plaintiff in a justice's court, defendant brings error. Affirmed.

Jno. F. Kerrigan, of Tulsa, for plaintiff in error. R. E. Berger, of Tulsa, for defendant in error.

BLEAKMORE, C. This action was commenced by J. E. Blythe as plaintiff, against J. F. Hodges, defendant, in the justice court in Tulsa county, to recover \$157.75, balance on the purchase price of an automobile alleged to be due and owing by defendant to plaintiff. Upon trial there was judgment for plaintiff and defendant appealed to the county court of said county, where a like judgment was rendered, and defendant has brought the cause here for review.

Upon trial plaintiff testified to a contract, by the terms of which he sold to defendant a certain automobile for the sum of \$250, to be paid as follows: \$25 cash at the time of the making of the contract, and \$75 upon de-

livery of the automobile, and \$150 payable in 30, 60, and 90 days after such delivery, to be evidenced by three promissory notes to be executed and delivered by defendant to him; that pursuant to such contract he delivered the automobile to defendant, who paid \$100 of the purchase price thereof, and promised to execute said notes, but failed and subsequently refused so to do.

Defendant testified as follows:

"Q. Mr. Hodges, state to the jury the circumstances of your agreement in the purchase of this car. A. Well, Mr. Barr took me down there to Mr. Blythe, and I wanted to buy a car, and at that time didn't have money enough to pay for all of it, and I bought a car partly cash and partly on payments, and bought this car, and it was in very bad condition, with the agreement he was to put it in first-class condition. We specified what was to be done to it, and while I was still there with him I gave him a check for \$25 on the car, subject to approval. Q. What about the payments? A. I was to pay him, on delivery of the car \$75 more; on approval of the car I was to give him three notes, \$50 each, and either to give him a separate note for \$15 to cover the \$265, or pay him cash."

The sole contention of plaintiff in error is that the action was prematurely commenced. In our opinion, this contention is not tenable. While the general rule seeming to be that, where goods are sold, to be paid for by a note due and payable at a future time and the note is not given, the seller cannot recover in assumpsit on the general count for goods sold and delivered until the credit has expired, yet it is almost universally held that he may immediately proceed for a breach of the special agreement to give the note. In this jurisdiction, however, where but one form of action is recognized, if the facts pleaded and proved established that a party is entitled to relief in any form (whether as in the instant case, for the purchase price of goods sold, or, nominally for damages for breach of a special contract), it would seem that he may obtain such relief in the only action known to the Code. The evidence here clearly shows a refusal of defendant to execute the notes as he had agreed for the purchase price of the automobile, which under the authorities, immediately gave rise to the very cause of action upon which recovery was had. In *Stephenson v. Repp*, 47 Ohio St. 551, 25 N. E. 803, 10 L. R. A. 620, it is held:

"Where goods are purchased upon an agreement to give a promissory note for the price, payable in one year with interest, on a refusal of the purchaser to make and deliver the note after the goods have been delivered, the vendor may, without waiting for the expiration of the credit, maintain an action at once for the breach of the agreement, and the measure of damages will be the price of the goods sold and delivered."

In the body of the opinion it is said:

"The plaintiff in error claims that the petition below does not state facts sufficient to constitute a cause of action, for the reason that the time of the credit on which the goods had been sold and delivered had not expired at the bringing of the action, and that he was not, therefore so indebted to the plaintiff as that an ac-

tion could be maintained for the price of the property sold and delivered. It will be conceded that under the common-law system of procedure a general assumpsit for goods sold and delivered could not have been maintained upon the facts stated in the petition—the time of the credit not having expired, there would have been no ground for averring an implied assumpsit. But this is not material under our system, where no particular form of action is recognized, and the plaintiff is entitled to recover, if it appears from the facts stated in his petition that he is entitled to any relief. * * * The law applicable to the case is well stated by Brown, J., in *Hanna v. Mills*, 21 Wend. 90 [34 Am. Dec. 216]: 'When goods are sold to be paid for by a note or bill payable at a future day, and the note or bill is not given, the vendor cannot maintain assumpsit on the general count for goods sold and delivered, until the credit has expired; but he can sue immediately for a breach of the special agreement. *Mussen v. Price*, 4 East, 147; *Dutton v. Solomonson*, 3 Bos. & P. 582; *Hoskins v. Duperoy*, 9 East, 498; *Hutchinson v. Reid*, 3 Campb. 329. In such an action he will be entitled to recover as damages the whole value of the goods, unless, perhaps, there should be a rebate of interest during the stipulated credit. The cases referred to by the counsel for the plaintiff in error give no countenance to the argument in favor of a different rule of damages. The right of action is as perfect on a neglect or refusal to give the note or bill as it can be after the credit has expired. The only difference between suing at one time or the other relates to the form of the remedy; in the one case the plaintiff must declare specifically, in the other he may declare generally. The remedy itself is the same in both cases. The damages are the price of the goods. The party cannot have two actions for one breach of a single contract; and the contract is no more broken after the credit expires than it was the moment the note or bill was wrongfully withheld."

See, also, *Kelly v. Pierce*, 16 N. D. 234, 112 N. W. 995, 12 L. R. A. (N. S.) 180.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(67 Okl. 299)

ROCK ISLAND COAL MINING CO. v.
TOLEIKIS. (No. 8124.)

(Supreme Court of Oklahoma. Feb. 12, 1918.)

(Syllabus by the Court.)

1. TRIAL \S 260(1)—REQUESTED INSTRUCTION—GIVEN INSTRUCTION.

When an instruction is given which fairly contains the substance of an instruction refused, the refusal of such instruction does not constitute reversible error.

2. MASTER AND SERVANT \S 291(4) — TRIAL \S 260(1) — ACTION FOR INJURY — INSTRUCTIONS.

Instructions given examined, and held to correctly state the law applicable to the issues joined by the pleadings and the evidence in a fair and impartial manner. Held, further, that in these circumstances, it is not error to refuse to restate the law of the case in the more amplified form requested by one of the parties.

3. SETTING ASIDE JUDGMENT—GRANT OF NEW TRIAL—STATUTE.

Section 6005, Rev. Laws 1910, provides: "No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of

misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

4. APPEAL AND ERROR \Leftrightarrow 1026—TRIAL ERRORS—NEW TRIAL.

After an examination of the entire record, we are unable to say that it appears that the errors complained of have probably resulted in a miscarriage of justice, or constitute a substantial violation of any constitutional or statutory right.

Error from District Court, Pittsburg County; R. W. Higgins, Judge.

Action by Joe Toleikis against the Rock Island Coal Mining Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. H. Moore and C. O. Blake, both of El Reno, and Wright & Boyd, of McAlester, for plaintiff in error. Arnote & Anderson, of McAlester, for defendant in error.

KANE, J. This was an action for damages for personal injuries, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. Upon trial to a jury there was a verdict for the plaintiff, upon which judgment was duly entered, to reverse which this proceeding in error was commenced. Hereafter, for convenience, the parties will be designated "plaintiff" and "defendant," respectively, as they appeared in the trial court.

At the time of the injury the defendant was operating a coal mine, and the plaintiff was in its employ as a miner. The petition alleges in substance that at the time of his injury the plaintiff was working at the face of the thirteenth east air course of said mine, engaged in driving and advancing said air course, and in mining coal therefrom. The primary act of negligence complained of was that the defendant, in violation of the requirements of the statute, failed to keep a sufficient current of fresh air at plaintiff's working place to dilute and render harmless the dangerous and explosive gases, or to remove said gases, and that in consequence of said violation of the statute the injuries complained of were caused by an explosion of accumulated gases in the working place of said plaintiff. The theory of the defendant is stated by counsel in their brief as follows:

"It was the theory of the defendant that the 'cracking shots' exploded the night before had so cracked and opened the coal that small pockets of gas had been disturbed and, as the result of the shot, or the operations of the plaintiff with his pick, this gas was allowed to 'bleed' into the cutting which plaintiff was making."

In other words, it is contended that the defendant furnished the plaintiff a safe place to work in accordance with the provisions of

the statute, but the place became unsafe during the progress of the work, because the plaintiff, while working as stated, uncovered the small quantities of gas which naturally accumulate during the progress of such work, and permitted the same to "bleed" into the working place without making the inspection for gas with a safety lamp that it was his duty to do, knowing such gas was likely to accumulate.

[1] No question is raised as to the sufficiency of the evidence to support the judgment rendered, the assignments of error all being directed to alleged error of the court in refusing to give instructions Nos. 5, 7, 11, and 12, requested by the defendant, and error in giving instructions Nos. 3 and 5 by the court. The contention that the court erred in refusing to give instruction No. 5 requested by the defendant is without merit, for the reason that instruction No. 6 given by the court contains substantially every principle of law contained in instruction No. 5 refused. It is well settled that, when an instruction is given which fairly contains the substance of an instruction refused, the refusal of such instruction does not constitute reversible error. *Ellet-Kendall Shoe Co. v. Ross*, 28 Okl. 697, 115 Pac. 892; *Eisminger v. Beman*, 32 Okl. 818, 124 Pac. 289; *Enid City Ry. Co. v. Reynolds*, 34 Okl. 405, 126 Pac. 193.

[2] Counsel's contention as to the refusal of the court to give instructions Nos. 2, 3, and 4 are discussed together. Each of these instructions, counsel say, sought to have submitted to the jury the question of assumption of risk, and were drawn to present to the jury defendant's theory of the case. We have elsewhere stated in this opinion defendant's theory of its case. Their contention now is that if the injury was proximately caused by a danger which plaintiff caused as an incident in the course of the very work which he at the time was doing, he assumed the risk, and the court erred in refusing to submit the defense to the jury.

In instruction No. 4½ the trial court presented the theory of both parties together as follows:

"Therefore the court instructs you that if you find from a preponderance of the evidence that the defendant failed to exercise ordinary care to furnish a sufficient current of fresh air to the face of the thirteenth east air course to dilute and render harmless any noxious and explosive gases that might be accumulated there, if there were any, and that this was the proximate cause of the plaintiff's injury, then your verdict should be for the plaintiff, unless you find the plaintiff guilty of contributory negligence as herein defined, or the gases, if any, were suddenly opened up by the plaintiff in his work that the ordinary and customary methods of inspection would not discover; but on the other hand, if the defendant did use ordinary care in furnishing a sufficient current of air to render harmless any gases, if any, therein accumulated, or if the plaintiff by his negligence contributed to the injury, or if the injury was caused by the sudden opening up of a gas feeder as herein stated,

then the plaintiff should not recover, and your verdict should be for the defendant."

The clear import of this instruction, in so far as it relates to the defendant's theory of its case, is that if the injury was caused by the sudden opening up of the gas feeders, by plaintiff himself in the course of his work, thereby causing accumulations of gas which the ordinary and customary methods of inspection would not discover, then the plaintiff was not entitled to recover and a verdict should be returned for the defendant. This, as we understand it, is a fair statement of counsel's theory of their case, as stated by them in their brief; and we find it no more clearly or comprehensively stated in any of the instructions which were requested and refused. As the primary negligence complained of was the failure of the defendant to use ordinary care to keep a sufficient current of air at the face of the plaintiff's working place to dilute and render harmless the dangerous and explosive gases, a duty enjoined upon it by statute, the doctrine of assumption of risk was not applicable to plaintiff's theory of the case. *Sans Bois Coal Co. v. Janeway*, 22 Okl. 425, 99 Pac. 153; *Great Western Coal & Coke Co. v. Coffman*, 43 Okl. 404, 143 Pac. 30; *Curtis & Gartside Co. v. Pribyl*, 38 Okl. 511, 134 Pac. 71, 49 L. R. A. (N. S.) 471; *Jones v. Oklahoma Planing Mill & Mfg. Co.*, 47 Okl. 477, 147 Pac. 999; *Harris-Irby Cotton Co. v. Duncan*, 157 Pac. 746.

As the trial court in the instructions given presented the theories of both parties to the jury in a fair and impartial manner, there was no necessity for restating the same doctrine in the amplified form requested by counsel for defendant.

[3] The remaining proposition argued by counsel for defendant in their brief relates to the action of the court in giving instructions Nos. 3 and 5. Of this assignment of error it is sufficient to say that we have examined the instructions given by the court as a whole, and believe that they are substantially correct, and that they presented to the jury in a fair and impartial way the contentions of the respective parties. This is all that is required. There is no complaint as to the sufficiency of the evidence to sustain the verdict of the jury; the sole reliance for reversal being based upon error of the court in relation to instructions given or instructions requested and refused. Section 6005, Rev. Laws 1910, provides:

"No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

[4] On the whole, after an examination of the entire record, we are unable to say that it appears that the errors complained of have probably resulted in a miscarriage of justice, or constitute a substantial violation of any constitutional or statutory right.

For the reasons stated, the judgment of the court below is affirmed. All the Justices concur.

CHEYNE et al. v. COUNTY COURT OF
CRAIG COUNTY et al. (No. 6187.)
(Supreme Court of Oklahoma. Feb. 12, 1918.)

(Syllabus by the Court.)

PROHIBITION §3(3) — ADMINISTRATION OF
ESTATE—REMEDY AT LAW.

Where a county court of this state assumes jurisdiction to administer upon an estate, and the petition therefor shows upon its face that such county court has jurisdiction to administer such estate, *held*, that a writ of prohibition sought by an administrator appointed by a county court in another county seeking to prohibit such administrator from administering upon said estate will not lie for the reason that the action of the county court in assuming jurisdiction to administer upon such estate may be reviewed and corrected on appeal, unless it be made to appear by the pleadings and proof that an irreparable injury would result on account of the delay necessarily incurred by an appeal, or that an intolerable conflict had arisen which could not be remedied by appeal.

Commissioners' Opinion. Division No. 2.
Error from District Court, Craig County;
Preston S. Davis, Judge.

Prohibition by John B. Cheyne, administrator of the estate of James Welch, deceased, and Maud Welch, a minor, by John A. Daniels, her guardian, against the County Court of Craig County and S. W. Parks, County Judge of Craig County, Okl., and others. Demurrer to petition sustained, and plaintiffs bring error. Affirmed.

Riddle, Bennett & Mitchell, of Vinita, and F. D. Adams and A. C. Towne, both of Miami, for plaintiffs in error. Davenport & Rye, of Vinita, for defendants in error.

WEST, C. This cause was begun in the district court of Craig county, Okl., on the 15th day of December, 1913, by John S. Cheyne, administrator of the estate of James Welch, deceased, and Maud Welch, a minor, and sole heir at law of James Welch, deceased, by John A. Daniels, her guardian, plaintiffs in error, plaintiffs below, against the county court of Craig county, S. F. Parks, county judge of Craig county, and E. D. Ficklin, defendants in error, defendants below, for writ of prohibition, to prohibit the said defendants from administering upon the estate of the said James Welch, deceased. The parties will hereinafter be designated as in the court below.

It appears that the said James Welch, deceased, died in Vinita, Craig county, Okl., on or about the 26th day of July, 1913; that on

said date there was filed by Helen Welch, claiming to be the widow of the said James Welch, deceased, a petition in the county court of Craig county, praying that letters of administration be granted on his estate. On the same day there was filed in the county court of Ottawa county a petition asking for letters of administration to be granted on the estate of the said James Welch, deceased, by W. A. Waggoner, who claimed to be a creditor of said estate, and in this petition Maud Welch, a minor, residing at Miami in Ottawa county, was alleged to be the only heir at law of said James Welch, deceased. The county court of both counties undertook to assume jurisdiction, the petition in both instances stated a prima facie case, and alleged facts which, if true, would entitle either county to administer upon said estate. Both counties assumed jurisdiction of the respective petitions, gave notice, and appointed administrators. It is argued in the brief that the petition in Ottawa county was filed first, and that, therefore, that county had exclusive jurisdiction to act until it was shown that said court was without jurisdiction. Both petitions were filed on the same day, but which petition was filed first is not made to appear by the record before us. On the 11th day of August, 1913, the county court of Craig county appointed the defendant E. D. Ficklin as administrator of the estate of James Welch, deceased, who on said day qualified as such administrator; and on the 14th day of August the county court of Ottawa county appointed the plaintiff John S. Cheyne administrator of the estate of James Welch, deceased. On the 15th day of December the district court of Craig county issued an order against the defendants to show cause why a writ of prohibition should not issue. In response to said petition defendants filed a demurrer, which, omitting the formal parts, was as follows:

"Now come the said county court of Craig county, S. F. Parks, county judge of Craig county, Okl., and E. D. Ficklin who are named as defendants in the petition heretofore filed in the case, and in response to the notice given to them under and in pursuance of the order of the said district court made in this case on the 15th day of December, 1913, requiring of them that they show cause, if any they can, why an alternative writ of prohibition should not be issued against them, say:

"(1) That it appears upon the face of the said petition that the said county court of Craig county had full and complete jurisdiction of the subject-matter of the appointment of an administrator of the estate of James Welch, deceased.

"(2) That it appears upon the face of the said petition that the said county court of Craig county had at that time mentioned in the said petition when it took jurisdiction of the matter of the administration of the said estate of the said James Welch, deceased, and before and at all times since full and complete and exclusive jurisdiction of the subject-matter of the administration in probate matters in said Craig county, and the said petitioners had a perfect, complete, and adequate remedy at law for the correcting of any error to irregularities committed by the said court in the exercise of

its jurisdiction, and are not entitled to remedy prayed for by their petition.

"(3) The said petition does not state facts sufficient to constitute any cause of action, does not state facts sufficient to show themselves entitled to have issued against the said defendants an alternative writ of prohibition, or against any of the said defendants, and does not state facts sufficient to show that plaintiffs are entitled to any writ or order of prohibition against the said defendants or against any of them."

This demurrer was sustained by the court, and thereupon plaintiffs declined to plead further, elected to stand upon their petition, and the action of the trial court in sustaining said demurrer is brought here to review. This appeal being taken upon transcript, we are to look only to such errors as appear upon the face of the petition, proceedings, return, and pleadings subsequent thereto, reports, orders, and judgments. In case of *Spradling v. Hudson*, 45 Okl. 767, 146 Pac. 588, this court in the first paragraph of the syllabus lays down the following rule:

"Where an inferior court has jurisdiction of the subject-matter and the parties to an action, and an appeal lies from the orders of said court therein to the Supreme Court, prohibition will not lie, though said court may make erroneous application of the law in the determination of said cause."

In case of *State ex rel. Mose et al. v. District Court of Marshall County et al.*, 46 Okl. 654, 149 Pac. 240, the first and second paragraphs of the syllabus are as follows:

"1. Prohibition, being an extraordinary remedy, cannot be resorted to when ordinary and usual remedies provided by law are available.

"2. The writ will not be awarded on account of inconvenience, expense, or delay, nor for the reason that the applicants may not be able to secure a supersedeas bond."

In the body of the opinion the court uses the following language:

"The language here used is plain and cannot be misunderstood. If the applicant for a writ of prohibition has a remedy by appeal, the writ [of prohibition] will not issue. That is the settled rule and doctrine of this court. There is no question but what an appeal from a decree of partition lies from the district court to this court, nor does the right to appeal depend upon the giving of a supersedeas bond. The object and effect of the bond is simply to stay execution—nothing more. Besides, if the decree of partition should be without authority and not within the jurisdiction of the court, it would simply be a nullity and void. The purchaser at the sheriff's sale, if it should go to that extent, would have notice of the appeal, and therefore could not be an innocent or protected purchaser. In a recent case, not yet officially published, Justice Hardy, speaking for the court upon the question of the issuance and use of the writ of prohibition, says: 'It is a well-settled rule in this state that where an inferior court has jurisdiction of the subject-matter and of the parties, and where an appeal will lie from the order or judgment of the court in said cause to the Supreme Court, pending which appeal such order may be superseded, a writ of prohibition will not lie, even though such court may make an erroneous application of the law to the facts therein.' In *Spradling v. Hudson*, Judge (No. 5590) 45 Okl. 767, 146 Pac. 588: 'The writ of prohibition, being an extraordinary writ, cannot be resorted to when the ordinary and usual remedies provided by law may be

availed of by the party complaining.' *Morrison v. Brown*, Judge, 26 Okl. 201, 109 Pac. 237; *Herndon v. Hammond*, County Judge, 28 Okl. 616, 115 Pac. 775; *Ex parte Oklahoma*, 220 U. S. 191, 31 Sup. Ct. 426, 55 L. Ed. 431; *State v. Huston*, 27 Okl. 606, 113 Pac. 190, 34 L. R. A. (N. S.) 380."

High on Extraordinary Remedies, § 770, uses the following language:

"It is a principle of universal application which lies at the very foundation of law of prohibition that the jurisdiction to issue is strictly confined to cases where no other remedy exists and a sufficient reason for withholding the writ is that the party aggrieved has another and complete remedy at law"

In the case of *Goodwyn*, Judge, et al., v. *State ex rel. Wakefield et al.*, 145 Ala. 536, 40 South. 122, the court uses the following language:

"Prohibition is an extraordinary writ, only to be resorted to when its exercise is necessary to give a general superintendence and control of inferior jurisdiction; never to be resorted to except in cases of usurpation and abuse of powers and not then unless other remedies are ineffectual to meet the exigencies of the case."

In case of *Drummond v. Drummond et al.*, 154 Pac. 514, the second paragraph of the syllabus is as follows:

"Where a husband commenced action for divorce against his wife in the district court of a county, and thereupon said wife commenced action for divorce and incidental relief against him in the district court of another county, and it does not appear that there is or will be any sharp and intolerable conflict of jurisdiction between said courts against which there is no adequate remedy at law, the writ of prohibition will not issue to prevent the latter court from exercising jurisdiction."

Section 6511, R. L. 1910, is as follows:

"6511. *Appeal Does Not Stay Issue of Letters*.—An appeal from the decree or order admitting a will to probate, or granting letters testamentary, or letters of administration, does not stay the issuing of letters, where, in the opinion of the county judge, manifested by an entry upon the minutes of the court, the preservation of the estate requires that such letters should issue. But the letters so issued do not confer power to sell real property by virtue of any provision in the will, or to pay or satisfy legacies or to distribute the property of the decedent among the next of kin, until the final determination of the appeal."

It will appear by the provision of the above statute that where the right of a court to administer upon an estate or issue letters is in controversy, and an appeal is taken from the action of the court in assuming jurisdiction that no letters will issue unless an entry is made upon the minutes by the court finding that it is necessary to issue the letters in order to preserve the estate, but the letters so issued do not confer power upon such administrator to sell such property, or to pay or satisfy legacies, or to dispose of the property of the decedent until the final determination of the appeal.

Section 6521, R. L. 1910, is as follows:

"6521. *Reversal for Error Does Not Affect Lawful Acts*.—When the order or decree appointing an executor, or administrator, or guard-

ian, is reversed on appeal for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate, performed by such executor, or administrator or guardian, if he have qualified, are as valid as if such order or decree had been affirmed."

It would appear from the reading of this section that where an appeal is taken from the action of a court in assuming jurisdiction, and upon appeal it is found that the court is without jurisdiction to administer the estate, then all acts performed by such administrator would be void and of no effect. It would therefore appear from the settled law in this jurisdiction that in the instant case the plaintiffs should be denied the writ of prohibition as they have a full and complete remedy at law. The action of the county court of Craig county in appointing an administrator and issuing letters testamentary in the matter of the estate of James Welch, deceased, is subject to review on appeal to the district court, and then from the district court to the Supreme Court; and if the facts disclose that the county court of Craig county had no jurisdiction to appoint said administrator, then its action is subject to review and correction by appeal; and if it is found upon appeal that the county court had no jurisdiction to appoint an administrator, then any act performed by such administrator would be void and of no effect.

From the record of the transcript before us the petition filed by Helen Welch in the county court of Craig county praying for letters testamentary upon the estate of James Welch, deceased, a copy of which is attached by plaintiffs to their petition for writ of prohibition, clearly shows jurisdiction in the county court of Craig county to administer upon this estate. The evidence which the court considered in acting upon said petition is not before us. It is true that both counties could not administer upon this estate at the same time. It is true that one of the counties has jurisdiction to administer upon this estate perhaps, and the other has not. If the county court of Craig county assumed jurisdiction to administer this estate, wrongfully finding the residence of decedent to be in said county at the time of his death, then its action is subject to review and correction on appeal. The action of both counties in assuming jurisdiction to administer upon this estate may be reviewed upon appeal; and from the record before us it clearly appears from the law announced in the foregoing cases that the plaintiffs in error upon the showing made are not entitled to a writ of prohibition, and that the trial court below was correct in sustaining the demurrer to the petition.

A condition might arise where the interested parties were cut off from their right to test by appeal the action of the county court in assuming to administer upon an estate which clearly had no jurisdiction to act, and it might present a condition where an intolerable conflict would arise between two county

courts in assuming to administer upon a particular estate, and the right to test this by appeal was lost owing to lapse of time, and which might be made to appear that irreparable injury would result on account of the delay necessarily incurred by an appeal, and thus present a condition where the court might be justified in issuing the writ, but the instant case does not present such condition.

Finding no error in the action of the court below in sustaining the demurrer to the petition of plaintiffs for writ of prohibition, cause is affirmed.

PER OURIAM. Adopted in whole.

(67 Okl. 307)

INCORPORATED TOWN OF SALLISAW v. CHAPPELLE. (No. 8428.)

(Supreme Court of Oklahoma. Feb. 12, 1918.)

(Syllabus by the Court.)

1. PLEADING — 193(9), 367(2) — DEMURRER — FAILURE TO ATTACH COPY OF INSTRUMENT — MOTION.

The failure of the plaintiff to attach to his petition a copy of the written instrument upon which his cause of action is founded cannot be reached by demurrer, but should be challenged by motion, where the petition is defective on that account.

2. TRIAL — 39 — COPY OF INSTRUMENT SUEDE ON.

Section 5096, Rev. Laws 1910, does not apply to public documents or public records which are equally accessible to all the parties.

3. APPEAL AND ERROR — 1001(1) — VERDICT OR JUDGMENT — SUFFICIENCY OF EVIDENCE.

Where there is any evidence reasonably tending to support the verdict of the jury or the judgment of the court in an action of purely legal cognizance, the same will not be set aside on appeal on the ground that it is contrary to the evidence.

4. CONTRACTS — 353(1) — ACTION FOR BALANCE — INSTRUCTION.

Instructions given examined, and held to correctly state the issues joined by the pleadings and the evidence.

Error from District Court, Sequoyah County; John H. Pitchford, Judge.

Action by Charles Chappelle against the Incorporated Town of Sallisaw. Judgment for plaintiff, and defendant brings error. Affirmed.

J. H. Jarman, of Sallisaw, for plaintiff in error. Frye & Frye, of Sallisaw, for defendant in error.

KANE, J. This was an action commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover the balance due for constructing certain wing walls and floodgates to a concrete dam, pursuant to the terms of a certain written contract entered into between the parties. The answer of the defendant, after a general denial, contained allegations to the effect that the plaintiff neglected, failed and refused to complete said wing walls

and floodgates in accordance with the terms of his contract, and therefore he was not entitled to recover. The defendant, by way of cross-petition, also alleged that by reason of plaintiff's failure and neglect to complete said wing walls and floodgates, in keeping with his contract, the defendant suffered damage in the sum of \$953. Upon a trial to a jury there was a verdict in favor of the plaintiff in the sum of \$473, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

Counsel for defendant have summarized their grounds for reversal in their brief as follows: (1) The petition fails to state a cause of action; (2) defendant was entitled to a copy of contract sued on before trial of the case; (3) evidence insufficient; (4) instructions erroneous.

[1] On the first proposition counsel contend that as this is an action founded upon a written contract, a copy thereof must be attached to and filed with the petition, and that, while a portion of the contract is attached to the petition, inasmuch as the plans and specifications mentioned in said contract are not, this does not constitute compliance with section 4769, Rev. Laws 1910, which provides:

"If the action * * * be founded on account or on a note, bill, or other written instrument as evidence of indebtedness, a copy thereof must be attached to and filed with the pleading. If not so attached and filed, the reason thereof must be stated in the pleading."

Counsel say that in order for the plaintiff to be entitled to judgment at all, it was necessary for him to show by proof that he constructed these wing walls and floodgates in keeping with the unattached specifications referred to. Therefore, he argues, as it was necessary for that fact to be proven, it was necessary for the specifications, plans, etc., to be attached to and filed with the petition. A sufficient answer to this is that, even if we assume that this is an action founded upon a contract, within the meaning of the statute, the failure of the plaintiff to attach a copy of the instrument to his petition cannot be raised by demurrer to the petition. "This deficiency, if such it be, cannot be reached by demurrer, but should have been challenged by motion if the petition was defective on that account." Rogers Milling Co. v. Goff, Gamble & Wright Co. et al., 46 Okl. 339, 148 Pac. 1029; England Bros. & Co. v. Young, 26 Okl. 494, 110 Pac. 895; Andrews et al. v. Alcorn, Adm'r, 13 Kan. 352; Curtis v. Buckley, 14 Kan. 449.

[2] In support of his second proposition counsel says:

"The court erred in denying the motion of defendant to require plaintiff to file complete contract, including the plans, blueprints, and specifications prescribed in the manner in which the 'wing walls and floodgates' were to be constructed, with his petition, and to furnish the original or copies thereof to the defendant."

And in support of this proposition he calls attention to section 5096, Rev. Laws 1910, which provides:

"Either party, or his attorney, if required, shall deliver to the other party or his attorney, a copy of any deed, instrument or other writing whereon the action or defense is founded, or which he intends to offer in evidence at the trial."

It appears from the record that the plans, blueprints and specifications referred to by counsel were at all times prior to the trial in possession of the defendant, all being public records of the town of Sallisaw, and, if anything, more accessible to the defendant than to the plaintiff. In such circumstances, the statute relied upon is not applicable. *Hammerslough v. Hackett*, 30 Kan. 64, 1 Pac. 41.

It further appears from the record that counsel for the defendant did not file his request or make demand for these blueprints, plans, specifications, etc., until after both parties had answered ready for trial, and that the trial court, in ruling upon said motion, held the demand came too late. We think the motion could have been overruled on either of the foregoing grounds.

[3] The third assignment of error attacks the sufficiency of the evidence to support the verdict and judgment rendered. We have examined the evidence adduced at the trial, particularly that part of it called to our attention in the briefs of the respective parties, and believe that it reasonably supports the verdict and judgment rendered. Authorities are numerous to the effect that, where there is any evidence reasonably tending to support the verdict of the jury or the judgment of the court in an action of purely legal cognizance, the same will not be set aside on appeal on the ground that it is contrary to the evidence. *Roff Oil & Cotton Co. v. Winn*, 27 Okl. 22, 110 Pac. 652; *New State Groc. Co. v. Wiles*, 32 Okl. 87, 121 Pac. 252; *Kiser v. Nichols*, 35 Okl. 8, 128 Pac. 103; *City of Wynnewood v. Cox*, 31 Okl. 563, 122 Pac. 528, Ann. Cas. 1913E, 349.

[4] The instruction complained of reads as follows:

"You are further instructed that if you find from the evidence that the plaintiff failed to do the work under the contract according to the plans and specifications, and that by reason of his failure to so comply with said contract that his work was rendered useless and valueless to the defendant, and that, before the defendant discovered that the work was not done according to plans and specifications, the defendant paid to the plaintiff the sum of \$932.60, then and in that event you should find in favor of the defendant for the sum of \$932.60, with interest thereon from the 21st day of September, 1910, at 6 per cent. per annum."

As we understand the record, this is a fair statement of the issues as presented by the pleadings and the evidence. The plaintiff contended that he was entitled to recover because he had complied with his contract; the defendant denied that the plaintiff had com-

pleted his contract according to its terms, and, by way of cross-petition, alleged that, inasmuch as the defendant had paid the plaintiff the sum of \$932.60 upon the contract before the default was discovered, instead of the plaintiff being entitled to recover a balance, he was liable to the defendant for the return of the money thus paid. We think the instruction given sufficiently states the theory of the case, and as we are unable to say that the instructions requested by the defendant and refused by the court tended to make the issues any clearer, their refusal, if error at all, was harmless.

Finding no error in the record, the judgment of the court below is affirmed. All the Justices concur.

(67 Okl. 319)

BAKER et al. v. PITTSBURG MORTGAGE INV. CO. (No. 8100.)

(Supreme Court of Oklahoma. Feb. 12, 1918.)

(Syllabus by the Court.)

USURY — 47 — NOTE — RATE OF INTEREST.

Affirmed upon the authority of *Metz et al. v. Winne*, 15 Okl. 1, 79 Pac. 223, *Covington et al. v. Fisher*, 22 Okl. 207, 97 Pac. 615, and *Garland et al. v. Union Trust Co. et al.*, 49 Okl. 654, 165 Pac. 197.

Thacker, J., dissenting in part.

Error from District Court, Roger Mills County; T. P. Clay, Judge.

Action by the Pittsburg Mortgage Investment Company against Earl W. Baker and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Hendrix & Tracy, of Sayre, for plaintiffs in error. T. M. Robinson, of Altus, for defendant in error.

KANE, J. This was an action upon a promissory note and to foreclose a mortgage given to secure the payment thereof, commenced by the defendant in error, plaintiff below, against the plaintiffs in error, defendants below. Hereafter, for convenience, the parties will be designated "plaintiff" and "defendants," respectively, as they appeared in the trial court. The petition was in the usual form, and admittedly stated facts sufficient to constitute a cause of action. The answer admitted the execution of the note and mortgage sued upon, and by way of defense alleged facts which the pleader says show that the instruments sued upon were usurious, and "that by reason of the amount of interest which said notes and mortgage carried with them, and the amount which was agreed to be paid thereon, the plaintiff, by charging said rate of interest, incurred the penalty of the usury law, to wit, double the entire amount of said usurious interest charged; that the total so charged was the sum of \$830.78; that the total amount which said contract, if it had been made according to law, at 10 per cent. per annum, was the

sum of \$458.87; that by reason of the said transaction the plaintiff forfeited the sum of \$1,061.56." Wherefore they pray that the plaintiff take nothing by its suit; that said notes and mortgage be declared canceled and annulled, and that the sum of \$1,061.56 be declared forfeited on said transaction, and that these defendants be allowed credit for the further sum of \$26, overcharge of interest in addition to said forfeiture; that said coupon note be declared paid and discharged, and the notes herein sued on be declared paid and discharged, and the said mortgages annulled by reason of said forfeiture, and that these defendants have judgment over against plaintiff for the balance of said adjudged forfeiture, and for general relief. After reply, in effect, a general denial, the plaintiff withdrew the same, and moved the court for judgment on the pleadings, which motion was sustained, and judgment rendered in favor of plaintiff, to reverse which this proceeding in error was commenced.

From the admitted facts it appears that the trial court rightly decided the case upon the authority of *Metz et al. v. Winne*, 15 Okl. 1, 79 Pac. 223, and it is conceded by the parties that, unless the court overrules or modifies the proposition of law stated in the first paragraph of the syllabus of that case, the judgment of the court below must be affirmed. The opinion in *Metz et al. v. Winne*, supra, was handed down by the territorial Supreme Court in September, 1904, and the proposition of law stated in the first paragraph of the syllabus has been approved at least twice by the Supreme Court of the state since statehood. *Covington et al. v. Fisher*, 22 Okl. 207, 97 Pac. 615; *Garland et al. v. Union Trust Co. et al.*, 49 Okl. 654, 165 Pac. 197. In the latter case, after a very full examination and review of the authorities, the court adheres to the doctrine announced in *Metz et al. v. Winne*, and *Covington et al. v. Fisher*, supra. In view of the recent discussion of this question and the conclusion reached by the court, further discussion here would serve no useful purpose.

The judgment of the court below is affirmed, upon the authority of *Metz et al. v. Winne*, *Covington et al. v. Fisher*, and *Garland et al. v. Union Trust Co. et al.*, supra.

All the Justices concur, except Mr. Justice THACKER, who expresses his views in a separate opinion.

THACKER, J. (concurring). I concur in the conclusion reached and dissent from the reasoning and the rule announced in the opinion of the court in this case for the same reason that I did the same in the case of *Garland v. Union Trust Co.*, 165 Pac. 197.

The notes and mortgages in this case were executed on February 12, 1913, and the contract specifies March 1, 1913, as the time from which the \$750 loan should bear inter-

est. A note and mortgage for the principal loan called for interest thereon at the rate of 7 per cent. per annum and interest coupons attached to this note called for the first payment at the expiration of nine months and for the succeeding payments at the end of each succeeding year. Three additional notes for \$50 each, payable on November 1, 1913, November 1, 1914, and November 1, 1915, were also executed and delivered by the debtor to the creditor as a part of the loan contract. I do not think this shows the amount of interest charged that is contended by the plaintiff in error.

Allowing the \$50 called for on November 1, 1913, the \$50 called for on November 1, 1914, and the \$50 called for on November 1, 1915, each, in so far as the same is not in excess of accrued interest on those dates, to sterilize the interest-bearing quality of an equal amount of the principal loaned until such excess could lawfully be earned as interest, upon the principal of the benefits to be derived from and burden imposed by the contract, and looking to the essence of the contract as a whole, it does not appear that usurious interest was charged. Even if it be assumed, in the face of the fact that it is not shown that the borrower's failure to receive the loan at the date it commenced to bear interest was due to the fault of the lender, it does not appear that the contract was usurious when considered as a whole and tested by its benefits and burden, unless I have erred in my calculations; but I protest against the rule by which this case is tested for usury in the opinion of the court.

RALLS et al. v. CAYLOR LUMBER CO. (No. 8426.)

(Supreme Court of Oklahoma. Feb. 12, 1918.)

(Syllabus by the Court.)

1. MECHANICS' LIENS — 14 — EXEMPT PROPERTY — HOMESTEAD.

Under the Constitution and laws of the state, the homestead of a family is not exempt from forced sale for labor and materials furnished and used in constructing improvements thereon, and one furnishing material to construct improvements on such homestead may perfect a lien therefor upon said homestead in the manner prescribed by statute and enforce the same against said homestead in the same manner as if there were no homestead exemptions.

2. MECHANICS' LIENS — 73(2) — MATERIAL-MAN'S LIEN — PROPERTY OF WIFE — JOINDER OF HUSBAND — HOMESTEAD.

Where a building contractor has a contract with the wife, the owner of the homestead, to erect improvements thereon, and one furnishes material to be used in the constructing of such improvements under an agreement with the contractor, it is not necessary for the husband to join in the contract for the improvements, nor is it necessary that the contract be made directly with the person furnishing the material.

Commissioners' Opinion, Division No. 3. Error from District Court, Atoka County; J. H. Linebaugh, Judge.

Action by the Caylor Lumber Company, a partnership consisting of Floyd Caylor and R. A. Caylor, against Eva A. Ralls and others. Judgment for plaintiff, foreclosing the materialmen's liens, and defendants bring error. Affirmed.

See, also, 162 Pac. 711.

J. G. Ralls, of Atoka, for plaintiffs in error. A. A. McDonald and A. M. Works, both of Hugo, for defendant in error.

PRYOR, C. This is an action commenced in the district court of Atoka county by Caylor Lumber Company, a partnership consisting of Floyd Caylor and R. A. Caylor, against Eva A. Ralls, J. G. Ralls and E. W. Steward, to foreclose a materialman's lien.

The parties will be referred to as they appeared in the trial court.

The facts, so far as necessary to the determination of the questions raised on appeal, are: That the defendants, Eva A. Ralls and J. G. Ralls were husband and wife, and occupied lot 3 of block 28 in the city of Atoka as their homestead; that the title of the lot was in the wife, Eva A. Ralls; that she entered into a contract with the defendant E. W. Steward to construct and erect a building upon said lot, the husband, J. G. Ralls, not joining with her in said contract. The plaintiff lumber company furnished the material to the said Steward for the construction of said building. The plaintiff in due time filed its materialman's lien and served notice thereof upon the defendant, Eva A. Ralls, but did not serve notice thereof upon her husband, J. G. Ralls, the amount of the lien claim being \$1,192.55. There was a trial by the court and jury in said cause and a verdict and judgment for the plaintiff in the amount claimed and judgment for the foreclosure of the materialman's lien, from which judgment the defendants appeal.

The contentions urged by the defendants on appeal which merit consideration are as follows: First, that there can be no lien for material furnished for making improvements upon a homestead; second, that where persons are occupying premises as a homestead, the title of which is in the wife, a lien for material which is used in making improvements on said property cannot be created unless the husband joins in the contract therefor; third, that the notice of filing the lien claim must be served on both the husband and wife; and, fourth, that under the laws of the state of Oklahoma, where by contract the contractor agrees with the owner to furnish all the material and labor, the person who furnishes material under contract with the contractor has no lien upon the premises on which the material was used in making improvements.

[1] Section 2, art. 12, of the Constitution

of the state protects the homestead of the family from forced sale for the payment of debts, "except for the purchase money therefor or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon," and in foreclosures to satisfy mortgages joined in by both husband and wife. The statute exempting the homestead from forced sale is practically identical with the provision of the Constitution. The claim of the plaintiff being for material furnished to be used in constructing improvements upon the homestead falls squarely within the provision of the Constitution excepting such claims from the homestead exemption. Under this provision it seems to be that there could be no reason in the contention that the homestead is not subject to the satisfaction of the claim for the material furnished by the plaintiff, but the defendants claim that the materialman has no lien upon the homestead, granting that the same is not exempted from sale for the debt created for material furnished to be used in constructing improvements thereon. While we have no cases of this court deciding this particular phase of the case, it seems that from the principles laid down in cases construing analogous questions, in regard to the homestead exemptions, that it may be justly drawn from such principles that the homestead, not being exempt for such claims, is subject to such claims, and the same remedies may be pursued in enforcing such claims as if there were no homestead exemption. *Atlas Supply Co. v. Blake*, 152 Pac. 601; *Nichols v. Overacker*, 16 Kan. 54.

In the case of *Nichols v. Overacker*, 16 Kan. 54, the Supreme Court of Kansas held, in construing the provision relative to homestead exemptions of the Constitution of that state similar to the provision in the Constitution of this state, that the enforcement of the obligations against the homestead which are within the exceptions of the provision protecting the homestead against forced sale are governed by the same rules as if there were no homestead exemptions.

Under the principles announced in the foregoing cases, and from the general principles of law, the only reasonable construction that can be placed upon the Constitution and statute is that the person who furnished the material to be used in making improvements upon the homestead has all the rights and remedies in the enforcement of his claim as if there were no homestead exemptions, and has the right to perfect his lien for material furnished and foreclose the same against the homestead just as he would against property that was not used and occupied as a homestead.

[2] The defendants contend that there could be no lien created in favor of the materialman unless the contract for the improvements was joined in by both the husband and the wife. It has been uniformly

held by all the courts that a mortgage given by the spouse in whose name the title stands to secure the payment of the purchase is valid without the joining of the other spouse. There is no reason why the same principle should not apply to obligations for material furnished. The improvements which are created out of material furnished become as much a part of the homestead as the realty, and therefore the material furnished is a factor in creating the homestead by rendering it inhabitable. Hence the rights and remedies of the materialman are not inferior in the enforcement of his claim for material furnished to the rights and remedies of the vendor in enforcing payment of the purchase price.

And, further applying the principle announced above, that remedies for the enforcement of obligations which come within the exceptions of the provision of the law protecting the homestead against forced sale are the same in regard to other property, it is clear that the husband's joining in the contract for the improvements was not necessary. And the same reasons just stated answer the contention of the defendant that notice of the lien should be served upon the husband.

The contention of the defendants that the subcontractor or the person who furnished the material under contract with the contractor cannot have a lien upon the premises on which the improvements are made is answered fully by section 3804, Rev. Laws 1910, which expressly gives persons furnishing materials under a subcontract with the contractors liens upon the premises on which such materials are used in constructing improvements.

Therefore the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(87 Okl. 301)

In re OKLAHOMA GAS & ELECTRIC CO.
(Nos. 7714, 8393, 9203.)

(Supreme Court of Oklahoma. Feb. 12, 1918.)

(Syllabus by the Court.)

1. TAXATION \S 493(8) — EQUALIZATION—APPEAL—PRESUMPTION.

On appeal from the state board of equalization, in the absence of an affirmative showing that an erroneous method of valuation was used, or that values not properly assessable were taken into consideration, the presumption is that the action of the board of equalization is correct.

2. TAXATION \S 493(8) — DEPRECIATION AND REPLACEMENT—PRESUMPTION.

In a proceeding for the purpose of assessing the property of a gas and electric company for the purposes of taxation, in the absence of evidence to the contrary, the presumption is that any natural depreciation in the value of its instrumentalities are provided for by replacements paid for out of the net earnings of the company, and that the plant of the company is always kept in an ordinary state of efficiency.

3. TAXATION \S 40(6) — UNIFORMITY — DISCRIMINATION.

The consideration of the values represented by franchises held by a gas and electric company in determining the taxable value of the property owned by it does not violate the uniformity clause of the state Constitution, nor constitute an unjust discrimination against such company.

4. TAXATION \S 375 — GAS AND ELECTRIC COMPANY — VALUATION OF PROPERTY — EARNING CAPACITY.

The earning capacity of property may be considered in arriving at its fair value, but its value cannot be determined by that circumstance alone.

Appeal from State Board of Equalization.

The Oklahoma Gas & Electric Company appeals from the assessment of its property for taxation by the Board of Equalization. Affirmed.

Paul Reiss, of Oklahoma City, for appellant. S. P. Freeling, Atty. Gen., and Jno. B. Harrison and Hunter L. Johnson, Asst. Attys. Gen., for appellees.

HARDY, J. From the assessment of its property for taxation for the years 1915, 1916 and 1917 by the state board of equalization, the Oklahoma Gas & Electric Company appeals. The evidence consists of various reports made by it to the state board of equalization and to the Corporation Commission and certain other documentary evidence. The value placed upon its property by appellant for the purposes of taxation for the year 1915 was \$1,462,901, 1916, \$1,866,000, and for 1917, \$1,947,000, which values were arrived at by taking the total, naked, original cost of construction of its plant, based upon the cost of the different items such as posts, wires, etc., and deducting therefrom 5 per cent. of such original cost per annum for depreciation. This amount did not include the value of gas and electric franchises owned by it, nor was it intended to represent the aggregate cash value of all of its property as a going concern. In the return made to the state board of equalization for 1915, the total assets as of February 1, 1917, are stated to be \$6,111,987.59, 1916, \$6,210,539.59, and for 1917, \$6,516,766.08, which includes unsold bonds in the sum of \$75,000 and gas and electric franchises valued at \$3,610,145.13.

[1, 2] Appellant's property was assessed for taxation for the year 1915 by the state board of equalization at \$2,500,000, 1916 at \$2,500,000, and for 1917 at \$2,825,000, which values appellant claims are largely in excess of the taxable value of its property. And it further contends that such valuations work a discrimination between appellant and other public service corporations and individuals owning similar property. In support of this position it is urged that the board of equalization erred in taking into consideration the value of franchises owned by appellant, and also erred in the method by which

it arrived at the valuation fixed. The record does not disclose the method by which the value of appellant's property was determined, and, in the absence of a showing that an erroneous method of calculation was used, or that values not properly assessable were taken into consideration, the presumption is that the proper method was used. *Lusk v. Porter*, 156 Pac. 224; *Board Com'rs v. Field*, 162 Pac. 733.

The question then would be whether the result arrived at is erroneous. The total assets as of February 1, 1917, amounted to \$6,516,766.08, and if from this amount be deducted the amount of unsold bonds and the value of franchises as before stated, and accounts payable in the sum of \$97,770.17, there would remain physical, tangible property of the value of \$3,286,350.78, in addition to which there is in the hands of the trustee of appellant's bondholders the sum of \$471,981.17, deposited from current revenue as a reserve fund to take care of renewals and replacements and to maintain the value of the security of the mortgage on the plant. The figures for 1915 and 1916 are essentially the same, with small variations in amounts of income, expenditures, accounts receivable, accounts payable, and cash on hand. If no deductions be permitted for depreciation, the actual value of appellant's tangible property is largely in excess of the sum fixed by the board of equalization. There was no evidence of depreciation, and it will be presumed that depreciation has been cared for out of current operating expenses, and deductions therefor should not be permitted. *Re Assessment of Western Union Tel. Co.*, 35 Okl. 626, 130 Pac. 565.

[3, 4] In addition to this presumption, the record affirmatively shows that depreciation has been cared for out of current operating expenses, and by a reserve fund created especially for that purpose. If, however, deductions therefor be permitted, the result would not be different, because it was proper for the board of equalization, in fixing the value of appellant's property, to take into consideration the value of franchises owned by it, and said board was required to fix the aggregate value of all of appellant's property for the purpose of taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. Article 10, § 8, Const.

By section 7302, Rev. Laws 1910, it is provided that all property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation, and by section 7343, every gas, light, heat, and power company is required to return annually to the state auditor sworn statements of its property, including a statement of franchises held by such company from any municipal corporation, showing the length of time same is to run and the conditions under which they were granted, and section 7344 requires all

electric light and power companies, among other things, to show in the return made by them to the state auditor all contracts between such corporation and any municipal corporation of the state and the amount of revenue derived therefrom and all franchises owned or held by such company. These provisions evidence beyond controversy the legislative intent to consider franchises held by corporations such as appellant in determining the value of its property for the purpose of taxation. Aside from the statutes specifically requiring such information to be returned, the Constitution expressly declares that no property shall be exempt from taxation except as provided therein. Section 50, art. 5, Const.

It would be a manifest injustice to permit the enormous values represented by municipal franchises to escape a just proportion of the burdens of taxation. Such franchises are property, and often possess great value and produce large incomes, and are as properly subjects of taxation as any other species of property, and the taxation thereof is within the legitimate exercise of the taxing power of the state. *Veazie Bank v. Fenko*, 8 Wall. (75 U. S.) 533, 19 L. Ed. 482; *Taylor v. Secor*, 92 U. S. 575, 23 L. Ed. 663; *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 192, 12 Sup. Ct. 406, 36 L. Ed. 121.

And the consideration of intangible values represented by such franchises in determining the taxable value of appellant's property does not violate the provisions of the Constitution requiring uniformity of taxation, nor does it constitute an unjust discrimination between property owned by individuals and that owned by corporations. While the Constitution requires taxation in general to be uniform and equal, this provision is not violated, nor is any unjust discrimination made between individuals and corporations, if a different mode of taxation is adopted as between individuals and corporations or between corporations of different classes. The Constitution authorizes the classification of property for the purposes of taxation and the valuation of different classes by different methods. Article 10, § 8, Const.; *Taylor v. Secor*, supra; *Pac. Ex. Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035; *Adams Ex. Co. v. Ky.*, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. Ed. 960.

And it would not be error for the board of equalization to take into consideration the income and revenue derived by appellant from the operation of its plant in determining its fair cash value. Whatever property is worth for the purposes of income and sale, it is also worth for the purposes of taxation. *Re Ind. Ter. Illuminating Oil Co.*, 43 Okl. 307, 142 Pac. 997; *Adams Express Co. v. Ohio State Auditor*, supra, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 633.

The standard fixed by the Constitution in determining the taxable value of property

is that it shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale, and whenever separate articles of property such as that owned by appellant are joined together in unity of ownership and unity of use, and there has been developed an intangible value, such value must necessarily be considered in arriving at the fair cash value of the property as a whole and as a part of a going concern. *Re Assessment Western Union Tel. Co., supra; Adams Express Co. v. Ohio State Auditor, supra.*

The evidence discloses that there is outstanding capital stock amounting to \$2,600,000, and outstanding bonds to the amount of \$2,863,000, which bear interest at the rate of 5 per cent. In addition to paying interest upon these outstanding bonds, the company has been paying a dividend upon its capital stock of 8 per cent., $8\frac{1}{2}$ per cent., and $9\frac{1}{2}$ per cent. and depreciations have been taken care of out of operating expenses and 5 per cent. of the amount of outstanding bonds has been set aside annually as a reserve fund for the purposes of maintaining the value of the security of the mortgage. The net income for 1917 was \$493,000, and after paying interest on bonds, the appropriation to take care of depreciation, and a dividend of 7 per cent. upon its capital stock, there would remain a balance of \$111,986.61. Capitalizing this sum at 7 per cent., it would pay a 7 per cent. dividend upon an investment of \$1,599,808.70, which, being added to the amount of capital stock and bonded indebtedness, would give a total earning capital value of the entire property of appellants for the purposes of sale of \$7,062,808.70 for the year 1917. Another way of demonstrating that the valuation fixed by the board of equalization is not unfair would be to take the value of the tangible, physical property of appellant, to wit, \$3,580,492.74, and take the surplus of \$111,986.61, after paying interest on bonds, dividends on stock, and depreciation reserve, and capitalizing it at 7 per cent. as before, and adding the value thus obtained to the actual value of the tangible, physical property of \$3,580,492.74 would give a sale value of \$5,180,301.44, which is even less than the total values returned to the Corporation Commission. A similar calculation for each year will demonstrate that the values fixed are less than the actual value of appellant's property for each respective year. That it is proper in arriving at a fair cash value of property to consider the income and revenues derived therefrom is not open to serious question. *Re Assessment of Osage & Oklahoma Gas Co., 135 Okl. 154, 128 Pac. 692.* Appellant's property was worth to it in the matter of income and revenue the valuations shown by the foregoing calculations, and there is no doubt of the power of the state to assess it for taxation at that value, for

whatever may be the fair cash value of property, that value may be accepted by the state as the basis for taxation, and this value ought not to be evaded by any mere confusion of words or juggling of figures or shifting of accounts. If it be not so taxed, an unjust discrimination arises between property of this character and other property not possessing such values, and, as stated by Mr. Justice Brewer in *Adams Express Co. v. Ohio State Auditor, supra*—

"accumulated wealth will laugh at the crudity of taxing laws which reach only the one and ignore the other, while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation."

Appellant uses several methods of illustrating the contention that it is not equally assessed as compared with other corporations of like character in the state. The first comparison is made with the Oklahoma Railway Company. This company is not of the same class of corporations as appellant, and the valuation of its property stands upon a different basis. Besides there is no statement in the record of the assets of the railway company nor sufficient evidence upon which a fair comparison can be made. Comparison is also made with the Muskogee Gas & Electric Company and the Enid Electric & Gas Company. There is nothing in the record in this case upon which a fair comparison of the assessments of the two companies can be made. While the appeals of the respective companies have been briefed together and the propositions of law urged are identical, each case is presented in a separate appeal upon its own record. Neither is there sufficient evidence to justify the comparison attempted with other corporations. If such comparisons were justified and a discrepancy appeared between the assessment of appellant and that of the various companies, appellant's assessment would not thereby be rendered illegal, in the absence of a showing that the discrimination was intentional or fraudulent. There is no system of taxation that is perfect, and inequalities and inaccuracies will creep in, but such inequalities, if the result of an honest mistake, and not based upon some fundamentally erroneous theory, will not avoid the assessment. *C. B. & Q. R. Co. v. Babcock, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. Ed. 636, 37 Cyc. 736; Cooley on Taxation (3d Ed.) 254-260.*

The assessments of Oklahoma county, Muskogee county and Garfield county for the years 1912 to 1916, both inclusive, are relied upon as showing an unjust discrimination against appellant. The total assessment of these counties for the years 1912, 1913, and 1914 are not in the records; neither is there anything to show what part of the total values of either of the counties appellant or any of the other companies own, and this comparison is without merit.

This was an appeal from the assessment made by the state board of equalization under section 3, subd. B, c. 107, Sess. Laws 1915, p. 177, which is the same in substance as section 3, subd. B, art. 1, c. 240, Sess. Laws 1913. Under this section a taxpayer may file a complaint attacking his assessment, which complaint is set for hearing, evidence heard and the complaint acted upon. From an adverse action the taxpayer or the county attorney for the taxpaying public may appeal to this court, and we will examine and review the transcript of the record, and will affirm, modify, or annul the order appealed from as justice may demand.

On an examination and review of the record in this case, it does not appear that any error was committed by the board of equalization in the method by which it arrived at the values fixed, nor that such values are unjust or contrary to the evidence.

The order appealed from is therefore affirmed. All the Justices concur.

(67 Okl. 287)

In re ENID ELECTRIC & GAS CO.
(Nos. 7712, 8391.)

(Supreme Court of Oklahoma. Feb. 12, 1918.)

Appeal from State Board of Equalization.

The Enid Electric & Gas Company appeals from the assessment of its property for taxation. Orders affirmed.

Paul Reiss, of Oklahoma City, for appellant. S. P. Freeling, Atty. Gen., and Jno. B. Harrison and Hunter L. Johnson, Asst. Attys. Gen., for appellees.

HARDY, J. From the assessment of its property for taxation for the years 1915 and 1916 the Enid Electric & Gas Company appeal. The facts as to this company are presented in reports, and returns similar to those presented in the record in *Re the Assessment of the Oklahoma Gas & Electric Company* and in *Re Assessment of the Muskogee Gas & Electric Company* just decided. The appellant returned its property for assessment for 1915 at \$223,477 and for 1916 at \$206,000. The value as finally fixed by the board of equalization was for 1915 \$275,000, and for 1916, \$275,000. As in the other cases, the values returned by appellant represents the naked cost of the different items entering into the construction of its plant without considering the value of the plant as organized, and excludes from consideration franchises held by it. From the original cost of construction 5 per cent. per annum for depreciation has been deducted. No showing appears in the record as to depreciation, and the same cannot be allowed. In *re Assessment Western Union Tel. Co.*, 35 Okl. 626, 130 Pac. 565; In *re Assessment Oklahoma Gas & Electric Co.*, 171 Pac. 26.

It affirmatively appears that depreciation has been taken care of. By the terms of the mortgage securing the bonds of this appellant it is provided that neither the value of the mortgaged property nor the lien of the mortgage will be diminished or impaired in any way as a result of any action or nonaction on the part of the company, and the company undertakes to keep in good repair working order and condition all its property, plant, appliances, system, and

equipment, and that it will from time to time make all needed and proper repairs and replacements, and the return affirmatively shows that such has been done. If, notwithstanding the fact that repairs and replacements have been taken care of, depreciation be allowed, a moment's reflection will show that in 20 years the taxable value of the plant will be nothing, and after 20 years, less than nothing, although, so far as its efficiency and earning capacity is concerned, the plant may have been kept up during all these years to its original efficiency. The outstanding paid-up capital stock of appellant for the years in question, was preferred stock \$439,300 and common stock \$500,000. The outstanding bonds for the same period amounted to \$620,000. In its reports made to the state auditor and board of equalization and a general report made to the Corporation Commission in compliance with order No. 774, the total assets for 1915 are shown to be \$1,666,589.16 and for 1916, \$1,671,773.88. In these totals the separate values of the tangible and intangible assets are not separated. For the same years, the gross revenue was \$130,458.62 and \$141,248.18, respectively, and the net income \$53,032.55 and \$58,630.54, respectively. The general report to the Corporation Commission on April 30, 1914, shows the cost of construction to that date to be \$689,000, and shows that the appellant owned franchises which were valued by it at \$823,786.11, making a total of \$1,513,001.56, which amount did not include the value of certain property discarded. For the year ending February 1, 1915, improvements in the sum of \$2,978.15 and for 1916 in the sum of \$5,184.72 were made. In order to determine the fair cash value of appellant's property the figures for 1915 may be taken. The net income for that year was sufficient to pay 5 per cent. interest on the amount of outstanding bonds and a 7 per cent. dividend on a capital stock of \$314,750.71, which gives a total reasonable investment value for that year of \$934,750.71. This amount is not equal to the entire outstanding capital stock, but gives a fair basis for the valuation of the assets for the purposes of taxation, which should be assessed, not on the par value of the outstanding capital stock, but upon the actual value of the property as a whole.

Another way of demonstrating that the values fixed by the board of equalization is not unfair to appellant is to take the actual cost of construction of its property as it existed in 1915, to wit, \$692,194 and, after allowing an annual interest of 7 per cent. thereon, which would amount to \$48,453.58, and deducting this amount from the total net income of \$53,032.55, a balance of \$4,578.97 would remain, which would pay a 7 per cent. return on an additional value of \$65,413.85, thus showing that the net income for the year in question would give a return of 7 per cent. upon a total value of \$757,607.85. The amount thus ascertained is much less than the values reported to the Corporation Commission, and is less than for 1916, but is far in excess of the assessment for that year. A capitalization of the net income for 1916 will give some increase both in tangible and intangible values, and will show a value largely in excess of that fixed by the board of equalization. Accepting either the returns in the various reports made by appellant, or ascertaining the value of its property by a capitalization of its net income, the assessments appealed from are much less than the actual values of the property assessed.

The questions of law involved are identical with those in *Re Assessment of the Oklahoma Gas & Electric Company*, and upon the authority of that case, the orders appealed from are affirmed. All the Justices concur.

(67 Okl. 288)

In re MUSKOGEE GAS & ELECTRIC CO.
(Nos. 7713, 8392, 9202.)

(Supreme Court of Oklahoma. Feb. 12, 1918.)

Appeal from State Board of Equalization.

The Muskogee Gas & Electric Company appeals from orders of the State Board of Equalization, assessing its property for taxation for certain years. Affirmed.

Paul Reiss, of Oklahoma City, for appellant. S. P. Freeling, Atty. Gen., and Jno. B. Harrison and Hunter L. Johnson, Asst. Attys. Gen., for appellees.

HARDY, J. From orders of the state board of equalization, assessing its property for taxation for the years 1915, 1916, and 1917, the Muskogee Gas & Electric Company appeals.

The estimate placed by appellant upon its property for the purposes of taxation for said years, respectively, is as follows: For 1915, \$775,172; 1916, \$790,000; 1917, \$783,767. These values were arrived at by taking the naked cost of construction of appellant's plant and equipment disconnected with any value of the property as part of a going concern and deducting therefrom 5 per cent. of such cost per annum for depreciation. The property was assessed by the board of equalization of said years, respectively: For 1915, \$1,000,000; 1916, \$1,000,000; and for 1917, \$1,200,000, which values appellant claims to be excessive, and urges that the board of equalization erred in the method by which it arrived at such values, and by taking into consideration the value of franchises owned by it, and that such assessment constitutes an unjust discrimination against appellant. The outstanding capital stock of the company for the three years named was \$2,314,300, and the amount of its outstanding bonds was \$1,380,000. The total value of its assets, including tangible property and franchises for the year 1915 as shown by reports made to the state auditor and board of equalization, was \$3,774,963.76, and the gross revenue for that year amounted to \$506,801.57. The net profits as shown by its reports for that year amounted to \$48,577.78, which amount was arrived at by deducting from the gross revenue operating expenses, payment of interest on bonds and dividends on capital stock. The net income given in the report to the Corporation Commission was \$212,678.84. For the year 1916 the total assets are shown to be \$3,797,574.69, and the gross revenue for the same year appears to have been \$516,833.38. The net income as shown by the report to the Corporation Commission for this year was \$203,185.11. For the year 1917 the total assets were shown by reports to the auditor and board of equalization to be \$3,980,788.14, and the gross revenue for that period was \$606,699.98 and the net income for the same year was \$246,378.61.

In compliance with order No. 774 of the Corporation Commission, appellant, on April 3, 1914, filed a report with the Corporation Commission, giving in detail the values of all property owned by it from the time of its organization to the last-mentioned date, and this report was introduced before and considered by the board of equalization. From this report it appears that up to and including the month of April, 1914, appellant had paid out on account of construction the sum of \$1,749,771.96, and that the value of its property, tangible and intangible, added to the payment made on account of construction or the acquisition of physical property, amounted to \$3,617,305.41, which included the electric plant at Muskogee, electric plant at Ft. Gibson, a gas plant at Muskogee, and an ice plant at Muskogee. The appellant

expended for improvements during 1915 \$8,790.17; 1916, \$238,404.38; for 1917, \$35,018.73. Adding annual improvements to the totals shown in the report of April 30, 1914, a value would be obtained of \$3,626,095.58; for 1916, \$3,864,499.92; for 1917, \$3,886,525.43—which totals are less than the amounts returned in the annual reports to the Corporation Commission. The claim for depreciation cannot be allowed because there is no evidence thereof. Re Assessment Western Union Tel. Co., 35 Okl. 626, 130 Pac. 565; Re Assessment Oklahoma Gas & Elec. Co., 171 Pac. 26.

It affirmatively appears that depreciations have been cared for in addition to which, under the terms of a mortgage securing the bonds of the company, renewals, and repairs in plants and equipment have been currently kept up out of current operating expenses and a reserve for depreciation has been maintained as follows: For 1915, \$40,000; 1916, \$40,000; 1917, \$70,000. While the net income for the three years is different yet in 1915 and 1916 depreciation was cared for out of operating expenses while in 1917 \$30,000 was set aside for this purpose. Deducting this amount from the larger income in 1917, leaves the net income for the three years substantially the same, so that the value of appellant's property may be approximately determined for the three years by capitalizing the net income, which for 1917, less the depreciation reserve, was \$216,378.61, which was sufficient to pay annual interest at 5 per cent. on the bonded debt and a 7 per cent. dividend on capital stock to the amount of \$2,081,837.28, which is somewhat less than the amount of capital stock outstanding. Adding together the amount of bonds, to wit, \$1,380,000, and the sum upon which the net income would pay a 7 per cent. dividend, the property would possess a total income-paying value of \$3,494,837.28, which would be substantially the same for each of the three years, and is very largely in excess of the values fixed by the board of equalization.

Appellant seeks to eliminate its gas plant from consideration upon the claim that amounts paid by it for gas exceed the revenues from that source. The contract under which appellant obtains its gas is not in the record, and it does not appear what per cent. of its income is received from the gas and electric departments, respectively. The evidence does show what its net income is, and it is hardly to be presumed that the company would be operating its gas department at a loss. The questions of law involved in this case have been determined in Re Assessment of Oklahoma Gas & Electric Company, this date decided. Upon the authority of that case, the action of the board of equalization in each of the three cases here considered is affirmed. All the Justices concur.

(67 Okl. 289)

STATE ex rel. BREENE, Chief Deputy Inspector of Oil and Gas, v. HOWARD,
State Auditor. (No. 9114.)

(Supreme Court of Oklahoma. Feb. 12, 1918.)

(Syllabus by the Court.)

1. STATES — EXECUTIVE OFFICES — CREATION AND DEVOLUTION — LEGISLATIVE POWER.

The office of chief deputy inspector of oil and gas wells, created by chapter 207, Laws 1913, p. 459, was not imbedded in the Constitution nor created in pursuance to any mandate thereof, but was purely a creation of the statute, and it was within the power of the Legislature to abolish the office by transferring the duties thereof.

2. CONSTITUTIONAL LAW §42—LEGISLATIVE POWER—RIGHT TO QUESTION.

Relator, as chief deputy inspector of oil and gas wells, cannot urge the objection that the Legislature is without power to denude the office of chief mine inspector of any portion of the duties thereof with reference to the inspector of oil and gas.

3. STATUTES §141(1)—AMENDMENT BY REFERENCE—CONSTITUTIONAL PROVISIONS.

Chapter 207, Laws 1917, p. 385, does not purport to amend any prior law, but on its face appears to be an act in itself, and is not within the inhibition of article 5, § 57, Williams' Constitution, even though it seeks to effectuate the power conferred by reference to and requiring the officers thereby created to proceed in the performance of their duties in accordance with general laws formerly enacted.

Error from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Mandamus by the State of Oklahoma, on relation of H. H. Breene, Chief Deputy Inspector of Oil and Gas, against E. B. Howard, State Auditor. Judgment for defendant, and plaintiff brings error. Affirmed.

Hainer, Burns & Toney and Stuart, Cruce & Cruce, all of Oklahoma City, for plaintiff in error. S. P. Freeling, Atty. Gen., and J. I. Howard, Asst. Atty. Gen., for defendant in error.

HARDY, J. The state, upon the relation of H. H. Breene as chief deputy inspector of oil and gas, commenced an action in the district court of Oklahoma county against E. B. Howard, as state auditor, praying a writ of mandamus directed to said defendant requiring him to audit and allow the claims of relator for salary and expenses as chief deputy inspector of oil and gas for the month of March, 1917. The auditor approved said claim up to and including March 17th, but refused to approve same for the remainder of said month for the reason that the duties pertaining to the office held by relator had been, by chapter 207, Session Laws 1917, p. 385, transferred to the oil and gas department thereby established under the jurisdiction and supervision of the Corporation Commission. Plaintiff had been appointed chief deputy inspector of oil and gas wells by the chief mine inspector and performed the services and incurred the expenses for which claim was filed. It is admitted that the claim had been duly approved by the chief mine inspector, and that there were sufficient funds in the hands of the state treasurer for the payment of same. Judgment was for defendant, and plaintiff brings error.

[1] It is first urged that relator is not an officer whose term, duties, and compensation are within the protection of the Constitution, but that he is an employé without a term, and therefore has no such right in the subject-matter of the legislation referred to as would entitle him to question the constitutionality thereof; and, further, that even if he be an officer he has no property rights in

the office, nor to the compensation attached thereto, and therefore cannot assail the validity of such legislation.

Article 6, § 25, Williams' Constitution, is as follows:

"The office of chief inspector of mines, oil, and gas is hereby created, and the incumbent of said office shall be known as chief mine inspector. * * * The chief mine inspector shall perform the duties, take the oath, and execute the bond prescribed by the Legislature."

Article 6, § 26, is as follows:

"The Legislature shall create mining districts and provide for the appointment or election of assistant inspectors therein, who shall be under the general control of the chief mine inspector, and the Legislature shall define their qualifications and duties and fix their compensation."

Section 13 of the schedule, among other things provides:

"* * * The chief mine inspector shall also perform the duties required by laws of the territory of Oklahoma of the territorial oil inspector until otherwise provided by law."

Article 6, § 25, creates the office of chief mine inspector, and this office is embedded in the Constitution, but the duties to be performed by that officer are to be prescribed by the Legislature.

Article 6, § 26, commands the Legislature to create mining districts and provide for the appointment or election of assistant inspectors therein, and declares that said assistant inspectors shall be under the control of the chief mine inspector, and requires the Legislature to define their qualifications and duties and to fix the compensation which they are to receive, and section 13 of the schedule imposes upon the chief mine inspector the performance of the duties delegated to the territorial oil inspector at the time the Constitution was adopted.

Pursuant to the mandate of article 6, § 26, the Legislature of the state at its first session, chapter 54, Session Laws 1907-08, p. 521, and in article 2 of said chapter prescribed the duties and qualifications of the chief mine inspector, created three mining districts and provided for the election therein of assistant inspectors (sections 3949, 3950, Rev. Laws 1910), and prescribed their qualifications and the compensation to be received by them. Relator was not one of these, but his office was created by chapter 207, Laws 1913, p. 459.

The office held by relator, to wit, chief deputy inspector of oil and gas wells, is not named in the Constitution, neither is any provision made therein for the creation of such office, and therefore the office, when created, was purely a creation of the statute, and it was within the power of the Legislature to increase or diminish the duties of such office and the compensation attached thereto. And the Legislature could, in its discretion, abolish the office at will or transfer all, or any portion, of the duties thereof

to some other office or department if not prohibited by the Constitution.

In a number of cases it has been held that county, deputy county, or other municipal officials are not officers with a term, but are employes without a term. *Board of Com'rs v. Hart*, 29 Okl. 693, 119 Pac. 132, 37 L. R. A. (N. S.) 388; *State ex rel. Beardon v. Harper*, 33 Okl. 572, 123 Pac. 1038; *State ex rel. Matlack v. Oklahoma City*, 38 Okl. 349, 134 Pac. 58; *Town of Luther v. Crossley*, 45 Okl. 611, 146 Pac. 583. And it has also been held that the duties of such officers may be diminished or entirely taken away at the will of the power which created them. *Town of Luther v. Crossley*, *supra*.

In *Insurance Co. of North America v. Welch*, 154 Pac. 48, it was held to be within the power of the Legislature to create an insurance board and delegate thereto the duty of seeing to the execution of the laws of the state then in force, or that may be thereafter passed in relation to insurance and insurance companies doing business in this state. This was so because the Constitution did not define the duties of the insurance commissioner, but established an insurance department and left to the Legislature the detail of prescribing the duties to be performed by the insurance commissioner. The distinction between that case and this lies in the fact that the insurance board created was a part of the insurance department, and that the duties delegated to the insurance board thus created were not transferred to another department of the state government. The decision is in point, however, upon the principle that the Legislature may define the duties attached to an office where such authority is delegated by the Constitution.

The law must necessarily be so because officers are nothing more than the agents of the state for effectuating the public purposes for which the state was created, and the power to create or abolish offices was intended to further the public convenience and necessity, and so too are the terms for which they are selected, and the duties which are delegated to them. If the power of the Legislature, in the absence of constitutional prohibition, to abolish an office when the necessity therefor has ceased to exist be denied, progress and improvement in government according to the needs of the times would be arrested, and the state would inevitably become a great pension establishment upon which to quarter a host of sinecures. It would be impossible to arrange the different branches of state government in accordance with the needs thereof except by the slow and cumbersome method of constitutional amendment, and no government could be competent, or perfect, in the absence of a power to enact and repeal laws and to create change or discontinue the agents through whom the execution of these laws is secured. Such power is and will be indispensable for the preservation of the

body politic and the safety of the community itself. *Butler v. Commonwealth*, 10 How. 402, 13 L. Ed. 472; *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. 890, 1009, 44 L. Ed. 1187.

It was therefore within the power of the Legislature to increase or diminish the duties of the office held by relator, or to transfer the duties thereof to some other officer, unless prohibited by the Constitution, even though such transfer had the effect of abolishing said office. *Mechem on Public Officers*, §§ 463-465.

[2] The question whether it was within the power of the Legislature to denude the office of chief mine inspector of the duties transferred by the act is a question in which relator has no interest, and is therefore not presented for our consideration and we express no opinion thereon. It is an established rule that the Supreme Court will not pass upon the constitutionality of an act of the Legislature nor any of its provisions, until there is presented a proper case in which it is made to appear that the person complaining has an interest in the very question urged, and would be entitled to the benefits of any decree that might be rendered on the decision of such question or would be subject to the burdens thereof. *Insurance Co. of North America v. Welch*, 154 Pac. 48; *Black v. Geissler*, 159 Pac. 1124. Therefore, when it is determined that the constitutional requirements as to the passage of the act have been complied with, and the power of the Legislature to abolish the office held by relator has been sustained, his interest in the subject-matter of the legislation has been determined.

In *Black et al. v. Geissler et al.* (not yet officially reported) 159 Pac. 1124, it was held that plaintiff could not urge constitutional objections to chapter 24, Session Laws 1916, p. 33, commonly known as the registration law, because it did not appear that he would be affected in any way by the act, except that he would be required to pay the tax therein provided for, and it was further held that an efficient remedy was provided by statute to protect his interest as a taxpayer. In *Wiley v. Sinkler*, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84, the Supreme Court of the United States held that plaintiff could not question the validity of a law requiring registration of voters because it did not appear that plaintiff was affected thereby.

It has also been held that a white man, upon trial for an alleged crime, cannot question the constitutionality of an act because it excludes negroes from the jury. *Commonwealth v. Wright*, 79 Ky. 22, 42 Am. Rep. 203. And also that a man cannot raise the objection that under the law women are excluded from service as jurors. *McKinney v. State*, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710. And it is further held that a white man cannot raise the objection that a law is invalid be-

cause it excludes negroes from equal benefits in the public schools in the state. *Marshall v. Donovan*, 10 Bush (Ky.) 681. And so a plaintiff in a divorce suit who has not resided within the state the length of time prescribed by statute regulating action for divorce cannot challenge the constitutionality thereof. *Pugh v. Pugh*, 25 S. D. 7, 124 N. W. 959, 32 L. R. A. (N. S.) 954. Neither can a sheriff object to the constitutionality of an act fixing the fees of certain officials on the ground that it is local and special, where the provisions as to the sheriff are complete within themselves, and capable of being executed independently of the provisions relating to other officers. *Henderson v. State of Indiana ex rel. Stout*, 137 Ind. 552, 36 N. E. 257, 24 L. R. A. 469.

Legislation has frequently been sustained in respect of corporations even though held invalid as to natural persons, or corporations of different classes. *Tullis v. Lake Erie & Western R. R. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; *Pittsburgh, C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. Rep. 301; *Leep v. St. Louis, I. M. & S. R. Co.*, 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109; *St. Louis, I. M. & S. R. Co. v. Paul*, 64 Ark. 83, 40 S. W. 705, 37 L. R. A. 504, 62 Am. St. Rep. 154. For further illustrations of the extent and application of the rule the following cases may be examined: *McLaury v. Watelsky*, 39 Tex. Civ. App. 394, 87 S. W. 1045; *Cronin v. Adams*, 192 U. S. 108, 24 Sup. Ct. 219, 28 L. Ed. 365; *Fidelity & Cas. Co. v. Freeman*, 109 Fed. 847, 48 C. C. A. 692, 54 L. R. A. 680; *State ex rel. People's F. Ins. Co. v. Michel*, 125 La. 55, 51 South. 66; *Com. v. Porter*, 113 Ky. 575, 68 S. W. 621; *McCully v. Chicago, B. & Q. R. Co.*, 212 Mo. 1, 110 S. W. 711; *State v. Rose*, 40 Mont. 66, 105 Pac. 82; *People ex rel. Kenny v. Kolks*, 89 App. Div. 171, 85 N. Y. Supp. 1100; *Sweeney v. Webb*, 33 Tex. Civ. App. 324, 76 S. W. 766; *State ex rel. Kellogg v. Currens*, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252; *State v. Barr*, 78 Vt. 97, 62 Atl. 43; *McClelland v. Denver*, 36 Colo. 486, 86 Pac. 126, 10 Ann. Cas. 1014; *Ritz v. Lightston*, 10 Cal. App. 685, 103 Pac. 363.

[3] The legislation is assailed as being unconstitutional on the ground and for the reason that it is in conflict with, and in direct violation of, article 5, § 57, *Williams' Constitution*, which provides:

"* * * And no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length."

The act is said to be in conflict with this provision of the Constitution because the amendatory provisions of chapter 96, Session Laws 1915, which relator says are amended by it, are not re-enacted and published at length as provided in said clause of the Con-

stitution. Said chapter 207, Session Laws 1917, does not purport to amend any other chapter or section, but on its face purports to be a complete act in itself providing for the creation of an oil and gas department under the jurisdiction of the Corporation Commission for the appointment of a chief oil and gas conservation agent, conferring exclusive jurisdiction on the Corporation Commission in reference to the conservation of oil and gas and the inspection of gasoline and oil, the product of crude petroleum, and repeals all acts or parts of acts in conflict therewith and declares an emergency.

The provision of the Constitution relied upon was intended to prevent the mischief which arose by the enactment of amendatory statutes so blind in terms that the legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws by the enactment of such legislation. A familiar illustration was the passage of an act amending a prior act which purported only to insert certain words, or to substitute a phrase of another by referring thereto without re-enacting the section affected. Such constitutional provisions have always received a liberal construction with the view of preventing the evil at which they were aimed, but when the statute in itself appears to be original, and in itself intelligible and complete, and does not either in its title or in the body thereof appear to be revisory or amendatory of any law, it is not within the inhibition of section 57, art. 5, even though such act seeks to effectuate the power conferred by referring to, and requiring, the officers thereby created to proceed in the performance of their duties in accordance with the general laws previously enacted. *City of Pond Creek v. Haskell*, 21 Okl. 711, 97 Pac. 338; *No. 9182, In re Application of John W. Lee*, 168 Pac. 53; *1 Lewis' Sutherland, Stat. Const. § 243*.

To hold otherwise would require that every statute, local or general, must contain within itself every detail necessary for its complete execution, and the Legislature, when it desired to adopt the procedure or some matter of detail contained in another statute, could not, by suitable reference thereto, make the law effective, but must embrace in the proposed legislation, and actually insert therein, every provision necessary for a complete working law in itself without referring to any other provision of the statute. The mischief produced by such construction would lead to innumerable repetitions of the laws on the statute books, and would render them too bulky and cumbersome for any reasonable use, and, in addition, would render them confusing and unintelligible almost beyond the power of the mind to conceive.

A very full discussion of this question, with copious citation of authorities and comment thereon, sustaining the view here expressed is found in the case of *City of Pond Creek et al. v. Haskell, Governor, et al.*, 21 Okl. 711, 97 Pac. 338.

The judgment is affirmed. All the Justices concur.

(67 Okl. 283)

CHICAGO, R. I. & P. RY. CO. v. WEAVER.
(No. 8107.)

(Supreme Court of Oklahoma. Feb. 12, 1918.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇐773(5) — BRIEFS — REVERSAL.

Where plaintiff in error has served and filed his brief in compliance with the rules of this court, and defendant in error has neither filed a brief nor offered an excuse for such failure, the court is not required to search the record to find some theory upon which the judgment of the court below may be sustained, but may, where the authorities cited in the brief filed appear reasonably to sustain the assignments of error, reverse the case in accordance with the prayer of the petition.

Error from County Court, Stephens County; J. W. Marshall, Judge.

Action by Will Weaver against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, and cause remanded for new trial.

Kent W. Shartel, of Oklahoma City, and C. O. Blake, R. J. Roberts, and W. H. Moore, all of El Reno, for plaintiff in error.

KANE, J. This is an action for damages for being wrongfully ejected from a passenger train, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. Upon trial to a jury there was a verdict in favor of the plaintiff in the sum of \$141.70, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

It seems that the plaintiff, who resided at Duncan, Okl., had been on a visit to Wichita Falls, Tex., and in returning from Wichita Falls to Duncan a controversy arose between the plaintiff and the train auditor as to whether the plaintiff was an interstate or an intrastate passenger. The contention of the auditor was, and the contention of the railway company now is, that the plaintiff was an interstate passenger, and that as such the auditor was bound to collect from him the rate for interstate passengers prescribed by its duly published and filed tariffs, and not the intrastate rates of either Texas or Oklahoma, which were somewhat lower.

Counsel for plaintiff in error, in compliance with the rules of this court, have filed a brief wherein they set out portions of the record and call attention to many authorities

which seem to support their contention. Among the cases cited to which they call special attention is *M., K. & T. Ry. Co. v. Ashinger*, 162 Pac. 814, L. R. A. 1917D, 1180, which they say is precisely in point and therefore decisive of the case at bar.

The defendant in error has filed no brief, although the time has long since expired for doing so. It is well settled in this jurisdiction that, where plaintiff in error has served and filed his brief, in compliance with the rules of this court, and defendant in error has neither filed a brief nor offered an excuse for such failure, the court is not required to search the record to find some theory upon which the judgment of the court below may be sustained, but may, where the authorities cited in the brief filed appear reasonably to sustain the assignments of error, reverse the case in accordance with the prayer of the petition. *C. R. I. & P. Ry. Co. v. Booher*, 34 Okl. 64, 124 Pac. 760; *Hampton v. Thomas*, 35 Okl. 529, 130 Pac. 961; *Dievert v. Rainey*, 41 Okl. 31, 136 Pac. 1086; *Midland Valley R. Co. v. Horton*, 46 Okl. 534, 149 Pac. 131; *St. L. & S. F. R. Co. v. Metts*, 46 Okl. 502, 149 Pac. 197; *St. L. & S. F. R. Co. v. Hawthorth*, 48 Okl. 132, 149 Pac. 1086; *St. L. & S. F. R. Co. v. Lowrance, Adm'r*, 169 Pac. 1086, not yet officially reported.

As the authorities cited by counsel for plaintiff in error, and particularly the case of *M., K. & T. Ry. Co. v. Ashinger*, supra, appear reasonably to sustain the assignments of error, the judgment of the court below is reversed, and the cause remanded for a new trial. All the Justices concur.

(67 Okl. 281)

BOARD OF COM'RS OF OKLAHOMA
COUNTY v. BEATY. (No. 9370.)

(Supreme Court of Oklahoma. Feb. 12, 1918.)

(Syllabus by the Court.)

CLERKS OF COURTS ⇐12. 33—EVIDENCE ⇐25(1)—STATUTES ⇐102(4)—SALARY—CLASSIFICATION—JUDICIAL NOTICE.

Act approved March 7, 1911 (Laws 1910-11, c. 60), amended chapter 69, § 30, Laws 1910, and fixed the salary of the clerk of the district court in counties having a population in excess of 50,000 at \$3,000 per annum. Act approved May 1, 1913 (chapter 161, Laws 1913), provided that the office of clerk of the district court and certain others were thereby consolidated into the office of court clerk, and section 9 of that act fixed his compensation as provided by act approved March 7, 1911, for the clerk of the district court. But construing act approved May 1, 1913, and May 19, 1913 (Laws 1913, c. 212), in pari materia with section 1 of the latter operating as a proviso on section 5 of the former, we held (*Ratcliff v. Fleener et al.*, 43 Okl. 652, 143 Pac. 1051), that said consolidation did not apply to counties having a population in excess of 80,000, thereby excluding O. county. But act approved February 1, 1915 (Laws 1915, c. 6), in effect repealed the proviso and extended the consolidation of Act May 1, 1913, to counties having a population of more than 60,000, thereby excluding O. county, and by section 4 amend-

ed section 9 of act approved May 1, 1913, so as to read that the salary of the clerk in counties having a population of 60,000 or less should be that provided for clerk of the district court by act approved March 7, 1911, and that in counties of more than 60,000, he should receive a salary of \$2,100. *Held*, that when the Legislature, by section 4, amended section 9 as stated, the effect was to adopt by implication and incorporate therein the act approved March 7, 1911, so as to, among other things, provide that the salary of the court clerk in counties having a population in excess of 50,000 and not to exceed 60,000 shall be \$3,000, and in counties having a population of more than 60,000, his salary shall be \$2,100. And as thus incorporated act examined, and *held*, that while six of the classifications made by the act may be just and reasonable, when the act makes the further classification that in counties having a population of more than 60,000, which we judicially know includes O. county only, the clerk shall receive an annual salary of \$2,100 only, thereby placing his salary below that of a clerk in a county containing a population of 34,000, who, under the act, receives a salary of \$2,110, the classification is arbitrary and unjust, and, being a general law which fails to operate uniformly throughout the state, violates Const. art. 5, § 59, and cannot be sustained in so far as it attempts to fix the salary of the court clerk in counties having a population of more than 60,000. *Held*, further, that act approved March 7, 1911, fixes plaintiff's salary as court clerk of O. county at \$3,000 per annum, and is the governing statute here.

Error from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by James Beaty against the Board of County Commissioners of Oklahoma County. Demurrer to petition overruled, and judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 156 Pac. 1181.

Chas. B. Selby, Co. Atty., of Oklahoma City, and S. P. Freeling, Atty. Gen., and R. E. Wood, Asst. Atty. Gen., for plaintiff in error. D. S. Levy and McAdams & Haskell, all of Oklahoma City, for defendant in error.

TURNER, J. On May 2, 1917, James Beaty, the duly elected, qualified, and acting court clerk of Oklahoma county, defendant in error, having theretofore been paid his salary as such by the board of county commissioners for the next preceding January and February at the rate of \$250 per month, in the district court of that county, after the same had been disallowed, sued the board, plaintiff in error, on account for \$250, alleging the same to be his salary as court clerk earned for March of that year. After a demurrer to his petition was overruled, and defendant had thereupon refused to plead further, there was judgment for plaintiff, and defendant brings the case here.

Whether the court was right in overruling the demurrer turns upon the question of whether section 4 of chapter 6 of an act approved February 1, 1915, amending section 9 of chapter 161, Sess. Laws 1913, so as to fix the salary of the court clerk at \$2,100 in counties having a population of more than 60,000 is unconstitutional, and whether the gov-

erning act is an act entitled an "Act amending section 30 of an act entitled 'An act relating to certain county and district officers,' chapter 69 of Sess. Laws 1910, repealing all laws in conflict," approved March 7, 1911 (Sess. L. 1910-11, c. 60, p. 139), and fixing the salary of the district clerk in counties having a population in excess of 50,000 at \$3,000 per annum. Of this we will now inquire.

After the latter act had amended section 30 of the act referred to, so as to read:

"The clerk of the district court, the clerk of the superior court, the county clerk, the county treasurer, and the register of deeds, shall receive as their full compensation the following salaries: In counties having a population of not to exceed 7,000; the district clerk and register of deeds, per annum \$1,000. The county clerk and clerk of the county court, per annum, \$1,000. The treasurer, per annum, \$900.

"In counties having a population in excess of 7,000 and not to exceed 10,000 the sum of \$1,300 per annum. In addition to the foregoing he shall receive the sum of \$50 for each additional 1,000 inhabitants up to 20,000 inhabitants. In addition to the foregoing, in counties in excess of 20,000 and not exceeding 30,000 the sum of \$25 for each additional 1,000. In addition to the foregoing, in counties having a population in excess of 30,000 and not to exceed 40,000, the sum of \$15 for each additional 1,000. In addition to the foregoing, in counties having a population in excess of 40,000 and not to exceed 50,000 the sum of \$10 for each additional 1,000; and in counties having a population in excess of 50,000 the sum of \$3,000"

—along came an act approved May 1, 1913 (chapter 161, Sess. L. 1913, p. 330), which provided that the office of clerk of the district court, clerk of the county court, and clerk of the superior court were thereby consolidated into the office of court clerk, who should perform the duties of all of the offices thus consolidated. Section 9 of that act fixed his compensation thus:

"The court clerk and county clerk, provided for in this act, shall each receive the same salary, as full compensation for their services, as is provided by law for the district clerk and county clerk"

—which, by the former act, was fixed at \$3,000 per annum in counties having a population of more than 50,000. But, construing said act, which we shall call the consolidation act, in pari materia with an act approved May 19, 1913 (Laws 1913, c. 212), we held that section 1 of that act should operate as a proviso on section 5 of the consolidation act so as to provide that the consolidation should not apply to counties such as Oklahoma county having a population of over 80,000. *Ratliff v. Fleener et al.*, 43 Okl. 652, 143 Pac. 1051. Then, along came an act approved February 1, 1915 (chapter 6, Sess. L. 1915, p. 5), which we will call the second consolidation act, and which, by enacting in *hæc verba* section 1 of 'the consolidation act without said proviso, repealed it and extended the consolidation of the first act to counties having a population of more than 60,000 (thus including Oklahoma county), and by section 4 of that act amended section 9 of chapter 161

(Sess. L. 1913), or the first consolidation act, so as to read:

"The court clerk and the county clerk provided for in this act in each county having a population of 60,000 or less, as now or hereafter shown by the last federal census, shall each receive the same salary as full compensation for their services, as provided by law for the clerk of the district court and county clerk. In counties having a population of more than 60,000 as now or hereafter shown by the last federal census, the court clerk and county clerk, shall each receive a salary of twenty-one hundred dollars (\$2,100) per annum."

And by section 5 amended section 11 of said act so as to abolish the office of clerk of the district court, clerk of the county court, clerk of the superior court, and register of deeds in every county of the state. It is the contention of plaintiff that when said section 4 of the act approved February 1, 1915, provides, as we see, that "the court clerk and the county clerk provided for in this act, in each county having a population of 60,000 or less, * * * shall each receive the same salary * * * as [is] provided by law for the district clerk and county clerk," it means that in counties of 60,000 or less the same salaries shall be paid the court clerk as are provided for district and county clerks in counties having a population of 60,000 or less by the act of March 7, 1911 (Sess. L. 1911, c. 60, p. 139), and that when said section further provides, "In counties having a population of more than 60,000, * * * the court clerk and county clerk, shall each receive a salary of \$2,100 per annum," that said section is unconstitutional, in that, construing both acts in pari materia, the classification of counties on its face is so unfair, arbitrary, and irrational that the same can neither be sustained as a general law under article 5, § 59, of the Constitution, for the reason its operation is not uniform throughout the state, nor as a special law, for the reason that no notice of its intended introduction was filed in the office of the secretary of state pursuant to article 5, § 32, of the Constitution, which is admitted on demurrer.

When the Legislature, by section 4 of the act approved February 1, 1915, amended section 9 of the act aforesaid so as to read as stated, the force and effect thereof was to adopt by implication and incorporate therein the act of March 7, 1911, and together they should read:

"The court clerk and the county clerk provided for in this act in each county having a population of 60,000 or less, as now or hereafter shown by the last federal census, shall each receive the same salary as full compensation for their services, as provided by law for the clerk of the district court and county clerk."

That is to say:

"In counties having a population, as now or hereafter shown by the last federal census, not to exceed 7,000, per annum \$1,000. In counties having a population, as now or hereafter shown by the last federal census, in excess of 7,000 and not to exceed 10,000, the sum of \$1,300 per annum. In addition to the foregoing, he shall receive the sum of \$50 for each additional 1,000 inhabitants up to 20,000 inhabitants. In

addition to the foregoing, in counties in excess of 20,000 and not exceeding 30,000, the sum of \$25 for each additional 1,000. In addition to the foregoing, in counties having a population in excess of 30,000 and not to exceed 40,000, the sum of \$15 for each additional 1,000. In addition to the foregoing, in counties having a population in excess of 40,000 and not to exceed 50,000, the sum of \$10 for each additional 1,000; and in counties having a population in excess of 50,000 (and not to exceed 60,000) the sum of \$3,000; in counties having a population of more than 60,000 as now or hereafter shown by the last federal census, the court clerk and county clerk shall each receive a salary of twenty-one hundred dollars (\$2,100) per annum."

And when the Legislature by this act divided the counties of the state into five classes, and provided in the first that the salary of the clerk in counties of less than 7,000 population should be \$1,000 per annum, and, in the second, that it should be \$1,300 in counties with a population of from 7,000 to 10,000, inclusive, plus \$50 for each 1,000 additional population up to 20,000, it meant that in counties of 20,000 the clerk shall receive \$1,800. And when the act makes a third classification and says that in addition to \$1,800, in counties having more than 20,000 he shall receive \$25 for each additional 1,000 population up to 30,000, it means that the clerk in a county of 30,000 shall receive \$2,050. And when the act makes a fourth classification and says, in addition to \$2,050, in counties having a population of more than 30,000 and not over 40,000, he shall receive \$15 for each additional 1,000, it means that in counties of 40,000 he shall receive \$2,200. And when the act makes a fifth classification and says that in addition to \$2,200, in counties having a population of more than 40,000 and not over 50,000, he shall receive \$10 for each additional 1,000, it means in counties of 50,000 he shall receive \$2,300. And when the act makes a sixth classification, and says that in counties having a population in excess of that and not to exceed 60,000, he shall receive \$3,000, it is, so far, a just and reasonable classification based upon the proposition that the more populous the county, the more work the clerk will have to do, and hence the more compensation he shall receive. But when the act makes the further classification that in counties having a population of more than 60,000, which we take judicial notice includes Oklahoma county only, the clerk shall receive an annual salary of \$2,100 only, thereby placing his salary below that of a clerk in a county of 34,000 who, under the act, receives a salary of \$2,110, the classification thereby becomes arbitrary and unjust, and cannot stand in so far as providing for the salary of plaintiff is concerned for the reason, being a general law, it fails to operate uniformly throughout the state. In *Burks v. Walker*, 25 Okl. 353, 109 Pac. 544, we said:

"To determine whether or not a statute is general or special, courts will look to the statute to ascertain whether it will operate uniformly upon all the persons and parts of the

state that are brought within the relation and circumstances provided by it. *People ex rel. v. Hoffman*, 116 Ill. 587 [5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793]; *Nichols v. Walter et al.*, 37 Minn. 204 [33 N. W. 800]. And the operation is uniform if it affects alike all persons in like situation. But where a statute operates upon a class, the classification must not be capricious or arbitrary and must be reasonable and pertain to some particularity in the subject-matter calling for the legislation. As between the persons and places included within the operation of the law and those omitted, there must be some distinctive characteristic upon which a different treatment may be reasonably founded and that furnish a practical and real basis for discrimination."

And, quoting approvingly from *Nichols v. Walter et al.*, 37 Minn. 204, 33 N. W. 800, we said:

"It is not essential that it operate upon all the inhabitants of the state; nor is it an objection that it distinguishes a class in the very nature of things, the law must, in dealing with persons and property and governmental divisions, group persons or objects having similar attributes into classes, and the general assembly must legislate appropriately for each, and, unless it is made manifest that such legislation is directly forbidden by the Constitution, or the attempted classification is purely arbitrary, unreasonable, unjust, or capricious, the power of the General Assembly to thus classify cannot be successfully challenged." *State v. Hogan*, 63 Ohio St. 208, 58 N. E. 572, 52 L. R. A. 863, 81 Am. St. Rep. 626.

While we take judicial notice of everything calculated to affect the validity of this statute, nothing we know or which has been suggested tends to justify this classification. For here is an act which, although upon its face it purports to be founded on a classification based upon the proposition, obviously correct, that the more populous the county, the more work the clerk will have to do, and the more compensation he should receive, providing in the last classification, in effect, that Oklahoma county, the most populous county in the state, shall be placed in a class by itself, that the basic principle of the act shall not, as to it, apply, but the contrary, and that the more work the court clerk in that county performs the less pay he shall receive, but not less than \$10 per annum less than the court clerk in a county containing 34,000 population. This means that the clerk in Oklahoma county, having a population of 85,232 at the last federal census, shall be required to perform about 2½ times as much work for pay equal to that of a court clerk in a county having a population of 34,000. Inasmuch as this is a statute that excepts from the operation of the general law Oklahoma county, without any good reason, and in fact without any reason at all so far as we can see, it is local and special in its nature and invalid under the constitutional provision invoked. 1 Dill. on Municipal Corp. (5th Ed.) § 170, says:

"Under a prohibition of special legislation which embraces counties within its operation, a classification of counties is permissible, and a statute which applies to all counties of a legitimate class is a general and not a local law. Therefore counties may be divided into

classes according to population for the purpose of assessing property for taxation; or for the purpose of regulating the compensation of county officers, and in other matters relating to the organization and government of counties where population furnishes a reasonable basis for discrimination. But a statute which excepts from the operation of the general laws one or more counties a rule of law which is not applicable to the others, when no good reason exists why all should not be subject to the same rule, is local and special, and is invalid under the constitutional prohibition."

State ex rel. Douglas v. Ritt, 76 Minn. 531, 79 N. W. 535, was quo warranto to try the right to the office of assessor of Ramsey county. The relator S. claimed it in virtue of certain laws set forth in his information. Respondent R. claimed it by appointment in virtue of a certain act assailed. Whether the one or the other should prevail turned upon the constitutionality of the latter act. It provided (Laws 1899, c. 140):

"Section 1. There shall be elected in each county in this state, having a population of not less than 100,000 and not over 185,000 inhabitants, a county assessor, who shall hold his office for two years from and after the first Monday in January next succeeding his election," etc.

"Sec. 6. That the board of county commissioners of such counties, shall at their first meeting after the passage of this act nominate and appoint a county assessor, who shall fill such office * * * until the next general election to be held in the month of November, 1900, and until his successor is elected and qualified."

Of it the headnotes said:

"The primary and essential provision of the act, and that which differentiates counties falling within its operation, is that it provides for one county assessor for the whole county, instead of an assessor for each municipal division of the county, as provided by the then existing general laws."

And held:

"That the entire act is invalid, as being special legislation regulating the affairs of counties in violation of section 33, art. 4, of the Constitution; the attempted classification by population, as applied to the subject of the act, being incomplete, arbitrary, and evasive of the provisions of the Constitution."

In the body of the opinion it was said:

"It is also urged that the Legislature must be allowed a large discretion in the matter of classification by population. This is true, but all that this means is that a classification of municipalities by population in statutes relating to their structure, machinery, and powers is legitimate where population bears a reasonable relation to the subject of the legislation; and, classification in such cases being committed to the judgment of the Legislature, its judgment should prevail, unless the classification be manifestly arbitrary, illusory, or applied for the purpose of evading the provisions of the Constitution. These are the exact facts in this case. That it was intended to apply only to Ramsey county would not be clearer if the act had in express terms so stated."

It is unnecessary to cite further authority on a point so clear. But see *Weaver v. Davidson County*, 104 Tenn. 315, 59 S. W. 1105; *Morrison v. Bachert*, 112 Pa. 322, 5 Atl. 739; *L'Hote v. Hilford*, 212 Ill. 418, 72 N. E. 399, 103 Am. St. Rep. 234; *Commonwealth ex rel. Brown v. Gumbert*, 256 Pa. 531, 100 Atl. 990;

Freeholders, etc., v. Stevenson, 46 N. J. Law, 173.

We are therefore of opinion that that part of the act approved February 1, 1915 (Laws 1915, c. 6, § 4) which reads, "In counties having a population of more than 60,000, as now or hereafter shown by the last federal census, the court clerk and county clerk, shall each receive a salary of \$2,100 per annum," in so far as it attempts to provide for the salary of plaintiff, is unconstitutional for the reason stated; that being unconstitutional, it leaves unaffected that part of the act approved March 7, 1911 (Sess. L. 1911, c. 60, p. 139), operated upon by the second consolidation act as stated, fixing the salary of the court clerk in counties having a population in excess of 50,000 at \$3,000 per annum, and that such is the governing statute here under which plaintiff is entitled to recover.

The judgment is therefore affirmed. All the Justices concur, except RAINEY, J., who concurs in conclusion. THACKER, J., not participating.

(67 Okl. 309)

PAULSEN et al. v. WESTERN ELECTRIC CO. et al. (No. 4634.)

(Supreme Court of Oklahoma. Feb. 12, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇨362—ASSIGNMENT OF ERROR—TRIAL ERRORS.

Where the plaintiff in error fails to assign as error the overruling of his motion for a new trial, the Supreme Court has no power to review errors alleged to have occurred during the progress of the trial.

2. MECHANICS' LIENS ⇨304(3) — LIEN OF SUBCONTRACTOR — PERSONAL JUDGMENT AGAINST OWNER.

A subcontractor, materialman, or workman, between whom and the owner there is no privity of contract, and in whose favor no direct liability has been imposed upon the owner, is not entitled to a personal judgment against the owner.

3. JUDGMENT ⇨252(1)—PRAYER FOR RELIEF —RECOVERY.

The right to recover depends, not upon the prayer, but upon the scope of the pleadings and issues made, or which might have been made under them.

4. APPEAL AND ERROR ⇨1152 — JUDGMENT ⇨251(1) — PERSONAL JUDGMENT — ISSUES —MODIFICATION.

The action of a district court in rendering a personal judgment against parties defendant over their objection, which is entirely outside of the issues as made by the pleadings, constitutes reversible error, and where the judgment is otherwise valid, this court will modify the same by striking from the judgment that part erroneously entered.

Error from District Court, Canadian County; John J. Carney, Judge.

Action by Western Electric Company against Hans C. Paulsen and Henry Schafer and another. Judgment for plaintiff, and defendants, Paulsen and Schafer, bring error. Modified and affirmed on rehearing.

R. B. Forrest, of El Reno, for plaintiffs in error. J. R. Spielman, of Oklahoma City, for defendants in error.

RAINEY, J. The Western Electric Company instituted this action in the district court of Canadian county, against Hodge-Scott Electric Company, Henry Schafer, and Hans C. Paulsen. The plaintiff alleged, in substance, that it furnished certain electrical and telephone apparatus to the Hodge-Scott Electric Company, which company installed said apparatus in the Southern Hotel, under a contract with Henry Schafer and Hans C. Paulsen, who were copartners, transacting business under the firm name and style of the Southern Hotel. Issue was joined with the plaintiff in separate answers filed by the Hodge-Scott Electric Company and the defendants Schafer and Paulsen. Trial was had to a jury, resulting in a verdict for the plaintiff, on which the trial court rendered a personal judgment against all of the defendants for the amount sued for, and fixed a lien on the property of the defendants, Schafer and Paulsen. From this judgment the defendants Schafer and Paulsen have appealed to this court.

[1] The petition in error of plaintiffs in error does not assign the overruling of the motion for a new trial as error, and for that reason we cannot review the errors alleged to have occurred during the trial. *Cleveland et al. v. Lampkin et al.*, 165 Pac. 159; *Witherspoon v. Smith et al.*, 160 Pac. 57; *Millus et ux. v. Lowrey Bros.*, 164 Pac. 663; *Keenan v. Chastain*, 164 Pac. 1145.

[2, 3] Plaintiffs in error contend that the court erred in rendering a personal judgment against them. We think this question is properly raised by the second and third assignments of error, which specifically assign as error the rendering of a personal judgment against them which was without the issues in the case.

It is not alleged in the petition that plaintiffs had a contract with the defendants, Schafer and Paulsen, for the furnishing of the electrical apparatus, or that there was any privity of contract whatever between them and the plaintiff, and plaintiff did not allege any facts entitling it to a personal judgment against the defendants, Schafer and Paulsen.

In *Alberti v. Moore et al.*, 20 Okl. 78, 93 Pac. 543, 14 L. R. A. (N. S.) 1036, we held that a subcontractor, materialman, or workman, between whom and the owner there is no privity of contract, and in whose favor no direct liability has been imposed upon the owner, is not entitled to a personal judgment against the owner. See, also, *Union Bonding & Investment Co. v. Bernstein et al.*, 40 Okl. 527, 139 Pac. 974.

It is true, that in the prayer of the petition personal judgment is asked against the "defendants," but it is well settled that the

right to recover does not depend upon the prayer of the petition, but upon the scope of the pleadings and issues made, or which might have been made under them. Burnham-Hanna-Munger D. G. Co. v. Hill, 17 N. M. 347, 128 Pac. 62; Lucas v. Board of Commissioners of Ford County, 67 Kan. 418, 73 Pac. 56; Willoughby v. Summers, 162 Pac. 206.

We are satisfied that the personal judgment against the plaintiffs in error, Schafer and Paulsen, was entirely outside of the issues in the case, and that the court exceeded its authority in rendering a personal judgment against the plaintiffs in error. The second paragraph of the syllabus in the case of Champion et ux. v. Oklahoma City Land & Development Co., 159 Pac. 854, reads as follows:

"The rendition of a judgment which is entirely outside of the issues as made by the pleadings constitutes reversible error."

[4] The personal judgment against the Hodge-Scott Electric Company, and the judgment fixing the lien on the property of the plaintiffs in error, is within the issues, and is valid, and for this reason the judgment will be modified by striking therefrom that part awarding personal judgment against the plaintiffs in error, and, as modified, the case will be affirmed. All the Justices concur.

(67 Okl. 294)

TUTTLE v. F. C. FINERTY & CO. et al.
(No. 9141.)

(Supreme Court of Oklahoma. Feb. 12, 1918.)

(Syllabus by the Court.)

1. USURY §11—WHAT CONSTITUTES.

To constitute usury, there must either be a loan of money or forbearance of a debt for which the borrower pays and the lender knowingly receives a higher rate of interest than that allowed, or such higher rate is reserved, charged, or secured.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Usury.]

2. USURY §63—USURIOUS TRANSACTIONS—COMMISSION.

Where T. borrowed \$2,610 from F. & Co. and by agreement executed his note for \$5,610 to include \$3,000 commission claimed by F. & Co. on a prior transaction, the note was not rendered usurious by including this \$3,000, although the commission may not have been justly earned or may have been extortionate and unreasonable for the services rendered.

3. USURY §119—EVASION OF LAW—QUESTION FOR JURY.

Where a note and mortgage executed for the loan of money are apparently fair on their face, and the interest reserved thereby, as disclosed by the terms of the instruments, is within the legal limit, but the claim is made that usury was charged under a pretended claim for commission on a prior transaction, the question as to whether the amount so charged was in good faith claimed as a commission, or was a cloak or device to evade the law against usury, is a question of fact to be determined by the jury.

Error from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by James H. Tuttle against F. C. Finerty & Co. and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Riddle & Hammerly, of Chickasha, for plaintiff in error. Everest & Campbell, of Oklahoma City, for defendants in error.

OWEN, J. This action was begun by plaintiff in error, in the district court of Oklahoma county, to recover double the amount of alleged usurious interest paid to Finerty & Co. The cause was tried to a jury, verdict rendered, and judgment entered for the defendants.

[1] It appears that James H. Tuttle made written application to Finerty & Co. for a loan of \$12,500, and executed a note for this sum drawing 7 per cent. interest, payable in 10 years, and as part of the same transaction executed a note for \$3,865, payable in 10 annual installments; this note representing the commission to be paid to Finerty & Co. for procuring the loan. A portion of the \$12,500 was to be used in paying off existing loans secured by mortgages. When the mortgagees holding the prior loans refused to release the mortgages without a bonus of \$700, the loans not being due, plaintiff refused to pay the bonus and consummate the deal. Plaintiff and Finerty then entered into a transaction which resulted in plaintiff borrowing from Finerty & Co. \$2,610, for which he agreed to execute his note secured by mortgage. To this amount was added, by agreement of the parties, \$3,000 of the commission claimed by Finerty & Co. for negotiating the loan of \$12,500, and a note was executed by plaintiff for \$5,610. This note, with accumulated interest, was paid at maturity, and furnishes the basis for this suit.

Plaintiff contends that the notes for \$12,500 and \$3,865 were executed and delivered upon condition that the prior mortgagees would release their liens without a bonus, and, since they refused to do so, Finerty & Co. did not earn the commission of \$3,000 included in the note for \$5,610, and that in truth and in fact, the \$3,000 was charged plaintiff for the use of \$2,610. Defendants contend that the notes were delivered unconditionally, and the commission was earned when the loan of \$12,500 was negotiated and the money ready to be paid to the plaintiff according to the terms of the application, and as a compromise and in settlement it was agreed to accept \$3,000 in full satisfaction of the commission. This issue of fact was submitted to the jury, and determined in favor of the defendants and against plaintiff's contention.

Counsel for plaintiff concede that the original transaction was not tainted with usury, and that Finerty & Co. had a right to charge \$3,865 commission for negotiating that loan,

but insist the company had no right to any portion of the commission, because the money was not, in fact, paid over on that loan, and that, the company having no right to make that charge, the note for \$5,610 was rendered usurious when \$3,000, claimed as commission, was incorporated with the loan of \$2,610. A broker employed to procure a loan is ordinarily entitled to his commission, when he has procured a person able, ready, and willing to make the loan on the terms prescribed by the principal. 9 C. J. 598. But even if Finerty & Co. had not justly earned the commission, it does not necessarily follow that the note for \$5,610 was rendered usurious by including the \$3,000. The company was claiming the commission, and plaintiff agreed that it be incorporated in the note. Plaintiff's testimony on this point is to the effect that he was compelled to agree to this commission, although it was not earned, in order to secure the loan of \$2,610, which his straightened circumstances at the time made it imperative to secure. Taking this as true, the \$3,000 did not constitute usury. It was neither a loan nor the forbearance of a debt, but simply the amount which Finerty & Co. claimed to have earned for their services in negotiating the loan for \$12,500. It is essential, in order to establish the plea of usury, that there was a loan or forbearance of money, and that for such loan or forbearance there was an intent or agreement to take or reserve unlawful interest. *Livengood v. Ball*, 162 Pac. 706; *Davidson v. Davis*, 59 Fla. 476, 52 South. 139, 28 L. R. A. (N. S.) 102, 20 Ann. Cas. 1130; *Briggs v. Steele*, 91 Ark. 458, 121 S. W. 754.

[2, 3] The note for \$5,610 and the mortgage to secure the same, being apparently fair on their face, and the interest disclosed by the terms of these instruments appearing to be within the legal limit, the question whether the \$3,000 was in payment of the commission on the original transaction, or for the use of the \$2,610, and the claim for the commission merely a cloak or device to evade the law against usury, was a question of fact for the jury. *Garland v. Union Trust Co.*, 154 Pac. 676. Since the jury determined that issue against plaintiff's contention, we must consider the case in view of this \$3,000 being for commission claimed and not as interest charged.

Counsel for plaintiff contend that the court erred in paragraphs 5, 9, and 10 of the instructions to the jury. In paragraph 5 the jury was instructed, in effect, that if Finerty & Co. had found a person who was ready, able, and willing to make the loan of \$12,500, as provided in the contract of employment, the commission was earned, and that such commission was good as part consideration for the execution of the note for \$5,610. Counsel insist this instruction ignored the theory of plaintiff that the commission was not earned because the application for the

original loan was made on condition of the release of the prior loan without payment of bonus. If that paragraph stood alone, there might be cause of complaint, but in paragraph 6 the jury was instructed that if they found from the evidence that the application for the original loan was delivered on condition that it was not to become effective in the event the prior loan could not be paid and the mortgage released, except on payment of bonus, then Finerty & Co. would not be entitled to any commission, and in paragraph 7 the jury was further instructed that, if they found that plaintiff was not indebted to the defendants on account of the commission, but that the claim of the defendants for the commission of \$3,000 was included in the note of \$5,610 for the purpose and with the intent on the part of the defendants as a bonus or additional interest for the use of the \$2,610, and that the claim for commission was only a pretense and cloak to cover up the real transaction, then this would constitute usury, and the verdict should be for the plaintiff.

In paragraph 9 the jury was instructed that a mere failure of consideration for the note of \$3,865, by a failure to earn the commission, would not give rise to a cause of action in favor of the plaintiff for usury, and that if the jury found from the evidence that the \$3,000 was incorporated in the note for \$5,610 by agreement of the parties, in settlement of the commission claimed to be due, although this commission had not been justly earned by Finerty & Co., then this would not constitute usury, and could not be recovered in this action, but recovery could only be had in an action for failure of consideration.

In paragraph 10 the jury was instructed, in effect, that since neither party claimed the original transaction for the loan of \$12,500 was tainted with usury, if they believed the \$3,000 was agreed upon in settlement of the claim for commission, this added to the loan of \$2,610, would not constitute usury, although the jury might believe that this claim for commission was extortionate and excessive. Counsel insist that the effect of this paragraph in the instructions was to invade the jury's province in weighing the evidence and ignored plaintiff's theory of the case. It appears in paragraph 12 the jury was instructed that the paragraphs of the instructions were to be considered together as a whole, and that the jury was not at liberty to select any one or more of the paragraphs to the exclusion of the others. We think the instructions considered as a whole properly and fairly stated the law applicable to the issues. *Newton v. Allen*, 168 Pac. 1009.

Counsel also complain of error committed by the refusal of the court to give certain instructions requested. Since the instructions that were given properly and fairly submitted the issues to the jury, it follows

there was no error in the refusal to give the instructions requested.

It appearing there was competent evidence reasonably tending to support the verdict, the judgment will not be disturbed. Armstrong v. Jenkins, 170 Pac. 215, No. 8434, not yet officially reported.

The judgment of the lower court is affirmed. All the Justices concur, except SHARP, C. J., and RAINEY and THACKER, JJ., not participating.

(67 Okl. 296)

STATE ex rel. FREELING, Atty. Gen., v. HOWARD, State Auditor (ALEXANDER, State Treasurer, Intervener). (No. 9613.)

(Supreme Court of Oklahoma. Feb. 12, 1918.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW §122—IMPAIRMENT OF OBLIGATION OF CONTRACTS—BOND.

Chapter 89, Laws 1910-11, created the public building fund, to be composed of the proceeds of the sale and rentals of section 33, and lands granted to the state in lieu thereof for charitable and penal institutions and public buildings, and authorized the issuance and sale of \$3,000,000 bonds, which should be payable out of said fund, and pledged the faith of the state to safely keep and preserve the proceeds of such sale and rentals, and apply same to the payment of the bonds authorized by that act, and to no other purpose or purposes. Bonds were issued and sold to the amount of \$2,451,000, of which there have since matured and been paid bonds in the amount of \$447,500. In 1917 the Legislature made certain appropriations for public buildings payable out of surplus moneys in the public building fund. *Held*, that so long as the appropriations did not exceed the amount that would be due on the amount of bonds authorized but not issued, with the interest that would accrue thereon, the conditions of the contract of the state with the holders of outstanding bonds would not be impaired.

2. STATUTES §224 — CONSTRUCTION—SUBSEQUENT LEGISLATION.

Subsequent legislative enactment may be resorted to as an aid in the interpretation of prior legislation upon the same subject.

3. STATES §165—TRUST FOR BONDHOLDERS—MANAGEMENT.

The state, as trustee for the bondholders, has the same powers as any other trustee would have under similar circumstances, and is under the obligation to exercise its powers for the conservation of the trust fund and the accomplishment of the trust purposes as a prudent man would exercise in the management of his own affairs.

Thacker, J., dissenting.

Mandamus by the State of Oklahoma, on relation of S. P. Freeling, Attorney General, against E. B. Howard, State Auditor, W. L. Alexander, State Treasurer, intervener. Case submitted by agreement pursuant to statute as an original proceeding after leave of court obtained, and judgment for relator.

S. P. Freeling, Atty. Gen., and Hunter L. Johnson, Asst. Atty. Gen., for plaintiff. Chas. F. Barnett, of Oklahoma City, for defendant and intervener.

HARDY, J. This is an agreed case submitted pursuant to the provisions of sections 5303 and 5305, Rev. Laws 1910, filed in this court as an original proceeding after leave of court first had and obtained.

[1] The state, upon the relation of the Attorney General, prays a writ of mandamus directed to the state auditor, commanding him to open accounts against the public building fund of the state for the payment therefrom of appropriations made in 1917, and to issue a warrant against said fund in favor of W. T. Emerich, and also to compel said auditor to sign certain unsold public building bonds. W. L. Alexander, who, as state treasurer, holds a large part of the public building bonds of the state which have been deposited with him by various persons, intervened, and with defendant questions the right of the state to the relief prayed, and the controversy is submitted to the court to determine whether warrants may be lawfully issued against said public building fund to meet the appropriations made in 1917, and whether the receipts from the proceeds of the sale and rentals of lands known as section 33, and other lands granted in lieu thereof in excess of that required to pay maturing installments of bonds and accrued interest may be used to pay said appropriations, and whether certain unsold public building bonds, which have been signed by a former auditor, approved by a former Attorney General and registered by a former state treasurer, should be signed, approved, and registered by the respective persons now occupying those positions. The public building fund was created by chapter 89, Laws 1910-11, § 1, of which declares that all moneys received from the sale or rentals of section 33, and lands granted, in lieu thereof, should constitute and be known as the public building fund. Section 2 authorized the issuance and sale of \$3,000,000 in bonds, payable out of the proceeds of said lands, and section 9 of said act is as follows:

"All bonds and interest thereon, when issued as provided for in this act, shall become payable out of the public building fund arising from the sale or rental of section 33, and lands granted to the state in lieu thereof, until all of said bonds and interest thereon are fully paid. And the good faith of the state is solemnly pledged to administer the trust created by the terms of the Enabling Act and the Constitution of Oklahoma, to apportion and dispose of all lands granted to the state for charitable and penal institutions and public buildings, as the Legislature may prescribe, and safely keep and preserve the proceeds of the rental and sale thereof, and apply same to the payment of the bonds authorized by this act, and the interest thereon, as the same falls due, and to use such funds, constituting the public building fund, for no other purpose or purposes. All bonds shall be paid in the order in which they are issued. The state treasurer, commissioner of school land department and county treasurers are authorized to receive public building bonds as collateral security for the deposit of public funds in the various banks of the state."

Pursuant to this chapter bonds were issued and sold in the amount of \$2,451,000, of which amount there has since matured and been paid bonds in the sum of \$447,500, leaving outstanding bonds in the sum of \$2,004,000 with coupons thereto attached for interest yet to accrue at the rate of 5 per cent. per annum.

It is conceded that the provisions of said chapter 89 constitute a contract between the state and the holders of the bonds now outstanding, and that the terms of said contract cannot be impaired by any subsequent legislation. The general rule is that, where a special fund has been pledged for use in the payment of bonds or other obligations, such fund may not be diverted to any purpose other than that to which it is pledged. *Diggs v. Lobsitz*, 4 Okl. 232, 43 Pac. 1069; *Wabash & Erie Canal Co. v. Beers*, 67 U. S. (2 Black) 448, 17 L. Ed. 327; *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. Ed. 448; *Graham v. Horton*, 6 Kan. 343; *People v. Pachico*, 29 Cal. 210; *McCauley v. Brooks*, 16 Cal. 11; *Edemiller v. City of Tacoma*, 14 Wash. 376, 44 Pac. 877; *State v. Cardozo*, 8 S. C. 71, 28 Am. Rep. 275; *Park v. Candler*, 113 Ga. 647, 39 S. E. 89; *Western Savings Fund Society v. Philadelphia*, 31 Pa. 175; *Fazende et al. v. City of Houston (C. C.)* 34 Fed. 95.

The Attorney General contends that the trust provisions of chapter 89 do not prevent the use of moneys received to the credit of the public building fund in excess of the amount required to pay installments of bonds and interest as they mature for the purpose of paying appropriations made, and, further, that the pledge made by section 9 of said chapter extends, not alone to the bonds actually sold, but to the full amount of bonds authorized, and that moneys accruing to said fund in excess of the amount necessary to pay current maturing bonds and interest may lawfully be used to meet appropriations made without impairing any contract obligation contained within chapter 89, so long as the amount used does not exceed the amount of unsold bonds and interest that would accrue thereon.

[2] Previous to the sale of the bonds provision had been made for the sale of said lands on 40 years' time, the purchase price to be paid in installments and to bear interest. Rev. Laws 1910, art. 1, c. 69. And according to this plan there was provided an annual income sufficient to pay installments of bonds maturing and interest and leave an annual surplus of from \$90,000 to \$100,000. It certainly was not the intention of the Legislature that the total receipts to the credit of said fund should be paid to the bondholders, for all that they could demand would be the principal amount of the bonds held by them, together with the interest that would accrue thereon according to the terms of said bonds. Neither the state nor the purchasers of said bonds understood otherwise. Was it

then intended that all of said fund, other than what was necessary to take care of accruing claims of bondholders, should remain intact until the last of said bonds had been retired? By section 2 of chapter 89 certain warrants theretofore issued were made a legal and valid lien against the public building fund, and by chapter 34, Laws 1913, p. 67, all moneys in the building fund, in excess of the amount required for the payment of outstanding bonds and interest accruing, was transferred to the "union graded or consolidated school fund." By chapter 222, Laws 1917, these moneys were retransferred to the public building fund "in excess of the amount for which bonds have been issued," and all appropriations for the construction of public buildings have been made from the public building fund. Thus we have legislative evidence of legislative intent. True the obligations of chapter 89 cannot be changed by subsequent legislation, but it is permissible for us to refer to such subsequent legislation in order to determine the legislative intent in the enactment thereof. *Tiger v. Western Ins. Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; *Board Com'rs v. Alexander*, 159 Pac. 311.

[3] Not all of the bonds which were authorized have been sold, and the question arises, Must the moneys in the public building fund not needed to pay maturing bonds and interest lie idle to the credit of said fund until all of said bonds have matured and been paid and the state in the meantime be required to borrow moneys for the credit of said fund, and thereby incur larger indebtedness to be paid from said fund? No doubt is expressed of the power of the state to sell the remainder of the bonds authorized, and it is admitted that, should this be done, a liability against the public building fund would be incurred in excess of \$1,000,000, while if the moneys available and not needed for present demands may be used, a saving of more than \$600,000 will be made thereby, the security of the bondholders be conserved and rendered proportionately more valuable. The obligation of the state in the performance of the trust is to conserve the trust fund, and the plan proposed is conceded to be in keeping with sound business principles and for the best interest of all parties concerned, but it is said to be in violation of the strict letter of the contract. The bondholders may be heard to complain when the obligation of their contract with the state has been impaired. *Graham v. Horton*, 6 Kan. 209; *Fazende et al. v. City of Houston (C. C.)* 34 Fed. 95; *Trustees, etc., v. Bailey*, 10 Fla. 112, 81 Am. Dec. 194; *Wabash & Erie Canal Co. v. Beers*, 67 U. S. (2 Black) 448, 17 L. Ed. 327; *State v. Cardozo*, 8 S. C. 71, 28 Am. Rep. 275; *Park v. Candler*, 113 Ga. 647, 39 S. E. 89.

But the payment of said appropriations according to the arrangement proposed will not have that effect. On the contrary the

opposite result will be obtained. Neither does it violate the letter of the contract so long as the sum used does not exceed the amount that would be payable on both principal and interest of the remaining bonds authorized in the event of their sale.

The case of *Trustees of the Internal Improvement Fund v. Bailey*, 10 Fla. 112, 81 Am. Dec. 194, is cited as being opposed to the conclusion reached herein. The facts were that certain lands had been granted by the United States to the state of Florida for the purpose of providing a system of internal improvements. Bonds had been issued against the fund derived from those lands. Thereafter the state undertook to divert a portion of the fund to work upon a water course. In the litigation which followed the court held the purpose to which it was desired to devote the fund was not within the purposes of the trust fund. In the case at bar the state desires to apply the excess moneys on hand to the very purposes which would be accomplished by the sale of the remainder of the bonds authorized. In the later case of *Trustees of Internal Improvement Fund v. Gleason*, 15 Fla. 384, the court sustained the right of the trustees to apply a part of the trust fund to the improvement of the trust property. As trustee the state had the same powers as any other trustee under similar circumstances, and was under the obligation to exercise such powers for the conservation of the trust fund and the accomplishment of the trust purposes as a prudent man would exercise in his own affairs. *Wyman v. Herard*, 9 Okl. 35, 59 Pac. 1009; *Morrow v. County of Saline*, 21 Kan. 484; 39 Cyc. 295.

It is the substance of the fund in which the bondholders are interested and to which they look for security, and it is the value of that fund, and not the mere name attached thereto upon which they may rely. *Eldemiller v. City of Tacoma*, 14 Wash. 376, 44 Pac. 880. And if by reason of prudent foresight and good business judgment the fund has been enhanced and the value of their security increased without any part thereof being devoted to other purposes, they cannot complain that the obligations of their contract have been impaired or the value of their security injuriously affected.

The claim of Emerich is admitted to be correct, and was duly approved, and defendant refuses to issue a warrant for the payment thereof, for the sole reason that he is not advised as to whether such act upon his part would be legal, and for the same sole reason refuses to open accounts against the public building fund in accordance with the appropriations made in 1917, and the prayer of the state is granted and the auditor is directed to issue a warrant for the payment of said claim and to open accounts against the Public Building Fund in accordance with the prayer of plaintiff's petition.

Whether the pledge of the public building fund contained in chapter 89 simply binds the state to an administration of the fund, and the payment of obligations against said fund as they mature, leaving all other amounts in excess of that required for this purpose subject to appropriation prior to the payment of all outstanding bonds, is a question that we need not, in the present proceeding, determine. Entertaining the view that the obligation of the contract with the bondholders will not be impaired by the plan proposed so long as the excess moneys used do not exceed the amount which would be payable upon the balance of the bonds authorized, together with interest that would accrue thereon, we leave the remaining question undetermined.

Both parties join in the request that if we should reach this conclusion the bonds previously executed which remain unsold should be delivered into court for cancellation, and it is ordered that said bonds be delivered to the clerk of this court, and by him canceled as prayed. All the Justices concur, except SHARP, C. J., and TURNER, J., who concur in conclusion. THACKER, J., dissents.

(67 Okl. 304)

ATCHISON, T. & S. F. RY. CO. et al. v. STATE. (No. 8219.)

(Supreme Court of Oklahoma. Feb. 12, 1918.)

(Syllabus by the Court.)

CARRIERS ⇐12(5)—EVIDENCE ⇐20(2)—PUBLIC SERVICE COMMISSIONS—REASONABLENESS OF RATE ORDER—JUDICIAL NOTICE.

In response to a rule to show cause why the Corporation Commission should not issue an order providing that rates now charged for freight and passenger service shall not be advanced by any carrier until such advance is approved by the commission, the appellants appeared and filed a protest denying the jurisdiction of the commission to make such order. Thereafter, and without taking any extrinsic evidence tending to show the necessity for or reasonableness thereof, a final order was issued, providing that the appellants "shall not advance the rates now charged for freight or passenger service until such advance is approved by the commission and tariffs regularly filed with the commission." *Held*, that said order is a reasonable exercise of the power and authority conferred upon the commission by the Constitution and laws of the state, and invades no substantial right of the appellants, either state or federal. *Held*, further, that the taking of extrinsic evidence is not necessary to support such order where its necessity and reasonableness are apparent from the mere statement of conditions contained in the record, of which the courts and commission may take notice.

Appeal from Corporation Commission.

Proceeding by the Corporation Commission against the Atchison, Topeka & Santa Fé Railway Company and others. From a rate order issued by the Commission, and from a denial of a motion for new trial, the Atchison, Topeka & Santa Fé Railway Company and others appeal. Order affirmed.

J. R. Cottingham and S. W. Hayes, both of Oklahoma City, C. O. Blake, of El Reno, Clifford L. Jackson, of Muskogee, and R. A. Kleinschmidt, of Oklahoma City, for appellants. S. P. Freeling, Atty. Gen., Jno. B. Harrison, Asst. Atty. Gen., and Paul A. Walker, of Oklahoma City, for the State.

KANE, J. This is an appeal prosecuted by the above-named appellants from Order No. 982 of the Corporation Commission, whereby it was ordered that said appellants "shall not advance the rates now charged for freight and passenger service until such advance is approved by this commission, and tariffs regularly filed with the commission." The substance of this order was originally issued and promulgated in the form of proposed Order No. 143, whereby the appellants were notified "to appear before the Corporation Commission and present any objections it may have and introduce any evidence and show cause why the commission should not issue an order providing that the rates now charged for all freight service and the rates now charged for passenger service shall not be advanced by any carrier until such advance is approved by the commission and tariff filed with the commission." Pursuant to this rule to show cause the appellants appeared and protested against the issuance of the proposed order, upon the following grounds: (1) That the commission is without jurisdiction to make said order as applied to freight rates; (2) that the commission is without jurisdiction to make said order as applied to passenger fares; (3) because the entire intrastate revenues of each of these defendants is insufficient to yield a fair return upon the value of its property devoted to the intrastate business of these several defendants respectively, and particularly is the intrastate passenger revenue of each of said defendants insufficient to yield a fair return upon the value of its property devoted to the intrastate passenger business.

A short time after this protest was filed, the Corporation Commission issued its final Order No. 982, without taking any extrinsic evidence for the purpose of showing its necessity or reasonableness. Thereafter the appellants filed their motion for a new trial, upon various grounds, which was overruled by the commission, whereupon the appellants prosecuted this appeal to the Supreme Court.

The grounds for reversal of the order of the Commission assigned by counsel for appellants in their brief may be summarized as follows:

1. The Corporation Commission erred in promulgating Order No. 982, because said order is contrary to law and not within the jurisdiction of the Corporation Commission, in that: First, there was no evidence introduced to show that said order was necessary for any of the purposes for which the Corporation Commission is authorized by the Con-

stitution of the state to promulgate orders prescribing rates and charges; second, because said order violates paragraph 3, § 8, art. 1 of the Constitution of the United States, and the Act of Congress, entitled "An Act to Regulate Commerce" (Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379) and acts amendatory thereof.

We find ourselves quite unable to agree with any of these contentions. By section, 18, art. 9, Williams' Constitution, the Corporation Commission is granted the power and authority and is charged with the duty of supervising, regulating, and controlling all transportation and transmission companies doing business in this state in all matters relating to the performance of their public duties, their charges therefor, correcting abuses, preventing unjust discriminations, and preventing extortion by such companies, and to that end the commission shall from time to time prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations and shall require them to establish and maintain all such public service facilities and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void. Another portion of the same section requires the commission from time to time to make and enforce such rules and regulations to prevent unjust discrimination by any transportation or transmission company in favor of, or against, any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation, transmission, or otherwise, in connection with the public duties of such company. In pursuance of the power thus granted, it seems that the Corporation Commission had, some time prior to the issuance of Order No. 982, prescribed and fixed a general schedule of rates for intrastate passenger and freight service applicable to the various railroads doing business within the state. The purpose of Order No. 982, as we understand it, is to require the railroads to submit to the commission for approval, before they become effective, any schedule of rates adopted by them which would change or affect the intrastate rates established by the commission. If it is granted that the Corporation Commission has the power of promulgating intrastate rates—as it unquestionably has—and that the railroads have the right to change such rates, it would seem to us that an order such as Order No. 982 would not only be reasonable, but necessary, for the avoidance of unseemly conflicts of authority between these two bodies which might grow out of this condition, and that it would also tend to encourage efficient and orderly co-

ordination between the commission and the officers of the railway companies, which is always so desirable in the matter of the enforcement of the regulatory laws of the state. In this regard we are impressed by the fairness of the following statement made by the commission in their opinion handing down this order:

"In determining the fairness of rates to be charged for public service, both parties to the service must be considered. Neither the rights of the public nor those of the carrier are to be ignored. It is a rule invariably enforced, that before rates charged by the carrier can be reduced, an opportunity to be heard shall be given to the carrier. Carriers insistently demand that this opportunity shall be afforded, in order that they may produce such evidence and facts as they deem essential to a proper determination of the reasonableness of the rates proposed. In our opinion, the public should not be required to pay advanced rates without an equal opportunity to be heard. In other words, the public who pay the rates ought to be considered upon the same footing with the carriers who furnish the service. No rates should be increased unless there is good reason therefor; if the carrier deems the rates charged to be inadequate, certainly this conclusion ought to be founded upon facts within its possession; if so, those facts could be presented to the commission without casting any undue burden upon the carrier; if the facts do not warrant such increase, no advance in rates should be allowed. Moreover, it is a well-known fact that individual shippers are seldom in position to successfully attack the power of the carrier to charge and collect its published rate; the shipper must, if his commodities are to be moved, pay whatever charge is made and look to the future for reparation; advanced freight rates may circumscribe the activities of particular manufacturing concerns and may drive wholesalers and jobbers from territory in which an extensive business has been established. Yet it may be found after a thorough investigation that there was no jurisdiction for the advanced rates. We believe it fairer that the investigation into the reasonableness of increased rates should be made before the advances are put into effect, rather than thereafter."

Order No. 982, as we construe it, and as it was construed by the Attorney General appearing for the Corporation Commission, does not in terms deny the railway companies the right which they seem to contend for here of changing the freight and passenger rates fixed by the commission whenever the exigencies of the business of the companies require such action, but its purpose is to require the railroads to present their new schedules of rates to the Corporation Commission for approval before such advance in rates is made. Counsel for the Corporation Commission say in their brief that the only effect of Order No. 982 is merely to admonish the appellants not to violate the existing rules and schedules of rates formerly promulgated by the commission. The order, they say, does not require the appellants to do anything which would injure them; they are not required to do anything which would cast a burden upon them; they are simply admonished not to violate the law; so much and no more. Therefore the appellants have nothing whatever of which to

complain, or upon which to base a valid complaint.

We are disposed to agree with this view of the matter. Even if the railroads of the state have the right contended for, to change the intrastate rates fixed by the Corporation Commission, a rule requiring them to submit such schedule to the Corporation Commission for approval before they become effective would not be unreasonable in view of the broad regulatory power and authority conferred upon the Corporation Commission by the Constitution and statutes of the state. And in the very nature of things it is difficult to conceive why any extrinsic evidence is necessary to support such an order, or how any extrinsic evidence could be procured which would render the necessity or reasonableness of such an order more apparent than the mere statement of conditions contained in the record before us, the existence of which the commission and court take notice. Of course, this and all other general rules and orders of a similar nature promulgated by the Corporation Commission, prior to the taking over of the railroads by the federal government as a war measure, must be administered in the light of these changed conditions. But, as we have no doubt that at the time the order was entered it was entirely valid, and that it now invades no substantial right of the appellants, either state or federal, it ought to be affirmed, leaving the scope of its present operation to the sound discretion of the Corporation Commission.

For the reasons stated, the order of the Corporation Commission is affirmed. All the Justices concur.

LAMBERT v. HARRISON. (No. 8514.)

(Supreme Court of Oklahoma. Feb. 12, 1918.)

(Syllabus by the Court.)

1. **BILLS AND NOTES** \S 496(3)—**ACTION BY INDORSEE—BURDEN OF PROOF.**

Where an action is brought by an averred indorsee of a promissory note, claiming in his petition to have acquired ownership of such note by such indorsement, and a properly verified answer is filed containing a general denial, the burden is upon such averred indorsee to prove by a preponderance of the evidence the execution of such indorsement, and upon his failure to offer any evidence of the execution of such indorsement the evidence is insufficient to sustain a judgment, upon said note, for the averred indorsee, and it is reversible error for the court to overrule a motion for a new trial, based upon the ground that the judgment rendered is not supported by sufficient evidence.

2. **BILLS AND NOTES** \S 157—**NEGOTIABILITY—CONDITIONS—"NEGOTIABLE INSTRUMENT."**

Where a promissory note contains a condition "that in the event that said note is paid at maturity that 6 per cent. shall be deducted from the amount thereof, and nonpayment of any installment for more than thirty days after maturity renders remaining installments due at holder's option," such note is not a negotiable

instrument, under sections 4626 and 4627, Comp. Laws 1909.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negotiable Instrument.]

3. APPEAL AND ERROR §237(1), 238(1) — JUDGMENT—SUFFICIENCY OF EVIDENCE—REVIEW.

In a trial of a cause by the court, the question of a sufficiency of the evidence to support the judgment may be reviewed by this court upon the overruling of the motion for a new trial alleging the insufficiency of the evidence, although there has been no demurrer to the evidence or request for judgment for the defendant.

Commissioners' Opinion, Division No. 1. Error from County Court, Woodward County; Clyde H. Wyand, Judge.

Action by C. W. Harrison against C. L. Lambert. Judgment for plaintiff, motion for new trial overruled, and defendant brings error. Reversed and remanded.

Swindall & Wybrant, of Woodward, for plaintiff in error. H. W. Patton and A. W. Anderson, both of Woodward, and Nicholas & Lyle and John H. Halley, all of Oklahoma City, for defendant in error.

COLLIER, C. This is an action brought upon a promissory note, which said note is in the following words and figures:

"Chicago, Illinois, August 31, 1908.

"For value received, the undersigned promises to pay at Chicago, Illinois, to the order of the Puritan Mfg. Co. five hundred dollars, as follows:

"\$125—4 months after date.

"\$125—8 months after date.

"\$125—11 months after date.

"\$125—14 months after date.

"A discount of 6 per cent. will be given if the full amount of this instrument is paid at maturity of first installment. Nonpayment of any installment for more than thirty days after maturity renders remaining installments due at holder's option."

The note was indorsed on its back:

"Security State Bank at Mooreland, Oklahoma, September 18, 1908. Pay Johnson County Savings Bank, Iowa City, Iowa, or order. Puritan Mfg. Co., by M. H. Taylor. Pay C. W. Harrison, or order. Johnson County Savings Bank, Iowa City, Iowa. Geo. L. Palk, Cashier."

It is averred in the petition that said note prior to its maturity was indorsed by the Puritan Manufacturing Company, sold, assigned, and transferred to the plaintiff herein for a valuable consideration without notice of any equities existing between the original parties. The defendant filed an amended answer admitting that he had signed the instrument, copy of which is attached to plaintiff's petition, and denies generally and specifically each and every material allegation contained in said petition, and set up that the note was given for jewelry which was worthless, and which was sold under guaranties, and that said guaranties had not been kept.

There is no direct or circumstantial evi-

dence to show that said note was sold, transferred, and assigned by the Puritan Manufacturing Company to the Johnson County Savings Bank of Iowa City, Iowa, or that the Johnson County Savings Bank had ever sold, transferred, and assigned the said note to plaintiff. The only testimony in regard to such indorsement of the note being that same had been sent to A. M. Appelget, a member of the firm bringing the action, by Ralph Otto of Iowa City; that the attorney of plaintiff formed a partnership with one Appelget, and at the time the note sued upon was in the hands of Mr. Appelget, and afterwards it was in the hands of Appelget and Herod for collection, and remained so until December, 1911; that it was subsequently returned to Ralph Otto at Iowa City; that the indorsements to the Johnson County Savings Bank of Iowa City by the Puritan Manufacturing Company was upon the note prior to its being returned to Ralph Otto, but the indorsement to C. W. Harrison, plaintiff, by the Johnson County Savings Bank of Iowa City was not upon it, until it was sent a second time to said firm for collection.

The case was tried to the court, and judgment rendered for the plaintiff in the sum of \$500, with 6 per cent. interest from October 31, 1909, to which the defendant duly excepted. The defendant did not demur to the evidence, or ask for a judgment, but made timely motion for a new trial upon the ground, among other grounds, that the judgment of the court is not sustained by sufficient evidence.

[2] The note sued upon was executed prior to the enactment of our present "Negotiable Instruments Law," and in our opinion is not a negotiable instrument because it is not payable at a time and in a sum definite, by reason of there being a condition in the note that "a discount of 6 per cent. will be given if the full amount of the instrument is paid at maturity of first installment. Nonpayment of any installment for more than thirty days after maturity renders remaining installments due at holder's option."

The note having been executed prior to the enactment of the "Negotiable Instruments Law" of 1909 is governed by sections 4626 and 4627, Comp. Laws 1909, which provides:

"A 'negotiable instrument' is a written promise or request for the payment of a certain sum of money, to order or bearer, and must be made payable in money only, and without any condition not certain of fulfillment."

In *Bell et al. v. Riggs et ux.*, 34 Okl. 834, 127 Pac. 427, 41 L. R. A. (N. S.) 1111, it is said:

"Stated in another way, that rule is that if the date when due or the amount to be due depend upon conditions uncertain of fulfillment, and cannot be determined from the face of the note itself at the time of its execution without reference to extraneous circumstances, the note is not negotiable."

See, also, *Farmers' Loan & Trust Co. v. McCoy & Spivey Bros.*, 32 Okl. 277, 122 Pac. 125, 40 L. R. A. (N. S.) 177; *Clevenger v. Lewis*, 20 Okl. 837, 95 Pac. 230, 16 L. R. A. (N. S.) 410, 16 Ann. Cas. 56; *Clowers et al. v. Snowden et al.*, 21 Okl. 476, 96 Pac. 596—all of said cases supporting the rule of *Randolph v. Hudson*, 12 Okl. 516, 74 Pac. 946.

Under the view we have of the case it is not necessary for a review of the case to determine the negotiability of the note here sued upon, but as the question will probably be presented in another trial of the case we have thought best to do so.

[1] Although the defendant did not challenge the sufficiency of the evidence by a demurrer thereto, or ask a judgment in his behalf, he did timely move for a new trial upon the ground of the insufficiency of the evidence to support the judgment, and therefore as the rule requiring the procedure precedent of demurring to the evidence or asking an instructed verdict to authorize this court to review the evidence applies to a case tried to a jury, but does not apply in a case tried to the court, this court will review the sufficiency of the evidence to support the judgment rendered. *Porter v. Wilson*, 39 Okl. 500, 135 Pac. 732; *Lyon v. Lyon*, 39 Okl. 111, 134 Pac. 650.

[3] The verified answer denies the assignment of the note, and this placed the burden of proof upon the plaintiff to show that said indorsement to the plaintiff had been made, and that the title to said note was thus placed in the plaintiff. *Moore v. Leigh-Head & Co.*, 48 Okl. 228, 149 Pac. 1129. The plaintiff having failed to discharge the burden upon him as to proof of the indorsement by not offering any evidence even tending to show the execution of the indorsement of the note to the plaintiff, the evidence was insufficient to entitle the plaintiff to a judgment, and the court committed reversible error in overruling a motion for a new trial based upon the insufficiency of the evidence.

"Where the evidence in a cause is insufficient to sustain the judgment rendered, the court, upon timely motion, should grant a new trial." *Chicago, R. I. & P. Ry. Co. v. Boring-Kim Produce Co.*, 157 Pac. 351.

"Where there is no evidence reasonably tending to establish a material issue submitted to the jury under the instructions of the court, which the jury must have found in favor of the prevailing party in order to have returned the verdict returned, the verdict will be set aside." *Terry v. Creed*, 28 Okl. 857, 115 Pac. 1022.

"Where, on inspection of the record, it is apparent that the evidence does not reasonably sustain the verdict of the jury, the verdict will be set aside by this court." *Hassel v. Morgan et al.*, 27 Okl. 453, 112 Pac. 969.

"Where there is an entire lack of evidence to sustain a material issue found by * * * the jury, this court will set aside the verdict and grant a new trial." *Puls v. Robt. Casey*, 18 Okl. 142, 92 Pac. 388.

"Where the verdict of the jury is not sustained by sufficient evidence, or is based upon conjecture, it is the imperative duty of the court,

upon timely motion, to set it aside and grant a new trial." *Ingram et al. v. Dunning*, 159 Pac. 927.

Section 5033, R. L. 1910, provides as a ground for motion for new trial "that the * * * decision is not sustained by sufficient evidence."

As the error pointed out must work a reversal of the cause, and all the other errors assigned are practically decided in the former appeal in this case, we deem it unnecessary to consider any other errors assigned in this appeal.

This cause is reversed and remanded.

PER CURIAM. Adopted in whole.

(68 Okl. 35)

CORRIGAN v. OKLAHOMA COAL CO.
(No. 8396.)

(Supreme Court of Oklahoma. Jan. 29, 1918.
Rehearing Denied March 5, 1918.)

(Syllabus by the Court.)

1. NEGLIGENCE \S 59—"PROXIMATE CAUSE."

Strictly defined, an act is the "proximate cause" of an event, when in the natural order of things and under the particular circumstances surrounding it such an act would necessarily produce that event; but the practical construction of "proximate cause" by the courts is a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

2. MASTER AND SERVANT \S 129(4)—PERSONAL INJURY—"PROXIMATE CAUSE."

Where an unexploded charge of dynamite is negligently left in a hole in the wall of an entry in a coal mine, which was plaintiff's working place, and where the mine owner's foreman failed to direct the plaintiff not to work therein, but permitted him so to do, and the plaintiff, the mine owner's employé, was injured by the explosion of said charge of dynamite while the plaintiff was engaged in drilling a hole in said entry in pursuance of his duties, *held*, that the negligence of the mine owner in leaving the unexploded charge of dynamite in the hole, and in directing and permitting the plaintiff to work therein under such circumstances, was the proximate cause of the injury.

(Additional Syllabus by Editorial Staff.)

3. MASTER AND SERVANT \S 85—INJURY TO SERVANT — "ACTIONABLE NEGLIGENCE" — CAUSE OF ACTION.

In a servant's action for personal injury the three essential elements constituting actionable negligence on the part of the master, when the wrong charged is not willful or intentionally done, are the existence of a duty to protect the servant; the breach of that duty and injury to the servant proximately resulting therefrom.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actionable Negligence.]

Error from District Court, Okmulgee County; Ernest B. Hughes, Judge.

Action by James Corrigan against the Oklahoma Coal Company. Demurrer to petition sustained, and action dismissed, and

plaintiff brings error. Reversed and remanded, with directions to reinstate case and to overrule the demurrer.

W. N. Redwine, of McAlester, and M. N. Alexander, of Okmulgee, for plaintiff in error. William M. Matthews, of Okmulgee, for defendant in error.

RAINEY, J. The parties to this action will be designated as they appeared in the trial court. One James Corrigan, as plaintiff, instituted suit against the Oklahoma Coal Company, a corporation, as defendant, for damages for personal injuries alleged to have been sustained by the plaintiff on account of the negligence of the defendant company. The defendant company filed a demurrer to the plaintiff's petition, on the ground that the petition did not allege facts sufficient to constitute a cause of action. The demurrer was sustained, and the action dismissed by the trial court, and the plaintiff brings the case here for review.

The material averments of plaintiff's petition, necessary to a determination of the questions presented, are as follows:

"(1) Comes the plaintiff, and avers that he lives and resides within the jurisdiction of the aforesaid court, and that said defendant, the Oklahoma Coal Company, a corporation, is the owner of and operates coal mines in the aforesaid county and state, and is within the jurisdiction of this court.

"(2) Plaintiff avers that on and prior to January 19, 1914, plaintiff was working for said defendant, the Oklahoma Coal Company, in its mine No. 6, located near Dewer, in the aforesaid county and state, said plaintiff was working in the capacity of what is known as brushing down the entry, and while working in said mine, and in what was known as the Fourth North Back Dip entry, and without any fault of plaintiff, said plaintiff was carelessly and negligently injured through the fault of said defendant, as hereinafter set forth.

"(3) Plaintiff avers that it was his duty, while in the performance of his work, to take the rock down from the roof of the entry wherein plaintiff was at work, and clean the same up after said rock had fallen; also cut said rock and coal from the sides of said entries in order to widen the same, and also to bore holes for the shot firer to fire his shots that the rock and coal might be loosened and taken down, which shots were to be fired by said shot firer after plaintiff had come out of said mine. On the previous day that said plaintiff had worked in said mine subsequent to his injuries, he drilled a hole in the wall of said entry and placed a stick of dynamite in the hole so drilled preparatory for the shot firer, when said shot firer went into said mine, to fire the same, and when plaintiff went in said entry to his work on Monday morning he discovered that the shot had not been exploded, but was still in the hole, and the plaintiff, in the performance of his duty, commenced to drill another hole a short distance from the first hole where the shot so remained unexploded, and while so drilling said hole, and without any fault of the plaintiff, the shot, by some cause unknown to this plaintiff, exploded and injured the plaintiff, as follows, to wit: Bursted the drum of the left ear of plaintiff, which rendered him absolutely deaf in said ear for life, fractured the ribs of plaintiff, and tore the muscles therefrom, injuring the plaintiff in the left eye and his nose, which injuries are permanent.

"(4) Plaintiff avers that the hole drilled in the wall of the entry which exploded and injured this plaintiff was drilled on Saturday before plaintiff was injured on Monday following, and that same was attempted to be shot by the shot firer on Saturday, but the firing of same was unsuccessful, and at the time said plaintiff commenced to drill the second hole in the wall of said entry as aforesaid, he did not understand or appreciate the danger or hazards connected with the work of drilling a hole so near the hole, which was charged with dynamite, and which exploded.

"(5) Plaintiff avers that he had never been instructed by said defendant to not work about or near a hole charged with dynamite, and knew nothing about the danger connected therewith.

"(6) Plaintiff avers that it was the duty of said defendant to have a competent person employed as inside overseer of said coal company, to visit and examine, each and every day, all working places wherein employes were working in said mine, and to ascertain whether or not any danger exists in and about the working places of any employe, and, if so, to remove the same therefrom, and also to not permit any person to work in or about the place of danger, unless it is for the purpose of making said dangerous place safe.

"(7) Plaintiff avers that said defendant did not inspect or examine the place wherein plaintiff was injured by the explosion of the shot, as aforesaid, to ascertain whether or not the same was in a dangerous or unsafe condition.

"(8) Plaintiff avers that he was permitted to work in and about the shot which had not exploded, as aforesaid, by said defendant, and was not directed to not work in and about said dangerous place.

"(9) Plaintiff avers that said defendant was careless and negligent in failing and refusing to inspect the working place of said plaintiff each and every day to ascertain whether or not the same was in a dangerous condition, and carelessly and negligently failed and refused to inspect the shot, or the dynamite in the hole which exploded and injured plaintiff, after the same had been placed therein, and had failed to explode, and carelessly and negligently directed the plaintiff and permitted him to go in and near the unexploded dynamite as aforesaid, and directed and permitted him to work in and about said dangerous place in the performance of his duty, in brushing down the entry, and which was not for the purpose of making said dangerous place safe.

"(10) Said defendant was careless and negligent in failing and refusing to instruct this plaintiff of the hazards and dangers of working in and about a hole which had been charged with dynamite, and which had not been exploded. All of which was defendant's duty to do so.

"(11) Plaintiff further avers that he was making, at the time of his injuries, about \$5 per day, that he was confined to his bed about 30 days, and was unable to work; that since his injuries he has been unable to earn the money that he made before his injuries, and he has suffered and now suffers great pain and agony from said injuries, and by reason of the carelessness and negligence of said defendant and the concurrent careless and negligent acts of said defendant he has been damaged in the sum of \$10,000."

[3] It has frequently been held by this court that in an action for personal injuries the three essential elements constituting actionable negligence on the part of the master, when the wrong charged is not willful or intentionally done, are the existence of a duty on the part of the master to protect the

servant, the breach of that duty by the master, and injury to the servant proximately resulting therefrom. When any of these three essential elements are wanting in a petition, the petition does not state a cause of action, but when the petition alleges a state of facts comprising all these elements, it is sufficient to withstand a general demurrer. *Chicago, R. I. & P. Ry. Co. v. Brazzell*, 40 Okl. 460, 138 Pac. 794; *St. Louis & S. F. Ry. Co. v. Snowden*, 48 Okl. 115, 149 Pac. 1033; *Midland Valley Ry. Co. v. Williams*, 42 Okl. 444, 141 Pac. 1103.

[1] An inspection of the petition under consideration discloses that plaintiff has alleged the duty of the master to furnish him a safe place within which to work; that through the negligence of the master, as particularly set out in the petition, said working place became unsafe, and through the further negligence of the master, as is also particularly set out in said petition, and in violation of the duties owed him by the master, that plaintiff was directed and permitted to work therein, and that as a result of said negligence the plaintiff was injured. The rule is that negligence to render a defendant liable must be the proximate cause of the injury, and that connection between the act or omission and the resulting injury must be shown, and a complaint is insufficient if it fails to show such connection, or where the contrary appears from the other allegations. But no particular form of allegation is necessary, and where the negligent act causing the injury is set out with an allegation that by reason of, by, through, or in consequence of such negligence the plaintiff was injured, it is equivalent to an allegation that the defendant's negligence caused the injury, or that the injury was wholly caused thereby. 29 Cyc. 573. While there is no direct allegation in the petition under consideration that the plaintiff's injuries were caused solely by the defendant's negligence, we think the petition, alleging, as it does, the particular acts of negligence complained of in connection with the allegation that, "without any fault of plaintiff, said plaintiff was carelessly and negligently injured through the fault of said defendant, as hereinafter set forth," was sufficient as against a general demurrer. It follows that the petition states a cause of action, unless counsel for defendant is correct in his contention that, although plaintiff's petition sufficiently charges primary negligence on the part of the defendant, it further appears therefrom that such negligence was not the proximate cause of plaintiff's injuries, but that the negligent act of plaintiff in drilling a hole in close proximity to the stick of dynamite was the proximate and sole cause of his injuries. Notwithstanding the fact that plaintiff has alleged in effect that his injuries were proximately caused by the negligence of the master, as set out in his petition, if it appears from the facts, as al-

leged in said petition, that the negligence of the master, therein pleaded, had no causal connection with the plaintiff's injuries, or that said injuries were proximately caused by some other agency, in this case the act of the plaintiff in drilling the hole, the petition would be demurrable. From the facts alleged, which are conceded to be true for the purposes of the demurrer, was the alleged negligence of the master the proximate cause of the plaintiff's injuries? In the case of *City National Bank of Mangum v. Crow et al.*, 27 Okl. 107, 111 Pac. 210, Ann. Cas. 1912B, 647, it was held:

"It is true that, as a general rule, if one is guilty of a negligent act which would not have produced the loss or injury but for the subsequent intervening negligence of another, he will not be responsible for the resulting damages. 1 Thompson's Commentaries on the Law of Negligence, § 55. This doctrine, however, is subject to the proviso, among others, that the circumstances were such that the injurious result which did happen might have been foreseen as likely to result from the first wrongful act or omission. 1 Thompson's Commentaries on the Law of Negligence, § 57. The test of whether the act complained of was the remote or proximate cause of the injury is to be found in the probably injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise. 1 Thompson's Commentaries on the Law of Negligence, § 58."

In the case of *Missouri, O. & G. Ry. Co. v. Miller*, 45 Okl. 173, 145 Pac. 367, the contention was made that an act of the plaintiff, and not the primary negligence of the master, was the proximate cause of the injury, and the views of the court therein expressed are applicable to the question under consideration. In disposing of the contention made this court, in an opinion by Mr. Justice Riddle, said:

"Approaching the fourth reason, it is contended that the act of the defendant in piling the coal and permitting it to remain near the track was not the proximate cause of the injury, but that it was the act of plaintiff in rushing out and attempting to board a moving train. This contention is untenable. It is true, had plaintiff remained in the storeroom and not attempted to board the train, he would not have been injured at this time and by this particular train. It is also reasonably certain that, had the coal not been piled near this track, plaintiff could and would have boarded the train safely; but, according to plaintiff's theory, under his employment and under instructions of his superior, he was required to board this train. If his testimony is true, after he first noticed the train, it would have been most impossible for him to have run around the train and flagged it from the opposite side, for the end of the rear coach had already passed his door when he ran out. The question is: When an experienced railroad man, who has been accustomed to boarding moving trains, was presented with a condition of this kind, what action is he authorized to take? What would have been reasonable to expect of a man of his experience in performing the duty which he was called upon to perform? If he performed this duty as a reasonable man, engaged in such work with his experience under the same conditions and circumstances would have performed it, and in obedience to orders of a superior, who was authorized to give such orders, then it cannot be said that his acts were the approximate cause of the injury. Strictly

defined, an act is the 'proximate cause' of an event when in the natural order of things and under the particular circumstances surrounding it such an act would necessarily produce that event; but the practical construction of 'proximate cause' by the courts is a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue. *Enochs v. Pittsburg, C. & St. L. Ry. Co.*, 145 Ind. 635, 44 N. E. 658. Or, as stated by some of the courts, where the question is whether a cause proximated to the accident, the test is whether it was such that a person of ordinary intelligence and prudence should have foreseen that the accident was liable to be produced by that cause. *Wilber v. Follansbee*, 97 Wis. 577, 72 N. W. 741, 73 N. W. 559; *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849; *Davis v. Chicago, M. & St. P. Ry. Co.*, 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935. Where different forces and conditions concur in producing a result, it is often difficult to determine which is proper to be considered the cause. The law will not go further back than to find the active, efficient, and procuring cause of which the event under consideration is a natural consequence. *Freeman v. Mer. Mut. Acc. Ass'n*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753. See, also, *City Council of Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422; *Shear. & R. Neg.* § 10; *Williams v. So. Pac. Ry. Co.* [2 Cal. Unrep. Cas. 613] 9 Pac. 152; *Texas & P. Ry. Co. v. Woods*, 8 Tex. Civ. App. 462, 28 S. W. 416; *American Exp. Co. v. Risley*, 179 Ill. 295, 53 N. E. 558; *Missouri, K. & T. Ry. Co. v. Byrne*, 100 Fed. 359, 40 C. C. A. 402. Applying this definition to the facts in the instant case, and accepting plaintiff's theory of the case as true, defendant might expect him under the circumstances to board the train at the time and in the manner in which he undertook to board it; and, with this in mind, it seems to us the approximate cause of the injury was the act of defendant in piling the coal so near the track that it would be probable that plaintiff, in attempting to board this train, would likely come in contact with such coal, resulting in the accident or injury complained of."

See, also, *Chicago, R. I. & P. Ry. Co. v. Brazzell*, 40 Okl. 460, 138 Pac. 794; *Midland Valley Ry. Co. v. Williams*, 42 Okl. 444, 141 Pac. 1103; *Producers' Oil Co. v. Eaton*, 44 Okl. 55, 143 Pac. 9.

In the case of *Bales v. McConnell et al.*, 27 Okl. 407, 112 Pac. 978, 40 L. R. A. (N. S.) 940, the alleged negligence of the master consisted in leaving cogs unguarded in a horse-power corn sheller. The petition in that case also alleged that the plaintiff slipped from a wagon which was near said machine, and upon alighting on the ground threw out his hand to protect himself, and in throwing out his hand it caught in the cogs. The trial court sustained a demurrer to this petition. In support of the action of the trial court the defendant contended that plaintiff's slipping and falling from the wagon was the proximate cause of the injury, and that the exposed cogwheels only gave rise to the condition which made the accident possible, and argued that if the plaintiff had not slipped and fallen from the wagon, the accident would not have occurred. This court, in an opinion by Mr. Justice Turner, held that the trial court erred in sus-

taining the demurrer to the petition, and said:

"That which caused plaintiff to slip from the wagon was the cause of his fall, but the negligently unguarded cogs were the proximate cause of his injury."

The opinion in the case contains an instructive discussion of proximate cause.

[2] In applying the principles deducible from the above authorities to the facts as alleged by the plaintiff in this case, we must say that the alleged negligence of the master in permitting the working place of the plaintiff to become unsafe by one of the master's employes leaving an unexploded charge of dynamite in the wall of the entry of plaintiff's working place, and the further negligence of the mine owner's foreman in failing to inspect said working place, as required by the Mining Act, § 3988, Rev. Laws Oklahoma 1910, and the negligence of the mine owner's foreman in directing and permitting the plaintiff to work near the unexploded charge of dynamite was the proximate cause of plaintiff's injuries. Under such circumstances it seems to us that the injurious result which did happen might have been foreseen as likely to result from plaintiff performing his usual duties in his working place, and the consequences were such as should have been anticipated by the master.

Upon a trial of the issues in this case a jury might be justified in finding that the act of the plaintiff in drilling the hole near the unexploded charge of dynamite was contributory negligence, but that question cannot be determined upon the general demurrer to the petition. In *Duncan Cotton Oil Co. v. Cox*, 41 Okl. 633, 139 Pac. 270, it was held that where the petition charged certain specific acts of negligence on the part of the defendant as the proximate cause of the accident resulting in the death of the deceased, it was not error to overrule a general demurrer to the petition, even though said petition contained statements from which the negligence of the deceased might be inferred.

For the reasons stated, this cause is reversed and remanded, with directions to the trial court to reinstate the case and overrule the defendant's demurrer to the plaintiff's petition. All the Justices concur, except KANE, J., and SHARP, C. J., who concur in the conclusion.

(67 Okl. 263)

COWOKOCHEE v. CHAPMAN et al. (two cases).

WILDCAT et al. v. SAME.

Nos. 5979, 6847, 7220.

(Supreme Court of Oklahoma. Feb. 12, 1918.)

(Syllabus by the Court.)

1. INDIANS — 18 — RECEIVERS — 12 — LANDS — INHERITANCE — DISCRETION OF COURT.

In a suit in ejectment and to clear the title to certain lands C. answered, and, by way of

cross-petition, set up title thereto in himself, assailed for fraud in its procurement his certain deed purporting to convey the same to one of his codefendants, and prayed that said deed be canceled and his title quieted. On his application for the appointment of a receiver pendente lite, it appeared that A., a citizen of the Creek Nation and duly enrolled as such, died intestate and unmarried, after receiving his allotment, without mother, who was a Creek, or issue him surviving, leaving him surviving O., his father, a full-blood Creek, but enrolled as a Seminole, and W., a half-brother, enrolled as a Seminole, and J., a brother of the full blood, a citizen of the Creek Nation and duly enrolled as such. Section 6 of the Supplemental Agreement (Act Cong. June 30, 1902, c. 1323, 32 Stat. 500) and chapter 49 of Mansfield's Digest of the Laws of Arkansas construed together, and held that, as the land was ancestral and came to A. by the blood of both tribal parents, C., the father, as a Creek descendant of A., inherited one-half thereof, and J. the other by right of representation of his mother. And where it further appeared that C., after descent cast by A., made, executed, and delivered a deed purporting to quitclaim his interest in the allotment of A. to the defendant grantee named therein, which, before delivery, was duly approved by the judge of the county court in which the administration of the estate of A. was pending, held, further, that the judge in chambers before whom the application was made did not abuse his discretion in overruling the same and refusing to appoint a receiver.

2. APPEAL AND ERROR ⇨955—ORDER REFUSING TO APPOINT RECEIVER—REVIEW.

Where, after a consideration of the claim made by a party on his application for the appointment of a receiver, the appointment is refused, and on appeal by him to this court his interest in the property appears improbable and no abuse of discretion is shown, the order refusing to appoint a receiver will not be disturbed.

3. APPEAL AND ERROR ⇨871—VACATION OR MODIFICATION—STATUTE.

Where, pending a suit in ejectment and to clear the title to certain lands—the allotment of A., deceased—C. answered and filed his cross-petition against the plaintiffs and his codefendants, and set up an interest in the land, and prayed that his title thereto be quieted; and where, pending the suit, another defendant, claiming adversely to him, went into the county court of the county granting the final order of distribution of A.'s estate and invoked the jurisdiction of that court to enter an order nunc pro tunc amending the final order of distribution so as to show that his grantor, who was J., a brother of deceased, inherited the entire allotment to the exclusion of C., the father, which the court refused to do, whereupon the district court on appeal reversed the county court, whereupon C. brought the case here, where the same was numbered 6055, and consolidated by agreement of counsel with this, the ejectment suit brought here on appeal—held, that as cause number 6055 was an independent proceeding in another court, no part of which found its way in the ejectment suit, that no order made therein is such an intermediate order involving the merits of the ejectment suit as this court is authorized, in considering said suit on appeal, to reverse, vacate, or modify under the provisions of Rev. Laws 1910, § 5236.

4. APPEAL AND ERROR ⇨966(1)—DISMISSAL AND NONSUIT ⇨42, 43(1)—DISMISSAL OF CROSS-PETITION—DISCRETION OF COURT—HEARING.

Pending a suit in ejectment and to clear the title to certain lands, C. answered and filed a cross-petition setting up his interest therein, and thereafter filed a written dismissal of his

cross-petition, but paid no part of the costs. Rev. Laws 1910, § 5126, construed, and held, that such did not operate as a dismissal thereof as to him, and that the court did not err in overruling his motion to reinstate the same. And where, the cause coming on to be heard on the issues joined between plaintiffs and defendants, he moved to continue the cause, which was overruled, and judgment rendered and entered that C. "is no longer a party to this proceeding and has no right, title, or interest in the land" in controversy, and thereafter proceeded to trial and to final judgment upon the issues joined between the other parties to the suit, held that, as the motion was addressed to the discretion of the court, his action thereupon will not be disturbed in the absence of an abuse of discretion, which is not claimed. Held, further, that the court erred in rendering final judgment against C. without giving him his day in court as a defendant and upon the issues joined upon the allegations of his answer and cross-petition.

5. INDIANS ⇨27(7)—ALLOTTED LAND—EVIDENCE—INSTRUCTIONS.

A suit was brought by J.'s widow and heirs in ejectment and to clear their title to certain lands allotted to A., deceased. The evidence disclosed that A. died seised thereof in fee in 1903, leaving him surviving no mother, who was a Creek, nor issue, but C., his father, a full-blood Creek enrolled as a Seminole, and W., a half-brother enrolled as a Seminole, and J., a brother of the full blood enrolled as a Creek, and that J. inherited an undivided half interest in the allotment and died. The case turned upon the question of whether J. had parted with the title thereto to defendants Chapman and McFarlin before he died; concerning which the evidence further disclosed that J., prior to the removal of his restrictions, sold, and by warranty deed dated March 31, 1906, undertook, as the sole heir of A., to convey said land for \$800 cash in hand to the grantee named therein, which said deed was void, and, after his restrictions were removed at the instance of said grantee, on April 28, 1906, without further consideration, made, executed, and delivered a similar deed conveying the same land to G., who thereafter deeded it to the grantee named in the first deed and another, parties defendant Chapman and McFarlin. Held insufficient to justify an instruction that the first deed was void, and that if the jury found for the making of the second deed a contract or agreement was entered into before the removal of restrictions the latter deed was also void, and hence the court did not err in refusing so to charge.

6. INDIANS ⇨13—ALLOTTED LAND—QUANTUM OF INDIAN BLOOD—CONCLUSIVENESS OF ROLL.

Under Act April 26, 1906, c. 1876 (34 Stat. 137), providing that for all purposes the quantum of Indian blood possessed by any member of the Five Civilized Tribes shall be determined by the rolls of citizens thereof approved by the Secretary of the Interior (Act June 21, 1906, c. 3504 [34 Stat. 325]), requiring the Secretary of the Interior, on completion of the approved rolls, to prepare and print the same in a permanent record book, and Act May 27, 1908, c. 199, § 3 (35 Stat. 312), declaring that the rolls of citizenship of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen, the Creek Roll of Indians by Blood, as prepared by law, is conclusive, and not subject to collateral attack.

Error from District Court, Creek County; Tom D. McKeown, Trial Judge.

Suit in ejectment and to clear title by Chotkey Wildcat, a minor, by his guardian,

and others, against Cowokochee, James A. Chapman, and R. W. McFarlin, with answer and cross-petition by Cowokochee and by his codefendants to quiet title, and amended answer and cross-petition by Cowokochee to amend an order of distribution, and application by him for the appointment of a receiver pendente lite. From the judgment plaintiffs and Cowokochee bring error. Affirmed as between plaintiffs and defendants Chapman and McFarlin, and reversed as to Cowokochee.

Lewis C. Lawson, of Holdenville, for plaintiff in error Cowokochee. John W. Willmott, of Wewoka, J. G. Harley, of Muskogee, and Hainer, Burns & Toney, of Oklahoma City, for plaintiffs in error Chotkey Wildcat and others. Harry H. Rogers, of Tulsa, and N. A. Gibson, of Muskogee, for defendants in error.

TURNER, J. On June 4, 1913, in the district court of Creek county, Chotkey Wildcat, a minor, by his guardian, and Joshua, Simmer, and Luvinia Cunny, minors, by their guardian, and Lousanna Marparyecher and Geo. M. Swift, plaintiffs in error, sued Cowokochee, James A. Chapman, R. M. McFarlin, defendants in error, and McMann Oil Company, a corporation, in ejectment for the S. E. $\frac{1}{4}$ of section 27, township 18 north, range 7 east, containing 160 acres, and to clear their title thereto.

The petition, as amended, substantially states: That the land in question was the allotment of Albert Wildcat, a citizen of the Creek Nation, who died intestate, seised thereof in fee, in 1905, leaving him surviving as his only heir at law his brother, John Wildcat, a citizen of the Creek Nation; that John died intestate, seised thereof in fee, in 1910, leaving him surviving as his only heirs at law said Lousanna, his widow, and their four minor children, Chotkey Wildcat, Joshua, Simmer, and Luvinia Cunny, who thereby became the owners thereof; that she and said minors, acting through their respective guardians, had theretofore made, executed, and delivered to plaintiff Swift certain oil and gas leases on said land, copies of which were thereto attached, marked Exhibits C, D, and E, and that the object of the suit was to put the lessee in possession of the land; that they were entitled to its immediate possession; and that defendants wrongfully detained the same. For a second cause of action they further state that defendants claim some interest in the land adverse to plaintiffs under certain void conveyances, to wit: A warranty deed dated March 31, 1906, from John Wildcat, as the sole heir of Albert Wildcat, purporting to convey the land to the defendant Chapman; a warranty deed dated April 28, 1906, from John Wildcat, as the sole heir of Albert Wildcat, purporting to convey the land to H. B. Gooch; a warranty deed

dated January 28, 1907, from John Wildcat and wife purporting to convey the land to J. Coody Johnson; a quitclaim deed dated October 12, 1907, from Hampton B. Gooch and wife, purporting to convey the land to defendants James A. Chapman and R. M. McFarlin; a warranty deed dated January 11, 1908, from one Albert Wildcat, purporting to convey the land to Cecil Taylor; a warranty deed dated January 13, 1908, from said Taylor, purporting to convey the land to J. Garfield Buell; a quitclaim deed dated December 21, 1908, from J. Coody Johnson, purporting to convey the land to the defendant Chapman; a quitclaim deed dated October 22, 1909, from J. Garfield Buell, purporting to convey the land to defendant Chapman; a quitclaim deed dated March 18, 1911, from Watty Wildcat, purporting to convey the land to said Chapman; a quitclaim deed dated April 27, 1912, from Watty Wildcat, purporting to convey the land to defendant Chapman; a quitclaim deed dated January 20, 1913, from defendant Cowokochee, whom they alleged to be a full-blood Seminole, and hence took no interest in the land, purporting to convey the land to said Chapman—all of which were duly recorded, and asked to be set aside for certain reasons stated.

For answer and cross-petition, after a general denial, Cowokochee alleged that he was the father of Albert Wildcat, a citizen of the Creek Nation and duly enrolled as such; that John was his brother of the full blood, and was also a citizen of the Creek Nation duly enrolled as such, and Watty Wildcat, his brother of the half blood, was a Seminole and duly enrolled as such; that all the deeds sought to be set aside were void for the reasons stated in the petition and for other reasons set forth by him; that after the death of Albert, John Wildcat died in 1910, leaving him surviving said Lousanna, his widow, and Chotkey Wildcat and Joshua, Simmer, and Luvinia Cunny, his children, and that they executed the leases as stated, but says that he is not a full-blood Seminole, although enrolled as such, but is a full-blood Creek, and that his father and mother were also full-blood Creeks and duly enrolled as such, and that, on the death of Albert, he, under chapter 49 of the Statutes of Arkansas, inherited in said land, if the same were a new acquisition, a life estate, and, if ancestral, at least one-half thereof in fee with his son John; that all the deeds set forth in plaintiffs' petition constitute a cloud upon his title to the land, and are void for certain reasons which he states, and that the quitclaim deed from him dated January 20, 1913, purporting to convey his interest in the land to the defendant Chapman, is also void for fraud in its procurement; and prayed, in effect, that his rights in the land be adjudged and decreed and his title thereto quieted.

The McMann Oil company disclaimed, and passed out of the case.

For answer the defendants Chapman and McFarlin, after general denial, admitted that Albert Wildcat died a Creek citizen as stated, seised and possessed of the land in controversy, leaving him surviving as his only heir at law John Wildcat, also a Creek citizen, but allege that Albert died in 1903. They further deny the execution of the lease to plaintiff Swift, and that neither he nor plaintiffs have any interest in or are entitled to possession of the land. They admit the existence of all the deeds sought to be set aside, but deny that the deed from Cowokochee to them, dated January 20, 1913, is void, but allege the same to be good and to convey to them all his right, title, and interest, if any, in the land; and while they disclaim any interest under the deed of March 31, 1906, from John Wildcat to the defendant Chapman, they rely to support their title upon the deed of Cowokochee to them, dated January 20, 1913, and the deed dated April 28, 1906, from John Wildcat to Gooch, and the deed dated October 12, 1907, from Gooch to them, and the deed dated January 20, 1907, from John Wildcat to J. Coody Johnson, and a quitclaim deed dated December 21, 1908, from J. Coody Johnson to the defendant Chapman. By way of cross-petition they further state that Albert Wildcat died intestate and without issue, leaving him surviving as his only heir at law John Wildcat, a brother of the full blood duly enrolled as a Creek citizen of the half blood. They then set up the deed of Cowokochee to Chapman aforesaid, which, they allege, was duly approved by the county court of Seminole county, and passed to them his title, if any, and that the Swift leases were taken while they were in adverse possession of the land, and for that reason are void, and pray that their title to the land be quieted.

After issue joined by answer to the cross-petitions and reply came Cowokochee, and for amended answer, in effect, set up, as evidence of his right to inherit a share in the land, that the county court of Seminole county, in a final order of distribution of the estate of Albert Wildcat, a certified copy of which he files as an exhibit, on October 7, 1912, adjudged and decreed him to be entitled to share equally therein with John Wildcat as the sole heirs at law of Albert; and again assailed for fraud in its procurement his deed of January 2, 1913, purporting to quitclaim the land to Chapman, and prayed relief as in his original answer and for general relief. To this plaintiffs filed a general denial, and assailed said proceedings of the county court of Seminole county as void for certain reasons, and again alleged that Cowokochee took no interest in the land. To this amended answer Chapman and McFarlin, after general denial, specifically denied that Cowokochee took any interest in the land, but allege, if he did, he parted with his title therein to Chapman by said deed of January 20, 1913. They spe-

cifically deny that the county court of Seminole county adjudged and decreed as charged, and allege that on October 7, 1912, said court adjudged and decreed defendant Cowokochee to be a Seminole of the full blood duly enrolled as such, and that he inherited no interest in the land, and filed as an exhibit a certified copy of a nunc pro tunc order of that court, dated October 7, 1913, correcting its order of October 7, 1912, so as to show that Cowokochee took no part of the allotment of Albert Wildcat. Then came Cowokochee, and by leave of court filed both a second amended answer and cross-petition, and for supplemental matter set up that since his last pleading, to wit, on October 7, 1913, the county court of Seminole county, at the instance of defendant, had set aside and modified its final order of distribution of the estate of Albert Wildcat, dated October 7, 1912, wherein the court found that he, as the father, and John Wildcat as the brother, were entitled to share equally in the estate of Albert Wildcat, and had entered an order nunc pro tunc, in effect, that John Wildcat was the sole heir of Albert. He alleged that the same was void for certain reasons, and asked that the same be canceled and set aside. Of the over 200 pages of so-called pleadings, it is only necessary to add that, after plaintiffs had come in and stood upon the nunc pro tunc order of the county court of Seminole county dated October 7, 1913, which, in effect, decreed Cowokochee to have no interest in the land, Cowokochee applied to the judge in chambers to appoint a receiver pendente lite.

After response to the application, there was a hearing before the judge; whereupon A. D. Norvell, judge of the county court of Seminole county, in support of the application, testified that he became such January 6, 1913; that on January 20, 1913, Cowokochee and his attorney, accompanied by an interpreter, appeared in his court to secure the approval of his quitclaim deed to Chapman of the land in controversy; that the attorney made known to the court that Cowokochee had employed him on a contingent fee of one-half to sue for and recover his interest in the land; that he did not think Cowokochee had much interest in it; that his chances to recover were not good; that the land was not worth much; that Chapman wanted the land, and that the \$300 named as the consideration in the deed was what he was willing to pay in compromise of Cowokochee's claim thereto; that he thought it would be to the best interest of Cowokochee to accept it, and that the deed be approved; that Cowokochee understood and agreed to it, and had received one-half of the \$300. The judge further testified that Cowokochee could not speak English, but the whole thing was explained to him through the interpreter; after which the deed was approved in open court, and possession thereof turned over to Mr. Turner,

the attorney. And that thereupon the court rendered and entered an order of confirmation, the pertinent part of which reads:

"That the petitioner herein has settled and compromised his contention with the said James A. Chapman, grantee of said John Wildcat, and in consideration of the sum of \$300 cash has agreed to execute a quitclaim deed to whatever possible interest he might have in and to said land, and said deed is here presented to the court for approval; that said settlement and compromise appears to be a fair and reasonable one, considering the facts as set forth in said petition and as found herein, and it appears to the best interests of said petitioner that his said deed be approved. Wherefore it is by the court considered, adjudged, and decreed that the said quitclaim deed executed by the said Cowokochee to the said James A. Chapman to all his interest in the southwest quarter of Sec. 27, Tp. 18 north, range 7 east, dated the 20th day of January, 1913, be, and the same is hereby, in all things ratified, confirmed, and approved.

"A. S. Norvell, County Judge."

Cowokochee testified that he was 60 years old; that he lived at Sasakwa; that his parents were Creeks; that he was an adopted Seminole, duly enrolled as such; that Albert and John Wildcat were his sons by a former wife, who was a Creek, and Watty Wildcat was his son by his second wife; that both wives and Albert and John were dead; that Albert died first, leaving him surviving Cowokochee and John, and that thereafter, in 1910, John died, leaving him surviving Cowokochee and plaintiffs, his widow and children; that Albert died in 1905, leaving as his allotment the land in controversy; that on January 20, 1913, he accompanied Turner and an interpreter to the court of Judge Norvell, in Wewoka, where the deed was approved, but no one told him anything about what the deed contained; that the judge asked him if he was satisfied with the deed, but later said he could not understand anything the judge said; that no one told him what the paper amounted to; that he thought it was a contract; that Turner told him it was; that it was a contract to bring suit for his interest in the Albert Wildcat land, Turner agreeing to furnish the costs; that he did not know Chapman; that he never sold him the land; that no one ever said anything to him about buying the land for Chapman; that he did not know that the instrument approved was a deed; that the next morning \$150 was paid him by Turner, his attorney; that Turner kept the other \$150; that he never said anything about what it was for; that he did not ask the interpreter to interpret for him upon that occasion and paid him nothing therefor; that he knew nothing of what became of the deed; that not long after he learned it was a deed to Chapman; that no one explained to him what it was at the time it was approved; that, had he known it to have been a deed, he would not have signed it or had it approved; that he never required its approval; that he did not know what transpired before Judge Norvell; that he took the \$150 from Turner because the interpreter told

him to; that he asked the interpreter not a word at the time; that he did not know what the money was for.

For Cowokochee there was also introduced in evidence a certified copy of an order of the probate court of Seminole county setting aside the nunc pro tunc order of October 7, 1913, and a certified copy of another order of that court refusing thereafter to enter an order nunc pro tunc to amend the court's order of October 7, 1912, so as to show the judgment of the court to be that Cowokochee took no part of the allotment of Albert Wildcat; but nowhere in the evidence does there appear the order of October 7, 1912, relied on by Cowokochee as showing him to be entitled to one-half thereof, and which, he claims, he is at least entitled to recover in this suit. It is admitted that there were three producing wells on the allotment.

It is unnecessary to recite the remainder of the evidence adduced upon the hearing of and in opposition to this application. Of it it is sufficient to say the same was offered by plaintiffs, and was leveled at the validity of the warranty deed of John Wildcat, as the sole heir of Albert, dated April 28, 1906, purporting to convey the land to H. B. Gooch, and the quitclaim deed of Gooch and wife, dated October 12, 1907, to Chapman and McFarlin; also, at the invalidity of the warranty deed dated January 28, 1907, from John Wildcat and wife to J. Coody Johnson, and the quitclaim deed dated December 21, 1908, from him to Chapman. This, it seems, was for the purpose of showing that those deeds were void, and that John Wildcat had not parted with his interest in the land during his lifetime, and hence the same was inherited by plaintiffs on descent cast by him. It did not tend to prove that Cowokochee had a probable right or interest in the land.

[1] Upon this showing the judge overruled the application, and refused to appoint a receiver, and so adjudged and decreed; to reverse which Cowokochee brings the case here, where it is numbered 5979. If we catch the contention of counsel for Cowokochee, it is that as Albert Wildcat, an enrolled Creek citizen of the half blood, died sole and intestate in 1905 seised of the allotment in question, without mother or issue him surviving, leaving him surviving Cowokochee, his father, a full-blood Creek, but enrolled as a Seminole, and John Wildcat, a brother, an enrolled Creek citizen of the half blood, and Watty Wildcat, a half-brother, a citizen of the Seminole Nation and enrolled as such, he, Cowokochee, as a Creek descendant of Albert, was entitled to inherit one-half of the allotment in his own right, and his son John the other in right of representation of his mother, who was a Creek, under the provisions of chapter 49 of Mansfield's Digest of the Statutes of Arkansas, directed to apply by section 6 of the Supplemental Creek Agree-

ment (Act Cong. approved June 30, 1902), which said section reads:

"The provisions of the act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: Provided, that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: And provided further, that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said chapter 49." 32 Stat. 500, c. 1323.

As said chapter 49 provides that on the death of a person intestate, unmarried and leaving no children, the estate, if it came from the father, shall go to the father, and if from the mother, it shall go to the mother, but if the estate be a new acquisition, it shall ascend to the father for his lifetime, and then descend in remainder to the collateral kindred of the intestate, it is clear, on descent cast by Albert Wildcat, intestate and unmarried, without mother or children or their descendants, that, as his allotment was not a new acquisition (*Pigeon v. Buck*, 38 Okl. 101, 131 Pac. 1083), but was an ancestral estate which came to him by the blood of both tribal parents, that Cowokochee, as a Creek descendant of Albert, was entitled to inherit one-half thereof in his own right, and John the other by right of representation of his mother, and the court should have so held. This point is ruled by *Pigeon v. Buck*, supra, and *Shulthis v. McDougal*, 170 Fed. 529, 95 C. C. A. 615; *Roberts v. Underwood*, 38 Okl. 376, 132 Pac. 673; and *Thorn v. Cone et al.*, 47 Okl. 781, 150 Pac. 701. In the former case, where descent was cast by a citizen of the Creek Nation in 1905, seised of an allotment, the question was whether the brothers and sisters or the father and mother were entitled to the allotment, all being citizens of the Creek Nation. The governing statute was as here, construing which, after holding that the allotment was not a new acquisition, the court held that, as the land came to the allottee by the blood of both tribal parents, the father and mother took the fee to the exclusion of the brothers and sisters. In the *Shulthis* case the facts were that Andrew J. Berryhill, son of George Franklin Berryhill, a citizen of the Creek Nation, and Clementine Berryhill, his wife, a noncitizen of the tribe, died seised of an allotment. Again the governing statute was as here; construing which the court, after holding that the land was not a new acquisition, but came to the allottee by the blood of his tribal parent, held that the father was entitled to inherit the land in fee as the sole heir of the allottee, he having died when only a few months old, leaving no brothers or sisters surviving him. In the *Underwood* case the land was allotted to a full-blood

Chickasaw Indian, who thereafter died intestate in 1907, leaving no descendants nor father nor mother. The contest over his allotment was between two paternal relatives and one maternal relative concerning their respective interests in the land. The governing statute was the same as here, and there we held the estate to be ancestral, and that one-half passed to the paternal relatives and the other to the maternal. Or, in other words, that the land would have passed to the parents of the allottee, if living, and, being dead, passed to their respective relatives in equal moieties by right of representation. This holding was followed in the *Thorn* case.

From which we learn that, as the land in question came to Albert by the blood of both tribal parents, the same, on descent cast by him, went to them both in equal shares, if living, or, if dead, to their next of kin under the statute, and that Cowokochee, the father, and John, the brother, inherited the land in equal shares. And the court should have so held; that is, if Cowokochee was qualified to inherit the land as a Creek descendant of Albert under the first proviso of section 6, supra, which provides "that only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit the land of the Creek Nation." And such he was for the reason that it is not only alleged, but the uncontroverted facts disclose him to be, although enrolled as a Seminole, of Creek parentage, and hence a Creek descendant of Albert, and hence qualified to inherit his allotment.

In *Lamb v. Baker*, 27 Okl. 739, 117 Pac. 189, the governing statute was as here, and the question was who took the allotment of Yama Buffalo, a citizen of the Creek Nation, who died intestate in January, 1903, after the land had been allotted to her. On the one hand it was contended it went to her cousin, a citizen of the Creek Nation. On the other hand, it was contended it went to her nieces, who were of Creek blood, because, it was urged, they were her Creek descendants. And such the court held them to be, and entitled to inherit the allotment under the first proviso, which limits the inheritance to citizens of the Creek Nation and their Creek descendants.

In *Hughes Land Co. et al. v. Bailey et al.*, 30 Okl. 194, 120 Pac. 290, the governing statute was also as here, and the question who took the allotment of Charley McNac, a Creek citizen who, in 1904, died intestate seised thereof, leaving him surviving two daughters, whose mother was a Seminole and they half-blood Creeks, but not enrolled as such, but as members of the Seminole Nation, and a half-brother, an enrolled citizen of the Creek Nation. It was urged the land went to the half-brother, because he was a citizen of the Creek Nation. But the court held not so, and following *Lamb v. Baker*, supra, that it went to the two daughters on the ground they were Creek descendants of their father within the

contemplation of the first proviso to section 6. In passing, the court said:

"So, having determined that the second proviso does not constitute a limitation upon the first, but was intended only to provide for a line of descent when no heirs of the classes named in the first proviso exist, and it being admitted that the defendants in error are the daughters of the deceased allottee, they are in law his descendants, and, by virtue of his citizenship in the Creek Nation, are Creek descendants, though enrolled as citizens of the Seminole Nation, the word 'Creek' having reference to the blood of the father and not the tribal enrollment of the descendants."

[2, 3] This being true, standing alone, the court should have appointed a receiver at the instance of Cowokochee, for the reason that his right to a joint ownership in the land appeared, so far, probable. In order to justify the appointment of a receiver, Rev. Laws 1910, § 4979, provides:

"A receiver may be appointed by the Supreme Court, the district or superior court, or any judge of either, or, in the absence of said judges from the county, by the county judge:

"First. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured. * * *

Governed by which, in *Willard Oil Co. v. Riley et al.*, 29 Okl. 19, 115 Pac. 1103, quoting approvingly from *High on Receivers*, § 7, we said:

"The appointment of a receiver pendente lite, like the granting of an interlocutory injunction, is to a considerable extent a matter resting in the discretion of the court to which the application is made, to be governed by a consideration of the entire circumstances of the case. And, since the appointment of a receiver is thus a discretionary measure, the action of the lower court in appointing or denying a receiver pendente lite will not be disturbed upon appeal unless there has been a clear abuse."

And in the syllabus:

"Where, from a consideration of the claims made by the parties on an application for appointment of a receiver pendente lite, the same is made, and on appeal plaintiffs' interest in the property or fund appearing probable, and no abuse of discretion is shown, and there being evidence and circumstances reasonably tending to sustain the order, the same will not be disturbed."

But let the interest of Cowokochee in the land on descent cast by Albert be as it may. Assuming that Cowokochee at that time was entitled to the most he claims, when it was shown, on the application to appoint a receiver, that he had, on January 20, 1913, executed a quitclaim deed thereto, without a scintilla of fraud or duress, and received therefor the \$300 consideration named in the deed, and on his own petition and with full knowledge of what he did (as found, in effect, by the trial court) had the deed approved by formal order of the county court, such showing was sufficient to lead the court to believe that he had probably parted with all

his interest in the land to Chapman, the grantee in the deed, and hence it cannot be said the judge abused his discretion in refusing to appoint a receiver.

To set aside this deed for fraud in its procurement, as alleged, it takes more than the statement of Cowokochee that he, in effect, understood nothing that took place during the entire transaction, or that, if he did, he thought the deed approved was a contract and mistook entirely the nature of its contents. This for the reason the evidence, on the other hand, discloses that the nature of the transaction was explained to him through an interpreter in open court in the presence of the judge, whose duty it was so to do and who will be presumed to have done his duty. When such is the state of the record, the validity of the deed assailed will be upheld on the ground that the evidence fails to preponderate against the deed assailed and repel all opposing presumptions in favor of the deed. This was, in effect, the holding of the trial court, and the court was right. *Adams et al. v. Porter et al.*, 158 Pac. 899. We are therefore of opinion that the judge did right in refusing to appoint a receiver at the instance of Cowokochee.

Then went the defendant Chapman and the plaintiffs, the widow and children of John Wildcat, and by petition filed in the county court of Seminole county, October 6, 1913, invoked the jurisdiction of that court to render and enter a judgment nunc pro tunc correcting the final order of distribution in the estate of Albert Wildcat, dated October 7, 1912, so as to show that John Wildcat took the whole allotment in question to the exclusion of Cowokochee. But this the court, after Cowokochee had been heard, refused to do; whereupon petitioner appealed to the district court, where, on January 15, 1914, the cause was reversed, with directions to enter the order; to reverse which Cowokochee brings that case here, where it is numbered 6055, and ordered consolidated with this case. Of the errors assigned in that case we shall speak later.

Thereafter, with full knowledge of its effect and for \$600 cash in hand paid by Chapman and McFarlin, but without payment of costs, or the knowledge or consent of his counsel, Cowokochee filed with the clerk of the court an instrument in writing which reads:

"Comes now Cowokochee, one of the defendants herein, and dismisses his cross-petition against defendants James A. Chapman and R. M. McFarlin and McMan Oil Company, with prejudice.

"This the 8th day of April, 1914.

"[Signed]

his
Cowokochee X
mark

"I hereby certify that I signed the name of said Cowokochee to the above and foregoing dismissal in his presence and at his request, after which he made his own mark.

"U. G. Foreman.

"Additional witnesses: Martin Goot, Mary Tiger."

And executed the following affidavit:

"Cowokochee, being duly sworn, upon oath states that he is a citizen of the Seminole Nation; that he is over sixty years of age; that his postoffice address is Sasakwa, Oklahoma; that he is one of the defendants in case No. 3039, pending in district court, Creek county, Oklahoma; that he desires to dismiss his cross-petition in said action for the reason that on January 20, 1913, he executed a quitclaim deed in favor of defendant James A. Chapman, which deed was approved by the county judge of Seminole county, Oklahoma; that at the time he executed said deed he fully understood same, and understood that whatever rights, if any, he had in the estate of Albert Wildcat, he conveyed by said deed; that he received for said quitclaim deed the sum of three hundred dollars, and that he paid his attorney, John E. Turner, the sum of one hundred and fifty dollars.

"Affiant further states that he does not further want to prosecute said suit, because when he signed said deed and got the money that he agreed to take for same he understood fully the transaction, and does not now want to repudiate same; that he would not have filed said cross-petition herein had he been fully advised as to the nature and contents thereof, and that he is now and has at all times been satisfied with the trade he made, whereby he conveyed by quitclaim deed all his interest in the allotment of Albert Wildcat, deceased, to James A. Chapman.

his
Cowokochee X
mark

"I hereby certify that I signed the name of said Cowokochee to the above and foregoing affidavit in his presence and at his request, after which he made his own mark.

"U. G. Foreman.

"Additional witnesses: Martin Goot, Harry Tiger.

"Subscribed and sworn to before me this 8th day of April, 1914.

[(Seal.) I. S. White, Notary Public.

"My commission expires March 3d, 1917."

Whereupon, on April 18, 1914, a journal entry of dismissal was duly filed and entered. On June 25, 1914, came Cowokochee by his attorney, and moved the court to set aside, for fraud in its procurement, the order of dismissal and reinstate the case, and, after response thereto filed, on September 10, 1914, the cause coming on to be heard upon the merits, by verified application, in which he asks to have considered as a part thereof an unverified application filed May 2, 1914, he also moved the court to continue the cause (1) for certain reasons set forth in said unverified application not necessary to mention; (2) because the motion to reinstate was pending; and (3) because case number 6055 was pending in this court. And when the court, after hearing evidence on the motion to reinstate, at the same time overruled both motions, and held that his written dismissal automatically dismissed the case as to him, and rendered and entered judgment that he "is no longer a party to this proceeding, and has no right, title, or interest in and to the lands" in controversy, Cowokochee brings the case here by separate appeal (which is numbered 6847), and for reversal assigns that the court erred in refusing to reinstate his case and in overruling his motion for a continuance.

The court did right in overruling the mo-

tion to reinstate for the reason that, as no part of the costs were paid by Cowokochee at the time he filed his written dismissal, the cause remained still pending, and hence could not be reinstated upon motion. Rev. Laws 1910, § 5126, provides:

"A plaintiff may, at any time before the trial is commenced, on payment of the costs and without any order of court, dismiss his action after the filing of a petition of intervention or answer praying for affirmative relief, but such dismissal shall not prejudice the right of the intervener or defendant to proceed with the action. Any defendant or intervener may, in like manner, dismiss his action against the plaintiff, without an order of court, at any time before the trial is begun, on payment of the costs made on the claim filed by him. * * * Such dismissal shall be in writing and signed by the party or his attorney, and shall be filed with the clerk of the district court, * * * where the action is pending, who shall note the fact on the proper record: Provided, such dismissal shall be held to be without prejudice, unless the words 'with prejudice' be expressed therein."

Construing this statute, in Harjo et al. v. Black et al., 153 Pac. 1137, we said:

"The statute was intended to furnish an expeditious means whereby a civil action could be voluntarily dismissed by the plaintiff at any time before the filing of a petition of intervention or answer seeking affirmative relief against plaintiff was filed, and without the necessity of obtaining an order of court directing such dismissal. But the filing of the stipulation by plaintiff is not all, for the statute requires that the costs be paid. We have already seen that, although the stipulation was filed on June 10th, the costs were not paid until July 5th, and were not then paid by the plaintiffs, but by defendants. It cannot be said, therefore, that the mere filing of the stipulation automatically dismissed the suit. Until the costs were paid it remained upon the court docket, as though the stipulation had not been filed. The court was not divested of jurisdiction over the action until a compliance with the statute."

We say the court did right in overruling the motion to reinstate, and that, too, although the judgment entry shows the court to have been of the erroneous opinion that the filing of the dismissal automatically operated as a dismissal of his cross-action by Cowokochee without his payment of costs. This for the reason that we cannot reverse the court where he gave a wrong reason for a right ruling. *Hodgins v. Hodgins*, 23 Okl. 625, 103 Pac. 711.

[4] Neither did the court err in overruling the motion for a continuance. This for the reason that the motion was addressed to the discretion of the court, and it is not claimed the court abused its discretion. Besides, if the application was made on account of the absence of evidence, as it falls to show the materiality thereof, the same was properly overruled. And we cannot see how, if Cowokochee should win in cause No. 6055 in this court, and we should accordingly hold that the district court erred in reversing the county court, and that the order of that court dated October 7, 1912, should remain unamended nunc pro tunc and so as to show Cowokochee to be entitled to one-half the land, assuming that the judgment of that

court to that effect was admissible in evidence here to prove that fact, still we cannot see of what material benefit that would be to Cowokochee since, by the quitclaim deed of January 20, 1913, duly approved by the county court, it seems, from the present state of the record, that he has since parted with his interest therein to Chapman, as pleaded. And, looking at it in the large, it is rather a novel proposition to say the court erred in refusing to continue one cause in order to await the termination of another cause, in which the applicant was a party and hoped to prevail, so as to give the applicant an opportunity to thereby secure evidence with which to bolster up the cause sought to be continued. And, in passing, it might be well to say that we will not consider any of the assignments of error in case No. 6055, for the reason that, as that case was an independent proceeding in another court, no part of which has found its way into this cause, no order made therein is such an intermediate order involving the merits of this cause as we are authorized in this cause to reverse, vacate, or modify under the provisions of the statute. Rev. Laws 1910, § 5236.

[5] But it does not follow that, because the court did right in overruling Cowokochee's motion for a continuance, he was also right in rendering and entering judgment that Cowokochee, in effect, be eliminated from the case, and that he had no right, title, or interest in the land. Rather was it the duty of the court not to render, as he did in effect, final judgment against Cowokochee, but, when the cause was reached on its merits, to afford him an opportunity to go to trial upon the merits of his cross-petition and the issues joined thereon. This the court did not do, and this was such error as requires a reversal of this cause as to Cowokochee, so as to give him his day in court.

On September 11, 1914, the cause came on for trial to a jury upon its merits and upon the issues joined between plaintiffs and defendants Chapman and McFarlin only, and upon their cross-petition, and not upon the merits of the cross-petition of Cowokochee. There was a verdict for defendants, in effect, that John had parted with his interest in the land before he died; whereupon the court rendered and entered judgment that plaintiffs take nothing by their suit, and that Chapman and McFarlin were the owners of and entitled to retain possession of the land in virtue of the deeds assailed, purporting to convey the land to them from John. And, granting the prayer of their cross-petition, the court further adjudged and decreed that their title to the land be quieted, and that plaintiffs be enjoined from incumbering the title, and that the Swift leases be canceled; to reverse which plaintiffs bring the case here by separate appeal (which is numbered 7720).

[6] On the trial, it being in effect conceded,

but not by Cowokochee, who took no part therein, that Albert Wildcat was an enrolled Creek citizen of the half blood; that he died intestate in 1905, seised of the allotment in question, without wife or issue, leaving him surviving Cowokochee, his father, a full-blood Creek, enrolled as a Seminole, and John Wildcat, a brother, an enrolled Creek citizen of the half blood, and Watty Wildcat, a half-brother, a citizen of the Seminole Nation—the court was of opinion that John Wildcat inherited the land in fee, to the exclusion of Cowokochee; that the same, on descent cast by John, went to the plaintiffs, his widow and children, and that they were entitled to the possession of the land, unless John had parted with his title thereto to defendants Chapman and McFarlin before he died. While the court erred, as we have seen, in holding that John inherited the land in fee to the exclusion of Cowokochee, the same was harmless, since, upon examination, we find there is no error in the verdict and judgment, in effect, that John had parted with his title to the land before he died. To maintain the issues on their part, and to show that John had not parted with his interest in the land before he died, plaintiffs offered to prove by parol that John Wildcat, although the evidence discloses him to be enrolled as of the half blood, was in fact a full-blood Creek. This was offered in order, if proved, to show that his warranty deed dated March 31, 1906, purporting to convey the land as the sole heir of Albert Wildcat to Chapman, and his deed dated April 28, 1906, to Gooch, and his warranty deed dated January 28, 1907, purporting to convey the land to J. Coody Johnson, were void because not approved by the Secretary of the Interior, which was excluded, and this is plaintiffs' first assignment of error. But, since defendants disclaimed all interest in virtue of the deed of March 31, 1906, of that we need not speak in this connection. Of the deed of April 28, 1906, it is sufficient to say that, as John was an adult of less than full blood, he at that time was not subject to the restrictions against alienation, but had a right to sell his interest in the land in controversy without the approval of the Secretary of the Interior, and his quantum of Indian blood could only be determined by the rolls, and could not be collaterally attacked by parol, as attempted.

Section 22 of an act approved April 26, 1906 (34 Stat. L. 137, c. 1876), provides:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent. * * *

And section 19:

"* * * And for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of

citizens of said tribes approved by the Secretary of the Interior. * * *

The Indian Appropriation Act of June 21, 1906 (34 Stat. 325, c. 3504), among other things, provides:

"That the Secretary of the Interior shall, upon completion of the approved rolls, have prepared and printed in a permanent record book such rolls of the Five Civilized Tribes and that one copy of such record book shall be deposited in the office of the recorder in each of the recording districts for public inspection. * * *

Concerning this same contention, in *United States v. Ferguson et al.*, 225 Fed. 974, 141 C. C. A. 98, the Circuit Court of Appeals for this circuit, in a case where, as here, a deed executed subsequent to the approval of the act of April 26, 1906, was assailed, said:

"At the trial appellant offered to show by the testimony of three witnesses, to wit, Jacob Harrison, Concharty, and Catcha Holatka, that the mother of Marche Yekcha was a full-blood Seminole Indian. The trial court ruled that the Seminole Roll of Indians by Blood was conclusive upon the question as to the quantum of Indian blood possessed by Marche Yekcha, and that as the act of Congress of April 26, 1906, contained no restrictions as to mixed-blood Indians, decided that the appellant could not maintain the action and dismissed the bill. It thus appears that the only question for decision is as to whether the Roll of Seminole Indians by Blood, as prepared by law, is conclusive against collateral attack."

And, after construing the sections of said acts, *supra*, together with section 3 of the Act of May 27, 1908 (35 Stat. 312, c. 199), which reads:

"That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes, * * *

—said:

"This court, in *Malone v. Alderdice*, 212 Fed. 668, 129 C. C. A. 204, and in *Nunn v. Hazelrigg*, 216 Fed. 330, 132 C. C. A. 474, decided that: 'The commission to the Five Civilized Tribes, which made the enrollment of their citizens and freedmen, was a quasi judicial tribunal, empowered to determine who should be enrolled and what land should be allotted, and in what way it should be allotted to every citizen and freedman, and its adjudication of these questions, and of every issue of law and fact that it was necessary for it to determine in order to decide these questions, is conclusive and impervious to collateral attack.' The Circuit Court for the Eastern District of Oklahoma in the case of *Bell v. Cook*, 192 Fed. 597, decided the question in the same way. To the same effect is *Yarbrough v. Spalding*, 31 Okl. 806, 123 Pac. 843; *Lawless v. Raddis*, 36 Okl. 616, 129 Pac. 711. It results that the ruling of the trial court in excluding evidence offered for the purpose of showing that the mother of Marche Yekcha was a full blood was correct, and the judgment below is affirmed."

See, also, *Campbell v. McSpadden*, 44 Okl. 138, 143 Pac. 1138.

We are therefore of opinion that the evidence was properly excluded, and that the deed of April 28, 1906, conveyed John's interest in the land to Gooch, as found by the jury, although not approved by the Secretary of the Interior; that is, unless the court

erred in fairly submitting the issues to the jury assailing it on other grounds. Otherwise assailing the deed, it was the theory of plaintiffs that the deed dated March 31, 1906, from John to Chapman, because executed before the removal of restrictions, was void as in fraud of an act of Congress approved April 26, 1906 (34 Stat. 137, c. 1876), which reads:

"And every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void."

And the court should have so instructed the jury, and at the same time left it to them to say whether for the making of the deed of April 26, 1906, a contract or agreement was entered into between the parties to the first deed; or, in other words, whether the deeds were part of one and the same transaction, or whether the second was taken pursuant to the illegal contract of sale evidenced by the first deed, and, if so, to further instruct them that both deeds were void; and that the court erred in refusing so to do.

Not so, for the reason the evidence is insufficient to support the charge, in that it does not reasonably tend to prove facts sufficient to justify an inference that both deeds were executed in violation of the statute. On this point the most that can be said of the evidence is that the deed of March 31, 1906, was void as in fraud of the statute, but, reciting, as it does, a consideration of \$800, we presume it was paid, since the same is not questioned; that, failing to secure the title by means of said deed, Chapman, after John's restrictions were removed, sent his agent from Holdenville, bearing to him, while in jail at Muskogee, the deed of April 28th to execute, conveying the same land to one Gooch, and that the agent spoke to John through an interpreter, whereupon John, with full knowledge of the effect of his act, and without duress of any kind or further consideration, executed the deed after which Gooch, an officer with Chapman in the Planters' Trust Company, relinquished his title to the land by quitclaim deed dated October 12, 1907, to the defendants Chapman and McFarlin. What though the deed was void and tainted with illegality, as taken in fraud of the statute? There is no evidence, other than that bearing upon that transaction, and, standing alone, proved only that the transaction of securing the title to the land ended with the execution and delivery thereof and the payment of the purchase money named in the deed. Such being true, there was no evidence to go to the jury from which they could reasonably find that both deeds were part of one and the same transaction, and that the taint of illegality in the one tainted the other, and hence that both were void. What though the second deed was executed two days after the removal of restrictions and without further consideration? As the grantor therein had at that time a perfect right to sell or give his land away, or make good any supposed moral obligation in consideration of

the purchase money already paid, from such it could not reasonably be inferred that for the making of the second deed a contract or agreement was entered into between the parties to the first deed, or that the deeds were part of one and the same transaction, or that the second deed was taken pursuant to the illegal contract of sale evidenced by the first deed, and hence the court did not err in refusing to instruct as requested. And this, too, although there was no present payment of a consideration for the second deed. This for the reason that a deed is good as between the parties without a consideration. 13 Cyc. 532.

Concerning the further testimony assailing the validity of the deed of John Wildcat and wife, dated January 28, 1907, purporting to convey the land to J. Coody Johnson, and the quitclaim deed from him to Chapman dated December 21, 1906, and the exceptions taken to the evidence in support thereof, and to the instructions of the court to the jury on the issues joined on their validity, we need not speak, for the reason that the jury having found, after being correctly instructed, on the issues joined as to the validity of the deed of April 28, 1906, that said deed was good and passed the title from John Wildcat to defendants, a finding by us that the court erred in the trial of said issues, in any of the particulars assigned, would not work a reversal of the case, but such error would be harmless.

It is unnecessary for us to speak concerning the other deeds set forth in the petition; that is, the deed from a certain other person of the name of Albert Wildcat purporting, after the death of the allottee, Albert Wildcat, to convey the land by warranty deed, dated January 11, 1908, to Cecil Taylor, and from him to J. Garfield Buell, and from him to Chapman. Nor of the deed of Watty Wildcat, dated March 18, 1906, purporting to convey the land to Chapman; or his deed of a later date, purporting to quitclaim the land to Chapman. This for the reason that the court, without objection, instructed the latter two out of the case, and the former deeds were not otherwise mentioned than in the pleadings.

Being of opinion that the jury did right in finding that John Wildcat, before his death, thus parted with his interest in the land to defendants, who are still the owners and entitled to retain possession thereof, and that by their leases the plaintiff Swift took nothing, the judgment of the trial court is affirmed as between plaintiffs and defendants Chap-

man and McFarlin, but reversed as to Cowokochee, not for a new trial upon his application for the appointment of a receiver, but for a trial upon the merits of the issues joined upon the allegations that his deed of January 20, 1913, purporting to convey his interest in the land to Chapman, is void for fraud in its procurement, and that the nunc pro tunc order of the county court of Seminole county, dated October 7, 1913, in effect that Cowokochee took no interest in the allotment of Albert, is void, and all other issues thus joined upon which he relies to show that he had not parted with his interest in the premises in controversy, and is entitled to have his title thereto adjudicated and quieted in him.

Let the costs of this appeal be equally divided between plaintiffs Cowokochee and Chapman and McFarlin.

All the Justices concur, except MILEY, J., disqualified and not participating.

(100 Wash. 697)

NORTHWESTERN IMPROVEMENT CO. et al. v. PIERCE COUNTY. (No. 13937.)

(Supreme Court of Washington. March 4, 1918.)

En Banc. On rehearing. Affirmed.

For former opinion, see 97 Wash. 528, 167 Pac. 33.

PER CURIAM. Upon a rehearing en banc, a majority of the court still adhere to the opinion heretofore filed herein as reported in 97 Wash. 528, 167 Pac. 33, and for the reasons there stated the judgment is affirmed.

(100 Wash. 698)

DAHLSTROM v. NORTHERN PAC. RY. CO. et al.

DAHLSTROM et ux. v. SAME

(No. 13974.)

(Supreme Court of Washington. March 4, 1918.)

En Banc. On rehearing. Denied.

For former opinion, see 98 Wash. 390, 167 Pac. 1078.

PER CURIAM. Upon a rehearing en banc, a majority of the court still adhere to the opinion heretofore filed herein as reported in 98 Wash. 390, 167 Pac. 1078, and for the reasons there stated, the judgments are affirmed.

(64 Colo. 179)

LUCIFER COAL CO. v. BUSTER et al.
(No. 9309.)

(Supreme Court of Colorado. Jan. 7, 1918.
Rehearing Denied March 4, 1918.)

1. CORPORATIONS §630(8)—JUDGMENT AFTER DISSOLUTION—VALIDITY—PRESUMPTION.

A judgment against a corporation in a suit in which the complaint was not filed until after the expiration of its charter by limitation is assumed to be valid until the contrary appears.

2. CORPORATIONS §630(1) — DISSOLUTION — RIGHT OF ACTION.

Under Rev. St. 1908, § 899, relating to the effect of dissolution, an action may be maintained against a corporation after its dissolution, where the cause of action arose prior thereto.

3. CORPORATIONS §630(1) — EXPIRATION OF CHARTER—SUIT—STATUTE.

Under Rev. St. 1908, § 847, providing that corporations, with certain exceptions, may not exist for more than 20 years, and that the term of existence must be specified in the charter, and sections 891, 899, extending the corporate entity for particular purposes, the capacity of a corporation whose charter had expired to be sued for liabilities accruing before its dissolution is extended, and its rights as a party to a suit are the same as those of other parties to actions.

4. CORPORATIONS §114—SALE OF STOCK.

Under Rev. St. 1908, § 870, relating to transfer of stock, the act of a corporation after the expiration of its charter, in executing a bill of sale of stock of another company, without then assigning or delivering the certificate, which was lost, where a new certificate was not issued because the buyer failed to furnish a satisfactory indemnity bond that the seller was then the record owner and holder of the stock, did not constitute a sale of the stock as against an attaching creditor.

Error to District Court, Boulder County;
Robt. G. Strong, Judge.

Suit for injunction by the Lucifer Coal Company against Sanford D. Buster, as Sheriff of Boulder County, and Mary Powers. Demurrer to complaint sustained, and action dismissed, and plaintiff brings error. Affirmed.

William H. Dickson and H. E. Luthe, both of Denver, for plaintiff in error. Rinn & Archibald and O. A. Johnson, all of Boulder, for defendants in error.

WHITE, C. J. [1, 2] A temporary injunction, upon application of plaintiff in error, was issued against Buster, as sheriff of Boulder county, and Powers, defendants in error, to prevent the sale of certain shares of the capital stock of the Davidson Ditch Company, which had been levied upon by the sheriff under an execution issued upon a judgment of the district court in favor of Powers and against the Louisville Coal Mining Company, a Colorado corporation. A demurrer to the complaint was sustained, and, plaintiff declining to plead further, the action was dismissed. It is alleged, in the complaint that the judgment upon which the execution is based was entered January 6, 1915, and that the charter of the judgment debtor therein, the Louisville Coal Mining Com-

pany, had expired by limitation on March 13, 1913. By virtue of these facts it is claimed that the judgment is void and the execution a nullity, notwithstanding the complaint fails to disclose the date of the commencement of the suit in which the judgment was rendered or when such cause of action arose. Courts assume that judgments, of the character of the one here in question, are valid, until the contrary appears. But, apart from this, it is conceded by the respective parties that the cause of action arose, and the suit was instituted, in 1912, which was prior to the dissolution of the corporation. It has been held that by virtue of the statute (section 899, Rev. Stat. 1908) an action may be maintained against a corporation after its dissolution, where the cause of action arose prior thereto. Klipp v. Miller, 47 Colo. 598, 108 Pac. 164, 135 Am. St. Rep. 236; Steinhauer v. Colmar, 11 Colo. App. 494, 500, 55 Pac. 291.

Plaintiff in error, however, claims that the statute does not authorize the conclusion, and that the statements to that effect in the cases cited, supra, are obiter. We are unable to concur in this view. The point was clearly presented in each case, urged and relied upon in the argument, and passed upon in the opinion. Newman v. Kay, 57 W. Va. 98, 49 S. E. 926, 68 L. R. A. 908, 4 Ann. Cas. 39.

[3] It is claimed, however, that as the trustees of a corporation, whose charter has expired, are invested with the title to its property and charged by law with the administration thereof, a judgment pronounced in an action against such corporation is contrary to the accepted ideas of legal procedure, as it would affect the rights of bona fide creditors without giving them an opportunity to be heard. We are unable to concur in this view. While the existence of corporations, with certain exceptions, may not exceed 20 years and the term of existence of each must be specified in its certificate of incorporation (section 847, Rev. Stat. 1908), other sections (891, 899) of the statute extend, in substantial effect, such corporate entities for particular purposes. Thus the section in question, in effect, continued the corporate capacity of the Louisville Coal Mining Company to be sued for liabilities which accrued before its dissolution. Singer & Talcott Stone Co. v. Hutchinson et al., 176 Ill. 48, 52, 51 N. E. 622. Therefore its rights as a party to a suit, and of those claiming under it, are the same as the rights of other parties to actions, and there is nothing in the case inconsistent with due process of law.

[4] It is further contended that, notwithstanding the validity of the judgment, the contemplated sale should be enjoined upon the ground that plaintiff in error is the owner of the stock. The claim of ownership is based upon the following facts: Subsequent to the expiration of the charter of the Louis-

ville Coal Mining Company, it purported to execute, in its corporate capacity, a bill of sale of the stock to the plaintiff in error, but did not assign or deliver the certificate, as the same had been lost or misplaced. December 30, 1913, plaintiff in error presented the alleged bill of sale to the Davidson Ditch Company in order that the books of such company "should show the sale, transfer, and assignment. * * *" The return to the levy of the execution recites that a new certificate was not issued because the plaintiff in error failed to furnish, as requested, a satisfactory indemnifying bond, and that the Louisville Coal Mining Company was then the "record owner and holder" of the stock. The transaction did not constitute a sale of the stock to plaintiff in error as against an attaching creditor. Section 870, Rev. Stat. 1908; Central Savings Bank v. Smith, 43 Colo. 90, 95 Pac. 307; Farmers' Pawnee Canal Co. v. Henderson, 46 Colo. 37, 102 Pac. 1063.

The trial court did not abuse its discretion in the premises, and the judgment is affirmed. Judgment affirmed.

(64 Colo. 177)

WELSH et al. v. STEINBAUGH. (No. 9287.)

(Supreme Court of Colorado. Jan. 7, 1918.
Rehearing Denied March 4, 1918.)

1. CORPORATIONS §617(5) — DISSOLUTION — VALIDITY OF PRIOR JUDGMENT.

Where the cause of action resulting in a judgment against a corporation arose prior to its dissolution, the judgment was valid.

2. CORPORATIONS §619 — DISSOLUTION — SALE BY TRUSTEES — STATUTE.

Where the charter of a domestic corporation expired by limitation on March 13, 1913, its board of directors and trustees of its creditors and stockholders were under Rev. St. 1908, §§ 894, 897, invested with its property with full power to sell and dispose of it and to settle its affairs, as sections 891, 892, authorizing a corporation under certain conditions to renew its charter at any time within one year after its expiration, did not defer the title of the directors and trustees until the expiration of that period.

En Banc. Error to District Court, Boulder County; Neil F. Graham, Judge.

Action by John J. Steinbaugh, for himself and others similarly situated, against Charles C. Welsh and others, severally and as trustees of the Louisville Coal Mining Company. Judgment for plaintiff, and defendants bring error. Affirmed.

Wm. H. Dickson and H. E. Luthe, both of Denver, for plaintiffs in error. Edward Afolter, of Louisville, and F. G. Folsom, of Boulder, for defendant in error.

WHITE, O. J. The charter of the Louisville Coal Mining Company, a Colorado corporation, expired by limitation on March 13, 1913, at which time the plaintiffs in error constituted its board of directors. Prior thereto Steinbaugh, the defendant in error

here, had instituted a suit in the district court of Boulder county against that corporation, in which judgment in his favor was rendered on December 17, 1914. It is this judgment that forms the basis of the case now before us. On October 15, 1913, the plaintiffs in error here, as "the board of directors of the Louisville Coal Mining Company and trustees of its creditors and stockholders," sold and conveyed all the property of that corporation to the Lucifer Coal Mining Company, a Wyoming corporation, and about the same time, as "trustees," executed another instrument of conveyance of the same property to the same grantee. The consideration expressed in each conveyance was "ten dollars and other good and valuable consideration." The property so conveyed was worth approximately \$100,000. Some debts of the dissolved corporation were paid, but not that here involved, though there was sufficient property to produce funds for that purpose. The real consideration for the transfer of the property by the trustees to the Lucifer Coal Mining Company was substantially its entire capital stock, consisting of 130,000 shares of the par value of \$1 per share, together with a like amount of the bonds of such company, all of which was received and distributed by plaintiffs in error Welsh and Loveland to the stockholders of the Louisville Coal Mining Company in proportion to their stock therein. Steinbaugh's judgment remaining unpaid, he prosecuted an action against the plaintiffs in error as individuals and as trustees under the statute of the dissolved corporation, and recovered the judgment here involved.

Plaintiffs in error claim that: (1) The judgment of Steinbaugh against the Louisville Coal Mining Company, rendered after the expiration of that corporation's charter, is void; (2) the plaintiffs in error had not become invested with the title to the property of the dissolved corporation at the time they executed the instruments of conveyance thereof to the Lucifer Coal Mining Company; and that, therefore, this company holds such property in trust for the creditors and stockholders of the dissolved corporation, and that the sole remedy of its creditors is by proceeding in equity.

[1] 1. The cause of action, resulting in the judgment of Steinbaugh against the Louisville Coal Mining Company, arose prior to the dissolution of that corporation, and is, therefore, valid. The Lucifer Coal Mining Co. v. Buster et al., decided at this term of court, 171 Pac. 61.

[2] 2. The alleged invalidity of the sale to the Wyoming company is upon the assumption that as the statute, sections 891, 892, Rev. Stat. 1908, authorizes a corporation, under certain conditions, to renew its charter at any time within one year after the expiration thereof, plaintiffs in error had no title to

the property or power in the premises until the expiration of such period. The contention is unsound. Upon dissolution by expiration of its charter, plaintiffs in error were, under the facts of this case, invested with the property and possessed of full power to sell and dispose of the same and to settle the affairs of the Louisville Coal Mining Company. Sections 894, 897, Rev. Stat. 1908. There was nothing which, expressly or impliedly, required the trustees to postpone their action in the premises. Whether, under the peculiar facts of this case, the property could be followed into the hands of the Lucifer Coal Mining Company and impressed with a trust in favor of the creditors of the dissolved corporation, is unnecessary to determine. We are very certain that defendant in error was not required to resort to an action of that character, but had the right to proceed against plaintiffs in error as he did. Section 894, *supra*. The judgment is affirmed.

Judgment affirmed.

(64 Colo. 180)

COLLAR v. GAARN et al. (No. 8812.)

(Supreme Court of Colorado. Jan. 7, 1918.

Rehearing Denied March 4, 1918.)

1. WILLS §755 — NATURE OF LEGACY — DEMONSTRATIVE BEQUESTS.

A will, after setting forth the property of the testatrix, including a note of a fraternal order, stated that as soon as possible after the decease of the testatrix she wished defendant to have such note turned over to her, and if that could not be done, it was her will that defendant should receive the interest thereon until the principal was paid to her, and that when the principal was paid she willed and directed that defendant should turn over \$100 towards funeral expenses or expenses of administration. Defendant was requested, in case she died without issue, to bequeath the proceeds of the note to persons therein named. A residuary clause disposed of the residue "when all of the above bequests have been paid," though the bequest to defendant was the only substantial one which it was claimed was specific. The residuary clause also contained a request that the legatee should, by will, leave certain amounts to others. *Held* that the bequest to defendant was demonstrative, and not specific, and was not extinguished by part payment of the note and the exchange of the note and the payment for other securities.

2. WILLS §450 — CONSTRUCTION — GIVING EFFECT TO WHOLE WILL.

In ascertaining the meaning of any portion of a will the instrument should be considered as a whole and effect given to all of it if possible.

White, C. J., dissenting.

En Banc. Error to District Court, City and County of Denver; George W. Allen, Judge.

Suit by Ruby Ames Gaarn against Emily Collar and others. Decree for plaintiff, and the defendant Collar brings error. Reversed and remanded.

Percy S. Morris, of Denver, for plaintiff in error. Frank L. Grant, of Denver, for defendant in error Gaarn.

HILL, J. This action is submitted upon an agreed short record on error. (The practice is commendable.) It involves a construction of the will of Ann Eliza McLaughlin. The portions necessary to consider read:

"First. As to my worldly estate and all property, real or personal, which I shall have at the time of my decease, I hereby dispose of it in the following manner, to wit:

"My real estate, consisting of lot fourteen (14) and the adjoining fifteen (15) feet of lot thirteen (13), block forty-four (44) Evans' addition * * * probably worth eight thousand dollars (\$8,000). I have also a note of one thousand dollars (\$1,000) of money loaned to the I. O. O. F., and held by Charles D. Cobb; also a small note of sixty-seven and fifty one hundredths dollars (\$67.50) from Andrew C. Gaarn, my niece's husband. I do not wish the above described real estate to be sold at a sacrifice if it is possible to avoid it, but after my decease, in order to settle the estate and pay some unpaid debts, my funeral expenses and some bequests I wish to make, it will probably be necessary to sell, so whenever it can be sold, in the judgment of the executors of this will and of my niece, Ruby Ames Gaarn, without too much sacrifice * * * I give them (my executors) full power to sell and convey this property. * * *

"Third. As soon as possible after by decease I wish my niece, Emily Collar, to have the note of one thousand dollars (\$1,000) loaned to the I. O. O. F., and held by Charles D. Cobb, turned over to her; or if that cannot be done, I will that she shall receive the interest thereon until the principal is paid to her, and when the principal is paid, as her bequest is the largest I have made, I will and direct that she shall turn over one hundred dollars (\$100) toward my funeral expenses or to the expenses of administering my estate. I pray my niece, Emily Collar, to make and publish a last will and testament, wherein the remainder of the proceeds of said note, whether in money or other property, shall be bequeathed and devised to Drue, wife of my nephew, Horatio Ames Collar, in the event of my niece, Emily Collar, dying without issue living at the time of her death."

The record discloses that prior to the death of the testatrix \$550 of this so-called I. O. O. F. note had been paid, and that the money received therefor, with some \$200 additional, and the note with this payment indorsed thereon, had, by her agent, Mr. Cobb, been exchanged for 12 bonds of \$100 each issued by the Odd Fellows' Temple Association of Denver, and that these bonds were a part of her estate at the time of her death.

[1, 2] This suit was instituted by Ruby Ames Gaarn, the residuary legatee, to determine the interest of Miss Collar under paragraph 3 of the will, etc. The question is: Was the bequest to her of this \$1,000 note a specific legacy, etc., or was it in the nature of a demonstrative legacy, which, in a way, applies to both general and specific legacies? The trial court held, in substance, that it was a specific legacy, and that it had been extinguished, for which reason that Miss Collar should take nothing by this bequest. We cannot agree with this conclu-

sion. Had the language used devised the note to Miss Collar and stopped there, the bequest would have been specific and become extinguished by the payment or other disposition of the note during the lifetime of the testatrix. *Nusly v. Curtis*, 36 Colo. 464, 85 Pac. 846, 7 L. R. A. (N. S.) 592, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134. But such is not the case here. In ascertaining the meaning of any portion of a will, the instrument should be considered as a whole and effect given to all of it, if possible. 40 Cyc. 1408, 1409. Paragraph 1 sets forth the testatrix's property. In paragraph 3 she says not only that she wants Miss Collar to have this note turned over to her, but if that cannot be done she wills that she receive the interest thereon until the principal is paid to her, not until the principal is paid, but until it is paid to her. This language, in substance, not only bequeaths the note to her, but provides that, if it cannot be given her, the principal shall be paid to her; also that she should receive interest until such time as the principal is paid to her. It does not stop there, but provides that when the principal is paid, as her bequest is the largest, she shall turn over \$100 toward funeral expenses or the expenses of administration, and it does not stop there, but requests that Miss Collar, by will, under certain conditions, leave a certain amount of the proceeds of this note, whether in money or property, to another. In paragraph 7, under which Mrs. Gaarn was made the residuary legatee, it makes her such to the extent only "when all of the above bequests have been paid." As the bequest to Miss Collar is the only one in any substantial amount which it is claimed is specific, the language last quoted is further evidence of the testatrix's intent that it was to be demonstrative in character. This paragraph also contains the request that Mrs. Gaarn by will leave certain amounts to others. This also strengthens Miss Collar's contention that the bequest to her was demonstrative. In *Nusly v. Curtis*, supra, we said:

"Courts are not inclined to favor a specific bequest. If compatible with the language employed, they are disposed to interpret gifts as general, or demonstrative."

Such being the general rule, when this will is considered as a whole, we conclude that the bequest to Miss Collar was in the nature of a demonstrative legacy, and that she is entitled to have it satisfied out of the Odd Fellows' Temple Association bonds. *School District v. International Co.*, 59 Colo. 486, 149 Pac. 620.

The judgment will be reversed, and the cause remanded for disposition accordingly.

Reversed and remanded.

WHITE, C. J., dissenting. ALLEN, J., not participating.

ZEIGLER v. BUTLER. (No. 8971.)

(Supreme Court of Colorado. Feb. 4, 1918.)

1. BROKERS —RIGHT TO COMPENSATION —ABANDONMENT OF EMPLOYMENT.

A statement by a broker employed to negotiate a trade, to a disinterested party at a time when he was impatient with his principal's delay, that he did not care whether the trade was made or not was not an abandonment of his agreement, where the principal proceeded thereafter and the trade was consummated.

2. BROKERS —RIGHT TO COMPENSATION —ABANDONMENT OF EMPLOYMENT.

Where plaintiff was employed by defendant to negotiate an exchange of a house for a stock of goods, and he inspected the goods, his refusal to accompany defendant, who was about to make an inspection, was not an abandonment of his employment, as the acceptance or rejection of the goods was solely with defendant, and it was no part of plaintiff's duty to again inspect them.

Error to Prowers County Court; C. B. Thomas, Judge.

Action by R. M. Zeigler against N. E. Butler. Judgment for defendant, and plaintiff brings error. Reversed, with instructions.

Gordon & Gordon, of Lamar, for plaintiff in error. O. G. Hess, of Carthage, Mo., and Fred W. Cuckow, of La Junta, for defendant in error.

SCOTT, J. This action is by the plaintiff in error, plaintiff below, to recover a broker's commission for the negotiation of a sale or trade of certain real estate for the defendant.

The defendant owned two houses in the city of Lamar, which he valued at \$3,000. He learned through plaintiff of a stock of groceries for trade at Sugar City. He asked plaintiff to negotiate a trade of his houses for the stock of goods. This plaintiff proceeded to do, with the result that the owner of the goods sent an agent to Lamar, who in company with the plaintiff inspected defendant's property. Afterward the owner of the stock of goods asked defendant to come to Sugar City and inspect the same. This the defendant did, and while in Sugar City the trade was consummated. The houses of defendant were taken in on the trade at the value of \$3,000. The goods were exchanged at invoice price.

Upon the conclusion of plaintiff's evidence the court upon motion of defendant directed a verdict for defendant. In sustaining the motion for a directed verdict the court found:

"It is my opinion that this plaintiff did abandon his agency by his refusal to accompany Mr. Butler to make that trade, and he further proved that abandonment by his statement, as he himself has admitted that he didn't care whether the trade was made or not. Whether or not it was made in Mr. Butler's presence, or whether it was made in the presence of others, it was made, and it is not denied; and it is my opinion that the motion to instruct the jury to find a verdict for the defendant should be sustained."

[1] This was error. The finding admits the employment, concerning which there is no doubt, and the mere alleged statement of plaintiff did not constitute abandonment of his agreement. The statement was not made to defendant but to a disinterested party, at a time when plaintiff was impatient with defendant's delay, but the defendant proceeded thereafter, and the trade was consummated as stated.

[2] It appears that when defendant was about to go to Sugar City to make the inspection of the goods he invited plaintiff to go with him. This plaintiff declined, for the reason stated that he had inspected the stock, and that defendant must necessarily act upon his own judgment in that respect. It is urged that this also constituted an abandonment by plaintiff of his employment. It was no part of plaintiff's duty to again inspect the stock of goods. The acceptance or rejection of the merchandise was solely with defendant, and he acted accordingly. Besides, the defendant at no time prior to the trial denied his liability, but, on the contrary, complained only of the amount demanded by plaintiff for his services, and tendered him \$50.

The plaintiff did all that he was required to do under the law. The judgment is reversed, with instructions to proceed in accordance with the views herein expressed.

Judgment reversed.

HILL, C. J., and GARRIGUES, J., concur.

(64 Colo. 139)

SAULPAUGH et al. v. HAMILTON.
(No. 8698.)

(Supreme Court of Colorado. Jan. 7, 1918.
Rehearing Denied March 4, 1918.)

1. LANDLORD AND TENANT §208(1)—LIABILITY FOR RENT—EFFECT OF ASSIGNMENT.

The mere assent of a landlord to an assignment of a lease and the acceptance of rent from the assignee did not release the lessee from his covenant to pay rent under the law of Colorado, or that of Minnesota, where the lease was made, especially where the assignment was on the express condition that it should not release the lessee from his liability.

2. LANDLORD AND TENANT §208(1)—LIABILITY FOR RENT—EFFECT OF ASSIGNMENT.

A lessee, though, as between himself and his assignee, a surety for the payment of the rent, was a principal as to the lessors, and his relation to them could not be changed except by an agreement with them, and hence, where they assented to the assignments of the lease on the express condition that he should remain liable, they had a right to look to him as the principal debtor, and did not discharge him by failing to record the lease, so as to protect their lien on the personal property on the leased premises therein given.

En Banc. Error to District Court, City and County of Denver; George W. Allen, Judge.

Action by Clarence H. Saulpaugh and another against Charles B. Hamilton. Judge-

ment for defendant, and plaintiffs bring error. Reversed.

Dana & Blount and Richard A. Smith, all of Denver, for plaintiffs in error. Goudy, Twitchell & Burkhardt, of Denver, for defendant in error.

TELLER, J. Plaintiffs in error brought suit against the defendant in error to recover on a covenant in a lease to pay the rent of a hotel, and, the court having directed a verdict for the defendant and entered judgment thereon, they bring the cause here for review. The parties will here be designated as they were in the trial court.

The lease on which the action was brought was made by the plaintiffs as lessors and the defendant as lessee for a term of years, and contained a provision which permitted the lessee to assign it to a corporation thereafter to be organized; but provided that "said lessee shall remain personally responsible for the fulfillment of all the terms of said lease just the same as if such transfer was not made." Soon after the execution of the lease it was assigned by the defendant to the Mankato Hotel Company, a corporation organized to take it over. Some two years later the plaintiffs, on the solicitation of the defendant, consented to an assignment of the lease by the corporation to one Heldenbrand and one Miller. This consent provided that it should "not in any way release the said Charles B. Hamilton or the Mankato Hotel Company from liability for rent upon said lease," etc. These assignees failing to pay the rent, the lessors brought this action against the defendant as lessee. The lease gave to the lessors a lien on the furniture in the hotel for the rent, but the lease was not recorded. Heldenbrand and Miller gave a chattel mortgage on said furniture to secure a debt to a bank, which mortgage was afterwards foreclosed.

The defense was that the lessors by consenting to an assignment of the lease and the acceptance of the hotel company, and the subsequent assignees, as tenants, relieved the defendant of the liability for the rent. It is also contended that the defendant, after the assignment, was a mere surety for the assignees, and that the failure of the plaintiffs to record the lease, and so preserve their security, discharged the defendant from his obligation to pay rent.

[1] It is the settled law in this jurisdiction that mere assent to an assignment of a lease and the acceptance of rent from an assignee does not release the lessee from his covenant to pay rent. *Wilson v. Gerhardt*, 9 Colo. 585, 13 Pac. 705. This is the law also in Minnesota, where this lease was made. In *Rees v. Lowy*, 57 Minn. 381, 59 N. W. 310, it is said:

"Nothing is better settled than that a surrender of the lease, or a release of a lessee, is not

to be implied from the mere facts that a lessor assented to the assignment of the lease, and accepted rent from the assignee in possession."

That is a settled rule of law. 6 M. A. L. 202; 24 Cyc. 1177. This being so, it is difficult to perceive upon what ground a release is to be presumed in the face of an express condition that the assent shall not work a release.

[2] The extended discussion by defendant's counsel of the plaintiffs' duties to defendant as a surety wholly overlooks the fact that while as between him and his assignees he was a surety, as to the lessors he was a principal by an express covenant to pay the rent. Defendant's relation to plaintiffs as a debtor being fixed by the lease, it could not be changed except by an agreement with the plaintiffs to that effect. Instead of such an agreement we find plaintiffs making their assent to the assignments conditional upon defendant's remaining liable for the rent. Since the plaintiffs had the right to look to defendant as the principal debtor, as well as to the assignees, the question of their failure to protect the security by way of the lien on the furniture need not be considered.

The assignments were both made at the instance of the defendant, and it would be a miscarriage of justice to allow those acts thus induced to defeat the plaintiffs' right to recover.

The court erred in directing a verdict, and the judgment is therefore reversed.

Judgment reversed.

ALLEN, J., not participating.

(64 Colo. 13)

FARNCOMB et al. v. CITY AND COUNTY OF DENVER et al. (No. 8747.)

(Supreme Court of Colorado. Jan. 7, 1918. Rehearing Denied March 4, 1918.)

1. CONSTITUTIONAL LAW §290(3)—MUNICIPAL CORPORATIONS §407(1)—ASSESSMENT OF BENEFITS—DUE PROCESS OF LAW.

Denver Charter, § 300, providing that the board of supervisors sitting as a board of equalization shall hear and determine all complaints and objections respecting assessments for public improvements, and may recommend to the board of public works any modification of their apportionments, that the board of public works may thereupon make such modifications or changes as to them may seem equitable and just, or may confirm the first apportionment and shall notify the council of their final decision, and that the council shall thereupon assess the cost of the improvements, does not deny due process of law, though the board which hears the complaints has power only to suggest or recommend alterations.

2. JUDGMENT §671—PERSONS CONCLUDED—ACTIONS ON BEHALF OF PERSONS SIMILARLY SITUATED.

The judgment, in an action brought by a property owner on behalf of himself and all others similarly situated in a park district of the city of Denver, was res judicata on other property owners similarly situated on the question of the constitutionality of the provisions of the charter as to the hearing of complaints respect-

ing assessments, as they could and should have participated in such action.

3. MUNICIPAL CORPORATIONS §488, 489(5)—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS—WAIVER OF OBJECTIONS.

Under the Denver charter property owners who had ample time after lawful notice to present their complaints and objections respecting assessments for a public improvement to the proper board, but failed and refused to do so, could not question any of the acts of the municipality in the premises.

En Banc. Error to District Court, City and County of Denver; John H. Denison, Judge.

Action by Henry Farncomb and others against the City and County of Denver and others. Judgment for defendants on demurrer, and plaintiffs bring error. Affirmed.

Omar E. Garwood, Bert Martin, T. J. O'Donnell, J. W. Graham, and Canton O'Donnell, all of Denver, for plaintiffs in error. James A. Marsh, City and County Atty., Henry A. Lindsley, and Walter E. Schwed, all of Denver, for defendants in error.

BAILEY, J. In this action plaintiffs in error here, plaintiffs below, for themselves and others similarly situated, sought to have certain assessments against their properties declared null and void, and the City and County of Denver restrained from enforcing payment. The assessment alleged to be unlawful is that established by Ordinance No. 3, Series of 1913, of the City and County of Denver, for providing parks and parkways in the East Denver Park District. The ordinance sets out as done all the acts requisite to be done before the ordinance could be legally passed, and prima facie shows compliance with all the charter provisions under which the land was secured. The property affected by the ordinance is that comprising the East Denver Park District, the purpose being to provide funds for what is known as the "Civic Center," within such district.

Plaintiffs contest the regularity of the preliminary steps leading to the passage of the assessing ordinance, and also contend that due process of law is not afforded by the hearing provided for before the board of supervisors, sitting as a board of equalization, since its action is not final, but advisory only.

A demurrer to the complaint was sustained and judgment of dismissal was entered accordingly, plaintiffs having elected to stand by their complaint and their cause as thereby made.

[1] It is urged that section 300 of the Charter of the City and County of Denver does not provide due process of law for taxation purposes. The section is as follows:

"At the meeting specified in said notice, or any adjournment thereof, the Board of Supervisors, sitting as a board of equalization, shall hear and determine all such complaints and objections and may recommend to the Board of

Public Works any modification of their apportionments. The Board of Public Works may thereupon make such modifications or changes as to them may seem equitable and just, or may confirm the first apportionment, and shall notify the council of their final decision; and the council shall thereupon by ordinance assess the cost of said improvement against all the real estate in said district and against such persons, respectively, in the proportions above mentioned."

It is argued that as the board of equalization thus established has power only to suggest or recommend alterations in the assessments, protestants are without remedy. This is set up as a question never before suggested, much less urged, in any of the several cases in which like Charter provisions have been construed, providing for the assessment and collection of funds for public improvements.

Section 300, *supra*, supersedes section 31 of the Charter of 1903, which makes similar provisions for hearing complaints, except that the City Council is designated as the equalization board to recommend changes in assessments to the board of public works. The constitutionality of section 31, was questioned in *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117, where plaintiffs contested the sufficiency of the petitions of the property owners of a paving district, the legality of the publication of the ordinance creating the district, the sufficiency of the published notice and the validity of the law creating the board of public works. It was further contended that due process of law was not provided by the Charter, and that certain specific tracts of land were not benefited, and that the assessments were arbitrary and excessive. In substance, the same questions were raised in that case as are before us in this one. This court upheld the position of the City, and while the Supreme Court of the United States reversed that decision, it did so wholly upon a point which in no way affects any question herein involved. This case is ruled, therefore, by that case, except upon the point upon which it was reversed.

In discussing the inquiry whether the City Council, as a board of equalization, sitting for the purpose of hearing complaints and with power only to recommend relief, is a competent and constitutional tribunal, this court in *City of Denver v. Londoner*, *supra*, after discussing *Brown v. City of Denver*, 7 Colo. 305, 3 Pac. 455, said:

"It is argued that because the judgment of the city council is not final, but its action is subject to revision by the board of public works, that therefore it is not a competent tribunal. The word 'competent,' as employed in the *Brown Case*, does not convey any such meaning, but, rather, that the tribunal which the law designates shall be suitable and legally qualified to act. It does not necessarily follow that the judgment of such tribunal must be final. The main purposes of affording an owner a hearing upon the question of assessing his land for special benefits, are to give him the opportunity to be heard upon the quantum of the tax which

may be assessed upon his land, as well as its validity. If this hearing is afforded at some stage of the proceedings, he is given the opportunity to be heard which the fundamental law contemplates"—citing *Bauman v. Ross*, 167 U. S. 518, 17 Sup. Ct. 968, 42 L. Ed. 270.

Denver v. Kennedy, 33 Colo. 80, 80 Pac. 122, 467, and *Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114, were decided with *Denver v. Londoner*, *supra*, and in them other provisions relative to special improvement taxes and matters pertaining to the construction of the Charter provisions were determined, in favor of the City. The Supreme Court of the United States, in passing upon the constitutionality of the Charter provisions, in *Londoner v. Denver*, 210 U. S. 373, 28 Sup. Ct. 708, 52 L. Ed. 1103, decided that these provisions were sound and afforded due process of law. At page 380 of 210 U. S., at page 711 of 28 Sup. Ct. (52 L. Ed. 1103), that court said:

"The ninth assignment questions the constitutionality of that part of the law which authorizes the assessment of benefits. It seems desirable, for the proper disposition of this and the next assignment, to state the construction which the Supreme Court gave to the Charter. This may be found in the judgment under review and two cases decided with it. *Denver v. Kennedy*, 33 Colo. 80 [80 Pac. 122, 467]; *Denver v. Dumars*, 33 Colo. 90 [80 Pac. 114]. From these cases it appears that the lien upon the adjoining land arises out of the assessment; after the cost of the work and the provisional apportionment is certified to the city council, the land owners affected are afforded an opportunity to be heard upon the validity and amount of the assessment by the council sitting as a board of equalization; if any further notice than the notice to file complaints and objections is required, the city authorities have the implied power to give it; the hearing must be before the assessment is made. This hearing provided for by section 31 is one where the board of equalization 'shall hear the parties complaining and such testimony as they may offer in support of their complaints and objections as would be competent and relevant' (33 Colo. 97 [80 Pac. 114]), and that the full hearing before the board of equalization excludes the courts from entertaining any objections which are cognizable by this board. The statute itself, therefore, is clear of all constitutional faults."

And at page 378 of 210 U. S., at page 711 of 28 Sup. Ct. (52 L. Ed. 1103):

"The State Supreme Court held that the determination of the city council was conclusive that a proper petition was filed, and that decision must be accepted by us as the law of the State. The only question for this court is whether the charter provision authorizing such a finding, without notice to the landowners, denies to them due process of law. We think it does not."

And further, at page 380 of 210 U. S., at page 712 of 28 Sup. Ct. (52 L. Ed. 1103):

"The fifth assignment, though general, vague and obscure, fairly raises, we think, the question whether the assessment was made without notice and opportunity for hearing to those affected by it, thereby denying to them due process of law. The trial court found as a fact that no opportunity for hearing was afforded, and the Supreme Court did not disturb this finding. * * * Those interested, therefore, were informed that if they reduced their complaints and objections to writing, and filed them

within thirty days, those complaints and objections would be heard, and would be heard before any assessment was made. The notice given in this case, although following the words of the statute, did not fix the time for hearing, and apparently there were no stated sittings of the council acting as a board of equalization. But the notice purported only to fix the time for filing the complaints and objections, and to inform those who should file them that they would be heard before action. The statute expressly required no other notice, but it was sustained in the court below on the authority of *Paulsen v. Portland*, 149 U. S. 30 [13 Sup. Ct. 750, 37 L. Ed. 637], because there was an implied power in the city council to give notice of the time for hearing. We think that the court rightly conceived the meaning of that case and that the statute could be sustained only upon the theory drawn from it."

In *Londoner v. City & County of Denver*, 52 Colo. 15, 119 Pac. 156, the allegations of the complaint are substantially the same as in this case. The *Londoner* suit was brought on behalf of the plaintiff and all others similarly situated in the East Denver Park District. It was alleged, as here, that the rules for apportioning the benefits were unreasonable and unjust; that there were irregularities, inconsistencies, conspiracy and fraud in the preliminaries relating to the notices, protests, remonstrances, and the permission given to some protestants to withdraw their objections. The question of the power of the City to acquire land except by bond issue regularly approved by the electors, and whether the Charter provisions provided due process of law, were also at issue. In that suit, as here, the cause was dismissed on demurrer. In disposing of the alleged lack of power in the municipality to acquire lands as provided in the Charter, this court, on page 24 of 52 Colo., on page 159 of 119 Pac., after citing *Hamilton on the Law of Special Assessments*, sections 256, 257, and sections 307, 356 and 357 of *Page & Jones on Taxation by Assessments*, said:

"We, therefore, conclude that the people of the City and County of Denver, when making a charter for the municipality, had the power to write therein provisions for the purchase of lands, or for the exercise of the power of eminent domain in acquiring lands for parks and park-ways, and the payment therefor, in whole or in part, by collections arising from assessments made upon the property within the districts specially benefited by the improvements, and that the charter provisions in that respect are constitutional.

"2. The charter provisions authorize the board of park commissioners to initiate the public improvements in question, and to finally determine whether the lands necessary therefor shall be acquired, subject, however, to the will of the owners of a certain percentage in area of the real estate to be assessed for the cost thereof, to annul that authority by expressing their disapproval of the proposed improvements within a designated time."

In reviewing the charter provisions relative to the acquirement of land for parks and parkways, the court, at page 29 of 52 Colo., at page 161 of 119 Pac., said:

"The charter provisions, by necessary implication, provide for two adjudications of the facts as to the sufficiency of the notice given and the

remonstrances filed. One, a direct hearing before the board of park commissioners. * * * The other, in the nature of a review of that hearing by the city council. * * * It would seem that the action of the board of park commissioners, in finally determining 'that said land shall be acquired for said purpose,' would, if it were not for other provisions of the charter, be a conclusive determination that the property owners assented to the improvement. But, be that as it may, as the charter expressly declares that the finding of the council by ordinance as to such facts 'shall be conclusive in every court or other tribunal,' the duty to determine, as well as the conclusive effect of the determination of the city council, is fixed beyond doubt. *Freeman on Judgments*, sections 522, 523 and 524."

Plaintiffs in the case above cited asked for an injunction restraining the city council from passing the assessing ordinance. Prior to the determination of the suit on writ of error the ordinance was passed by the council. Upon this phase of the case this court, at page 36 of 52 Colo., at page 163 of 119 Pac., held:

"The city council, in the exercise of the power vested in it by the Charter, and unrestrained by any [existing] authority duly enacted an ordinance, declaring the existence of the essential facts. This ordinance has the effect of a statute; and the mandate of the people of the municipality, expressed through their charter, is, that such findings shall be conclusive upon every court or other tribunal. * * * Upon these circumstances, we certainly do not have the power to nullify the legislative mandate, that the finding of the council shall be conclusive upon every court or other tribunal, and declare it is not conclusive upon us."

Fraud was charged as to the preliminary proceedings of the park board, in practically the same terms as in the case at bar. As to this, the court, at page 40 of 52 Colo., at page 164 of 119 Pac., held:

"We are fully persuaded that upon the record as here presented, a court of equity can grant no relief to plaintiff in error."

In the case at bar, the contention of plaintiffs in error that the constitutional questions attempted to be raised are new, and afford valid ground for annulling all the proceedings of the city in the matter, is without foundation. This question was settled in *Londoner v. Denver*, 210 U. S., as shown by the quotation herein from page 380 of that opinion, 28 Sup. Ct. 708, 52 L. Ed. 1103. As matter of fact, every contention made by plaintiffs in error is determined adversely to them by the rule of stare decisis, upon the authorities herein referred to, from which extracts are made.

[2] The constitutionality of the provisions of the Charter as to hearing of complaints by the board of supervisors is not only settled by the rule of stare decisis, but is also res judicata, for in *Londoner v. Denver*, 52 Colo. 15, 119 Pac. 156, plaintiff brought suit upon behalf of himself and all others similarly situated in the East Denver Park District. Plaintiffs in error here were, and are, similarly situated, and they not only could have participated therein, but should have done so, and for this reason the judgment in

that case is binding on them. Freeman on Judgments (4th Ed.) 178; 2 Van Fleet's Former Adjudication, 569, 570; Clark v. Wolf et al., 29 Iowa, 197, 207; State ex rel. Brown v. C. & L. R. R. Co., 13 S. C. 290; Lyman et al. v. Faris et al., 53 Iowa, 498, 5 N. W. 621; Harmon v. Auditor, etc., 123 Ill. 122, 13 N. E. 161, 163, 5 Am. St. Rep. 502; Cannon v. Nelson, 83 Iowa, 242, 48 N. W. 1033; Ashton v. City of Rochester, 133 N. Y. 187, 30 N. E. 334, 28 Am. St. Rep. 619, 623; 23 Cyc. 1269.

[3] It is admitted that plaintiffs in error had ample time after lawful notice given to present their complaints and objections to the proper board, but failed and refused to do so. Under the authorities they cannot now be heard to question any of the acts of the City and County of Denver in the premises. Fox v. Lipe, 14 Colo. App. 259, 59 Pac. 850; Pipe v. Smith, 5 Colo. 146; Walker v. Pogue, 2 Colo. App. 149, 29 Pac. 1017. The judgment of the lower court should be affirmed, and it is so ordered.

TELLER and HILL, JJ., agree with the conclusion. SCOTT, J., not participating.

(64 Colo. 164)

CLARKE v. PEOPLE. (No. 8868.)

(Supreme Court of Colorado. Jan. 7, 1918. Rehearing Denied March 4, 1918.)

1. FALSE PRETENSES ⇨49(5)—WEIGHT AND SUFFICIENCY OF EVIDENCE—RELIANCE ON PRETENSES.

On a trial for obtaining money from a purchaser of stock by false pretenses, evidence held sufficient to warrant a finding that the prosecuting witness relied and acted upon the false pretenses, though he testified on cross-examination that he did not know that he turned over in his mind, at the time of the sale, any specific statement previously made to him, except, perhaps, in a subconscious manner.

2. FALSE PRETENSES ⇨9—ELEMENTS OF OFFENSE—RELIANCE ON PRETENSES.

One may rely upon false pretenses previously made to him and act on, and because of, such pretenses without consciously reflecting upon them, provided the impressions theretofore created by such representations still remain in his mind.

3. FALSE PRETENSES ⇨4—ELEMENTS OF OFFENSES—ADOPTION OF FALSE PRETENSES.

If defendant made false pretenses to B. without intending B. to act thereon in purchasing stock, but afterwards sold to B. the stock with the intent and design that B. should rely upon and be influenced to buy the stock and make payment therefor, because of the former false pretenses, whether consciously or subconsciously so induced on the part of B., the former pretense was by adoption renewed in making the deal.

4. FALSE PRETENSES ⇨52—INSTRUCTIONS—RELIANCE ON PRETENSE.

On a trial for false pretense the court charged that, if defendant falsely made alleged pretenses without at the time intending B. to act thereon in purchasing stock, but afterwards sold stock to B. with intent and design that B. should rely thereon and be thereby influenced to buy the stock, "whether consciously or sub-

consciously so induced on the part of B.," then the jury should treat the former pretense as by adoption renewed upon such deal by defendant. Held, that this instruction was justified, though not required, by B.'s testimony that he believed the representations previously made by defendant and acted on them, and would not have paid for the stock if he had not believed them, but that he did not know that he turned over in his mind any specific statement at the time of the purchase, except, perhaps, in a subconscious manner.

5. CRIMINAL LAW ⇨823(4)—INSTRUCTIONS—CURE OF ERROR BY OTHER INSTRUCTIONS.

The instruction was not misleading on account of its reference to the subconscious mind or its use of the phrase "consciously or subconsciously" when considered in connection with other instructions in which the jury were told that it must be shown that B. parted with his money, and the defendant received it by means of false pretenses, and that in order for a pretense to be an inducing cause of the payment of money it was necessary that the money would not have been paid if the pretense had not been made and had not been believed and relied upon.

6. FALSE PRETENSES ⇨4—ELEMENTS OF OFFENSE.

Under the statute providing that, if any person shall knowingly and designedly by false pretenses obtain from another any money or other property with intent to cheat or defraud such person, he shall be guilty of obtaining property by false pretenses, the gist of the offense is the obtaining of the money by means of false pretenses with intent to cheat or defraud.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False Pretense.]

7. FALSE PRETENSES ⇨5—ELEMENTS OF OFFENSE—INTENT.

It is not necessary that the intent to defraud should exist at the time of making false pretenses if accused designs or intends, at the time of obtaining the money, to take advantage of the previously made false pretenses.

8. FALSE PRETENSES ⇨4—ELEMENTS OF OFFENSE.

Where defendant repeatedly talked with B. concerning the nature of the business of a medical corporation, the success of its treatment, and the financial success of its business, and after B. had become impressed with a belief in the truth of such statements, and while he was still deceived thereby, defendant sold him stock without retracting or changing the pretenses or statements theretofore made, this was an implied representation that the facts still existed as theretofore stated, and was equivalent to a reiteration and renewal of the pretenses previously made.

9. FALSE PRETENSES ⇨52—INSTRUCTIONS—RELIANCE ON PRETENSE.

Where the evidence showed such facts, an instruction that it was not requisite that the person charged should have intended and designed, by the pretense at the time of making it, to obtain money from the person from whom it was afterwards obtained by reason thereof, provided that upon the occasion of obtaining the money he designed or intended to take advantage of the previously made and manifested false pretense knowing that it was adapted or likely to induce the other to part with the money and failing to make known the truth in relation to such pretenses, was applicable to the evidence.

10. CRIMINAL LAW ⇨785(16)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

An instruction that, if the jury believed from the evidence that a witness had knowingly, willfully, and corruptly testified falsely to any ma-

terial fact, they should disregard such false testimony and should give any other testimony of the witness such weight or no weight according as they deemed it credible in view of all of the evidence, and particularly of any credible evidence tending to corroborate it, was not erroneous, as it did not tell the jury to disregard the testimony of the witness other than that which they believed to be false, but only to give it the consideration due it in view of the evidence, particularly that of a corroborating nature.

11. FALSE PRETENSES §9—ELEMENTS OF OFFENSE—CREDULITY OF VICTIM.

To constitute a "false pretense" the pretense need not be such as will impose upon a person of ordinary prudence or such as cannot be guarded against, but by caution or common prudence, and any pretense which deceives the person designed to be deceived is sufficient though it would not deceive a person of ordinary prudence or would not deceive some other person under the like circumstances.

12. CRIMINAL LAW §827—REQUESTS FOR INSTRUCTIONS—MODIFYING INSTRUCTIONS.

On a trial for false pretenses, the court charged that to constitute a false pretense the pretense need not be such as would impose upon a person of ordinary prudence or such as could not be guarded against but by caution or common prudence, and that any pretense which deceived the person designed to be deceived was sufficient, though it would not deceive a person of ordinary prudence or some other person under the like circumstances. *Held*, that a request to modify this instruction by submitting the rule that in determining whether the representations complained of were calculated to deceive the prosecuting witness, the jury should take his intelligence and ability into consideration was properly refused, as this would not modify the instruction given, but would merely have added a further proposition of law not inconsistent with anything contained in the instruction given.

13. CRIMINAL LAW §1038(3)—APPEAL—REVERSAL OF GROUNDS OF REVIEW—INSTRUCTIONS—NECESSITY OF REQUESTS.

On a trial for false pretenses the failure to charge that, in determining whether the representations were calculated to deceive the prosecuting witness, the jury should consider his intelligence and ability, afforded no ground for reversal where no proper instruction covering the omitted point was requested and refused.

En Banc. Error to District Court, Weld County; Robt. G. Strong, Judge.

H. J. Clarke was convicted of obtaining money by false pretenses, and he brings error. Affirmed.

Edmund J. Churchill, of Denver, for plaintiff in error. Fred Farrar, Atty. Gen., Wendell Stephens, Asst. Atty. Gen., Leslie E. Hubbard, Atty. Gen., and John L. Schweigert, Asst. Atty. Gen., for the People.

ALLEN, J. The plaintiff in error, herein-after also referred to as the defendant, was convicted of obtaining money by false pretenses, and brings error.

The evidence on the part of the prosecution shows that one O. F. Broman, the prosecuting witness, had several conversations with the defendant during October, 1913. In those conversations the defendant represented to Broman that the Clarke Medical Company had at that time in operation two in-

stitutions for the treatment of persons afflicted with either the liquor or the morphine habit; that one of such institutions was located at Denver and the other at Trinidad; that the one at Trinidad took care of the miners there and was a paying institution because a good many miners addicted to strong drink were willing to pay the fee; and that the institution at Denver was well equipped, had 16 beds, besides a county ward where county patients, averaging about 12 a year, were accommodated. The evidence further shows that in those conversations the defendant represented that the company earned in the business between 240 and 260 per cent. dividends on its capital stock, and that it had \$6,000 in the bank. It was also represented by the defendant that there was never any difficulty in having the alleged Denver institution filled with inmates, and that the average fee in each case was \$175, and that the county of Denver paid \$100 for the treatment of each county patient.

The defendant denied that he made such representations. It appears to be conceded that the statements or pretenses, if made, were false. The defendant was a director in the Clarke Medical Company, and a majority of the shares in the company was held by his wife. After these conversations between Broman and the defendant took place, and during the same month, the defendant came into Broman's office, and, as Broman testified, "pulled out these stock certificates." It appears that on that occasion the defendant transferred to Broman 1,000 shares of stock in the company, and received from Broman a check for \$200 at that time and a check for \$800 at a later date.

[1] The first contention of the plaintiff in error is that the trial court erred in refusing to direct a verdict of acquittal. It is claimed that the evidence fails to show that Broman relied upon the representations or that they constituted the initial cause of his paying the defendant the money as charged.

Broman testified on direct examination that he believed the representations that the defendant made; that he acted upon them; and that, if he had not believed them, he would not have paid \$1,000 for the stock. This witness further testified that he secured the stock as a result of the defendant's representations, and that on account of such statements he gave defendant the two checks of \$1,000.

The plaintiff in error, defendant below, insists that this testimony of Broman must be qualified by what the witness said on cross-examination, and that his testimony on such cross-examination materially, if not altogether destroyed the specific statements above mentioned made in the direct examination.

We do not take this view of Broman's testimony. He testified on cross-examination

that he did not give the matter any serious thought at the time he took the stock, and that the stock transaction "came at the psychological moment." The witness also said, "I accepted the papers because they made out the papers to me, or because of the impression received regarding the business in the past." In answer to the question, "Did you turn over in your mind any specific statement you had heard whether from Clarke [the defendant] or any one else?" the witness said, "No; I don't know that I did, except in a subconscious manner, perhaps."

[2] This evidence did not contradict nor was it inconsistent with, the testimony given in chief. One may rely upon statements previously made to him, and act on and because of the same, without consciously reflecting upon those statements, provided the impressions theretofore created by such representations still remain on his mind.

The evidence was sufficient to warrant the jury in finding that the prosecuting witness relied and acted upon the false pretenses. In the case of *State v. Thatcher*, 35 N. J. Law, 445, the prosecutor did not expressly testify that he was induced to act because of the false pretenses, but the court said:

"It is sufficient if the jury are satisfied that the unlawful purpose would not have been effected without the influence of the false pretense, added to any other circumstance which might have contributed to control the will of the injured party."

There was no error in refusing to direct a verdict of acquittal upon the ground mentioned.

[3, 4] The plaintiff in error further contends that the trial court erred in including in the instruction numbered 7 the expression "whether consciously so induced on the part of Broman." The context of this expression, or the portion of the instruction containing the same, reads as follows:

"And in this case, if you find from the evidence beyond a reasonable doubt that the defendant falsely made, in substance, any of the alleged pretenses without at the time intending Broman to act thereon in purchasing the stock of the company, but afterwards sold to Broman the stock with intent and design that Broman should rely upon and be influenced to buy such stock and make payment therefor because of the former false pretense, or false pretenses, whether consciously or subconsciously so induced on the part of Broman, you should in such case treat such former pretense as though by adoption renewed upon such dealing by the defendant on trial."

The expression contained in the instruction, and objected to in this connection, was evidently intended to be adapted to the theory that a person may be induced to act upon statements previously made to him without at the time of acting thinking about any of the statements. Such theory is correct because impressions are formed and a belief may be created at the time when the representations are made, and a party may act upon and because of the statements and pretenses without consciously reflecting upon

them or even upon the belief which they created. In such case it may be said that a person is acting "subconsciously" in reliance upon the truth of the statements previously made to him because of the impressions created on his mind by such statements. The testimony in this case justified, though not required, some instruction based on this theory.

[5] The instruction given is not erroneous. When considered along with other instructions, it is not misleading on account of its reference to the subconscious mind or its use of the phrase "consciously or subconsciously." In other instructions the jury were told that it must be shown that Broman parted with his money and the defendant received it by means of the false pretenses, and that, in order for a pretense to be an inducing cause of the paying of money, it is necessary that it be shown that the money would not have been paid if such pretense had not been made and had not been believed and relied upon. The jury were told that all instructions must be taken, considered, and read together. There was no prejudicial error in the giving of instruction 7, when viewed with reference to the objection now made to it.

The plaintiff in error also complains of instruction numbered 7 upon the ground that it "falls to state the law with reference to the intent on the part of the accused persons" in cases of this kind. The instruction, among other things, states:

"Nor is it requisite that the person charged * * * should have intended and designed by such pretense at the time of making * * * the same to obtain the money * * * from the person from whom it is afterward obtained by reason thereof, provided that the person so making * * * such pretense upon the subsequent occasion of obtaining the money * * * from the person to whom it had so before been made, * * * designed or intended at the time of the obtaining of the money * * * to take advantage of the previously made and manifested false pretense, knowing that the same was adapted or likely to induce the other to part with the money, * * * and failing to make known the truth in relation to such pretenses. * * *"

[6, 7] The statute defining the offense of obtaining property by false pretenses provides that, if any person shall knowingly and designedly by false pretenses obtain from another person any money or other property with intent to cheat or defraud such person of the same, he shall be guilty of the offense. There is no doubt that it is the obtaining of the money by means of false pretenses, with intent to cheat or defraud the person from whom it is obtained, that constitutes the gist of the offense. *Shemwell v. People*, 62 Colo. —, 161 Pac. 157, 161. The intent to defraud must exist at the time when the property is obtained. 19 Cyc. 416. The instruction given is in accord with this rule, but the instruction is complained of because it assumes that the intent to defraud need not ex-

ist "at the time of making" the false pretenses. That, however, does not render the instruction defective.

"The false pretense need not originally have been made for the purpose of defrauding, however. If it is reiterated for that purpose, it is sufficient. *Reg. v. Hamilton*, 1 Cox, C. C. 244." 19 Cyc. 416, note 65.

The instruction complies with this last-mentioned rule, since it requires that the prosecution show that the accused "designed or intended at the time of obtaining of the money to take advantage of the previously made and manifested false pretense."

[8, 9] The testimony shows that during October, 1913, the complaining witness talked with the defendant almost every day for many days, "and almost invariably the conversation led to the nature of the business engaged in, the success of the treatment, the financial success of the business; the conversation would lead up to that one thing." Apparently after Broman became impressed with a belief in the truth of the defendant's representations, and while still being deceived thereby, the defendant came to his office and "pulled out the stock certificates." It was then that the stock was transferred and the defendant obtained the money. Neither at that time nor at any other time did the defendant retract or change the pretenses or statements theretofore made by him, but allowed them to remain within the knowledge of Broman as they were originally stated. We deem such conduct on the part of the defendant to be an implied representation that the facts still existed as theretofore stated, and equivalent to a reiteration or renewal of the pretenses previously made. The instruction given was applicable to the evidence, and was not erroneous.

[10] The fourth assignment of error relates to the giving of instruction numbered 10, and the fifth assignment of error is predicated upon the following portion of instruction 10:

"If you believe from the evidence that a witness has knowingly, willfully, and corruptly testified falsely to any fact material to any issue in this case, you should disregard such false testimony and should give any other testimony of that witness such weight, or no weight, according as you deem it to be credible in view of all the evidence, and particularly of any deemed by you to be credible evidence that may tend to corroborate it in whole or part."

It is only this above-quoted portion of instruction 10 which is argued and criticized in the brief of plaintiff in error, and the remainder of the instruction therefore need not be considered. It is claimed that the instruction is erroneous on account of the use of the word "should." It requires no argument to show that defendant could not have been prejudiced by instructing the jury that they "should" disregard testimony which was false and given when the witness "knowingly, willfully, and corruptly testified falsely." As to the use of the word "should" with ref-

erence to the "other testimony," such use did not make the instruction erroneous. The jury were not told that they should disregard such other testimony, but rather were instructed, in effect, to give such testimony the consideration due it, in view of all the evidence, and particularly of corroborating testimony.

[11-13] Error is assigned to the giving of instruction numbered 5, which reads as follows:

"In order to constitute a false pretense within the meaning of the statute, the pretense need not be such as will impose upon a person of ordinary prudence or such as cannot be guarded against but by that caution or common prudence; but any pretense which deceives the person designed to be deceived thereby is sufficient, although it would not deceive a person of ordinary prudence, or would not deceive some other person or persons under the like circumstances."

The instruction as given correctly states the law on the point covered. *Miller v. People*, 22 Colo. 530, 45 Pac. 408. The plaintiff in error contends:

That the trial court erred "in refusing to modify the said instruction by submitting to the jury the rule that, in determining whether the representations complained of were calculated to deceive Broman, the jury should take into consideration the intelligence and ability of the witness Broman."

Submitting to the jury the rule mentioned in this contention would not "modify" the instruction given, but would merely add a further proposition of law which is not inconsistent with anything contained in the instruction as given. No instruction was offered by the defendant at the trial with reference to this rule. Mere nondirection by the trial court affords no ground for reversal, where a proper instruction covering the point omitted was not requested and refused. *West v. People*, 60 Colo. 488, 491, 156 Pac. 137, and cases cited; 12 Cyc. 658.

We find no error appearing in the record. The judgment is affirmed.

Affirmed.

(64 Colo. 222)

FT. MORGAN RESERVOIR & IRRIGATION CO. et al. v. STERLING IRR. CO. et al. (No. 8859.)

(Supreme Court of Colorado. Feb. 4, 1918.)

1. ASSOCIATIONS ⇐19—CONTRACTS—RATIFICATION.

Where the president of an unincorporated irrigation association, empowered with management subject to directors, notified them he had employed plaintiffs as attorneys in suit against the association, and no director objected, the contract was ratified and binding.

2. ASSOCIATIONS ⇐19—CONTRACTS—RATIFICATION—PRESUMPTIONS.

Members of unincorporated association, knowing of hiring of attorneys, and failing to disaffirm within a reasonable time, are deemed to have assented.

3. PRINCIPAL AND AGENT §=173(1)—RATIFICATION—EVIDENCE REQUIRED.

Where the act is beneficial to the principal, slight evidence of ratification will raise a presumption of ratification.

En Banc. Error to District Court, Morgan County; H. P. Burke, Judge.

Action against the Ft. Morgan Reservoir & Irrigation Company and others, the Sterling Irrigation Company and others, and the Julesburg Irrigation District, to recover attorney's fees and costs. Nonsuit as to the Julesburg Irrigation District, directed verdict for the Sterling Irrigation Company and others, and the Ft. Morgan Reservoir & Irrigation Company and others bring error. Reversed.

Johnson & Robison and Stephenson & Stephenson, all of Ft. Morgan, for plaintiffs in error. C. M. Rolison, of Julesburg, and T. E. Munson, of Sterling, for defendants in error.

TELLER, J. The parties to this action were defendants below in an action to recover attorney's fees and disbursements in a course of litigation alleged to have been brought for and at the instance of said defendants. The plaintiffs in error admitted the allegations of the complaint, and alleged that the other defendants were jointly and severally liable. The defendants in error, by their answer, denied that the plaintiffs had been employed by them in said litigation. On the trial, at the close of plaintiffs' case, the court sustained a motion by the Julesburg Irrigation District for a nonsuit as against it, directed a verdict in favor of the other defendants, who now appear as defendants in error, and entered judgment against the defendants which had admitted liability. They bring the case here for review, and allege error in the court's rulings in favor of the other defendants.

The litigation for which the attorney's fees are claimed grew out of the following circumstances: The defendants in that suit were members of an organization known as "The Lower Platte Protective Association," an unincorporated body, formed by various ditch companies in water districts No. 1 and No. 64, and the Julesburg Irrigation District, for the announced purpose of protecting the irrigation rights of its members. The plaintiffs acted as attorneys for the association in an adjudication of water rights, and in various suits in which the rights of these parties as appropriators were involved through claims by others for seepage, waste, and flood waters by which said rights are in great part satisfied. All of the litigation resulted in favor of the members of said association. The constitution of the association provided for a board of directors consisting of three members from each of the two districts, four of whom should constitute a quorum for the transaction of business. It further provided

that the president was to "have general executive control over all the officers, agents and employes of the association," and that he should "have entire charge of the operation and conduct of the business and affairs of the association, under the direction and supervision of the board of directors." The trial court held that, as against the defendants in error, the plaintiffs had failed to show an employment; this for the reason that they failed to show any formal action by the board in the matter. That was the ground of defense below, as it is here.

The president of the association testified, and it is undisputed, that there was, from the inception of the movement to organize the association, a general understanding among the parties in interest that the plaintiffs were to be employed as attorneys of the association; and that in pursuance of such understanding, and after consulting a majority of the board, he employed the plaintiffs. It appeared also from the testimony of the president and of two other directors that at least five of the directors had knowledge of plaintiffs' employment and of the work they were doing for the association. The president testified that he reported to the board, at a formal meeting, the fact that plaintiffs had been so employed, and that no objection was made thereto. It appeared, also, that the board allowed and paid a number of bills for services and expenses of other parties rendered at the instance of the president without formal authority from the board. Though the litigation extended over several years, there was no meeting of the board between 1908, the year in which the organization was formed, and the date on which the suit was begun. There is no question as to the value of the services rendered by plaintiffs, nor is it denied that material benefits accrued to all these parties as a result of plaintiffs' efforts.

[1] The members of this association made some of its members their agents, under the designation of directors, to carry out the purpose for which the association was formed, and any valid contracts made by these agents will bind the principals. It may be conceded that the so-called directors did not formally employ plaintiffs; yet, since Chase, one of the directors and acting as president of the association, reported to the board of directors the fact of such employment, and they made no objection thereto, the ratification of the act of employment is complete. *Henry v. Water Co.*, 10 Colo. App. 14, 51 Pac. 90; 10 Cyc. 1075 et seq.

[2, 3] Those members who had knowledge of the hiring and did not disaffirm it within a reasonable time are deemed to have assented to it. *Higgins v. Armstrong*, 9 Colo. 48, 10 Pac. 232; 10 Cyc. 1077. Where the act is beneficial to the principal, slight evidence of ratification will raise a presumption of ratification. *Id.* 1080; 2 Morawetz on Cor-

porations, § 629. Here the employment of an attorney to protect the interests of the members was the chief purpose of the organization. The employment of counsel was necessary to the furtherance of that purpose. It is unnecessary to determine whether or not all the defendants in error were members of the association under its constitution, or whether an irrigation district may become a partner with other corporations or individuals.

The organization may be treated as having no legal existence, but the defendants in error, acting within their undoubted powers, unitedly chose six agents to carry out a business enterprise for the benefit of all. The plaintiffs were retained by these agents, litigation was carried on for a period of years—of which all these parties must have had knowledge—with results of great value to all. The defendants in error are enjoying the benefits of the transaction, and so far as the record shows, they made no objection to plaintiffs' employment until called upon to aid in paying therefor. The court erred in taking the case from the jury, and holding that the fact of employment was not proved.

The judgment is reversed.

HILL, C. J., not participating.

(64 Colo. 229)

DENVER & S. L. R. CO. v. CHICAGO, B. & Q. R. CO. et al. (No. 8938.)

(Supreme Court of Colorado. Feb. 4, 1918.)

1. CONSTITUTIONAL LAW §70(1)—JUDICIAL POWERS—ENCROACHMENT ON LEGISLATIVE POWERS.

Courts are not prohibited from reviewing orders of the Public Utilities Commission, establishing a division of freight rates between carriers, on the ground that such would be an encroachment on legislative power.

2. CONSTITUTIONAL LAW §72—JUDICIAL POWERS—REVIEW OF ORDERS OF PUBLIC UTILITIES COMMISSION.

Laws 1913, p. 497, §§ 52, 53, providing for review and final determination by the Supreme Court of orders of the Public Utilities Commission, is not unconstitutional, as conferring on the courts nonjudicial powers encroaching on the executive.

3. PUBLIC SERVICE COMMISSIONS §32—APPEAL—REVIEW AND DETERMINATION BY COURT.

Laws 1913, p. 497, §§ 52, 53, providing that findings by the Public Utilities Commission, on disputed questions of fact, are not subject to review, and making the provisions of the Code of Civil Procedure as to review applicable so far as not in conflict, does not prevent the court, in reviewing an order of the commission making a division and apportionment between carriers of through rates from determining whether there is conflict of testimony, whether there is competent evidence to support the order, and whether such order is just and reasonable.

4. PUBLIC SERVICE COMMISSIONS §32—REVIEW—CONFLICTING EVIDENCE—"DISPUTED QUESTION OF FACT."

A conflict in deductions made by witnesses, but not in their testimony, as to facts from which the Public Utilities Commission should draw its own conclusion, does not render a de-

cision thereon one of disputed facts, not reviewable by the Supreme Court under Laws 1913, p. 497, § 52; the commission's conclusions being of law rather than of fact.

5. CARRIERS §12(5)—CHARGES—DIVISION OF RATES—REASONABLENESS.

A division of freight rates between railroads by a Public Utilities Commission, that gives far less than the average ton-mile rate on the through haul to the railroad, which has necessarily the highest ton-mile cost, is unjust and unreasonable.

6. CARRIERS §12(7)—PUBLIC UTILITIES COMMISSION—CONSIDERATION OF LOCAL FREIGHT RATES NOT IN EVIDENCE.

In determining a division of freight rates between railroads, the Public Utilities Commission could not consider for any purpose local freight rates not offered in evidence.

7. CARRIERS §12(1)—DIVISION OF RATES—SCOPE AND EFFECT OF REGULATION.

When a reduction is made in a through freight rate, it does not follow that the Public Utilities Commission may base a division of such new rate between roads upon a former division, regardless of its inequalities.

8. CARRIERS §18(2)—APPEAL—DIVISION OF THROUGH RATES—MILEAGE.

A division of through freight rates between connecting railroads, made by the Public Utilities Commission, without any regard to mileage basis as an element, is an error of law, reviewable by the Supreme Court on appeal.

9. CARRIERS §12(7)—REASONABLENESS OF DIVISION OF THROUGH RATES—PROOF—FORMER RATES.

A prior division of freight rates, based on agreement, does not prove its reasonableness after the Public Utilities Commission has reduced the through rate.

10. CARRIERS §13(3)—CHARGES—DIVISION OF—LONG AND SHORT HAUL—DISCRIMINATION.

Because a railroad is located where coal of superior quality is mined, which will come into competition with coal on which connecting carriers get a longer haul, is no reason for discrimination against such railroad by the Public Utilities Commission in adjusting division of through rate.

11. CARRIERS §12(5)—DIVISION OF RATES—EVIDENCE—COMPETENCY—RATES OF OTHER LINES.

An order for division of rates, based in part on the comparison with what has been agreed to between roads carrying from other coal fields with a less costly haul, is erroneous.

12. CARRIERS §13(3)—DIVISION OF CHARGES—REASONABLENESS OF LOCAL RATES—COMPARISON.

Respondent railroad company cannot complain of an adjustment of through rates from different coal fields, which causes it to haul coal between the same stations at different rates dependent on the field from which the coal comes, as unlawful discrimination, and seek to justify the same condition operating in its favor affecting petitioner railroad.

13. CARRIERS §12(7)—PUBLIC CONTROL—DIVISION OF RATES—DISTRIBUTION OF CARS.

The consideration of the relative number of cars furnished on through hauls of coal by the respective carriers in fixing a division of rates is error; that being a separate matter for adjustment either by the commission or the railroads.

14. EVIDENCE §48—JUDICIAL NOTICE—ORDERS OF PUBLIC UTILITIES COMMISSION—RATE SHEETS ON FILE.

Assuming that the Supreme Court will take judicial notice of the opinions of the Public Utilities Commission as printed, it cannot take

notice of a rate sheet filed with such commission, but not introduced in evidence, or made a part of the record.

15. CARRIERS ⇐10—CONTROL—PROCEEDINGS TO PREVENT ENFORCEMENT OF DIVISION OF RATES.

Since the power to make rates and fix division of rates has been lodged in commissions, both state and federal, carriers cannot retire from a rate or division so fixed, leaving shippers on their lines without opportunity to compete, but their remedy lies in appeal to the commission and courts.

16. CARRIERS ⇐18(2) — APPEAL—MODIFICATION—RATE-MAKING POWER.

Laws 1913, p. 497, § 52, providing that "upon hearing the Supreme Court shall enter judgment either affirming, setting aside, or modifying the order of decision of the commission," does not authorize such court to modify an order of the commission by fixing a division of rates between carriers; that power belonging to the commission.

En Banc. Error to Public Utilities Commission.

Petition by the Denver & Salt Lake Railroad Company against the Chicago, Burlington & Quincy Railroad Company and others, to the Public Utilities Commission, from whose decision the petitioner brings error. Reversed, set aside and remanded.

Tyson S. Dines, Tyson Dines, Jr., Carle Whitehead, and Albert L. Vogl, all of Denver, for plaintiff in error. E. E. Whitted and T. M. Stuart, Jr., both of Denver, for defendant in error Burlington. William V. Hodges, Wallace T. Hughes, of Chicago, Ill., and D. Edgar Wilson and Harold H. Healy, both of Denver, for defendant in error Rock Island. C. C. Dorsey and John Q. Dier, both of Denver, for defendant in error Union Pacific.

HILL, C. J. This action is to review an order of our Public Utilities Commission fixing a division or apportionment of through rates on coal to be shipped from points in northwestern Colorado, known as the Oak Hills district, on the road of the petitioner, to points in the eastern part of the state, on the roads of the respondents. 2 Colo. P. U. C. Rep. 8. For convenience the petitioner, the Denver & Salt Lake Railroad Company, will be called "the Moffat road"; the respondent the Chicago, Burlington & Quincy Railroad Company "the Burlington"; the Union Pacific Railroad Company "the Union Pacific"; the Chicago, Rock Island & Pacific Railway Company and its receiver "the Rock Island"; and our Public Utilities Commission "the commission."

The record discloses that on January 11, 1915, the commission instituted on its own motion an investigation into the rates charged on coal between these and other points in the state; that on May 10th following it announced its opinion and entered its order. 1 Colo. P. U. C. Rep. 48. By this order it required the carriers, who are parties to this action, to establish new rates for the transportation of coal between the points above

referred to, which new rates as a whole were materially lower than the former ones, varying from no change at a few points to as high as 30 per cent. reduction to others, probably an average reduction of at least 10 per cent., the exact amount being immaterial so far as this controversy is concerned. The carriers being unable to agree upon a division of the new rates, the Moffat road appealed to the commission to decide it. Its decision was that as between the Moffat, the Burlington, and the Union Pacific the new rates should be divided in the same proportion as the former, each bearing its proportion of the reduction in proportion to what its proportion of the old rate bore to the whole; that as between the Moffat and the Rock Island the divisions should be similar to those on the other roads, which were different than the former divisions between them. The Moffat road brings the case here for review, and contends that the divisions for it are unjust, unreasonable, and contrary to the evidence, and that there is no testimony to sustain the justness of the order.

[1, 2] The respondents contend that this court is without jurisdiction to interfere in the respect complained of; that the fixing of the divisions is along the same line as the establishment of reasonable rates, and is legislative in character; that this prohibits a review of that question by this court; that it is the exercise of an authority which the law vests in the commission, viz. the determination of a question of fact, and that any attempt to provide for a review by a court and for its final determination of the matter would be unconstitutional as giving to the judiciary nonjudicial powers; that the courts must not usurp administrative orders on their own conception of their wisdom; that in any event the questions of divisions are questions of fact, which were determined upon conflicting evidence, hence cannot be disturbed.

The principles upon which courts act in such cases and their jurisdiction are well settled. All such acts, so far as we are advised, including those involving the Interstate Commerce Commission, provide for review by the courts. No case has been cited which holds that similar provisions providing for review are for that reason invalid.

[3] The debatable question is the scope and extent of the review and the court's judgment in connection with it. Section 52 (pages 497-498, Laws 1913) of our act provides for a review by this court for the purpose of having the lawfulness of the commission's order inquired into and determined. It provides that no new or additional evidence may be introduced in the Supreme Court, but the case shall be heard on the record of the commission as certified by it. It further provides that the review shall not extend further than to determine whether

the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States, or of the state of Colorado, and whether the order of the commission is just and reasonable, and whether its conclusions are in accordance with the evidence. It also provides that the findings and conclusions of the commission on disputed questions of fact shall be final and shall not be subject to review, also that upon hearing the Supreme Court shall enter judgment either affirming, setting aside, or modifying the order or decision of the commission. Section 53 provides that pending a review, this court may stay or suspend, in whole or in part, the operation of the commission's order on certain conditions, etc.

It will thus be observed that among other things the act requires this court to determine whether the order of the commission is just and reasonable, and whether its conclusions are in accordance with the evidence. This language assumes, as other parts of the act provide, that the commission will take testimony and base its decision thereon, and that on review the testimony will be made a part of the record for consideration by this court. Section 52 further provides that the provisions of our Code of Civil Procedure relative to rights of review shall, so far as applicable and not in conflict with the provisions of this act, apply to proceedings had in this court under the provisions of this section. When these sundry provisions are considered together, it follows that our review of such cases was intended to be the same as in other cases between litigants, except as otherwise provided or limited in the act.

Counsel for respondents contend that the question of a reasonable division of rates is a question of fact, and that as section 52 of the act prohibits us from reviewing any question of fact based upon conflicting testimony, we are without jurisdiction to go into that question. In order to properly construe this paragraph, it should be considered in connection with those immediately preceding it. They provide that we shall determine whether the order of the commission is just and reasonable, and whether its conclusions are in accordance with the evidence. When they are read together, we agree that our duties in so far as this phase of the contention is concerned are controlled and limited by them. We cannot agree, however, that they prohibit us from considering the evidence in order to ascertain from it, which the act says we shall do, whether the order is just and reasonable, and whether the commission's conclusions are in accordance with the evidence. This includes whether there is a substantial conflict in the evidence, which, if there is, we agree would prohibit us from overruling the commission's finding based thereon. Our con-

clusions in this respect are supported by the highest court in the land.

In *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U. S. 88, 91, 33 Sup. Ct. 185, 186 (57 L. Ed. 431), the court had under consideration an order of the Interstate Commerce Commission reducing rates. In discussing its powers to review such orders the court said:

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence;' * * * or if the facts found do not, as a matter of law, support the order made. * * * In a case like the present the courts will not review the commission's conclusions of fact * * * by passing upon the credibility of witnesses, or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the commission. An order based thereon is contrary to law, and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.'"

To the same effect is *Interstate Commerce Commission v. U. P. R. R. Co. et al.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308. In *Louisville & N. R. Co. et al. v. United States et al.* (D. C.) 216 Fed. 672, 679, in commenting upon the same question the court said:

"Accordingly it is well settled that where all the evidence introduced before the commission is exhibited to the court, its conclusion of fact that a given rate is reasonable or unreasonable will be accepted by the court as final and not reviewed upon the weight of the evidence, unless either there is no substantial evidence supporting such conclusion, or such conclusion is contrary to the indisputable character of the evidence, in which cases the conclusion involves an error of law, and is therefore reviewable by the court."

In *Louisville & N. R. Co. v. United States*, (D. C.) 227 Fed. 258, at page 262, the court says:

"It is well settled, on the one hand, that a conclusion of the commission upon a question of fact, such as the reasonableness of a rate or the giving of a preference, whose correctness depends wholly upon a consideration of the weight to be given evidence before it, will not be reviewed by the court; and, on the other hand, that a conclusion which plainly involves, under the undisputed facts, an error of law, or which is shown to be supported by no substantial evidence or to be contrary to the indisputable character of the evidence, thereby likewise involving an error of law, will be so reviewed."

In *State v. Great Northern Ry. Co.*, 130 Minn. 57, 61, 153 N. W. 247, 248, Ann. Cas. 1917B, 1201, in passing upon this phase of their statute, the Supreme Court of Minnesota says:

"The order may be vacated as unreasonable if it is contrary to some provision of the federal or state Constitution or laws, or if it is beyond the power granted to the commission, or if it is based on some mistake of law, or if there is no evidence to support it, or if, having regard to the interest of both the public and the carrier, it is so arbitrary as to be beyond the exercise of a reasonable discretion and judgment."

In *Louisiana & P. Ry. Co. et al. v. United States et al.* (Com. C.) 209 Fed. 244, 250, in re-

referring to a finding of the Interstate Commerce Commission the court says:

"Whether or not this is a justifiable finding of fact is to be determined, in the first instance by the Interstate Commerce Commission. When, as in these cases, a full and fair hearing has been granted, the commission's findings of fact are subject to review in this court only upon an allegation that they are not sustained by any substantial evidence in the record before it or are arbitrary in being based upon improper distinctions and considerations."

This opinion was approved by the Supreme Court of the United States in *Tap Line Cases*, 234 U. S. 1, 34 Sup. Ct. 741, 58 L. Ed. 1185. While these cases apply to orders fixing rates, the same rule follows in division cases; the federal courts have thus applied them in reviewing such cases. *Louisiana & P. Ry. Co. et al. v. United States*, supra; *O'Keefe v. United States*, 240 U. S. 294, 36 Sup. Ct. 313, 60 L. Ed. 651.

The rule pertaining to reviews in the cases quoted from are applicable here and call for a consideration of the evidence in order to determine whether there is competent testimony to support the findings of the commission, and whether the commission's order is just and reasonable. This the statute says we shall do; hence is a duty which we cannot escape. *C., R. I. & P. R. Co. v. Nebraska State Railroad Commission et al.*, 85 Neb. 818, 124 N. W. 477, 26 L. R. A. (N. S.) 444, relied on by respondents, does not sustain their position. So far as applicable, it is in harmony with the views herein expressed. The Nebraska statute provides for appeals from the commission to the district court with a proviso:

"In all trials under the foregoing article, the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the * * * orders * * * complained of are unreasonable and unjust to it."

It further provides that the commission's order—

"shall, when properly authenticated, * * * be received in evidence in the trial of said cause, that said * * * order * * * is prima facie just and reasonable." *Cobbey's Ann. St. 1907, § 10655.*

Upon review the Supreme Court said:

"Under all the facts in evidence, and giving the statutory presumption proper weight, we are satisfied that the order of the commission is not unreasonable, and the judgment of the district court so finding is affirmed."

This holding is to the effect that the testimony was sufficient to support the finding of the district court.

[4] The Moffat road claims that the conclusions of fact which the commission arrived at, as set forth in its opinion, do not, as a matter of law, support the order made; that the commission's order is not only not supported by the evidence, but is contrary to its legal effect. We have given the testimony careful consideration, and find no real conflict in it. It is not claimed that there is, upon any question of fact, such as locations of mines, quality of coal, prior business markets, roads, distances, tonnage, amounts carried,

equipments of the different roads, proportion of cars furnished for the coal business, cost of carriage, rates heretofore charged by these and other roads, divisions thereof, agreements pertaining thereto, distances in connection therewith, local rates east and west, hauls on all lines, difference in cost of hauls, empties hauled and furnished, and all other such facts. The conflict, if any, is in the conclusions drawn therefrom by the witnesses which, instead of being testimony, is simply their deductions as to the legal effect of the evidence concerning the real facts, which are not in dispute. These deductions were for the commission to make, and are questions of law rather than of fact. We admit that there is a conflict in the deductions of these different witnesses. For example, one testified that Interstate Commerce Commissioner Clark had characterized divisions as a matter of barter and trade; for this reason certain deductions follow that because certain rates at certain places had once been approved by the Interstate Commerce Commission, that certain conclusions should follow here. Another testified that because certain originating carriers had accepted lower proportions in order to assist them to find markets not on their lines, that certain conclusions should follow in this case. Such matters were but reasons or arguments as to what they thought ought to follow. When it came to testimony of existing facts pertaining to rates, divisions upon other roads, the custom concerning such matters, etc., there was no dispute.

In *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308, it is said:

"Neither can any specific effect be given to the statement of witnesses that the 40-cent rate was low. The reasonableness of rates cannot be proved by categorical answers, like those given, where a witness may, in terms, testify that the goods were worth so much per pound, or the services worth so much a day. Too many elements are involved in fixing a rate on a particular article, over a particular road, to warrant reliance on such method of proof. The matter has to be determined by a consideration of many facts."

[5] This declaration is likewise applicable to the question of a division of rates. It is undisputed that between Oak Hills and Denver the Moffat road crosses the continental divide at an altitude of 11,660 feet, with 28 miles of 4 per cent. grade, 16 ascending from the west, and 12 descending; that the topography of the country through which it runs is almost entirely mountainous with sharp curves, excessive grades, and high altitude; that for these reasons (and the commission so found) its operating conditions are more difficult and expensive than on the lines of the respondents to the towns upon the prairie country east of Denver. It was also shown that the west-bound movement into Colorado on respondents' lines was much heavier than the east-bound movement, outside the coal traffic, and that the coal movement east over them furnished loads to many cars which, at

times, would otherwise have to go back empty; that the principal traffic on the Moffat road is coal for Denver and the East; that this necessitates the hauling of a large number of cars west from Denver to Oak Creek empty, which adds materially to its cost in the transportation of coal the other way. It is also agreed that the average distance from Oak Hills coal district on the Moffat road to Utah Junction is 212 miles; that from this point the Moffat road, out of its divisions, absorbs a switching charge for delivery to the Union Pacific and the Rock Island of 20 cents a ton, yet regardless of all of these facts the commission awarded to the respondents' roads a much greater portion of the through rate per mile than it allowed to the Moffat road, being an average of nearly twice as much. To illustrate, the divisions on lump coal (the others being similar in proportion) to which we will add the equivalent per ton per mile in cents allowed each road to 10 out of some 65 stations on the Burlington (the divisions to the remainder being fixed on the same basis) are as follows: Derby, distance from Utah Junction 10 miles, through rate \$1.90 per ton; Moffat's portion \$1.50 per ton, equivalent to .71 cents per ton per mile; Burlington's portion 40 cents per ton, equivalent to 4 cents per ton per mile. Barr, 22 miles, through rate \$2 per ton; Moffat's portion \$1.303 per ton, equivalent to .61 cents per ton per mile; Burlington's portion 69.7 cents per ton, equivalent to 3.17 cents per ton per mile. Hudson, 34 miles, through rate \$2.10 per ton; Moffat's portion \$1.26 per ton, equivalent to .59 cents per ton per mile; Burlington's portion 84 cents per ton, equivalent to 2.47 cents per ton per mile. Wiggins, 68 miles, through rate \$2.40 per ton; Moffat's portion \$1.241 per ton, equivalent to .59 cents per ton per mile; Burlington's portion \$1.159 per ton, equivalent to 1.70 cents per ton per mile. Akron, 116 miles, through rate \$2.85 per ton; Moffat's portion \$1.296 per ton, equivalent to .61 cents per ton per mile; Burlington's portion \$1.554 per ton, equivalent to 1.34 cents per ton per mile. Schramm, 148 miles, through rate \$3.15 per ton; Moffat's portion \$1.39 per ton, equivalent to .66 cents per ton per mile; Burlington's portion \$1.76 per ton, equivalent to 1.19 cents per ton per mile. Laird, 176 miles, through rate \$3.40 per ton; Moffat's portion \$1.499 per ton, equivalent to .71 cents per ton per mile; Burlington's portion \$1.901 per ton, equivalent to 1.80 cents per ton per mile. Sterling, 123 miles, through rate \$2.95 per ton; Moffat's portion \$1.318 per ton, equivalent to .62 cents per ton per mile; Burlington's portion \$1.632 per ton, equivalent to 1.33 cents per ton per mile. Amherst, 187 miles, through rate \$3.50 per ton; Moffat's portion \$1.362 per ton, equivalent to .64 cents per ton per mile; Burlington's portion \$2.138 per ton, equivalent to 1.14 cents per ton per mile. Hereford, 200 miles, through rate \$3.50 per ton; Mof-

fat's portion \$1.32 per ton, equivalent to .62 cents per ton per mile; Burlington's portion \$2.18 per ton, equivalent to 1.09 cents per ton per mile. To 8 out of 38 stations on the Union Pacific (the divisions to the remainder being on the same basis) are as follows: Sandown, 4 miles from Pullman station in Denver, where the Union Pacific receives the coal, through rate \$2 per ton; Moffat's portion \$1.50 per ton, equivalent to .71 cents per ton per mile; Union Pacific's portion 50 cents per ton, equivalent to 12.50 cents per ton per mile. Sable, 8 miles, through rate \$2 per ton; Moffat's portion \$1.364 per ton, equivalent to .64 cents per ton per mile; Union Pacific's portion 63.6 cents per ton, equivalent to 8 cents per ton per mile. Bennett, 30 miles, through rate \$2.15; Moffat's portion \$1.152 per ton, equivalent to .54 cents per ton per mile; Union Pacific's portion 99.8 cents per ton, equivalent to 3.32 cents per ton per mile. Hugo, 103 miles, through rate \$2.75 per ton; Moffat's portion \$1.25 per ton, equivalent to .59 cents per ton per mile; Union Pacific's portion \$1.50 per ton, equivalent to 1.46 cents per ton per mile. Kit Carson, 151 miles, through rate \$3.15 per ton; Moffat's portion \$1.26 per ton, equivalent to .59 cents per ton per mile; Union Pacific's portion \$1.89 per ton, equivalent to 1.25 cents per ton per mile. Chemung, 190 miles, through rate \$3.50 per ton; Moffat's portion \$1.40 per ton, equivalent to .66 cents per ton per mile; Union Pacific's portion \$2.10 per ton, equivalent to 1.11 cents per ton per mile. Masters, 71 miles, through rate \$2.45 per ton; Moffat's portion \$1.267 per ton, equivalent to .60 cents per ton per mile; Union Pacific's portion \$1.183 per ton, equivalent to 1.67 cents per ton per mile. Julesburg, 195 miles, through rate \$3.50 per ton; Moffat's portion \$1.47 per ton, equivalent to .69 cents per ton per mile; Union Pacific's portion \$2.03 per ton, equivalent to 1.04 cents per ton per mile. To 10 stations on the Rock Island east of Limon, the divisions are about the same as on the Union Pacific east of the same point.

In its former opinion, wherein it reduced these through rates, the commission found that the reduced rates fixed by it were just and reasonable, and would give to the carriers a sufficient return for the services performed. In commenting concerning it they said:

"The commission has given careful consideration to the conditions surrounding each particular line, and feels that they have been most liberal with the carriers in arriving at the various rates in this case. In no case, except in very long hauls, has the rate been reduced to less than one cent per ton per mile, the general average being from 12 to 14 mills per ton per mile."

Yet in this case, when it came to divisions, the Moffat road is not given any such amounts as were stated in the former case that the particular lines were entitled to. For instance, to shipments on the Burlington, the Moffat is given rates of 5.9 mills to

7.1 mills per ton per mile, instead of an average of 12 to 14 mills, as the former opinion states; whereas, the Burlington divisions on this haul yield it from 1.09 cents to 4 cents per ton per mile, or nearly twice as much upon its longest hauls and up to about six times as much per ton per mile upon its shortest haul, an average of about twice as much on all hauls. The same is true concerning the Union Pacific and the Rock Island. It will thus be observed that these divisions are all out of proportion to the mileage, the amount allowed per ton per mile for such mileage or the cost of carriage. 'Tis true as counsel for respondents urge, the testimony shows that for a short haul on their lines the expense of carriage is greater per mile than upon a longer haul on the same line. For this reason they urge they should be allowed a greater amount per mile than the Moffat road for its longer haul. We appreciate that the Interstate Commerce Commission recognizes this fact and makes such allowances to the extent of fixing a minimum of 25 per cent. for the short haul. See *Hayden Bros. Coal Corporation et al. v. Denver & Salt Lake Railroad Co. et al.*, 45 Interst. Com. Com'n R. 236, wherein at page 244 it is said:

"The result of applying the method of dividing on a mileage prorate with a minimum of 25 per cent. to the short line, which is a common method of dividing rates when an originating or delivering line has a relatively short haul."

If this rule were applied here, and the cost of carriage for the shorter haul considered as a factor in fixing the divisions, which we agree should be, it must still be conceded that there are but two hauls involved which do not give respondents a division greatly in excess of 25 per cent., while there is no testimony which shows that any of these hauls on their lines cost any more, or even as much, per mile as do the longer hauls on the Moffat line. Besides, this argument does not sustain the claim that the commission's divisions were based upon the theory of these differences in the distances of carriage, for the reason that the same discrimination is made to stations where the distance on each road is about the same. To illustrate, the distance from Utah Junction to Hereford on the Burlington is 200 miles, the through rate is \$3.50 per ton; the Moffat's portion is \$1.32 or .62 cents per ton per mile; the Burlington's portion is \$2.18 per ton, or 19 cents per ton per mile, being over twice as much for practically the same distance. The remainder of the longer hauls from 50 miles up on the Burlington will be found upon practically the same basis. This is likewise true of the Union Pacific. Take Julesburg, 195 miles from Denver, or Pullman station in Denver, where it receives the coal, the through rate is \$3.50 per ton; the Moffat's portion is \$1.47 per ton, or .69 cents per ton per mile; the Union Pacific's portion

is \$2.03 per ton, or 1.04 cents per ton per mile. To Chemung, a distance of 190 miles from Pullman, the through rate is \$3.50 per ton, the Moffat's portion is \$1.40 per ton, or .66 cents per ton per mile, while the Union Pacific's portion is \$2.10 per ton, or 1.11 cents per ton per mile. In arriving at this conclusion, the commission says:

"It is a general principle that the proportion of a through rate shall be somewhat lower than the local rate; there are many reasons why this should be so, and the commission can see no reason why that principle should not be followed in this case."

The commission, however, did not apply this principle to the respondents' roads, but only to the petitioners'. In comparing these rates with the rates on respondents' roads from the Northern coal field immediately north of Denver, the commission says that they are not disproportionate with them. But their figures are not in harmony with these findings. They show that in making these divisions they gave to the Union Pacific to points on its Kansas divisions east of Denver and to points on its Julesburg branch east of La Salle divisions, which average about 90.8 per cent. and 102.2 per cent., respectively, of its local rate from the Northern Colorado coal fields to the same points, when it only gave to the Moffat road 80 and 85 per cent., respectively, of its local rates to Denver; that they gave to the Burlington divisions which average 120 per cent. of its local rate from the Northern coal fields to the same points, while it gave to the Moffat road on coal going to these same points divisions which average only 84 per cent. of its local rate to Denver. Besides, there is no testimony which shows that these local rates on the Burlington and the Union Pacific are exceptionably low, as was shown concerning the Moffat local rate to Denver.

[6] The petitioner claims that there was no testimony offered of these local rates on the Burlington and the Union Pacific, for which reason that the commission was without authority to consider them for comparison purposes. The petitioner also claims that had they been introduced in evidence, it could have shown that these hauls were on prairie lines, etc., and therefore not comparable to that of the Moffat road. Respondents have failed to show, and we have been unable to find, that these local rates were offered in evidence, for which reason the commission was without authority to consider them for any purpose. *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431. We have commented upon these rates, using the figures given in the commission's opinion and the briefs for the purpose of showing (were they in evidence) the unequal portion of the divisions here made when compared with the local rates of each line. The respondents recognized these vast discriminations in so far as all facts heretofore

stated are concerned. They seek to justify their right to the excessive portion, on the theory, among others, of strategic position, prior service to these districts from other fields, which, under the former higher rates, gave them these same divisions, and for the further reason that since the reductions other initial carriers have agreed with them upon the old divisions.

[7] The record discloses that for many years the respondents have been receiving coal from other roads at Denver and delivering it to these stations from what is called the Walsenburg district, an average of 195 miles south of Denver; that coal from this district under the old divisions had been supplied to these stations for many years before coal from the Moffat Oak Hill district entered the field; that in 1909 the Oak Hill district first became a factor when the Moffat road fixed a rate to Denver of \$1.60 per ton on lump coal and \$1.40 per ton on slack, being the same as from the Walsenburg district; that it likewise accepted the same divisions of the through rates to points involved (except stations on the Rock Island) as were given to the initial carriers from Walsenburg. For these reasons and others, which will hereafter be considered, respondents contend that when any deduction is made in the through rate, it should follow as a matter of course that the divisions of the lower rate should be upon the same basis, regardless of the inequalities in the former divisions. The commission appears to have acquiesced in this position. We cannot agree with this conclusion, and the authorities do not sustain it. The commission held that the former through rates were unreasonable, and that the reduced through rates fixed by it were reasonable. It did not change the former rates from either district into Denver, for which reason its holding must have been that they were reasonable.

[8] In *People's Fuel & Supply Co. v. Grand Trunk Western Railway Co. et al.*, 27 Interst. Com. Comn. R. 24, at page 28, the Interstate Commerce Commission says:

"It is not the separate factors in a through rate, but the rate or charge as a whole, to which the test of reasonableness must be applied. In examining into the reasonableness of a combination rate or charge we are not, however, precluded from looking to the several factors thereof in an effort to locate unreasonableness in the total charge."

This comment is applicable to the facts here. The commission held the former through rate unreasonable, but in making this division of the new lower rates, they based it practically upon two grounds and decline to give consideration to the other general factors in an effort to locate the unreasonableness in the former total charge in order to place the apportionment of the new rate where it properly belongs. In *Stacy & Sons v. Oregon Short Line Railroad Co. et al.*, 20 Interst. Com. Comn. R. 136, in speaking on the subject here involved, the

Interstate Commerce Commission, at page 139, says:

"The question of divisions of these rates is of course now left to the defendants to agree upon. * * * A mileage prorate basis of divisions would divide the earnings according to the service actually performed by each carrier."

In commenting upon this language, our commission in its opinion said:

"We agree with the Interstate Commerce Commission in the above statement. It is, however, of no assistance to the commission in this case."

If they considered, as they say, that it was of no assistance to them, that means that the mileage basis was not given any consideration, or considered as a factor, or as having any bearing in the fixing of these divisions; the divisions fixed confirm this statement. This was an error of law. Such questions are always a proper element to be considered. *Pulp & Paper Mfg. T. Ass'n v. C., M. & St. P. Ry. Co. et al.*, 27 Interst. Com. Comn. R. 83; *Hayden Bros. Coal Corporation et al. v. D. & S. L. R. Co. et al.*, 45 Interst. Com. Comn. R. 236.

[9] The respondents assert that because of the prior existence and divisions of the old Walsenburg rates and their acceptance by the Moffat road, that this is conclusive evidence that those divisions were reasonable, and that for this reason the divisions of the lower rates should be upon the same basis. This position was evidently accepted by the commission. This does not follow as a matter of course, and is in conflict with the previous rulings of the commission that the former through rates were unreasonable. These through rates were the sum of the divisions, they being condemned by the commission as too high; it necessarily follows that the division to at least one of the carriers was also too high. The record shows that when the old Walsenburg rates and divisions were agreed upon, we had no commission to appeal to in such cases. It was not until June, 1906, that the Interstate Commerce Commission had power to prescribe interstate rates. *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; *I. C. C. v. C., N. O. & T. P. Ry. Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243.

The record shows that in order to get its coal into the Denver market, the Moffat road, when cost of carriage is considered, made a very reasonable local rate for that service; that it accepted the Walsenburg divisions of the old through rates on the Burlington and the Union Pacific, because they were the best that it could get at that time, and that it was willing to participate in those divisions, even though not profitable to it in order to develop the coal industry along its line. The right to do this is recognized by the Interstate Commerce Commission. In *Indianapolis Freight Bureau v. P. R. R. Co.*, 15 Interst. Com. Comn. R. 587,

at page 576, the Interstate Commerce Commission says:

"A carrier may voluntarily make, under the force of controlling competition, rates which it might not be required to make."

Our commission has recognized this fact. In *Greeley Gas & Fuel Co. v. Colorado & Southern Ry. Co. et al.*, 1 Colo. P. U. C. 197, it held that voluntary rates established by carriers under high competitive conditions are not a fair measure of comparison with rates between points where little or no competition exists. By analogy, this position is applicable to a division of rates; a carrier may voluntarily agree to a division which it might not be required to accept. This principle applies to this case. It should be borne in mind that it is the commission's rates and the division of those rates by the commission which are involved. They are not a matter of barter and trade, and the Moffat line is not at liberty to withdraw from them if they are unprofitable and it believes them to be unjust. For these reasons, we cannot agree that because they participated in former rates and certain divisions thereof, which gave them a greater amount for the services rendered than those under consideration, that it follows as a matter of course that a similar division upon a lower rate fixed by the commission is just, or that for this reason it should be divided upon the same basis and the authorities do not so hold. In *Burnham, Hanna, Munger Co. v. C., R. I. & P. Ry. Co.*, 14 Interst. Com. Comn. R. 299, the Interstate Commerce Commission held that the through rates from Eastern points to the Missouri river cities were unreasonably high; that they were so because those portions of the through rate between Mississippi river crossings and Missouri river cities were too high; for this reason it ordered that the divisions of certain carriers upon through transportation between Mississippi river crossings and the Missouri river cities should be reduced to a scale as therein defined. This order was upheld by the Supreme Court of the United States. *I. C. C. v. C., R. I. & P. Ry. Co.*, 218 U. S. 88, 30 Sup. Ct. 651, 54 L. Ed. 946. It was again observed by the Interstate Commerce Commission with a slight change by increases to the Western lines. *Warnock Co. et al. v. C. & N. W. Ry. Co. et al.*, 21 Interst. Com. Comn. R. 546. The mileage of the Western lines in those cases in proportion to the whole were, prior to this reduction, less out of proportion than the mileage to the stations east of Denver in connection with the total mileage under consideration. The fact that the former divisions had been originally agreed upon and worked under for years was not considered as a controlling factor in taking the reduction all off of the Western lines. In *State of Iowa v. C., St. P. M. & O. Ry. Co. et al.*, 28 Interst. Com. Comn. R. 64, at page 73, the Interstate Commerce Commission said:

"It does not follow, however, that a carrier's separate rates applicable to through transportation are beyond control and regulation by the commission. On the contrary, it not infrequently happens, as in this case, that the through charges for the through service are unreasonable because one of the proportionals entering into the through charges is excessive; and in such a case and upon a proper record our authority to reduce the unreasonable through charges by reducing the excessive proportional rate is beyond question. The reasonableness of the through rates is challenged, however, by some of the complainants, and that question is before us on the pleadings and on the record, and is the question that is more particularly dealt with in this report. In support of the various contentions of the complainants a large volume of testimony was offered, together with numerous diagrams, plats, and other exhibits, financial and otherwise, by means of which the facts are graphically represented. Although the Eastern defendants took no active part in the hearing, the defense by the Western lines was prepared with care. All the points to which these exhibits and testimony were directed have had careful consideration, but it is not possible and would not be profitable to extend this statement of the case by a discussion of them in detail. It will suffice to say that upon the whole record we have arrived at the conclusion, and so find, that the rates on class traffic moving between interior Iowa points and the territory east of the Indiana-Illinois state line are excessive and unreasonable, and therefore unlawful. The proportional rates between the Mississippi river and the Eastern territory last defined are in harmony with the general system of rates east of the river, and there is no basis of record for condemning that factor in the through charges. The through rates exacted of shippers are made excessive by reason of the demands of the carriers west of the river and this is the factor in the through charges that we here condemn in finding that the through charges are excessive."

In *Cedar Rapids Commercial Club v. C., R. I. & P. Ry. Co.*, 28 Interst. Com. Comn. R. 76, the commission had under consideration the question of rates between Chicago and interior Iowa points. It was held that the rates between such interior points and Chicago were unreasonable and unduly discriminative in comparison with the rates of the river towns; that for this reason the through rates were unreasonable, but that the reduction should be on a graded scale between the Mississippi river and those interior Iowa points. In *Stacy & Sons v. O. S. L. R. Co.*, 20 Interst. Com. Comn. R. 136, after holding that certain through rates were unreasonable, the commission, at page 139, says:

"The question of divisions of these rates is of course now left to the defendants to agree upon. It may be that their divisions will depend somewhat upon whether the traffic is exchanged at Silver Bow or at Butte. The Oregon Short Line haul to the junction with the Northern Pacific would be the same on a shipment to Fargo as a shipment to Bismarck, while the Northern Pacific haul would be considerably greater to Fargo than to Bismarck. The Oregon Short Line haul will be somewhat longer on shipments from Hot Springs or Brigham than on shipments from Logan. An arbitrary basis of divisions would ignore these differences in the lengths of the hauls. A mileage prorate basis of divisions would divide the earnings according to the service actually performed by each carrier. If defendants are unable to agree upon the divisions of the rates herein prescribed

the commission will, upon further hearing, determine that question."

Neither can we agree that it is always customary where a through rate has been reduced to prorate the reduction between the carriers upon the same basis as each one's reduction bore to the whole. In some cases that system has been adopted, but an investigation of them will disclose that the original apportionment was in harmony with some reasonable division in proportion to the mileage of each, and the services rendered, while in others the rule has not been followed at all; but to the contrary they are based upon some equitable division in proportion to the mileage of each. For instance in *Sloss-Sheffield Steel & Iron Co. et al. v. L. & N. R. R. Co. et al.*, 35 Interst. Com. Comn. R. 461, where a reduction was made on pig iron rates in car lots from producing points in Alabama and Tennessee to points north, including Chicago, it was held that the Southern carriers should bear 23 cents and the Northern carriers 12 cents out of a 35-cent reduction from a former rate of \$4.35 when reduced to \$4. The new division gave to the Southern lines operating between Birmingham and the Ohio river \$2.52, and the Northern lines operating between the river and Chicago \$1.48; the former division of the \$4.35 rate being \$2.75 to the Southern lines and \$1.60 to the Northern lines. The average distance through the gateway (the Ohio river) was 366 miles from Birmingham, and 287 miles from Chicago.

[10] While it may be conceded that the strategic position of a company's road may be taken into consideration in the matter of divisions, it is not by any means the sole or controlling factor. In the case last cited on this subject, the commission, at page 463, said:

"The Northern carriers take the position that no part of the reduction should be borne by them. Their contention is based chiefly on the theory that pig iron from the South displaces pig iron produced at furnaces in their own territory, and therefore does not furnish them any additional traffic over and above what they would otherwise haul. In view thereof, and of the fact of their strategic position, with respect to traffic that originates in their own territory, they claim to be possessed of equities and of trade advantages which entitle them to larger divisions than they might otherwise reasonably demand. The contention in part implies an assumption that there is practically no demand for pig iron in the Northern markets which could not be supplied from furnaces in central freight association territory. The evidence shows, however, that for many uses, especially in the manufacture of stoves, small castings, and certain kinds of machinery, Southern iron is preferred, and that there is considerable demand for it in the Northern markets. It commands a ready sale as a mixture for many kinds of iron products. This is true to such an extent that some foundries are quite largely dependent upon it because of its peculiar qualities as distinguished from pig iron from the Northern furnaces. It is therefore a matter of general public interest that Southern iron should move freely into the Northern territories."

To some extent this condition prevails here. The uncontradicted testimony discloses that the Moffat coal is harder than that in the

Southern fields, or even the Rock Springs Wyoming coal on the Union Pacific, or that in the Big Horn Basin on the Burlington, and that it develops tests which disclose its superior qualities. The coal in the local fields north of Denver is not claimed to be its class; that for all of these reasons there is an increasing demand for it, and that it commands a ready sale, which is increasing in the territory in question, as well as in Nebraska, Kansas, and other points. In such cases, as stated by the Interstate Commerce Commission, it is a matter of general public interest that it should move freely into the Eastern territory. The Moffat road should not be discriminated against because it is on its line. The question of the market and demand for this coal was eliminated by the commission in fixing these divisions. This was error. In *Hayden Bros. Coal Corporation et al. v. Denver & Salt Lake R. R. Co. et al.*, 45 Interst. Com. Comn. R. 236, wherein the commission fixed divisions on this coal to points in Kansas, Nebraska, Missouri, and South Dakota, at page 237, it said:

"The delivering lines contend that consideration should be given to the fact that coal from the Oak Hills district displaces that which could be supplied by those roads from producing points on their own lines, and thus deprives them of a longer haul if the coal were to originate at the latter points. But this last contention was also offered by these same carriers in the original case, and was there rejected as not being a sufficient reason for refusing to establish joint rates from Oak Hills to such destinations. Likewise, in the matter of divisions, such a proposition cannot be controlling in the determination of the portion of the rate which should accrue to the delivering lines for the service which they perform on coal originating at the Oak Hills mines."

While it is true that in this case the Interstate Commerce Commission gave to the Moffat road a smaller amount than our commission has awarded it for these intrastate shipments, it was upon a three-line haul, and the amount awarded to the delivering carrier is very much less than awarded here; also the divisions for these interstate shipments are somewhere equal in proportion to the mileage of each, while the divisions under consideration are all out of proportion to the mileage, the services rendered, or the cost of carriage. This condition is more clearly shown between the intrastate and interstate divisions on the Union Pacific for the same coal over the same line. To illustrate, in the case last cited, the through rate under consideration on coal from Oak Hills to points on the Chicago & Northwestern Railway Company hauled from Denver to Fremont, Neb., over the Union Pacific was \$4; the commission gave to the Union Pacific \$2.13½ per ton as its portion for hauling the coal a distance of 525 miles. By the division under consideration, it gets \$2.03 for its haul for the same coal over the same line from Denver to Julesburg, a distance of 195 miles, yet its strategic position is just as favorable upon the Fremont haul as it is upon the

Julesburg haul so far as furnishing coal from mines upon its lines are concerned, both being upon its main line where they can be readily supplied from its Wyoming fields. This case also discloses that under the divisions therein fixed, the Union Pacific gets more per ton per mile for its Oak Hills-Fremont haul than it gets for its Rock Springs-Fremont haul, a distance of 763 miles, and much more than for its Evanston haul to Fremont, a distance of 878 miles, for which it voluntarily accepts a division of \$3 per ton. Other similar illustrations could be shown which tend to disclose the vast discrimination under consideration. In commenting upon the former Walsenburg rate, our commission, in its opinion, says:

"The joint rates on coal from the Walsenburg district to points on the lines of the defendants have been in effect for many years, and as far as this commission has been advised, the divisions of the same have been entirely satisfactory to all concerned. The commission feels that a condition which has been in effect for so many years, and which is so closely associated with the present case, should have some weight and be given careful consideration."

In re Rates on Lumber, etc., 31 Interst. Com. Comn. R. 673, is cited as authority for this conclusion, also as a precedent for making the divisions the same as they were on the old rates. An examination of this case discloses that conditions are not similar. Had the respondents parallel lines to the Moffat road from Denver into the Oak Hills district, and were hauling similar coal upon their own line from this district throughout the entire distances, and the Moffat road was asking for a larger division than formerly for its haul to Denver, the Arkansas case would be applicable so far as these phases of it are concerned, and would be entitled to be given consideration accordingly. But even then, as a comparison of the divisions in that case will disclose, it would not be authority to justify the divisions under consideration, besides there are other elements which enter into this case, which were ignored by the commission, which would distinguish it from that, even though the product came from different directions; for instance, it appears to be conceded that the cost of carriage per mile upon the different lines in the Arkansas case was practically the same. There is a vast difference in this respect here. It is uncontradicted that the mountainous character of the Moffat line is such that it greatly restricts the number of cars that can be handled in a train; that it requires two and sometimes three engines over a part of the line to haul 23 cars. The cost from Walsenburg is much less expensive. It is shown that one engine can haul over twice as many cars from this district as can two over the entire line of the Moffat road.

In Coal Rates from Oak Hills, Colorado, 35 Interst. Com. Comn. R. 456, the commission, in fixing the divisions between the Moffat and Rock Island roads, recognizes a distinction, wherein, in concluding its findings, it is said:

"This report deals with a particular case. It refers only to the relations between the Moffat road and the Rock Island lines on a particular commodity, and is not intended for application to other commodities or to the relations of the Moffat road, the Rock Island, or both, with other roads. The divisions received by the initial lines in the Walsenburg district, on coal delivered to the Rock Island at Pueblo, while not as large as the constant divisions herein found reasonable for the Moffat road in connection with the Rock Island at Denver, yield much higher returns per ton-mile. We have not considered them sufficiently high to measure the divisions which the Moffat road should receive for its haul from Oak Hills to Denver. The divisions and revenues herein found reasonable for the Moffat road's services in connection with the Rock Island should not be used to measure the divisions of the carriers serving the mines at Walsenburg on coal delivered to other carriers at Pueblo or at Denver, or its own in connection with other carriers."

A comparison will disclose that the rates under consideration are all out of proportion to those fixed in the Rock Island case when considered from a mileage basis.

[11] There are other reasons which enter into the consideration of divisions from Walsenburg that do not apply to the Oak Hills district which tend to show that initial carriers from Walsenburg might be willing to accept the old basis of divisions when it would not be just to the Moffat line. For instance, the testimony discloses that the Colorado & Southern with a line from the Walsenburg district to Denver is controlled by the Burlington, that between them it makes no difference what the divisions are, but if the Colorado & Southern joined in a request for more equal divisions, and it was granted, the Burlington would get less for its haul when the coal was received at Denver from the Denver & Rio Grande Railroad Company. There is no testimony which discloses that the Denver & Rio Grande Railroad Company is not satisfied with these divisions, but the cost of their haul from Walsenburg to Denver is materially less than that of the Moffat road from Oak Hills. The Denver & Rio Grande serves a large territory out of Denver. It takes both passengers and freight from the Burlington and Union Pacific to the South and West. To many stations on its line for shipments coming from the East on the Burlington and Union Pacific, it is in the same favorable position for exacting unequal divisions upon such shipments as the respondents are with it to stations on their lines east of Denver. The Moffat road is not thus favorably situated. So far as business from the East is concerned, it might be said that it ends nowhere and has nothing to offer, like the Denver & Rio Grande and the Colorado & Southern, when it comes to a question of barter and trade concerning divisions. For this additional reason, this discrimination against the Moffat road reached in part by a comparison of what has been agreed to between the other roads is erroneous.

The former division sheets were not submitted to the commission before the hearing,

but after the arguments the commission issued an order requiring all parties to furnish them, which was done. The petitioner claims that it was relying upon the commission to decide these cases upon the record made; that it refrained from introducing its former division sheets for the reason that it considered them incompetent and immaterial; it being admitted that the new rates were constructed on a different basis from the former ones, to wit, for each station instead of grouping them. It further suggests that the previous divisions from the Walsenburg lines bear on their face evidence of bargaining between the carriers, and cite the testimony of Mr. Spens, a witness for the Burlington, in corroboration of this claim, wherein he states that they tried to get all they could. They further cite a portion of the commission's opinion, wherein it is said:

"As far as this commission has been advised, the divisions of the same have been entirely satisfactory to all concerned."

Counsel urge there is no evidence to that effect; that had these division sheets been in the record when the testimony was taken so it would then have been advised that the commission would consider them, that it could and would have introduced testimony to establish that such divisions were not satisfactory to all concerned; that their lack of opportunity to produce evidence showing this and other facts concerning the original divisions was prejudicial error. *I. C. C. v. L. & N. R. R. Co.*, 227 U. S. 88, 93, 33 Sup. Ct. 185, 187 (57 L. Ed. 431), is cited as sustaining this position. The question involved was the legal sufficiency of the evidence to sustain the commission's order. The commission contended that the law imposed upon it the duty of keeping itself informed upon the condition of railroads; that for this reason it could consider the information so obtained in deciding questions involved in hearings. In answer to this the court says:

"The commission is an administrative body, and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Int. Com. Comn. v. Baird*, 194 U. S. 25 [24 Sup. Ct. 563, 48 L. Ed. 860]. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense."

Counsel for respondents concede that this declaration would be applicable had the petitioner, after notice of this order and the furnishing of those sheets, requested permission to offer further testimony and argument, and suggests that upon request the commission would undoubtedly have granted it. As

counsel agree upon the rights of each to offer further testimony after the receipt of division or rate sheets, and as the case must be reversed for other reasons, it is unnecessary to pass upon the respective contentions concerning this assignment.

[12] Respondents urge that if these divisions are fixed in amounts different than those from Walsenburg, it will require them to haul coal from Denver to the same stations east at different amounts for the same haul, depending upon which of these fields it comes from. This they say would present an unlawful discrimination against them. In presenting this argument, they overlook the converse of it adopted by the commission against the Moffat road in their favor, and which they seek to justify; that is, that in fixing the divisions for the Moffat road, on coal from the Oak Hills district, the commission has fixed its division in something over 50 different amounts for the same haul, depending upon the destination of the coal. To illustrate, on the Burlington, if consigned to Derby, 10 miles from Utah Junction, the Moffat road gets \$1.50 per ton, but if consigned to Barr, 22 miles from Utah Junction, it gets but \$1.303 per ton, while if consigned to Ft. Morgan, a distance of 82 miles from Utah Junction, it gets \$1.25 per ton; while if to Laird, a distance of 176 miles from Utah Junction, it gets \$1.499 per ton, and so on. The same method is applied to the Union Pacific and Rock Island; the Moffat road being allowed as its division a different amount for nearly every station, though its haul is the same for each. Respondents not only make no complaint concerning this, but seek to justify it. In such case they ought not to complain when the same results follow against them because they have different divisions with other roads fixed by agreement.

[13] The respondents were allowed to show the proportion of cars for Moffat coal loading furnished by their respective roads for about three years prior to this hearing; it being in their favor, although gradually decreasing. They urge this as one of the reasons for the unequal division in proportion to the mileage basis. The commission accepted this as an item to be considered in deciding the question. We cannot agree with this conclusion. In *Huerfano Coal Co. v. Colorado & Southeastern R. Co. et al.*, 28 Interst. Com. Comn. R. 502, the Interstate Commerce Commission held that each carrier on a through route owes a duty to the public to furnish its proportion of cars for the traffic over the through route; that the proportion of each should be the proportion it would have to furnish if a car for car interchange was actually made at the junction points. The record shows that a large number of cars furnished by respondents were for shipments of coal to points on their lines beyond Colorado. No testimony was offered as to the number for intrastate shipments.

alone. For this reason it is impossible to tell whether even in the past respondents have furnished more than their share for the stations under consideration. The record shows that the portion furnished by the Moffat road is increasing, but unless provided by agreement, this matter should not have any bearing on a division to be fixed by the commission for the future. The petitioner contends that this should not have been considered for the reason, among others, that the use of foreign equipment is compensated for by a per diem charge on each car between the roads, therefore it would be unjust to penalize by low divisions a road which uses a large proportion of foreign equipment when the road pays a per diem rental for that equipment. They cite no testimony showing such a custom, for which reason we will not consider it, but without it are of opinion that it ought not to be taken into consideration in fixing these divisions. There is no showing or promise as to what any road will do in the future in this respect. The commission made no order concerning it. If either fails to do its share, the rule for which has been laid down by the Interstate Commerce Commission, we take it that upon complaint our commission would have jurisdiction, and certainly would not require the respondents to do more than their share. In *Wichita Board of Trade v. A., T. & S. F. Ry. Co. et al.*, 25 Interst. Com. Comn. R. 825, in commenting upon this question, at page 631, the Interstate Commerce Commission says:

"We are not impressed by the contention of the Union Pacific that the present adjustment is necessary in order that it may retain possession of its equipment. As we have announced in previous cases, it is proper that the carriers, as between themselves, should adopt reasonable regulations calculated to induce the prompt return of cars by foreign lines, but a carrier has no right to establish regulations or fix rates with a view to controlling the direction in which its equipment shall be employed by the shipping public. *Missouri & Illinois Coal Co. v. L. & C. R. R.*, 22 Interst. Com. Comn. R. 39."

By analogy, this declaration is applicable here. In *Louisiana & P. Ry. Co. v. United States* (Com. C.) 209 Fed. 244, the court held that a reasonable division out of joint rates could not be denied a common carrier for transportation services by the Interstate Commerce Commission because of any past or present derelictions, or even the fear of further violations of law.

[14] Counsel for respondents suggest that in July, 1916, the Moffat road filed with the Public Utilities Commission a freight tariff, naming its proportional rate on coal from Oak Hills district to Littleton and Englewood, viz. the Santa Fé; they say that while the tariff is not a part of the record, yet it has been filed, and that this court in reviewing the decisions of the commission should take notice of the public records of that office. In just what manner this is to be done, they do not say. Assuming that

we will take judicial notice of the commission's opinions, which are furnished in pamphlet and bound volume, we cannot agree that we should take notice of the records in that office. Had counsel desired this court or the commission to consider that rate sheet, they should have offered it as evidence.

[15] The petitioner is without terminal facilities in Denver, for which reason the commission held that out of its divisions incident to delivery to the Union Pacific and Rock Island, it must pay the 20 cents per ton charged for the switching which is performed by another company. Error is assigned to this ruling. *People's Fuel & Supply Co. v. Grand Trunk Western Ry. Co. et al.*, 27 Interst. Com. Comn. R. 24, same title, 30 Interst. Com. Comn. R. 657, and *Waverly Oil Works Co. v. Pennsylvania R. Co. et al.*, 23 Interst. Com. Comn. R. 621, are cited as sustaining it; while *Sloss-Sheffield Steel & Iron Co. v. L. & N. R. R. Co.*, 35 Interst. Com. Comn. R. 460, is relied upon as holding to the contrary. The rule announced in the cases first cited appears to be the general one (of course with exceptions) followed by the Interstate Commerce Commission. We cannot agree that the testimony was insufficient to justify its adoption here. We do not concur, however, when applied to this case, in the quotation cited from the first of these cases, which reads:

"If it cannot afford to pay for the terminal services which other * * * carriers provide, it will doubtless have to retire from competitive traffic."

The day when this quotation was applicable in a case of this kind has gone by. Since rate-making power, as well as fixing the divisions, has been lodged in commissions both state and federal, the carriers are not at liberty to retire from a rate or division fixed by the commission, so that shippers on their lines will have no opportunity to compete with those on others. The carrier's remedy, as adopted here, is by an appeal to the commission, and then to the courts.

In harmony with the rule followed in *Interstate Commerce Commission v. Union Pacific Railroad Co. et al.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308, we have given all the testimony, including the comparison of these divisions with divisions upon other roads and on these in interstate shipments, as well as the deductions, sought to be drawn therefrom, together with all other competent testimony, careful consideration. To summarize, our conclusions are that for the reasons and in the particulars above stated, the commission erred as a matter of law in considering and giving effect to facts which should have no bearing upon the question, and in failing to consider and give effect to other facts which were entitled to consideration; that their order is not supported by any substantial testimony; that it is not in accordance with the evidence; and that when tested by the uncontradicted testimony,

it is unjust and unreasonable. Their conclusions in these respects involve errors of law. *Louisville & N. R. Co. v. United States* (D. C.) 227 Fed. 258; *Louisville & N. R. Co. v. United States* (D. C.) 216 Fed. 672.

[16] The petitioner calls our attention to that portion of section 52 of our Utilities Act which says:

"Upon hearing, the Supreme Court shall enter judgment either affirming, setting aside or modifying the order or decision of the commission."

It contends the testimony discloses that the divisions should be in certain amounts, stating them, and that the above language is authority for us to, and that we should, modify the order of the commission by fixing the divisions in these amounts. We cannot agree with this position. This court is not a rate-making tribunal, and the language quoted was not intended to make it such. The authority to do this is vested in the commission with the right to a review by this court. We are not only not authorized to fix a division, but feel it our duty and have attempted to discuss the points under consideration in a manner that will not disclose our personal views upon the weight to be given any competent testimony or the result that should follow, and thereby embarrass the commission in its determination of these questions, when considered under correct principles of law.

For the reasons stated, the decision and order of the commission will be reversed and set aside, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

WHITE and BAILEY, JJ., not participating.

(64 Colo. 263)

CHICAGO, R. I. & P. RY. CO. et al. v. PUBLIC UTILITIES COMMISSION OF COLORADO et al. (No. 8939.)

(Supreme Court of Colorado. Feb. 4, 1918.)

1. PUBLIC SERVICE COMMISSIONS §32 — ORDERS—APPEALS—REVIEW.

On writ of error to review an order of the Public Service Commission, it is the duty of the Supreme Court under the statute to examine the evidence to determine whether there is any competent evidence to support the findings of the commission, and whether the order is just and reasonable.

2. CARRIERS §12(7)—COAL RATES—ORDERS—EVIDENCE—SUFFICIENCY.

On writ of error to review an order of the Public Service Commission apportioning coal rates between petitioner and the initial carrier, *held*, that there was evidence to sustain the findings of the commission fixing the division upon the same basis as that for division of the rates between other railroad companies and the initial carrier.

3. CARRIERS §12(7)—COAL RATES—ORDERS—EVIDENCE—SUFFICIENCY.

On writ of error to review an order of the Public Service Commission apportioning coal

rates between the initial carrier and petitioner, *held*, that there was no evidence warranting the commission in awarding to petitioner for carriage over a portion of its line, which was paralleled by the line of another railroad company, a less sum than was apportioned to such other railroad company.

En Banc. Error to Public Utilities Commission.

Petition by the Chicago, Rock Island & Pacific Railway Company and Jacob M. Dickinson, receiver, for a writ of error to the Public Utilities Commission of the State of Colorado and others to review an order of that board. Order reversed and remanded.

William V. Hodges, Wallace T. Hughes, of Chicago, Ill., and D. Edgar Wilson and Harold H. Healy, both of Denver (M. L. Bell, of Chicago, Ill., of counsel), for petitioner. Tyson S. Dines, Tyson Dines, Jr., Carle Whitehead, and Albert L. Vogl, all of Denver, for respondent Denver & S. L. R. Co.

HILL, C. J. This action is to review an order of our Public Utilities Commission fixing divisions of through rates on coal to be shipped from points in northwestern Colorado, known as the Oak Hills district, on the road of the respondent, the Denver & Salt Lake Railroad Company, called "the Moffat road," to points in Eastern Colorado, on the road of the petitioner, the Chicago, Rock Island & Pacific Railway Company, called "the Rock Island." When before the Public Utilities Commission, this case was a part of *Denver & S. L. R. Co. v. Chicago, B. & Q. R. Co.* (No. 8938) 171 Pac. 74, decided at this term. Both roads were dissatisfied with the commission's divisions and asked for reviews, the Moffat road in the other case, the Rock Island in this. We allowed one record for both. In the other case, the Rock Island joined in the briefs in so far as its contentions were the same as the other roads; hence the opinion in that case controls those questions. In this case it urges the consideration of facts in its favor which it claims distinguishes its position from that of the Union Pacific and Burlington, for which reasons different results should be reached concerning its divisions.

[1] Regardless of the contention in the other case urged by the respondents other than the Rock Island that we were without jurisdiction to consider these questions, etc., the Rock Island requests us in this case to not only assume jurisdiction, but to consider the evidence, to determine the evidentiary degree of certain testimony, to hold that the commission erred concerning it, to declare that its order is unjust and unreasonable, etc., to set aside its decision and make a finding from the testimony that its divisions should be in amounts as claimed by it. We cannot subscribe to all of these contentions, but agree

with those portions recognized as correct in the former opinion, viz. that is, that it is our duty to examine the testimony in order to determine whether there is competent testimony to support the findings of the commission, and whether the commission's order is just and reasonable. This the statute says we shall do.

[2] For the reasons stated in case No. 8938, we find no substantial conflict in any material testimony concerning the questions under consideration. The commission held that, as between the Moffat, the Burlington, and the Union Pacific roads, the divisions of the new lower rate fixed by it should be prorated in the same proportion as the former divisions, each bearing its proportional share of the reduction; that the divisions between the Moffat and the Rock Island for stations on the Rock Island line east of Limon should be on a parity with the divisions fixed for the Burlington and the Union Pacific out of Denver, although some of them were fixed at less than this conclusion calls for. These are the alleged errors complained of as being in conflict with both the law and the evidence. To sustain its contention to the first, the Rock Island points to testimony which shows that it had been receiving a greater portion for its divisions out of the old rates than had the Burlington and the Union Pacific; hence the divisions to it out of the new rates are not fixed in the same proportion as the former divisions. Its justification for these prior divisions and right to the same divisions here is: Prior agreement to the former divisions; strategic position; agreements with other roads from the Walsenburg district to certain divisions; acquiescence by them to the same proportions of the new rates, etc.; also the fact that, while the Rock Island receives Oak Hills coal at Denver, it receives Walsenburg coal at Pueblo, 118 miles south of Denver; that the Rock Island extends east from Colorado Springs crossing the Union Pacific at Limon 79 miles distant; that it uses the rails of the Union Pacific from Limon direct to Denver 80 miles, and pays wheelage to the Union Pacific for the use of this track; that it enters Pueblo over the rails of the Denver & Rio Grande, to which company it pays wheelage charges for 44 miles to Colorado Springs; that the Walsenburg haul by the initial carrier to Pueblo is but 68 miles, then 123 miles by the Rock Island from Pueblo to Limon, a total of 191 miles from Walsenburg; that the Rock Island's haul from Denver to Limon is but 80 miles; that its service from Limon east is the same whether the coal originates at Oak Hills or Walsenburg, hence the greater revenue to it upon the Walsenburg haul. For these reasons, it claims to be entitled to a larger division of the through rate on Oak Hills coal than either the Burlington or Union Pacific, and urges that the commission

erred as a matter of law in holding otherwise.

In presenting these contentions, the petitioner ignores the distance of the haul from the Oak Hills district; the services rendered in such carriage; the demand for the Moffat coal by the public; the injustice of the former rates (so found by the commission from which no appeal was taken); that the lower rate was fixed by the commission; that in its general adjustments of these rates it did not reduce the Moffat's local rate to Denver; that the evidence discloses that this local rate was very reasonable, when based on distance and cost of haul. The petitioner also ignores the reasons for the agreements on divisions by other carriers with it and other matters set forth in case No. 8938, also the fact that the former divisions and subsequent agreement by other carriers pertaining to the new rate are not controlling of this controversy. In addition, the Moffat road earnestly insists that it never agreed with the Rock Island on a division of the former rates, and cites testimony to prove it, which is to the effect that while it shipped coal to these points, it accepted the amounts given it by the Rock Island under protest and had claims pending for the difference. If there is any disputed question of fact in the entire record, it is this; but, conceding that the Rock Island's position is correct concerning it, it is not controlling of the controversy.

The Interstate Commerce Commission has fixed the same divisions for the Moffat road for interstate shipments from the Oak Hills district to points east of Colorado over the Rock Island in both two and three line hauls as it has for similar shipments to points east of Colorado over the Burlington and the Union Pacific. For all of these reasons, as well as those stated in case No. 8938, we cannot agree with the petitioner that there is no testimony to sustain the commission in fixing these divisions upon the same basis as those for the Burlington and the Union Pacific through the Denver gateway, when they are ultimately established under correct principles of law.

[3] The petitioner makes the further contention that, accepting the basis of the Union Pacific and the Burlington divisions as controlling upon its shipments through the Denver gateway, the order of the commission is still unjust, unreasonable, and discriminative against it, in this, that the commission has awarded to it smaller divisions than to the Union Pacific for practically the same hauls and distances. They point to testimony which discloses that Limon is 89 miles from Denver, between which points the Union Pacific and the Rock Island use the same track; that from there east they closely parallel each other, but that the divisions awarded the Rock Island for the same distance east of Limon are lower than

to the Union Pacific. To illustrate, the Union Pacific's division for Oak Hills shipments from Denver to Limon is \$1.325; to Lake, the first station east of Limon on the Union Pacific, its division is \$1.367; while to Mustang, the first station east of Limon on the Rock Island, but 3 miles difference in distance, its division is \$1.219, and less than the Union Pacific's for the shorter haul to Limon over the same line; Hugo on the Union Pacific east of Limon is 103, while Bovina on the Rock Island, also east of Limon, is 106, miles from Denver, both through the Limon gateway; yet the Union Pacific is awarded \$1.50 per ton as its division to Hugo, while the Rock Island is only given \$1.294 as its division to Bovina, and that this discrimination thus continues to the Kansas line. We agree with the petitioner that there is no testimony which justified this discrimination, or which tended to disclose that there should be any difference in the divisions between these lines for the same distance on either line through the Limon gateway, and there has been no reason presented which justifies it.

For the reasons herein stated, as well as those in case No. 8938, the decision and order of the commission will be set aside and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

WHITE and BAILEY, JJ., not participating.

(64 Colo. 276)

EMERSON-BRANTINGHAM IMPLEMENT CO. v. SYLVESTER. (No. 8973.)

(Supreme Court of Colorado. Feb. 4, 1918.)

1. PRINCIPAL AND AGENT — 123(3) — AUTHORITY OF AGENT — SUFFICIENCY OF EVIDENCE.

Where, pursuant to the agreement under which plaintiff became a surety for part of the purchase price of machinery, the notes signed by him bore a notation stating that he was to be released when the amount of the notes signed by him had been paid, and the notes were returned by the seller's branch office to its local agent with a request that this provision should be written on a separate slip of paper to be attached to the notes, which was done, the court was justified in finding, in the absence of any suggestion, that the branch office was without authority to agree to this provision that this was done with the knowledge of the seller and by its authority.

2. CANCELLATION OF INSTRUMENTS — 32, 37 (8) — JURISDICTION — SUFFICIENCY OF COMPLAINT.

Plaintiff became surety on a part of the notes given by the principal for the price of machinery under the agreement that when the amount for which he was surety had been paid he was to be released. The notes contained a power of attorney to confess judgment. After the principal had paid more than the amount for which he was surety, he brought suit to enjoin the collection of the notes as against him, and for the cancellation of his liability thereon, alleging in the complaint that, notwithstanding this agreement and his full compliance with his obligation, the seller willfully refused to recog-

nize such agreement and was attempting to enforce the collection of the notes against him and threatened to cause a judgment by confession to be entered against him and to sell the notes before maturity to an innocent purchaser, and to otherwise harass him, and also alleged that he had no complete and adequate remedy at law. Held, that the complaint was sufficient and that equity had jurisdiction.

En Banc. Error to District Court, Weld County; Neil F. Graham, Judge.

Suit by Walter T. Sylvester against the Emerson-Brantingham Implement Company. Judgment in favor of plaintiff, and defendant brings error. Affirmed.

Frank L. Grant, of Denver, for plaintiff in error. Joseph O. Ewing, of Greeley, for defendant in error.

SCOTT, J. This is an action by the defendant in error to enjoin the collection as against him, and for the cancellation of his liability thereon, of four promissory notes signed by him as surety for one A. J. Hoover, aggregating the sum of \$1,882.33. The case was tried to the court without a jury and judgment rendered in accordance with the prayer of the complaint, which judgment is before us for review.

The testimony shows that plaintiff in error through its agents undertook to and did sell to the said A. J. Hoover a certain threshing machine and separator, for the total sum of \$4,911, \$500 of which was paid in cash, and the remainder by deferred payment notes. Sylvester signed but four of these notes, and in the aggregate sum of \$1,882.33. In the negotiation for the sale, the implement company declined to accept Hoover alone for the payment of the total price for the machinery so purchased, and it was finally agreed that if Hoover could get some one financially responsible to sign notes in the amount above stated, as involved in this suit, the sale would be consummated. The entire property so sold was to be covered by chattel mortgage on all machinery.

The plaintiff was induced by Hoover and the company's agents to sign the notes to the extent stated, but not until he had secured the agreement that he was to be entirely released from the obligation when Hoover should have paid on the entire purchase price a sum equal to \$1,882.33, being the total amount represented by the notes he was to sign.

Sylvester joined Hoover in signing the application contract of purchase, to the extent of making a property statement, and there was written on the margin of this contract application, at the time and before Sylvester signed it, the following condition:

"Sylvester is to be released as soon as \$1,882.33 is paid on the Big Four engine, and A-1 Geiser separator."

The machinery thus described was all that was included in the purchase price of \$4,911. This application contract was for-

warded to the branch house of the machinery company at Denver and accepted. Afterward the notes were executed, and on the notes signed by Sylvester there was written on the back of each note the same words as in Sylvester's release upon the application contract. These notes were returned to the local agents of the company by the Denver branch office of the company with the request that this provision as to the release of Sylvester should not be written on the notes but on a slip of paper to be attached to the notes. Duplicate forms of notes were returned the local agents for that purpose, and Hoover and Sylvester signed them; the four notes were pinned together with a slip of paper on which was written the same provision concerning the release of Sylvester.

It is admitted that Hoover had paid about \$2,500 on his contract, at least an amount in excess of his agreement, in addition to the cash payment, but that the machinery company had given the credit therefor upon the notes signed by Hoover alone, and insisted on the payment by Sylvester of each of the notes in full as signed by him.

Each of the notes contained the following confession of judgment and waiver clause:

"We hereby authorize and empower any attorney at law at any time after interest or principal in this note becomes due, to appear for us before any court of record in the state of Colorado or elsewhere, and waive the issuing and service of process upon us, entering our appearance therein and confess judgment against us and in favor of said Emerson-Brantingham Implement Company, payee, or its assigns, for said sum, interest, and costs, including any attorney fee of 10 per cent., and thereupon to release any and all error, and waive all right and benefit of a second trial or appeal in our behalf, also waiving the right of exemption and stay of execution. We also waive any and all notice of protest for nonpayment, and in case the principal is not paid when due, we agree to pay a 10 per cent. attorney fee, whether suit is instituted on this note or not."

The machinery was delivered to and accepted by Hoover under this arrangement.

The statements of fact as above set forth were testified to by Sylvester and Hoover and by Blystone, the soliciting agent of the company, and by E. H. Soper, engaged in the agricultural implement business, at Greeley, likewise a local agent of the machinery company, and all of whom assisted in the consummation of the agreement and were cognizant of the facts.

The first contention of plaintiff in error is that there is not sufficient proof to sustain the finding by the court. There is the positive testimony of Sylvester and Hoover and of the company's agents, Blystone and Soper, all in agreement and not contradicted as to the facts stated. But it is contended that Sylvester knew he was dealing with an agent of limited authority and failed to show any contract with the marginal limitation which he claims to have signed and relied on, and which he says was pinned to the notes by the agent, or that these matters reached the company or were acted on by it.

[1] The provision for release written on the margin of the contract did not appear on the instrument when offered in evidence, but it is plain from the evidence that the notes with the release written on the back were returned to Blystone, accompanied by a letter of instruction from the branch office of the company, asking the provision for release be written on a separate sheet of paper. Blystone testifies that he received this letter; Soper testifies that he read it; and both testify that they and plaintiff acted on it. There is no suggestion that the Denver branch office of the company was without authority to so agree. The court was clearly justified in finding that this was with the knowledge of the company and in fact by its authority. Therefore the question of alleged limited authority of the local and soliciting agents, is not involved and will not be discussed.

[2] It is further contended that the complaint was insufficient in that it did not contain the essential allegations of a suit in equity. The complaint was not attacked by demurrer or otherwise on this ground prior to the trial. But we think it is sufficient to sustain the action.

The complaint further alleged that the company, notwithstanding the premises and a full compliance with plaintiff's obligation, willfully refused to recognize said agreement and was attempting to enforce the collection of the said notes against him and threatened to cause to be entered a confession judgment against him, and to sell the same before maturity to an innocent purchaser, and to otherwise harass him.

There was also the allegation of no complete, adequate, or speedy remedy at law. We think that jurisdiction of courts of equity in this class of cases is well settled in this jurisdiction. *Travelers' Ins. Co. v. Jones*, 16 Colo. 515, 27 Pac. 807.

The reason for the rule is well stated in the early case of *Cornish v. Bryan*, 10 N. J. Eq. 146, where it was said that if a party holds an obligation which ought to be canceled, and persists in holding it for the purpose of harassing the obligor with a suit, he ought not to be permitted to select his own time, place, and circumstances for such prosecution. And that the mere fact that the grounds upon which the jurisdiction of a court is invoked may avail the party in such a case, in an action at law, and constitute a valid defense by plea or otherwise, is not a sound objection to the courts' exercise of equity power.

In a precisely similar case, and likewise involving a judgment note, it was said in *Ginsberg v. Rubinstein*, 20 Pa. Co. Ct. Rep. 230:

"The serious question in this case is whether a court of equity has jurisdiction, and will intervene to prevent the confession of judgment on a note of this character and compel the holder to deliver it up for cancellation. That the defendant has no right to make any use

whatsoever of the note is free from doubt, and that the plaintiff is entitled to have it surrendered and canceled is clear and beyond dispute. In these circumstances must the plaintiff await an improper use of the note before he can move to assert his rights in the premises, and then be compelled to invoke the equitable powers of the court to save him from the consequences of the defendant's wrongful act? It is in the power of the defendant, at his pleasure, to make it both expensive and inconvenient for the plaintiff to defend himself against an attempt to collect this note, and the lapse of time may not only weaken but actually defeat his defense to it. Moreover, the constant annoyance and hazard to which the plaintiff is subject by this outstanding note, in the hands of one who can assign no valid reason for retaining it, is calculated to harass and distress the plaintiff, and to do him irreparable injury."

The view we have taken in this respect is sustained by the great weight of authority.

The judgment is affirmed.

(177 Cal. 493)

ASATO v. EMIRZIAN. (S. F. 7464.)

(Supreme Court of California. Feb. 13, 1918.)

1. APPEAL AND ERROR §1208(1) — TROVER AND CONVERSION §5 — REVERSAL — RESTITUTION—WHAT CONSTITUTES TAKING.

Where plaintiff in action for specific performance of contract to sell orange trees got judgment, and defendant appealed without filing a stay bond, and receiver was appointed for defendant, and delivered the trees to plaintiff, plaintiff's taking the trees was not an unlawful taking, though when the judgment was reversed he was bound to account to the defendant for the property.

2. APPEAL AND ERROR §1208(8)—REVERSAL — RESTITUTION.

In such case, if he was unable to make restitution, plaintiff was bound to show that loss of the trees was not due to want of good faith or lack of common skill, prudence, and diligence.

3. TROVER AND CONVERSION §5 — WHAT CONSTITUTES.

In such case, where plaintiff took the trees and planted them in his orchard, there was a conversion which rendered him liable for the value of the trees.

4. APPEAL AND ERROR §1064(1)—REVIEW—HARMLESS ERROR—INSTRUCTION.

Where defendant gave no stay bond, and plaintiff under order of court which appointed receiver for defendant went on defendant's land and removed trees, and planted them on his own land, and the judgment was reversed, instruction to consider value of trees at the time of conversion, without confining time of conversion to the time when the trees were planted, was not prejudicial, the trees having been transplanted in June, and presumptively, therefore, the conversion occurred at about the same time as the removal from defendant's land.

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Sotel Asato against Karl Emirzian. From an order denying motion for new trial after judgment for plaintiff, defendant appeals. Affirmed.

C. K. Bonestell, of Fresno, for appellant. Geo. Cosgrave, of Fresno, for respondent.

VICTOR E. SHAW, Judge pro tem. This action for conversion grew out of the fol-

lowing facts: On June 8, 1900, the parties entered into a contract whereby for a specified consideration plaintiff, Asato, agreed to grow and deliver to defendant, Emirzian, 4,000 orange trees, delivery thereof to be made in June, 1911. For some reason not material to the issues in this case, the trees were not delivered and Emirzian instituted suit for the specific performance of the contract, the result of which was a decree entered in his favor on March 28, 1912. After an appeal from this judgment by Asato without giving an undertaking to stay execution thereon, the court upon application of Emirzian appointed a receiver, who, in accordance with the terms of the decree and under order of the court, made delivery of the trees to Emirzian, who planted the same on his land as a part of his orange orchard, where prior to the commencement of this action, they died.

The appeal so taken by Asato from the judgment in the former action resulted in a reversal of the judgment. Emirzian v. Asato, 23 Cal. App. 251, 137 Pac. 1072. Thereupon, plaintiff brought this action alleging that on May 13, 1912, he was the owner, entitled to, and in the exclusive possession of 2,600 orange trees then and there of the value of \$2,600, which trees defendant unlawfully took and carried away and converted to his own use, all of which allegations were denied by defendant's answer. The case was tried by a jury which rendered a verdict as prayed for by plaintiff in accordance with which judgment was entered. Defendant appeals from an order of the court denying his motion for a new trial.

[1] In effect, the several provisions of the Code of Civil Procedure declare that where no undertaking on appeal is given by defendant in cases of this character to stay execution of the judgment, the same may be enforced as though no appeal were had. Hence the taking of the trees by defendant in this action under the terms of the decree as to the execution of which there was no stay could not be deemed an unlawful or wrongful taking. "A judgment, although it may be erroneous, nevertheless is the act of the court, and, until reversed, unless superseded, which was not done in the instant case, constitutes a sufficient justification for all acts done in its enforcement, and afforded complete protection for the defendant who acted in reliance upon the adjudication." State Nat. Bank v. Ladd, 162 Pac. 684, L. R. A. 1917C, 1176, and cases there cited. Nevertheless, where a plaintiff by virtue of a judgment rendered in an action obtains possession of money or specific property of the defendant therein, the latter upon a reversal of the judgment on appeal therefrom is entitled to restitution of the property or proceeds of the sale thereof under execution. Section 957, Code Civ. Proc.;

Dowdell v. Carpy, 137 Cal. 333, 70 Pac. 167; Ashton v. Heydenfeldt, 124 Cal. 19, 56 Pac. 624. As to such defendant "the courts will, where justice requires it, place him as nearly as may be in the condition in which he stood previously." Ward v. Sherman, 155 Cal. 287, 100 Pac. 864.

Since, under the decree, the possession of the trees taken by Emirzian was lawful, and Asato's right thereto did not attach until after the reversal, it follows that until the judgment was reversed defendant herein was lawfully in possession of the property so acquired. When, however, the judgment was reversed, he was in duty bound to account to Asato for the property which he had theretofore received, and, as said in Ward v. Sherman, supra, the rule governing the extent of defendant's liability is that applicable to a trustee which in 28 Am. & Eng. Ency. of Law (2d Ed.) p. 1059, is stated as follows:

"The general doctrine being that trustees ought to conduct the business of the trust in the same manner as an ordinarily prudent man of business would conduct his own, they will not be chargeable with more than they have received nor held responsible for losses that may arise, when they have acted in good faith and with common skill, prudence and diligence."

[2, 3] While pending the appeal Emirzian, under the principle stated, was entitled to the possession of the property, his title thereto was contingent upon the determination of the case, and if, as such trustee, he was unable to make restitution of the trees, it devolved upon him in order to escape liability to show that such fact was not due to the want of good faith, or the lack of common skill, prudence, and diligence in the care thereof. The only evidence touching the subject is that of defendant who stated that upon receiving the trees he planted them in his orchard as part thereof, thus changing their character from nursery stock, which constituted personal property, to a part of his real property, thereby placing it beyond his power to make restitution. By such act, in the absence of any evidence showing necessity therefor, or that in so doing he exercised common prudence, he, in violation of his duty as trustee, appropriated the property and converted it to his own use as fully and to the same extent as though the subject of controversy had been a lot of hay, upon the taking of which defendant had thereupon fed it to his cattle. "In such cases the true rule would seem to be that the trustee is liable to the extent of the actual value of the property at the time of the conversion, * * * with interest." Am. & Eng. Ency. of Law, p. 1062. If he had retained the trees as personal property, in which character they were received by him, he could at any time thereafter have made restitution to Asato, in which case, under the rule applied in Ward v.

Sherman, supra, his liability for loss would have been that due to want of common prudence and care. Had the trees been sold under execution, the proceeds thereof coming into the hands of Emirzian would, in the absence of fraud, have fixed the amount of his liability (section 957, Code Civ. Proc.), and since he converted them to his own use his liability should be measured by the value of the trees at the time of the conversion. The fact that the trees thereafter died is immaterial, unless such loss could be attributed to some cause for which defendant was not responsible existing prior to the conversion, evidence bearing upon which question was in fact introduced by both parties as affecting the value of the trees, which the jury found to be \$1 per tree at the time they were delivered to defendant.

[4] At the trial plaintiff's theory of the case was that the receiver's delivery of the trees to defendant constituted the conversion, while that of defendant was that, since the taking by defendant was lawful, and the capacity in which he held the property that of a trustee, there could be no conversion thereof by him. The trial court instructed the jury that in ascertaining the value of the trees they were governed by the evidence as to value as of the time of the taking and refused defendant's requested instruction fixing the value as of the time of the conversion. In this the court erred, but in view of the evidence disclosed by the record we are unable to perceive how defendant was prejudiced by the ruling. It was not the taking, which appears to have been about June 1st, but the appropriation made by defendant in planting the trees as part of his orange grove that constituted the conversion, and barring any lack of proper care of the trees on his part prior to such conversion, their value at such time was the measure of defendant's liability. Nevertheless, in the absence of any evidence as to the time when the trees were so planted other than that of defendant, who said upon receiving the trees he planted them in his orchard, we may indulge the presumption, based upon common knowledge, that the trees, upon being taken from the nursery in June, were permanently set in the ground about the same time, hence the error could not have been prejudicial.

The gist of appellant's whole claim and argument is that there was no conversion since defendant held the trees as trustee; that the permanent setting of the trees on his land in orchard form, thus appropriating them for all time to his own use, was, in itself, in the absence of other evidence of such fact, proof that he, as trustee, exercised proper skill and diligence in the care and management of the trust property, and hence, though shown to be in good merchantable condition when he got them, nevertheless, since they died, he is not responsible for the

loss to plaintiff. We cannot assent to this contention.

The order appealed from is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; MELVIN, J.; SHAW, J.; RICHARDS, Judge pro tem.

(177 Cal. 481)

GRIFFIN v. SMITH. (S. F. 7915.)

(Supreme Court of California. Feb. 11, 1918.)

1. BANKRUPTCY — 188(1) — EFFECT AS TO LIENS.

Under Bankruptcy Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 (U. S. Comp. St. 1916, § 9651), providing that liens given or accepted in good faith, and not in contemplation of, or in fraud upon, that act, and for a present consideration, which have been recorded, if necessary, shall, to the extent of such present consideration only, not be affected thereby, a pledge of stock, created more than four months before the filing of a petition in bankruptcy against the pledgor, was not affected by the bankruptcy proceeding.

2. BANKRUPTCY — 151 — TITLE ACQUIRED BY TRUSTEE.

Where a bankrupt had pledged stock more than four months before the filing of the petition, the trustee would take only such interest in the stock as the debtor had; that is, a title subject to the interest of the pledgee.

3. BANKRUPTCY — 214 — LIENS — ENFORCEMENT.

Under a pledge of stock created more than four months before bankruptcy, the pledgee's right to sell the stock and apply the proceeds to the payment of his debt was not affected by the bankruptcy proceeding.

4. BANKRUPTCY — 214 — LIENS — ENFORCEMENT.

The filing of a petition in bankruptcy did not oust a state court of jurisdiction to entertain an action by the pledgee to foreclose his lien, but at most authorized the bankruptcy court to enjoin the prosecution, or the state court to stay it.

5. BANKRUPTCY — 214 — CORPORATIONS — 123(24) — PLEDGE OF STOCK — ENFORCEMENT.

A pledgor of stock, or his creditors on his bankruptcy, were not entitled to ask that the pledgee, who had a matured and present right to realize upon his security should be required to defer the exercise of such right indefinitely, to await a purely problematical increase in the price which might be realized at a sale.

Department 1. Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by Henry T. Griffin against F. M. Smith. From a decree in favor of plaintiff, defendant appeals. Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, for appellant. St. Sure & Rose, of Oakland, for respondent.

SLOSS, J. On June 12, 1912, the defendant executed and delivered to plaintiff a demand note for \$3,000, secured by a pledge of certain shares of stock. A collateral agreement, made at the same time, authorized the holder of the note, in case of default, to sell the pledged property at public or private

sale, with or without notice to the pledgor. This action was brought in January, 1914, to foreclose the lien of the pledge. The court found that \$750 of the principal and \$150.05 of the interest due on the note was unpaid, and that the plaintiff had waived any right to a deficiency or personal judgment against the defendant. A decree was accordingly entered for the sale of the pledged property by a commissioner and for the foreclosure of defendant's right of redemption. The defendant appeals from the judgment.

His sole contention is that the court below should have stayed its hand because of the pendency of bankruptcy proceedings. It was alleged in the answer, and found by the court, that on July 24, 1913, there was filed in the United States District Court, in and for the Northern District of California, a petition praying that the defendant herein be declared an involuntary bankrupt; that said defendant had appeared in said proceeding, but no adjudication with respect to his bankruptcy had been made.

[1-3] The plaintiff's pledge was valid under the laws of this state, it was created more than four months before the filing of the petition against the defendant, and its validity was in no way affected by the bankruptcy proceeding. Bankruptcy Act, § 67, subd. "d" (U. S. Comp. St. 1916, § 9651). The trustee appointed upon an adjudication of bankruptcy, if there had been such adjudication, would have taken only such interest in the stock as the debtor had—that is, a title subject to the interest of the plaintiff under his pledge. 7 C. J. 185. Since the judgment under review did not decree any personal liability, it gave to plaintiff no more than he had by the terms of the collateral agreement, viz., the right to sell and apply the proceeds to the payment of his debt. This right, which might have been exercised without resort to any court, was not affected by the bankruptcy proceedings. *Hiscock v. Varick*, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945.

[4, 5] The filing of the petition in bankruptcy did not oust the state court of jurisdiction to entertain the present action. 7 C. J. 204, 205. The most that could possibly be claimed is that bankruptcy court might have enjoined the prosecution, in a state court, of an action which might interfere with its own administration of the estate, and that, on like grounds, the state court itself should have granted a stay. But no case was made calling for the intervention of the bankruptcy court. The answer avers that the pledged shares of stock had no "market value," and that, if they were sold under the most favorable circumstances, they would not bring enough to satisfy plaintiff's demand. If this were so, there would be no surplus available to the appellant's other creditors, and the estate in bankruptcy would have no interest in seeking to control

the foreclosure sale. In re Holloway (D. C.) 93 Fed. 638. The answer alleges further, on information and belief, that "the actual value of the stock is in excess of the amount due to the plaintiff." There is no attempt to state what value the stock has above the amount of the debt. But if, overlooking the defective form of the pleading, we take it as intended to aver that a substantial surplus above plaintiff's claim might be realized if the sale were postponed, the allegation is still insufficient. The plaintiff, as pledgee, has a matured and present right to realize upon his security. The pledgor is not justified in asking that the exercise of this right be deferred indefinitely to await a purely problematical increase in the price which might be realized at a sale. Nor are the general creditors of the alleged bankrupt entitled to this indulgence.

The answer showed no ground, therefore, for staying the proceedings, or otherwise interfering with the plaintiff in the pursuit of his remedy. In this view, the further points made by the appellant become immaterial.

The judgment is affirmed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

(177 Cal. 498)

HUDSON v. UKIAH WATER & IMPROVEMENT CO. (S. F. 7680.)

(Supreme Court of California. Feb. 15, 1918.
Rehearing Denied March 14, 1918.)

1. WATERS AND WATER COURSES ⇐152(11)—APPROPRIATION—LIMITING BY DECREE.

An old decree limiting a water right to what could be conveyed from defendant's pipes through a half-inch pipe means the quantity that could then be conveyed, and a later decree, attempting such limitation, but not providing for increased pressure and lessened friction, enlarges such right to include water hereafter acquired by defendant, which is error.

2. WATERS AND WATER COURSES ⇐152(11)—DECREE—ENLARGING RIGHT APPURTENANT TO LAND.

A decree erroneously enlarging a water right limited by contract and former decree from its being appurtenant to four acres of land to include an additional tract, and ignoring a limitation to what may be used in sprinkling with a hose, requires reversal.

3. WATERS AND WATER COURSES ⇐143—APPROPRIATION—QUANTITY OF WATER.

Plaintiff's right to establish her private water right as against the public served by defendant corporation would be measured not by the amount claimed by her predecessors, but by the amount which had been actually taken for beneficial use on the land to which appurtenant.

4. WATERS AND WATER COURSES ⇐152(11)—RIGHTS—SUCCESSOR IN INTEREST BOUND BY DECREE.

In so far as a company is bound by a judgment against its predecessors confirming the rights of plaintiff's predecessors to preferential right in water appropriated to public use, it is estopped from claiming such rights unlawful.

5. WATERS AND WATER COURSES ⇐130—APPROPRIATION—PUBLIC USE.

While plaintiff might enlarge her right to use a certain quantity of water from defendant's pipes by prescription or implied grant, yet no such right can be acquired against waters appropriated or acquired by defendant for public use.

Department 2. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Grace Hudson against the Ukiah Water & Improvement Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Robert Duncan, of Ukiah, for appellant.
Preston & Preston, of Ukiah, for respondent.

WILBUR, J. Defendant appeals from the judgment establishing plaintiff's water right.

[1, 2] The water right in question was before this court in Farmer v. Ukiah Water Co., 56 Cal. 11. Plaintiff claims as the successor to the plaintiff in that case by mesne conveyances of the land owned by Farmer, and seeks to bind the defendant as the successor of the defendant corporation, the Ukiah Water Company. Assuming, without deciding, that the parties hereto are bound by the decree in the case of Farmer v. Ukiah Water Co., the judgment must, nevertheless, be reversed for the reason that the water right described therein is entirely different from the water right confirmed in the decree in Farmer v. Ukiah Water Co. To make this apparent, it will be necessary to state some of the facts and to compare the provisions of the decree in the former case and in this case. At the time of the rendition of the decision in Farmer v. Ukiah Water Co., supra, the defendant corporation therein was appropriating a portion of the water of Gibson creek by means of a dam, diverting the water into its reservoir, and conducting the same therefrom in a two-inch pipe, to which plaintiff's predecessors attached a half-inch pipe, and it was to this water of Gibson creek so diverted that the decree declared plaintiff's right. That decree was entered on retrial after reversal, and described the water right of plaintiff therein with reference to the amount of water that would flow through a half-inch pipe, as does the decree in this case. That amount varies with supply, pressure, and friction. Since the decree in Farmer v. Ukiah Water Co., the defendant has increased the supply by diverting all the water of Gibson creek, by diverting water from Orr creek, and by pumping water from wells on Russian river. It has increased the pressure by diverting the water a mile higher up Gibson creek and constructing reservoirs at a higher elevation, and it has decreased the friction in the pipes by increasing to six inches the diameter of the pipe to which plaintiff's one-half inch pipe is attached. It is evident that the plaintiff will

receive a vastly greater quantity of water through a half-inch pipe under the circumstances stated than under the system as established at the time her right was granted to her predecessor. But the decree also confirms in plaintiff a right for all future time to use the pipes and water of the defendant corporation. If it erects new reservoirs at greater elevation and establishes larger pipe lines, the plaintiff under this decree would be entitled to the increased flow in her one-half inch pipe due to such increased supply, for the decree herein provides that:

"Plaintiff is the owner of so much of the water of the defendant corporation as may now or hereafter at any time flow in or through their aqueducts, reservoirs, or pipes, as may or can be conveyed in, through or by a pipe or aqueduct one-half inch in diameter. Also the right to draw such supply of water from the main pipes, aqueducts, or reservoirs, of the said defendant corporation."

Thus, it will be observed, the decree secures to plaintiff and her successors an undivided interest not only in all waters now owned by the defendant, or passing through its pipes, but all water that may from any source subsequently be diverted into said pipes, and this without regard to the question as to whether or not the waters of Gibson creek have become exhausted for any reason. In the former decree there were also limitations upon the amount of water plaintiff's predecessors were entitled to receive through their half-inch pipe, which are entirely ignored in the decree in this case. The right to irrigate was restricted "to water that may be used in sprinkling by means of a hose," etc., and it was therein provided "that nothing herein contained shall authorize the plaintiff to use said right and privilege for purposes of speculation," probably meaning that plaintiff was not allowed to sell water for use by others. But, for an even more obvious enlargement of the plaintiff's water right, it is necessary that the judgment be reversed. The water right which plaintiff claims by mesne conveyances of land as aforesaid is appurtenant to a piece of land about four acres in extent, known as the Fox property. Since the acquisition of that land she has also acquired an adjoining piece of property, known as the Bennett property. By the terms of this decree, perhaps by an inadvertence, the water is made appurtenant to both properties. This enlargement of the right is particularly important because of the above-mentioned limitations imposed in the decree in *Farmer v. Ukiah Water Co.* upon the right to irrigate, etc., even upon the Fox property.

[3] Plaintiff claims her right under *La Mar*, one of three partners who originally formed the copartnership known as the Ukiah Water Company, succeeded by the Ukiah Water Company, a public service corporation, defendant in *Farmer v. Ukiah Water Co.* The defendant in the case at bar is a public service corporation in charge of a

public utility, organized since the Constitution of 1879, and supplying the inhabitants of the city of Ukiah with water purchased or appropriated by it since its organization. Where the plaintiff seeks to establish her private right to water as against the right of the public served by the defendant, her right would be measured not by the amount of water which *La Mar* claimed, nor by the amount which would flow through a half-inch pipe, but by the amount which had been actually taken and applied to a beneficial use upon that land. The "right to priority in the use of water would also be measured according to these facts and limited to this quantity." *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 86, 106 Pac. 404, 29 L. R. A. (N. S.) 213. It is because the water was used with the land for its benefit that it was held to be appurtenant to the land in question. *Farmer v. Ukiah Water Co.*, supra. There should be no difficulty upon a new trial in fixing the quantity of water to which plaintiff is entitled, if any, in terms of gallons per month, based upon the amount that was used upon the Fox property during the time that the Ukiah Water Company, a corporation, defendant in said *Farmer Case*, was furnishing such water (1872-1895).

[4] Appellant claims that the conveyance, if any, to the plaintiff or her predecessors gives her such a preferential right in waters devoted to public use as is void under the law, citing such cases as *Leavitt v. Lassen Irr. Co.*, supra, *People v. Kerber*, 152 Cal. 732, 93 Pac. 878, 125 Am. St. Rep. 93, *City of South Pasadena v. Pasadena Water Co.*, 152 Cal. 579, 93 Pac. 490, *Byington v. Sacramento Valley, etc., Co.*, 170 Cal. 124, 148 Pac. 791, arising under article 11, § 19, of the Constitution, and *Price v. Riverside Land & Irr. Co.*, 56 Cal. 432, under the law and the Constitution previous to the Constitution of 1879. But this principle does not apply in this case except with reference to the statute of limitations, which will be hereafter discussed, for, as was held in *City & County of San Francisco v. Itsell*, 80 Cal. 57, 22 Pac. 74, even though there is no power in the first instance to make such conveyance, a judgment establishing a private right, although erroneous in law, is nevertheless binding upon the company and its successors, so that in so far as the defendant here is bound by the decree in *Farmer v. Ukiah Water Co.*, it is, to that extent, barred from claiming that the right therein confirmed is violative of the law against creating preferential rights in water appropriated to public use.

[5] The findings and decree herein are based in part upon a prescriptive right in the plaintiff. Whether during the 42 years that plaintiff and her predecessors have used water from the pipes of the Ukiah Water Company (1872-1895) and of the defendant (1895-1914) the use has been enlarged does not appear from the findings or decree, but the evi-

dence would seem to indicate that the use had been about the same. If this question arises upon a new trial, it is sufficient to say that in so far as any right to water is claimed by the plaintiff by reason of prescription or implied grant, no such right can thus be created against the waters appropriated or acquired for public use by the defendant. *Leavitt v. Lassen Irr. Co.*, supra; *People v. Kerber*, supra; *Holladay v. San Francisco*, 124 Cal. 352, 57 Pac. 146; *County of Yolo v. Barney*, 79 Cal. 375, 21 Pac. 833, 12 Am. St. Rep. 152.

Appellant makes the point that the Ukiah Water Company could not and did not transfer all its properties to the defendant company. On a new trial other and different evidence as to the relation of the defendant to the Ukiah Water Company, a corporation, and the properties, may be presented, so that we deem it unnecessary to discuss this question, as the general question has been discussed in recent cases by this court, as well as those cited by counsel. *Byington v. Sacramento Valley, etc., Co.*, supra; *Southern Pacific Co. et al. v. Spring Valley Water Works et al.*, 173 Cal. 291, 150 Pac. 865, L. R. A. 1917E, 680; *Limoneira Co., Farmers' Ditch Irr. Co. et al. v. Railroad Comm. of California*, 174 Cal. 232, 162 Pac. 1033.

The complaint states a cause of action.
Judgment reversed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 484)

AVERY v. WILTSEE. (S. F. 7564.)

(Supreme Court of California. Feb. 13, 1918.)

1. TRIAL §48—RECEPTION OF EVIDENCE—ADMISSIBILITY FOR PARTICULAR PURPOSES.

In an attorney's action for services in various matters, a verified complaint filed against defendant in an action brought by third parties, charging him with fraud, was properly admitted to show the nature and character of the services performed by plaintiff in warding off the filing of the complaint, in negotiating with the attorneys for the plaintiff in such suit, and in securing its dismissal, though it might be suspected that the jury was improperly influenced by the charge of fraud, and though it might have been more just to have excluded the evidence, especially where the court and counsel made every possible effort to prevent the jury from giving it any other effect than that for which it was offered.

2. APPEAL AND ERROR §1170(7)—REVERSAL—STATUTE—HARMLESS ERROR.

Code Civ. Proc. § 1854, provides that when part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other, and that when a detached act, etc., is given in evidence, any other act, etc., which is necessary to make it understood may also be given in evidence. *Held* that, where in an attorney's action for services he introduced letters written by defendant to third parties, the exclusion of the letters written by the third parties in reply which had not been communicated to plaintiff, and which contained hearsay

statements that plaintiff had neglected his duty, was not prejudicial under Const. art. 6, § 4½, prohibiting the setting aside of judgments for errors not resulting in a miscarriage of justice.

3. EVIDENCE §155(1) — ADMISSIBILITY BY REASON OF ADMISSION OF SIMILAR EVIDENCE.

Under Code Civ. Proc. § 1854, where evidence otherwise incompetent is relevant, if at all, only because connected with other evidence in the case, and would have little, if any, weight, but would be prejudicial if erroneous, any doubt as to its connection with the evidence already admitted should be resolved against its admission.

4. PRINCIPAL AND AGENT §116(1)—AUTHORITY—UNDISCLOSED LIMITATION.

Defendant's instructions to his agent with reference to the scope of his employment were inadmissible against an attorney to whom they were never communicated, and who had been notified by defendant that the agent represented him, and was thereby fully justified in conferring with the agent concerning the various matters on which he was employed.

5. EVIDENCE §368(7) — DOCUMENTARY EVIDENCE—COMPELLING PRODUCTION.

Code Civ. Proc. § 1855, subd. 2, provides that there can be no evidence of the contents of a writing other than the writing itself, except in the case, among others, when the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice. Section 1938 provides that, if a writing be in the custody of the adverse party, he must first have reasonable notice to produce it, and that, if he then fail to do so, its contents may be proved as in case of its loss. Section 454 provides that the items of an account need not be pleaded, but that the pleader must deliver to the adverse party within five days after demand a copy of the account or be precluded from giving evidence thereof. Section 1000 authorizes any court or judge to order either party to give to the other an inspection and copy, or permission to take a copy of entries of accounts in any book, etc. *Held* that, where the trial of an action by an attorney for services began April 28th, and the jury were instructed June 4th, and the action had been pending for more than a year when defendant on the 16th day of the trial demanded the production of plaintiff's books, which were then in New York, the court did not err in refusing to order the production of the books, as plaintiff was entitled to reasonable notice to produce them.

Department 2. Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Brainard Avery against Ernest A. Wiltsee. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles S. Wheeler and John F. Bowie, both of San Francisco (Charles S. Wheeler, Jr., of San Francisco, of counsel), for appellant. Wise & O'Connor, of San Francisco, for respondent.

WILBUR, J. Defendant appeals from a judgment, after verdict, for the sum of \$7,500, in an action for attorney's fees. The main proposition urged is that the evidence is insufficient to justify the verdict. The typewritten transcript, containing the testimony of only two witnesses, plaintiff and defendant, with exhibits, covers 3,000 pages; the

printed briefs 380 pages. Plaintiff claims that for more than two years he was actively engaged as attorney for the defendant in an endeavor to combine certain mining properties in Mexico, to adjust the claims against said properties, to settle a lawsuit growing out of the transactions involved therein, and in so doing participated in the organization of a corporation in Canada to take over said properties and issued its stock and debentures, the same to be sold for the purpose of paying off certain judgments and claims against the Mexican mining properties. The amount involved in these various transactions was \$4,000,000. Plaintiff sued for \$25,000 attorney's fees. The contentions of the respective parties were submitted to the jury under instructions which are conceded to be correct. Defendant contends that certain services performed by the plaintiff were not authorized by him and were without any value, etc. All the evidence for and against these claims was submitted to the jury. It is sufficient to say that there was substantial evidence to justify the verdict.

[1] Certain rulings of the trial court on the admissibility of documentary evidence are complained of by defendant. In each instance the contents of the documents were confessedly incompetent as hearsay declarations of third parties. Each was offered because of its more or less remote connection with the issues in the case. The plaintiff offered in evidence a verified complaint filed against defendant in an action brought by certain stockholders in one of the mining companies involved in the proposed organization, charging the defendant with fraud. It was conceded that the defendant was not guilty of the fraud therein charged, but the ground upon which the complaint was offered was to show the nature and character of the services performed by the plaintiff in warding off the filing of the complaint, and in negotiating with the attorneys for the plaintiff in that fraud suit, and finally in securing its dismissal. Court and counsel made every possible effort to prevent the jury from giving the evidence any other effect than that for which it was offered. Notwithstanding this, appellant claims that the ruling is prejudicially erroneous because "accusations of misrepresentations and fraud attached to any person's name are calculated to create prejudice against such person." But where, as here, the evidence is clearly admissible for one purpose, its reception in evidence is not error, even though we may suspect that the jury was improperly influenced thereby, and even though it would have been more just to have excluded the evidence.

[2, 3] The defendant offered in evidence certain letters written by third parties to him. None of these letters nor any information contained therein had been communicated to the plaintiff. They contained statements, confessedly hearsay, that the plaintiff had

neglected his duty. The defendant offered these letters as a part of the correspondence between defendant and the said third parties, to explain certain letters of the defendant in reply thereto already introduced in evidence by the plaintiff. The rule upon that subject is that:

"When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; * * * and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." Section 1854, Code Civ. Proc.

It is by no means easy to apply this rule to all the ramifications of the evidence in a trial. In passing upon the admissibility of such evidence, where the connection is doubtful, it is a safe rule to exclude evidence otherwise incompetent, where its admission would be prejudicial if erroneous. A court should be reluctant to admit evidence which in itself is incompetent, because of a more or less remote or inferential connection with evidence that is properly admitted. The purpose of a trial is to do justice between the parties, and even though such evidence, by reason of some slender thread of connection, is technically admissible under the above rule, it is not prejudicial error to reject it, unless its rejection results in a "miscarriage of justice." Const. Cal. art. 6, § 4½. Where a party seeks to introduce incompetent evidence, relevant, if at all, only because connected with other evidence already in the case, and admissible solely because of such connection, and where, if erroneously admitted, it would be prejudicial to one of the parties, and would have little, if any, proper weight with the jury, the trial court, if in doubt as to the sufficiency of the connection shown, should resolve the doubt in favor of the exclusion of the evidence, for the error in its exclusion, if any, would not be prejudicial to either party, while the error in its reception, if any, would be prejudicial to the party against whom it is offered. Suffice it to say that no prejudicial error was committed in the exclusion of these letters. It is therefore unnecessary to enter into an elaborate discussion of the situation which defendant claims sufficiently connects these letters with the evidence to make them competent.

[4] Appellant offered evidence of his instructions given to an agent named Mayer with reference to the scope of his employment. These instructions were never communicated to the plaintiff, who had been notified by the defendant that Mayer represented him and was thereby fully justified in conferring with Mayer concerning the various matters on which he was employed. Plaintiff did not base his claim of employment upon the authority of Mayer at all, but upon direct employment by the defendant.

No error was committed in excluding this testimony.

[5] Appellant complains that the court refused to make an order during the trial directing the plaintiff to produce his account books showing the expenditures made by plaintiff on behalf of the defendant. The demand for the production of these books was made on the 16th day of the trial. The case had been pending for more than a year. The trial began April 28, 1915, and the jury were instructed June 4, 1915. At the time the demand was made the books were in New York. Plaintiff was entitled to reasonable notice to produce said books. Section 1855, subd. 2, and section 1938, Code Civ. Proc. Defendant could have demanded a bill of particulars (section 454, Code Civ. Proc.), or an inspection of these books (section 1000, Code Civ. Proc.). Not having done so, there was no error in refusing the demand made at the trial under the circumstances indicated.

The judgment is affirmed.

We concur: VICTOR E. SHAW, Judge pro tem.; MELVIN, J.

(177 Cal. 504)

YOUNGBERG v. SOUTH END WAREHOUSE CO. (S. F. 7904.)

(Supreme Court of California. Feb. 15, 1918.
Rehearing Denied March 14, 1918.)

1. CONTRACTS §245(1)—EXTINGUISHMENT—SUBSEQUENT CONTRACT.

A contract by a warehouse company to deliver to plaintiff one-fourth of its net income in payment for his services as specified in the contract was extinguished by subsequent written contract, made when the company was insolvent, providing that plaintiff and another should assume the company's indebtedness, and that plaintiff should draw no money except his salary as fixed by such contract.

2. APPEAL AND ERROR §1052(8)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In such case, the admission of evidence as to the oral understanding of the parties as to the later contract, if improper, was an immaterial error, where the court was bound to decide that the later contract prevented plaintiff's recovery.

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Charles J. Youngberg against the South End Warehouse Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Wm. M. Sims, of San Francisco (F. A. Plank, of San Francisco, of counsel), for appellant. W. C. Sharpstein, of San Francisco, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in favor of the defendant in an action brought by the plaintiff to recover the sum of \$12,301.33, claimed to have become due to him under a certain written agreement made and entered into be-

tween the parties hereto on February 1, 1909, and which provided for the delivery by defendant to plaintiff of one-fourth of its net income and profits, in payment for the rendition by the plaintiff of certain services to the defendant, as set forth in said agreement. The defendant in its answer admits the making of said original agreement, and the performance for a time of certain services by the plaintiff thereunder, but denies that there was ever any greater sum than \$2,400 due or owing to said plaintiff under such agreement; and by way of further answer and defense avers that by a subsequent agreement in writing, entered into between the parties on April 15, 1911, the said plaintiff waived and released his claims against the defendant for whatever share of its profits was due under the terms of the former agreement, for the consideration of the transfer to him of one-half of the capital stock of the defendant corporation, and of the payment to him thereafter of a stated salary of \$100 a month for all future services to be performed by him. Upon the trial of the cause upon the issues thus tendered, both of these agreements were presented in evidence. There were also certain other facts admitted by the pleadings or referred to in the writings, which were the subject of proper consideration by the trial court in determining its rulings as to the effect of the later writing in respect to the obligations of the former one. One of these facts, as admitted by the express terms of the plaintiff's complaint, was the fact that shortly after the date of the first agreement between the parties, one G. W. Thomas was employed by the defendant, pursuant to an oral understanding with the plaintiff, to perform certain of the services which the plaintiff had engaged to perform by the terms of said writing. Another fact, shown in evidence at the trial and found by the court, was the fact that the defendant was in an insolvent condition on April 15, 1911, the date of the second written agreement. This later agreement contained a clause providing that the plaintiff, as one of the parties thereto, together with one George W. Lamb, also a party thereto, "hereby agree to assume, and hereby assume, all of the indebtedness due and owing from the South End Warehouse Company. * * *" Said agreement also contained a clause providing that:

"None of the parties of the third part [which included plaintiff] shall draw any money except their respective salaries, which are hereby fixed at \$250.00 a month for said George W. Lamb, and \$100.00 a month for said Charles J. Youngberg."

Upon the trial of the cause the defendant offered certain oral evidence for the purpose, as it was claimed, of explaining these two clauses of the later agreement by showing that at the time of its execution it was orally understood and agreed between the parties

to it that it should have the effect of extinguishing whatever liability the defendant might be under to pay any share of its previous profits to the plaintiff. To the introduction of this oral evidence the plaintiff objected, upon the ground that it operated to change the terms of the written agreement and was inadmissible under the provisions of sections 1625 and 1639 of the Civil Code. The court overruled the objection and admitted the evidence, and upon the strength of this admission, in effect, construed the later agreement of the parties, in its findings, to amount to an extinction of the obligation and liability created by the earlier agreement for a division of the defendant's profits with the plaintiff. It is this alleged erroneous ruling of the trial court which underlies the several assignments of error which are urged upon this appeal.

[1, 2] We are entirely satisfied from an examination of the terms of the written contract between the parties, dated April 15, 1911, and particularly of the above-quoted clause of it, that said writing required no explanation or aid from oral evidence to make clear its meaning. The agreement of the plaintiff, that he, together with another of the parties to it, would assume all of the indebtedness of the South End Warehouse Company, and his further agreement not to draw any money except his salary, then for the first time fixed at the definite sum of \$100 a month, can be given no other meaning than that his former contract with the corporation, and all obligations which had accrued thereunder, was to be at an end. The fact, shown in evidence without objection and found by the court, that the defendant corporation was at the date of this second agreement with the plaintiff in an insolvent condition would add further certainty to this interpretation if that were necessary, but it did not require the aid of the oral evidence which the court heard over the objection of the plaintiff, to explain uncertainties or ambiguities which did not exist. The ruling of the court, however, in the admission of such evidence, if improper, was nevertheless an immaterial error, since it was bound to decide in any event that the plaintiff was foreclosed by the express terms of his written agreement from a recovery in this action. Judgment affirmed.

We concur: SLOSS, J.; SHAW, J.

(177 Cal. 520)

HARDING et al. v. LIBERTY HOSPITAL CORP. (S. F. 7488.)

(Supreme Court of California. Feb. 16, 1918.)

1. ACTION — 27(1)—COMPLAINT—CONSTRUCTION.

An amended complaint, alleging that plaintiff entered into a contract with defendant, a corporation operating a hospital and carrying

on therein the general business of furnishing medicine and medical and surgical treatment, ambulance, and hospital care to the sick and injured, by which defendant agreed to furnish plaintiff medical and surgical treatment when the same should be necessary; that plaintiff suffered a fracture of certain bones of her leg, rendering surgical treatment necessary; that defendant undertook through its chief surgeon to render and furnish such treatment; that the surgeon was incompetent, and failed and neglected to use proper care, diligence, and skill in reducing the fracture; and that by reason thereof plaintiff's leg was shortened and its use impaired—shows that the gist of plaintiff's action, notwithstanding statements as to the contracts, was the negligence of defendant's chief surgeon and not breach of contract.

2. LIMITATION OF ACTIONS — 31—RUNNING OF STATUTE—NEGLIGENCE.

Code Civ. Proc. § 340, subd. 3, requiring actions for libel, slander, etc., or for injury to or death of one caused by the wrongful act or neglect of another, to be begun within a year, applies to an action against a hospital corporation for injuries resulting from the negligence of its chief surgeon, who failed to properly set plaintiff's broken leg, this being true notwithstanding the parties stood in contractual relations, and the hospital corporation had agreed to furnish plaintiff with medical and surgical attention; and hence an action against such corporation must be commenced within one year after the negligent act.

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Margaret A. Harding and George K. Harding, her husband, against the Liberty Hospital Corporation, a corporation. From a judgment for defendant, after demurrer had been sustained to plaintiffs' amended complaint, plaintiffs appeal. Affirmed.

Edwin T. McMurray and H. Clyde Harma, both of San Francisco, for appellants. John A. Percy, of San Francisco, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in favor of the defendant after its demurrer had been sustained to the plaintiffs' first amended complaint, the latter declining to further amend. The first amended complaint alleged, in substance, that at some date prior to October 11, 1913, the plaintiff Margaret A. Harding had entered into a contract with the defendant, a corporation operating a hospital and carrying on therein "the general business of furnishing medicines and medical and surgical treatment, ambulance and hospital care to the sick and injured," by the terms of which contract said corporation agreed to furnish to the said plaintiff medical and surgical treatment "when the same may be rendered necessary by any accidental injury or in sickness or disease"; that on the 11th day of October, 1913, the said plaintiff suffered a fracture of certain bones of her left leg at the knee joint, which rendered it necessary for her to have medical and surgical treatment under the terms of said contract, and that on or about said last-named day the defendant undertook

the treatment of said plaintiff for said injury and did through its chief surgeon render and furnish all surgical and medical treatment received by said plaintiff therefor; that the said chief surgeon of defendant was incompetent by reason of a lack of skill and experience to give plaintiff and to her said injury the medical and surgical treatment necessary and proper therefor, and that in treating said plaintiff for said injury the said chief surgeon of defendant wholly failed and neglected to use and exercise reasonable and ordinary care, diligence, and skill in reducing the fracture of said limb and in treating the same, and carelessly, negligently, improperly, and unskillfully set the bones thereof, and negligently, carelessly and unskillfully failed and omitted to use and employ the necessary, ordinary, proper, and approved methods in the reduction and treatment of said fracture, and negligently, carelessly, and unskillfully failed and omitted to remedy and correct the defects resulting from said negligent, careless, and unskillful reduction and treatment, at a time when said defects could reasonably have been corrected and remedied by the exercise of ordinary care, skill, and diligence, although he well knew that said defects existed. By reason whereof, and solely on account of defendant's failure to furnish a competent and skilled surgeon to treat plaintiff for said injury as aforesaid, and the aforesaid negligent, careless, and unskillful treatment of said injury by the aforesaid chief surgeon of said defendant, said plaintiff's left leg has become and is short, weak, crooked, and deformed, and the usual and proper use thereof permanently impaired, and said plaintiff rendered permanently lame, crippled, and deformed, to her damage in the sum of \$25,000, for which sum the plaintiffs prayed judgment in their favor and for their costs.

This action was commenced on April 12, 1915. The defendant demurred to the plaintiffs' first amended complaint upon the usual grounds, and also upon the ground that the plaintiffs' cause of action as set forth therein was barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure. The court sustained the defendant's demurrer upon this latter ground, and thereafter entered judgment in defendant's favor, upon the plaintiffs' refusal to further amend. The sole question presented upon this appeal is as to whether or not the plaintiffs' cause of action, as above set forth, is barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure. The chapter of the Code of Civil Procedure relating to the periods prescribed for the commencement of actions other than for the recovery of real property contains the above section and subdivision, which reads in part as follows:

"Sec. 340. Within one year. * * *

"3. An action for libel, slander, assault, battery, false imprisonment, seduction or for in-

jury to or for the death of one caused by the wrongful act or neglect of another."

[1, 2] The appellants herein contend that the cause of action set forth in their complaint is one arising out of the breach of the plaintiff Margaret A. Harding's contract with the defendant, such breach consisting in its failure to furnish adequate and competent surgical treatment for her injured limb, and hence that her cause of action, being one for the breach of a written contract, does not come within the scope or effect of subdivision 3 of section 340 of the Code of Civil Procedure. Notwithstanding the elaboration with which the plaintiffs have undertaken to set forth the terms and provisions of their said contract, we are of the opinion that the gravamen of this action consists in the alleged negligent acts of the chief surgeon of the defendant, consisting in his unskillful setting of the said plaintiff's injured limb, by reason solely of which the plaintiff's alleged injury and damage arose.

No distinction in principle can be discovered between this case and the case of *Basler v. Sacramento, etc., Ry. Co.*, 166 Cal. 33, 134 Pac. 993. That was an action brought to recover damages for injuries suffered by one of the plaintiffs while a passenger on a street car operated by the defendant in the city of Sacramento. There, as here, the plaintiffs pleaded the terms of the contract out of which the relation between the parties arose. In that case the relation was the contractual one of carrier and passenger. In this the relation was the contractual one of hospital and patient. In that case this court held that the pleading of the contract by the plaintiffs was merely matter of inducement, out of the existence of which the definite legal duty of the defendant arose; and in that case, as in the instant one, the breach of that definite legal duty consisted in the alleged negligent acts and omissions of the agent of the defendant and consequent injury directly and solely caused thereby. The court there held that this was the gravamen of the action, citing numerous authorities in support of its view.

In the later case of *Krebenios v. Lindauer*, 166 Pac. 17, the same question arose, and was similarly decided. There the injury complained of was the alleged negligence of the defendant in failing to provide the plaintiff with a safe place to work, in violation of its contract of employment, and the court there held the action to be one arising *ex delicto* and to be barred by the provision of the section and subdivision of the Code above quoted. In this latter case the court refers to and disposes of the case of *Gillette v. Tucker*, 87 Ohio St. 108, 85 N. E. 865, 93 Am. St. Rep. 639, upon which the appellant herein particularly relies. That was a case of malpractice on the part of a physician, which consisted in the careless leaving of a sponge in the patient's wound after an operation.

The court called attention to the fact, adverted to by the Ohio tribunal in its decision of said case, that the neglect of the physician was that of leaving the sponge in the wound until a period within the statute, during which his treatment of the case continued, but that in that case the Ohio tribunal held the action to be one *ex delicto*. In the case at bar, while it is true that the complaint alleges that the relation of hospital and patient continued for some time after the date of the alleged negligent acts of the physician and up to a time within one year prior to the commencement of the action, this cannot be held to negative the direct and positive averments of the complaint that the negligent acts of the physician which caused the immediate injury complained of occurred on October 11, 1913, and that said plaintiff's damage was solely referable thereto.

In the earlier case of *Denning v. State*, 123 Cal. 316, 55 Pac. 1000, cited with approval in *Krebenios v. Lindauer*, *supra*, the court, in discussing the question involved in all of these cases, says:

"The contract of employment has nothing whatever to do with the liability except to create a duty on the part of the employer, a duty not expressed in the contract and for the violation of which the contract of employment furnishes no rule or standard for the estimation of damages; nor is the action grounded upon the contract, but upon the duties springing from the relation created by it, namely, that of employer and employé, and under the old system of pleading was always classed as an action *ex delicto*."

In the recent case of *Marty v. Somers*, 169 Pac. 411, in which a rehearing has been denied by this court, the precise question presented in the instant case upon almost an identical state of facts arose. There the contract of employment was directly with the physician, who was alleged to have negligently performed the operation which caused the plaintiff's injury; and upon the authority of *Basler v. Sacramento, etc., Ry. Co.*, *supra*, the court there held that subdivision 3 of section 340 operated as a bar to the action. The authorities cited herein from other jurisdictions, dealing with cases of alleged malpractice on the part of physicians, are not uniform in their rulings as to whether the action is one arising upon contract or tort. But the case of *Lotten v. O'Brien*, 146 Wis. 213, 131 N. W. 362, bears instructively upon the case at bar. Its facts are similar. It appears that the employment of the physician continued for some time after the date of the negligent setting of the plaintiff's broken arm. The court held that the action sounded in tort, and that the cause of action accrued when the negligent acts were committed, without reference to the time of the physician's discharge. Notwithstanding the conflict of authority from other jurisdictions, we are satisfied that it has become the settled rule in California that actions for injuries caused by the negligent acts of another or his

agent must be commenced within the period of one year from the date of the alleged injury, and that the fact that the parties stand in contractual relation to each other does not operate to change the rule or extend the time for the commencement of such actions.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; SHAW, J.; VICTOR E. SHAW, Judge pro tem.; WILBUR, J.; MELVIN, J.

(177 Cal. 513)

J. M. HOWELL CO. et al. v. CORNING IRR. CO. et al. (Sac. 2459.)

(Supreme Court of California. Feb. 16, 1918.)

1. WATERS AND WATER COURSES \S 49—RIPARIAN RIGHTS—PROTECTION—FORM OF ACTION.

An action will lie to quiet title to riparian rights in a stream, and a new action is the appropriate remedy to clear up and remove the uncertainty on the face of a former judgment involving such rights.

2. WATERS AND WATER COURSES \S 79—IRRIGATION COMPANY—PUBLIC SERVICE.

A mutual water company which diverts water from a stream and devotes it exclusively to the use of its own stockholders and not to the general public is not engaged in public service, and is not a public utility.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Utility.]

3. WATERS AND WATER COURSES \S 49—RIPARIAN RIGHTS—EXTENT.

A judgment depriving a riparian owner of the right to a certain surface flow, and permitting an irrigation company to take the surplus not necessary for such owner's use, was an invasion of the owner's technical right to the full flow of the stream.

4. WATERS AND WATER COURSES \S 49—RIPARIAN RIGHTS—JUDGMENT—CONCLUSIVENESS.

A judgment adjudicating the water rights as between a riparian owner and an irrigation company is conclusive on the parties and their successors in interest.

Department 1. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by the J. M. Howell Company and others against the Corning Irrigation Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Frank Freeman, of Willows, for appellants. McCoy & Gans, of Red Bluff (P. H. Coffman, of Red Bluff, of counsel), for respondents.

SHAW, J. The defendants appeal from the judgment. The plaintiffs, respectively, own tracts of land which are riparian to a stream known as Thomas creek, in Tehama county. The defendant Corning Irrigation Company is, and for many years has been, diverting water from said creek, and carrying the same to nonriparian lands belonging to its stockholders, and there distributing the same to such stockholders for their use on

such nonriparian lands. The object of the present action is to ascertain and determine the respective rights of the plaintiffs and the defendants in the waters of said stream, and to quiet the plaintiffs' title to such part thereof as they are entitled to have flow down to their lands. The principal defendant is the Corning Irrigation Company, the other defendants being directors of said company and not otherwise interested in the action.

The complaint alleges that on May 14, 1894, in an action by the predecessors in interest of the plaintiffs, against the said corporation defendant, judgment was duly given, determining the respective rights of the parties in the creek; that the defendants have no right therein or thereto except as set forth and adjudged in said action, but that they have nevertheless diverted therefrom quantities of water greatly in excess of their rights under said judgment, and that they have violated the conditions of said judgment as to the manner of diverting water therefrom, greatly to the injury of the plaintiffs, and that unless they are restrained they will continue to do so, and that said defendants claim the right to take said waters in excess of the rights given to them by said judgment.

The judgment mentioned is made a part of the complaint. It declares that the defendant Corning Irrigation Company shall be perpetually enjoined from taking any of the waters of said creek to the lands of its stockholders, or at all, except to the extent and in the manner therein set forth. It fixes the point of diversion at which the defendant is allowed to take water, and the kind of ditch and diverting works by which it may do so, forbids the alteration of such diverting works, and further provides:

"That when there is an abundance and surplus of water in the said creek for all the uses and purposes of the riparian owners below the said point of diversion, including the use for the purposes of irrigation by ditches now constructed, then and at such time the defendant the Corning Irrigation Company may divert by and through the said ditch any amount of surplus water and convey and discharge the same into the water course known as Squaw Hollow."

It further provides that when the water is low and insufficient for the uses of the said riparian owners, the defendant company shall not take or divert from the creek more than 100 inches of water measured under a 4-inch pressure, which quantity of water the judgment further provides, in effect, may be taken by said defendant at any time, provided the same is taken from the surface water flowing in the stream and not otherwise.

For answer, the defendants alleged that since the rendition of the said judgment of 1894, the defendant company has acquired by prescription the right to divert from said stream a quantity of water amounting to 4,000 miner's inches, measured under a 4-inch pressure. The answer also alleges by way of estoppel that during the interval between

said judgment of 1894 and the beginning of this action, the plaintiffs have stood by, with full knowledge of the diversion by said defendant, and of the fact that said water has been distributed and used on nonriparian land, and of the fact that said defendant has expended large sums of money in the erection of works for conveying same, and have made no protest against such diversion or expenditure.

The findings of the court were that the defendant company has acquired no prescriptive right, and has no rights in the waters of the stream, except such as are given to it by the judgment of 1894; that the said defendant has at divers times diverted quantities of water from the creek greatly in excess of the amount permitted to it by said judgment, and has claimed the right to do so. It will be observed that the judgment of 1894 does not state the quantity of water necessary for the plaintiffs' use upon their riparian land, nor the amount, the excess of which may be deemed a surplus subject to diversion by said defendant. In its findings in the present action the court determined that the quantity necessary for plaintiffs' use was 2,500 inches, measured under a 4-inch pressure, and that the facts alleged in the answer as an estoppel against the plaintiffs, are not true, but that said defendant has been accustomed to take from the surplus waters of the stream not necessary for the use of the plaintiffs, the quantity of 3,100 miner's inches, measured under a 4-inch pressure.

The judgment appealed from declares that the defendant company shall be at all times entitled to take 100 miner's inches of water at the place of diversion described, provided that amount is flowing on the surface; that after that amount shall have been taken by said defendant, 2,500 miner's inches shall be allowed to flow down the stream for the use of the plaintiffs; and that the defendant Corning Irrigation Company may take through its diversion works and ditches, all the surplus not exceeding 3,100 miner's inches, measured under a 4-inch pressure.

The defendants claim that the finding against the prescriptive right to the water the company has been taking, over and above that allowed by the judgment of 1894, is not sustained by the evidence. It is sufficient to say that at most there is a conflict in the evidence, with sufficient substantial evidence in favor of the finding of the court to support it. The excessive diversions of the defendant were interrupted by the plaintiffs from time to time, and so often that no adverse use thereof for a period of five years has occurred. Hence no prescriptive right to such water could accrue.

Even if it were true, as appellants claim, that this action is nothing more than an action upon the former judgment, we are not prepared to say that such a judgment could

not be enforced by a new action as well as by proceedings in contempt. *Rowe v. Blake*, 99 Cal. 167, 33 Pac. 864, 37 Am. St. Rep. 45; *Ames v. Hoy*, 12 Cal. 11; *Stuart v. Lander*, 16 Cal. 373, 76 Am. Dec. 538. The present action, however, is more than a mere action to enforce the former judgment. That judgment contained elements of uncertainty. It allowed the defendant to take the surplus water not required for the use of the lands of the plaintiffs riparian to the stream. Whether this should be construed to mean the surplus over and above that required at the time of its rendition for use upon said lands, or the surplus in excess of what might from time to time thereafter be necessary therefor, is somewhat doubtful. The court below in the present action construed it to mean the surplus in excess of the quantity necessary in 1894 for plaintiffs' use, and the plaintiffs do not complain of this construction. It is clearly more favorable to the defendants than the opposite construction. But with that construction, the amount necessary for plaintiffs' use at that time is not stated with precision, and no facts are stated in that judgment from which it could be ascertained. Subsequent changes in physical conditions had increased the difficulty. The defendants had asserted the right to take from the stream a quantity of water that would deprive the plaintiffs of water necessary for their use, and their claims had been successfully resisted from time to time by the plaintiffs. This was the assertion of rights to water in excess of those given it by the judgment. The complaint asks not only for the enforcement of the former judgment, but for the quieting of their title against the new and additional claims of the defendants, and for an injunction against the taking of water by the defendants in violation of the former judgment, or in excess of the amount allowed thereby.

[1] It is obvious that an action will lie to quiet title to riparian rights in a stream, and it seems equally clear that a new action is the appropriate remedy to clear up and remove the uncertainty existing on the face of the former judgment, and by reason of subsequent events, as to the quantity to be allowed to run down to plaintiffs' land, so that the surplus available to defendants can be more readily determined than it could be by an inquiry as to plaintiffs' needs in 1894, or at any other time when the surplus was in question, in case the former judgment should have been construed so as to make that the test.

[2] The defendant company claims that it is a public service corporation; that it has been taking the excess water over and above that allowed by the judgment of 1894, and applying the same to public use; that it has done this for many years with the knowledge of the plaintiffs, who have allowed a large community to be built up by the use of said

water, and that consequently an estoppel arises under the doctrine established by numerous cases in this court. This doctrine is reviewed and stated at length in *Miller v. Enterprise, etc., Co.*, 169 Cal. 415, 147 Pac. 567. The defendant has not brought itself within the doctrine. It has nowhere alleged that it is using its water in public service. On the contrary, the answer alleges, and it is not disputed, that it is a mutual water company, devoting the water which it diverts exclusively to the use of its own stockholders, and not to the general public. Such a corporation is not engaged in public service, and is not a public utility. *McFadden v. Board*, 74 Cal. 571, 16 Pac. 397; *Hildreth v. Montecito*, 139 Cal. 29, 72 Pac. 395; *Barton v. Riverside Water Co.*, 155 Cal. 518, 101 Pac. 790, 23 L. R. A. (N. S.) 331. It appears that the case was fairly and thoroughly tried by the learned judge of the superior court, and that the conclusions at which he arrived are eminently reasonable and fair to the defendants. We find no cause for interfering therewith.

[3, 4] The former judgment, it may be well to add, constituted a limitation upon the riparian rights which were parcel of plaintiffs' lands bordering upon the stream. It deprived them absolutely of the right to 100 miner's inches of the surface flow, and so far as it permitted the defendant company to take the surplus not necessary for plaintiffs' use, it was an invasion of the technical right of a riparian owner to the full flow of the stream. It is conclusive on the parties and their successors in interest. The defendants in this action do not complain of the limitation of the amount to be taken of the surplus water to 3,100 miner's inches.

The judgment is affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

(177 Cal. 529)

PEOPLE v. KINGS COUNTY DEVELOPMENT CO. (Sac. 2372.)

(Supreme Court of California. Feb. 18, 1918.)

1. PUBLIC LANDS \S 144(1)—SALE—AGRICULTURAL LANDS.

Under Const. art. 17, \S 3, as to sale of state lands suitable for cultivation, and Act March 24, 1893 (St. 1893, p. 341), providing for sale of land uncovered by the recession of inland lakes, the surveyor general before selling such land must ascertain whether it is suitable for cultivation, and can make sales only to actual settlers, in tracts not exceeding 320 acres, if the land is suitable for cultivation.

2. PUBLIC LANDS \S 144(1)—SALE—SURVEYOR GENERAL—AGENCY FOR STATE.

The surveyor general in selling lands uncovered by recession of inland lakes under Const. art. 17, \S 3, and Act March 24, 1893, acts as the agent of the state, and, in the absence of fraud or mistake, the state is bound by his determination.

3. PUBLIC LANDS \S 144(4)—PATENTS—CANCELLATION—PLEADING—SUFFICIENCY.

Count of petition for cancellation of patent to lands uncovered by recession of inland lakes,

failing to allege mistake of the surveyor general in selling the land, and based solely on the theory that no state officer may grant such land to one not an actual settler, nor in excess of the prescribed area, is insufficient; the state being entitled to such remedy only for mistake or fraud.

4. PUBLIC LANDS §144(4)—PATENTS—CANCELLATION—PLEADING—SUFFICIENCY.

A count alleging that the patentee was not an actual settler, and procured the patent at the instance of the defendant development company, which knew of the fraud, was sufficient as alleging actual fraud.

5. LIMITATION OF ACTIONS §11(1) — STATUTES APPLICABLE — ACTIONS BY STATE — "RIGHT OR TITLE."

An action by the state to declare illegal a patent and certificate of purchase, and to declare the state the owner of the lands, is barred only after ten years under Code Civ. Proc. § 315, limiting actions by the state in respect to real property to ten years after the accrual of the state's "right or title," such words meaning "cause of action," and not under section 338, subd. 4, limiting actions for relief on the ground of fraud or mistake to three years, although the basis of the action was fraud in procuring the patent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Right; Title.]

In Bank. Appeal from Superior Court, Kings County; M. L. Short, Judge.

Suit by the People against the Kings County Development Company. Judgment for defendant after demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

U. S. Webb, Atty. Gen., and Jones & Welles, of Los Angeles, for appellant. Gibson, Dunn & Crutcher, of Los Angeles, and T. T. C. Gregory and D. Hadsell, both of San Francisco, for respondent.

SHAW, J. A demurrer to the complaint was sustained by the court below, and thereupon judgment was given for the defendant. From this judgment the plaintiff appeals.

The prayer of the complaint is that a certificate of purchase and patent issued by the state to Amelia C. Johnson for the lands described be declared illegal and void, and canceled, that the conveyance of the lands afterwards made by Johnson to the defendant be declared void, and that the plaintiff be adjudged to be the owner of the lands, free of any right or claim of defendant thereto, and for such further relief as may seem proper.

The complaint consists of two counts, each relating to the same subject-matter. The facts stated in the first count are as follows: The land described consisted of 507.45 acres and belonged to the state. It was a part of the land uncovered by the recession of the inland lake known as Tulare Lake, and was subject to sale under the provisions of the act of March 24, 1893, providing for the sale of land uncovered by the recession of inland lakes. On December 3, 1904, a certificate of purchase of said land was issued to Amelia C. Johnson in pursuance of said act. Said

land was then suitable for cultivation, that is, it was ready for and susceptible of immediate occupation, and was by ordinary farming processes fit for agricultural purposes. Amelia C. Johnson was not then and never had been an actual settler on said land or any part thereof. When she made her application and received the certificate therefor, she knew that said land was suitable for cultivation. On June 13, 1906, a patent was issued to her for said land in pursuance of said certificate, and on July 23, 1907, without any valuable consideration, she conveyed said lands to the defendant herein. Defendant and its directors and officers at the time of receiving said deed well knew that then, and at the time said land was so applied for by Johnson and patented to her, it was suitable for cultivation, as aforesaid.

The second count of the complaint relates to the same purchase, and alleges the same facts. It adds thereto the further statement that with her said application Amelia C. Johnson made an affidavit stating that she desired to purchase said land for her own use and benefit and for no other person or persons whatsoever, and that she had made no contract to sell the same to any person, but that in truth and in fact she made said application and affidavit at the instance and for the use of a syndicate of several persons, then organized for the purpose of acquiring in that manner from the state of California, without any settlement thereon, the said lands and other lands, which were then, and at all times referred to, suitable for cultivation; that said syndicate, with full knowledge of all of said facts, aided the applicant in procuring her certificate of purchase, and thereafter, in pursuance of said purpose, procured the making of said conveyance by said Johnson to the defendant; and that the defendant claims said land by virtue of said conveyance and not otherwise.

The complaint was filed on May 22, 1914. This was less than ten years after the issuance of the patent. The demurrer was based on the grounds that neither count of the complaint stated facts sufficient to constitute a cause of action, and that each of the causes of action set forth therein are barred by sections 315, 318, 319, and subdivision 4 of section 338 of the Code of Civil Procedure.

Section 3 of article 17 of the Constitution is as follows:

"Lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law."

The act of 1893 required that the applicant for such land should accompany his application with an affidavit stating that he desires to purchase the same for his own use and benefit, and for the use and benefit of no

other person, and that he has made no contract to sell the same; that upon the filing of said application the surveyor general should cause the county surveyor of the county in which the land lies to make an actual survey thereof, and establish the corners connecting the same with the United States survey, and should file with the surveyor general a copy of his field notes and plats, and a statement under oath showing whether or not the land is occupied by any actual settler, and that, if the lands are suitable for cultivation without reclamation, such lands shall be sold only to actual settlers, in tracts not exceeding 320 acres. It provides for the formation of reclamation districts to reclaim such of said lands as should not be suitable for cultivation without reclamation.

[1, 2] It will be observed that the Legislature has followed the constitutional mandate and has authorized sales of such lands only when the conditions of the Constitution are fulfilled. The surveyor general is given authority to sell land suitable for cultivation, in tracts not exceeding 320 acres to one person, and to persons who are actual settlers thereon, and not otherwise. Before making a sale of such land the duty rests upon him to ascertain its character, and, if it is suitable for cultivation to make the sales only to the persons and in quantities authorized by the statute. In making this inquiry he is acting as the agent of the state with authority to determine the fact. It would seem to follow, therefore, that in the absence of fraud or mistake such as would authorize an application for relief in equity, the state is bound by his decision thereon. Such is the uniform rule of decision regarding patents issued by the officers of the United States in pursuance of acts of Congress giving them similar authority. *Gage v. Gunther*, 136 Cal. 338, 344, 68 Pac. 710, 89 Am. St. Rep. 141. We perceive no reason why the same rule should not be applied to the decisions of the surveyor general of the state regarding land subject to sale under this act. The power to sell depends upon the determination of a fact, as in the cases relating to the United States officers, and the determination of the fact by an officer authorized to make it, should be binding to the same extent. On the other hand, if we hold that the constitutional provision deprives the Legislature of the state of power to sell or authorize officers to sell such land in quantities exceeding 320 acres to a single person, or to those not actual settlers, unless it is in fact unsuitable for cultivation at the time, and that no officer of the state has any power to determine this question so as to bind the state, the result would be to place the titles of such lands, even in the hands of innocent purchasers from the patentee, continually in jeopardy thereafter at the instance of the state, as succeeding officers may see cause for changing the original decision as to its character.

It is clear that this would not be a sound public policy. It is to the interest of the state that when persons have honestly acquired title from the state to such lands, upon applications made in good faith, and upon a decision thereon by the state officers of the facts involved, such titles should not be subject to attack in future on the ground that the original decision was wrong.

[3] The first count does not allege that the decision of the surveyor general was made by reason of any mistake, and it is not claimed by the attorney general that this count is based upon the theory of equitable relief on the ground of mistake. It is based solely on the theory that no power exists in any state officer to grant land of that character to one not an actual settler, or in excess of the prescribed area. For these reasons we think the first count does not state facts sufficient to constitute a cause of action.

[4] The addition in the second count of allegations of fraud on the part of the purchasers, and of knowledge thereof on the part of the present owners, clearly bring it within the rules regarding fraud, and render that count good as a cause of action to set aside the patent upon the ground that it was procured by actual fraud.

[5] The main controversy upon this appeal arises over the question whether or not the action is barred by the statute of limitations. Section 315 of the Code of Civil Procedure provides the general statute of limitations which runs against the state. It declares that the state will not sue any person "for or in respect to any real property" unless the state's "right or title shall have accrued within ten years before" the action or proceeding is commenced. The words "right or title" in this passage are to be construed to mean "cause of action." *People v. Banning Co.*, 167 Cal. 643, 646, 140 Pac. 587. If this section applies to the case, it would follow that the action is not barred. There can be no dispute over the proposition that the cause of action stated in the complaint is an action in respect to real property. It asks that a patent for real property be canceled, and that the state be declared to be the owner of the land which the patent apparently disposed of. The respondents claim that the case is governed by subdivision 4 of section 338, providing that an action for relief on the ground of fraud or mistake is barred within three years from the time of the discovery of the fraud or mistake. This theory is based upon the language of sections 335 and 345 of the same chapter in which section 338 is found. Section 335 is the first section of chapter 3, tit. 2. It declares that:

"The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows."

Then follow the remaining sections of the chapter, including those last mentioned. Section 345 declares that:

"The limitations prescribed in this chapter apply to actions brought in the name of the state or for the benefit of the state, in the same manner as to actions by private parties."

We cannot agree with the contention of the respondent that these provisions make the three-year statute applicable to an action of the character herein presented. Although the second count is based upon an alleged fraud perpetrated by the applicant and the syndicate which procured the conveyance to the defendant, yet it is not exclusively an action for relief on the ground of fraud. Its main purpose is to obtain for the state a cancellation of the patent, issued for its land by its officers acting under the influence of the fraudulent acts alleged, and to have the state declared to be the owner of that land. It is clearly an action in respect to land, as well as an action for land, and it is governed by the provisions of section 315 aforesaid. This proposition is well settled in this state. Sections 315, 318, and 319 are contained in chapter 2 of the article aforesaid. This chapter is entitled "Time of Commencing Actions for Recovery of Real Property." Its provisions relate to that subject, and fix the period of limitation for actions by private persons to recover real property or the possession thereof, and also for actions by the state, as above mentioned. It has been held in a number of cases that an action by a private person to recover real property, based upon allegations that the title was procured to be conveyed by such person by means of fraud, though an action seeking relief on the ground of fraud, is nevertheless an action for the recovery of real property, and is not barred by the period of three years fixed by section 338, but by the five-year period fixed by section 318. These decisions are based on the proposition that the actions referred to in chapter 3 of said article are "actions other than for recovery of real property," and that, when the main purpose of an action is to recover real property for the plaintiff, it is barred in five years, and not in three years. *Oakland v. Carpenter*, 13 Cal. 552; *Goodnow v. Parker*, 112 Cal. 441, 44 Pac. 738; *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820; *South Tule, etc., Co. v. King*, 144 Cal. 454, 77 Pac. 1032; *Hager v. Shindler*, 29 Cal. 47; *Scholle v. Finnell*, 166 Cal. 551, 137 Pac. 241. This proposition is elaborately stated and argued in the cases cited, and it is unnecessary to discuss it further in the present case. The same rule must obviously be applied to an action by the state in respect to land claimed by it, the object of which is to have the state declared to be the owner thereof, and to have a fraudulent patent therefor canceled. Such action is not barred until the expiration of ten years from the issuance of the patent attacked.

In support of their claim regarding the

statute of limitations, the defendants rely on *People v. Blankenship*, 52 Cal. 619. In that case the only relief asked was the cancellation of the patent. Apparently no relief was asked regarding the land itself, and the sole discussion was upon the proposition that it was an action solely for relief on the ground of fraud within the meaning of subdivision 4 of section 338 aforesaid. The principle of the case was condemned in *Goodnow v. Parker*, supra, and in *Murphy v. Crowley*, supra. Both of these cases were suits by private persons similar to the case at bar to recover possession of land and set aside deeds therefor under which the defendants held, alleged to have been obtained by fraud, and so far as *People v. Blankenship* may be deemed to be a decision that, where the restoration of the land to the rightful owner is the main object of the action, the three-year statute applies, it must be considered as overruled by the later cases. The same must be said of *People v. Noyo Lumber Co.*, 99 Cal. 456, 34 Pac. 96, which is also cited by the respondent. There was no serious discussion in either case of the question involved in the present case. We are of the opinion that the demurrer was improperly sustained, as to the second count.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; VICTOR E. SHAW, Judge pro tem.; MELVIN, J.; WILBUR, J.; RICHARDS, Judge pro tem.

(177 Cal. 488)

In re VERWOERT. (Sac. 2626.)

(Supreme Court of California. Feb. 13, 1918.)

1. GUARDIAN AND WARD §97—PRIVATE SALE—POWER OF COURT.

Under Code Civ. Proc. § 1787, providing that upon the petition of a guardian for sale of property the court may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale, and section 1789, providing that provisions of the chapters of the Code relating to sales of property by administrators shall apply to sales by guardians, where the petition of a guardian for sale of land was silent as to whether the sale should be private or public, the court could direct a private sale, in view of section 1544, providing that every such sale must be ordered to be made at public auction, unless in the opinion of the court it would benefit the estate to sell at private sale.

2. GUARDIAN AND WARD §101—SALE OF REALTY—RIGHTS OF PURCHASER.

Where petition for sale of ward's land gave full information as to trust deed against same, and stated that it was the purpose of the guardian to pay the debts of the ward, including that secured by the trust deed, the purchaser could not refuse to go on with the sale because of such incumbrances; the rule of caveat emptor applying to such sales.

3. GUARDIAN AND WARD §101—SALE—VACATION.

Where bidder refused for unfounded reasons to comply with the terms of the sale, and the guardian asked to have order of confirmation

revoked for such cause, bidder cannot be heard to complain of vacation of order confirming sale.

4. GUARDIAN AND WARD §101—SALE OF REALTY—VACATING ORDER.

Where bidder refused for unfounded reasons to comply with the terms of the sale, and the guardian asked to have order of confirmation revoked for such cause, the court was justified in making an order vacating order confirming sale.

5. GUARDIAN AND WARD §101—VACATING ORDER CONFIRMING SALE—FINDING.

On application of guardian for vacation of order confirming sale of land, where the purchaser's answer was in effect a repetition of his refusal to carry out the terms of the sale for unfounded reasons, there was no real issue of fact, and it was unnecessary for the court to make and file findings of fact and conclusions of law.

6. GUARDIAN AND WARD §101—REFUSAL OF PURCHASER TO CARRY OUT SALE—RIGHT OF GUARDIAN.

The guardian had the right to endeavor to secure another purchaser after defendant's refusal for unfounded reasons to carry out the terms of the sale.

Department 1. Appeal from Superior Court, Kings County; M. L. Short, Judge.

In the matter of the guardianship of Herman C. Verwoert. From an order vacating an order confirming sale and vacating the order of sale, W. O. Jenkins, purchaser at the sale, appeals. Affirmed.

H. Scott Jacobs, of Hanford, and W. O. Jenkins, for appellant. John G. Covert, of Hanford, for respondent.

SHAW, J. Alfreda Verwoert, as guardian of the estate of Herman C. Verwoert, obtained an order directing the sale by her as such guardian, of certain real estate belonging to the ward. The order directed that the sale be made at private sale, one-half cash, the balance on a credit not to exceed three years, with interest. The petition did not ask that the sale be at private sale, but was silent on that point. The guardian made a sale to W. O. Jenkins, appellant herein. A return of said sale was duly made, and the court made an order confirming the same. Thereupon Jenkins gave notice to the guardian that there were certain defects in the title to the land, and in the proceedings for the sale, and that as soon as such defects were removed he would complete the first payment and comply with the terms of the order of sale. The alleged defect in the title consisted of the fact that there was an outstanding deed of trust conveying the property to trustees to secure the sum of \$21,000 owing to the Sacramento Bank. The defect alleged to exist in the proceedings was that the petition for the sale did not ask that the sale be made at private sale. Thereupon the guardian moved the court to vacate the order confirming the sale, upon the ground that the purchaser had refused to complete the same, unless the alleged defect in the proceedings was removed and the incum-

brance arising from said deed of trust satisfied. The appellant appeared and resisted the motion. After hearing the evidence, the court granted the motion, and thereupon made an order vacating the order confirming the sale, and also the order directing the guardian to make the sale. From this order the said Jenkins prosecutes this appeal.

[1] The objection made by Jenkins to the validity of the sale is untenable, and his objection to the title of the ward in the land sold to him was not sufficient cause for his refusal to go on with his purchase. The claim that such a sale is invalid, if made at private sale, where the petition therefor did not ask for a sale at private sale, is not supported by the statute. Section 1787 of the Code of Civil Procedure provides that upon the petition of a guardian for a sale of property the court "may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale." Section 1789 provides that the provisions of the chapters of the Code relating to sales of property by administrators, shall apply to proceedings for such sales by guardians, unless otherwise specially provided in the chapter relating to guardians' sales. Section 1544 of the chapter relating to sales by administrators provides that:

"Every such sale must be ordered to be made at public auction, unless, in the opinion of the court, it would benefit the estate to sell the whole or some part of such real estate at private sale; the court may, if the same is asked for in the petition, order or direct such real estate or any part thereof to be sold at either public or private sale, as the executor or administrator shall judge to be most beneficial for the estate."

The effect of these provisions is not, as the appellant contends, to require the petition to pray for a private sale in order to give the court authority to order such private sale. The Code provides for two contingencies relating to private sales. The semicolon in the above quotation from section 1544 separates two distinct propositions. The first proposition is that if the court, exercising its own discretion, believes that a private sale would benefit the estate, it can so determine, and thereupon make the order accordingly. Section 1787 does not expressly declare in such a case whether the court can order the sale at private sale, or must order it at public sale; but by virtue of section 1789 the provisions of section 1544 are carried into the law respecting sales by guardians, and the court is authorized to order a guardian to sell at private sale if it deems the same beneficial to the estate. But the court may take another course, in case the petition lays the foundation therefor, which is to leave the question of selling at public or private sale to the discretion and judgment of the administrator or guardian. This is provided for both in section 1544 and in section 1787. By

each, however, in order to give the court this power to commit the matter to the discretion of the guardian or administrator, it is necessary that the same be prayed for in the petition. In the present case the petition was silent on the subject, but the court had power, under section 1544, in the exercise of its own discretion, to direct that the same be made at private sale.

[2] With respect to the title, the rule of caveat emptor applies. A guardian, in making a sale in pursuance of an order of court, does not warrant the title to the property sold. He merely sells such title as the ward may have therein, and, unless the order of sale provides otherwise, the purchaser takes the property subject to all incumbrances thereon. He is bound to examine the title and satisfy himself regarding it before he makes his bid. *Halleck v. Guy*, 9 Cal. 197, 70 Am. Dec. 643; *Miller & Lux v. Gray*, 136 Cal. 261, 68 Pac. 770. In this case the petition for sale gave full information of the trust deed, and stated that it was the purpose of the guardian to use the money derived from the sale to pay the debts of the ward's estate, including that secured by the trust deed. The order of sale was general, and made no provision for the discharge of the trust deed. Having bid with this information, Jenkins could not claim to have been misled, and he had no right to raise the objection or refuse to go on with the sale because of said incumbrance.

[3] Appellant further insists that the court below had no power or jurisdiction to vacate the order confirming the sale to him. In support of this proposition he cites *Estate of West*, 162 Cal. 352, 122 Pac. 953; *Estate of McCarthy*, 169 Cal. 708, 147 Pac. 941, and *Estate of Leonis*, 138 Cal. 194, 71 Pac. 171. These decisions, in effect, merely declare that after a sale has been made, and either before or after the confirmation thereof, the bidder at the sale has a vested interest in the proceedings, and a right to have the sale carried out, upon compliance on his part with the terms specified in the order under which it was made. They do not hold that he has such right without such compliance. The decision in the *Estate of Leonis* does not, as appellant contends, hold that the court is without any power whatever to vacate a sale of real property made by an administrator or guardian, except where the proceedings are unfair or the price disproportionate to the value, as provided in section 1552 of the Code of Civil Procedure. All that the case really decides on that point is that, under the facts shown in that case, the court had no power to vacate the sale, except for those reasons. It cannot reasonably be claimed that after a bidder for unfounded reasons refuses to comply with the terms of the sale made to him in pursuance of an order of the court, and the guardian for that

cause asks to have the confirmation revoked, such purchaser, still refusing to go on, can be heard to object to the revocation, and by that means prevent a sale to another who will comply or compel the sale to himself upon terms other than those prescribed in the order. This is, in effect, what the appellant is here attempting.

[4] There is no merit in the claim that the application to set aside the order confirming the sale, and the order directing the sale did not show sufficient facts to justify such order. The facts we have stated appear therein. What we have already said is sufficient upon that point.

[5] It was not necessary, in proceedings of this character, for the court below to make and file findings of fact and conclusions of law. There was no real issue of fact. The answer of the appellant to the application of the respondent was a mere reiteration of his objections to the validity of the order of sale and to the title of the ward to the property sold, and a demand that the guardian be required to remove the objections and make the title good. It was, in effect, a repetition of his refusal to carry out the sale on the terms of the order. No evidence was necessary to sustain the order of the court. There was, however, sufficient evidence of the facts.

[6] It is claimed that the court erred in refusing to permit the purchaser to show that, after appellant's refusal to complete the sale as above stated, the guardian had been endeavoring to secure other purchasers. She had a right to do so after the appellant's refusal. These comprise all the questions discussed in the briefs.

The order appealed from is affirmed.

We concur: RICHARDS, Judge pro tem.; SLOSS, J.

(35 Cal. App. 796)

BECKETT v. STUART. (Civ. 2501.)

(District Court of Appeal, Second District, California. Jan. 9, 1918.)

APPEAL AND ERROR §631—RECORD—SUFFICIENCY.

On appeal from the judgment alone under the alternative method where there is before the court a typewritten copy of the judgment roll certified by the clerk of the trial court, the appeal will not be dismissed because of the absence of record showing proceedings at trial, as is designated under Code Civ. Proc. § 953a, to take the place of a bill of exceptions, a typewritten copy of the judgment roll presenting such record as entitles the appeal to be heard on the merits.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Ida R. Beckett against Z. B. Stuart. On motion to dismiss defendant's appeal. Denied.

Hocker & Austin, Simms & Fulwider, and Stephen Monteleone, all of Los Angeles, for

appellant. Rupert B. Turnbull, of Pasadena, and Hugh Kelly and Joe Crider, Jr., both of Los Angeles, for respondent.

WORKS, Judge pro tem. This is an appeal from the judgment alone under what is known as the alternative method. There is before us no record showing the proceedings at the trial, but there is on file a typewritten copy of the judgment roll, certified by the clerk of the trial court. Respondent moves to dismiss the appeal because of the absence of such record of the trial as is designated, under section 953a, Code of Civil Procedure, to take the place of a bill of exceptions; but, under the opinion of the Supreme Court denying an application for rehearing in *McKinnell v. Hansen*, 167 Pac. 887, the typewritten copy of the judgment roll presents such a record as entitles the appeal to be heard on the merits. The record of the proceedings at the trial is not necessary as a predicate to the right to such hearing.

The motion to dismiss the appeal is denied.

We concur: CONREY, P. J.; JAMES, J.

(35 Cal. App. 793)

BALBOA AMUSEMENT PRODUCING CO.
et al. v. **INDUSTRIAL ACCIDENT COM-**
MISSION et al. (Civ. 2453.)

(District Court of Appeal, Second District,
California. Jan. 9, 1918.)

MASTER AND SERVANT §373—**WORKMEN'S**
COMPENSATION ACT — **ACCIDENT "ARISING**
OUT OF EMPLOYMENT."

Where a motion picture company plant occupied four corners of a street intersection, and an employé, whose duty it was to remain in the vicinity until needed, was loitering in the street talking with other employés about social affairs and was run over by a director's automobile, the accident was not one arising out of the employment within the meaning of the Workmen's Compensation Act (St. 1913, p. 279).

Proceedings under the Workmen's Compensation Act by Henry Stanley to obtain compensation for personal injuries. Opposed by the Balboa Amusement Producing Company, a corporation, the employer, and the Georgia Casualty Company, a corporation. There was an award by the Industrial Accident Commission, and the employer and the insurance company apply for a writ of review. Award annulled.

Redman & Alexander, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

WORKS, Judge pro tem. The Balboa Amusement Producing Company was engaged in the making of motion pictures, and Henry Stanley was an actor employed by it. On the day of the accident out of which this controversy arises, Stanley reported to the company for duty at the usual time in

the morning, but was told that his services were not then needed. However, the rules of the business required him to remain at the plant of the company, or on the "lot," to adopt the parlance of the motion picture industry, for possible service during the day. The situation of the company's lot was peculiar, and out of the peculiarity arises the question to be decided in this proceeding. Parts of the plant occupied the four corners of intersecting streets in the city of Long Beach, and the two thoroughfares were constantly used by the officers and employés of the company in passing between the portions of the plant on the respective corners in the discharge of their duties. On the morning of the accident, after reporting for service, Stanley crossed one of the streets, proceeding from the place where he had reported to a dressing room on one of the other corners. His purpose in going to the dressing room was to change his coat, merely for his own comfort, after which he intended to recross the street to play a game of chess in a part of the plant known as the extra room. On his return from the dressing room he stopped in the street, where he engaged in conversation with two other employés of the company. The conversation was purely social, and related to the private affairs of the participants in it. While the little knot of persons was congregated in the street, one of the directors of the company approached in an automobile, intending to stop at the location of the group. In attempting to stop his car the driver accidentally struck the accelerator, with the result that the car pitched forward, struck Stanley, and injured him. He applied to the Industrial Accident Commission for relief under the Workmen's Compensation, Insurance, and Safety Act, and the Commission made an award in his favor. The petitioners, admitting that the accident occurred in the course of Stanley's employment, contend that his injuries are not compensable under the statute, for the reason that they did not arise out of the employment.

The respondents, in justification of the award, cite many cases from jurisdictions outside of California in which compensation has been made for injuries suffered by employés while on public streets, but to them we need not specifically refer, as we believe them to be distinguishable from the case now before us and because the decisions of the Supreme Court of this state upon the present question are both numerous and clear. We cite *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164; *Fishering v. Pillsbury*, 172 Cal. 690, 158 Pac. 215; *Kimbol v. Industrial Accident Commission*, 173 Cal. 351, 160 Pac. 150, L. R. A. 1917B, 595, Ann. Cas. 1917E, 312; *Ward v. Industrial Accident Commission*, 164 Pac. 1123, decided May 2, 1917. In the first of

these cases it is said (172 Cal. 685, 158 Pac. 213, L. R. A. 1916F, 1164):

"The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employe's work or to the risks to which the employe's business exposes the employe. The accident must be one resulting from a risk necessarily incident to the employment. * * * It 'arises out of' the occupation when there is a causal connection between the conditions under which the servant works and the resulting injury. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

There is also a very complete statement of the same rule, in different language, in *Kimbol v. Industrial Accident Commission*, supra, a part of the statement being:

"The causative danger must be peculiar to the work and not common to the neighborhood."

When measured by the standards set down in these cases, it is not difficult to satisfactorily conclude the present proceeding. Even if it were conceded that injuries suffered by Stanley would have been compensable if they had resulted from an accident happening to him while actually traversing the street on the way from changing his coat, for his own convenience, to a contest at chess, for his own pleasure, we have by no means settled the matter. If we admit that his risk in crossing the street was a risk incident to his employment, upon the theory that, for the purpose of crossing and recrossing, the street was a part of the company's lot, we are yet afield. The thoroughfare was certainly not a part of the lot in the sense that Stanley might properly have loitered, or stood in social converse, upon it, as he might very properly have done upon any part of the lot located upon the corners of the intersection. When he stopped in the street he assumed a risk common to all who might sojourn there in the same manner. Under such circumstances his employer is not called upon to make compensation for his injuries. They did not arise out of the employment.

The award is annulled.

We concur: CONREY, P. J.; JAMES, J.

(55 Cal. App. 797)

Ex parte MOONEY. (Cr. 709.)

(District Court of Appeal, First District, California. Jan. 9, 1918.)

BAIL ~~49~~—CAPITAL CASES—CONTROLLING FACTOR.

That petitioner has been acquitted upon one of several indictments for murder pending against her, while persuasive, is not a controlling factor in the determination of an application for bail.

In the matter of the application of Rena Mooney for a writ of habeas corpus. Petition denied, and petitioner remanded.

Maxwell McNutt and Nathan C. Coghlan, both of San Francisco, for petitioner. F. L. Berry, Deputy Dist. Atty., and John D. Harloe, both of San Francisco, for respondent.

PER CURIAM. The defendant is restrained of her liberty under a bench warrant issued out of the superior court of the state of California, in and for the city and county of San Francisco, upon eight separate indictments presented by the grand jury in cases entitled "*People of the State of California v. Rena Mooney*" numbered 7530 to 7537, inclusive, wherein the defendant was charged with the murder of eight different persons. Upon one of these indictments only the defendant has been tried and acquitted by a jury. The record of that case is before us, as are also the proceedings before the grand jury in each of these several indictments which have not yet been put to trial.

The rule by which this court must be governed in determining this matter was early laid down in the case of *Ex parte Trola*, 64 Cal. 152, 28 Pac. 231, and was later followed and reaffirmed in the case of *Ex parte Curtis*, 92 Cal. 188, 28 Pac. 223, in which latter case Chief Justice Beatty declared the rule to be that bail should be denied in capital cases "when the evidence is sufficient to warrant a grand jury in bringing in an indictment, or, what practically amounts to the same thing, when the evidence is sufficient in law to sustain a capital conviction." Quoting from the case of *Ex parte Trola*, supra, the learned Chief Justice further stated:

"This court, in denying the application for bail, said: 'We cannot say, upon the evidence before us, that the superior court ought to set aside the verdict, as not justified by the evidence, should the jury find the petitioner guilty of the higher degree of the crime charged. We ought not to anticipate the action of the jury by discharging the prisoner from actual custody, with or without bail, upon evidence which we are not prepared to say is so insufficient as that a verdict requiring a capital sentence, based upon it, should not be permitted to stand.' I do not doubt," says the Chief Justice, "the soundness of this rule."

It is needless to say that the rule thus early stated, and since uniformly adhered to in this state, is binding upon this court.

After a careful examination of the record before us we are satisfied that it is to be given full application to the facts of the matter now under consideration.

It is, however, urged by the petitioner that the fact that in one of these several causes she has been tried and has been found not guilty by a jury is a controlling circumstance, requiring a variance in the instant case from the rule above stated. After an examination of the authorities bearing upon this question we are satisfied that the fact of the petitioner's acquittal upon one of these several indictments pending against her, while ordinarily persuasive, nevertheless it is not a controlling factor in the determination

of an application for bail. It is to be presumed that the courts and prosecuting officers will perform their duty promptly in presenting others of these several causes for trial. Upon the present state of these causes we are of the opinion that the rule set forth in the case of *Ex parte Curtis*, supra, should be given application.

It follows that the petition will be denied, and the petitioner remanded; and it is so ordered.

(35 Cal. App. 806)

Ex parte WEINBERG. (Cr. 723.)

(District Court of Appeal, First District, California. Jan. 9, 1918.)

In the matter of application of Israel Weinberg for a writ of habeas corpus. Denied, and petitioner remanded.

Maxwell McNutt and Edwin V. McKenzie, both of San Francisco, for petitioner. Louis Ferrari, Deputy Dist. Atty., of San Francisco, for respondent.

PER CURIAM. The defendant is restrained of his liberty under a bench warrant issued out of the superior court of the state of California, in and for the city and county of San Francisco, upon eight separate indictments presented by the grand jury in cases entitled "The People of the State of California v. Israel Weinberg," numbered 7530 to 7537, inclusive, wherein the defendant was charged with the murder of eight different persons. Upon one of these indictments only the defendant has been tried and acquitted by a jury. The record of that case is before us, as are also the proceedings before the grand jury in each of these several indictments which have not yet been put to trial.

We are of the opinion that the rule adopted in the matter of *Ex parte Mooney*, No. 700, 171 Pac. 109, this day decided by this court, as well as the reason for its application, are to be given full application to the instant case. Upon the reasoning and authorities in the case of *Ex parte Mooney*, supra, the application herein will be denied, and the petitioner remanded; and it is so ordered.

(35 Cal. App. 802)

In re WELLS. (Cr. 336.)

(District Court of Appeal, Third District, California. Jan. 10, 1918.)

1. APPEAL AND ERROR §655(1)—MOTION TO STRIKE TESTIMONY — SUFFICIENCY OF MOTION.

Where the index to reporter's transcript contains no reference to the exhibits, a motion to strike out an exhibit, which fails to point out where the exhibit can be found, will be denied.

2. EVIDENCE §314(1) — HEARSAY — JUDGMENTS—ADMISSIBILITY TO SHOW FACT.

A finding of a court on conflicting evidence in an action for fraud is hearsay in a hearing on application to practice law, in which respondent is entitled to examine witnesses as to the charges made against him.

3. APPEAL AND ERROR §656(1)—CORRECTING ERRORS IN TRANSCRIPT.

The appellate court in an original proceeding cannot correct errors in a transcript of evidence taken before a referee, where there is nothing to show whether or not the stenographer took down the evidence as given.

In the matter of the application of T. Alonzo Wells to practice law. Motion to strike out testimony taken before a referee. Granted in part.

See, also, 174 Cal. 467, 163 Pac. 657.

Clyde Bishop, R. Y. Williams, Joe C. Burke, L. A. West, and S. M. Reinhaus, all of Santa Ana, for petitioner. T. Alonzo Wells, in pro. per. S. N. Johnstone, of Los Angeles. H. N. Mitchell, of Sacramento, and M. C. Atchison, of Los Angeles, for respondents.

PER CURIAM. Counsel for respondent have filed a motion to strike out certain portions of the testimony taken before the referee named, designated, and appointed by the court to take testimony in this proceeding. It was understood and agreed by and between counsel on both sides that this motion should be disposed of before briefs addressed to the merits are filed. The portions of the testimony which respondent asks be stricken out are specified in the written motion, and, having considered the same, we now state the conclusions arrived at. The grounds of the allowance of the motion as to certain testimony are those stated by respondent in his written application to strike out. Where the motion is denied it is because the reasons stated for striking out are not legally tenable as to those portions of the testimony.

1. The motion as to all the testimony of the witnesses George W. Minter and G. W. Stevens is granted.

2. The motion as to the testimony of the witness R. Y. Williams, designated as subdivisions a, b, and c in the written motion, is granted.

3. The testimony of the witness W. H. Thomas, designated as subdivisions a, b, c, and d in said written motion, is stricken out.

[1] 4. The motion to strike out petitioner's Exhibit D is denied for the reason that the written motion fails to point out where the said exhibit may be found in the transcript. The index to the reporter's transcript contains no reference to the several exhibits, and it is not the duty of this court to search that voluminous document to find the exhibit, counsel themselves not having taken the pains to designate the particular part of the transcript in which it may be found.

5. The motion to strike out those portions of the testimony of the witness Clyde Bishop, designated as subdivisions a, b, c, l, m, n, o, and s, is granted. The motion as to those portions designated as subdivisions d, e, f, g, h, j, k, l, p, q, r, and t is denied.

6. The motion to strike out petitioner's Exhibit E is denied for the reason given above for the ruling as to petitioner's Exhibit D.

7. The motion as to the portions of the testimony of the witness George W. Moore,

designated as subdivisions a, b, c, and d, is denied.

8. The motion as to the portions of the testimony of the witness C. C. Johnson, designated as subdivisions a and b, is denied.

9. The motion as to the testimony of James McMillan, subdivisions a and b, is denied.

10. The motion as to the testimony of the witness C. E. Lavering, subdivisions a and b, is denied.

11. The motion as to the testimony of W. D. Seeley, subdivisions a and b, is denied.

12. The motion as to the testimony of J. E. McGowen, subdivisions a and b, is denied.

13. The motion as to the testimony of Sterling Price, subdivisions a and b, and the motion as to the testimony of the following witnesses, is denied: J. T. Stockton; A. W. Morehouse; R. L. Draper and Henry Brooks; Joe Gothard, Dr. G. A. Shank, and C. H. Mansur.

14. The motion to strike out all the testimony of Henry Brooks, Joe Gothard, and C. H. Mansur is denied.

15. The motion as to the testimony of H. J. Forgy, subdivisions a and d, is denied. As to the testimony of said Forgy, designated as subdivisions b and c, the motion is granted.

16. The motion as to the testimony of the witness James J. Conrad, designated as subdivisions a and b, is denied.

[2] 17. The motion to strike out the statement on motion for a new trial in the case of Commercial Bank of Santa Ana, a Corporation, Plaintiff, v. T. A. Wells and J. E. Wells, Defendants, is granted. The said statement is in the transcript before us, beginning on page 279 and ending on page 290 thereof. The general ground upon which we base the order striking out the said statement is that it is hearsay. This testimony was offered for the purpose of showing that, in the above-mentioned case, in which the statement was prepared, the respondent fraudulently secured a loan of \$550 from the said Commercial Bank. Wells and his wife having joined in making a promissory note to the bank for said sum. From the said statement on the motion for a new trial it appears that, about a year and a half before the \$550 transaction with the said bank was had, Wells borrowed from the latter the sum of \$350. It further likewise appears that, either on the first or second of the two said occasions on which he borrowed money from the bank, Wells told the cashier that a certain tract of land in his wife's name was unincumbered. After the \$550 loan was made to the respondent by the bank, the latter learned that the wife of the respondent had, on

the 3d day of June, 1903, filed a homestead on said land. The \$550 loan was made on the 31st day of August, 1903.

As a defense to the action by the bank on the \$550 note, Wells pleaded and proved his discharge in bankruptcy by the United States District Court for the Southern District of California on the 29th day of January, 1906. It was admitted by Wells at the trial that his note to the bank for \$550 was included in his schedule of liabilities filed in the proceeding in bankruptcy, and was therefore affected by the adjudication discharging him from all obligations or liabilities then existing against him.

Thus, it will be seen, it became a question of vital importance in that case whether the representation made to the bank by Wells that his wife's land was unincumbered was made when he obtained the loan for \$350 or when he obtained the loan for \$550. Upon this question there was, according to the statement on motion for a new trial, a sharp conflict in the testimony, Wells having testified that the representation was made when he borrowed the \$350 and the bank officials having testified that the representation was made when he borrowed the sum of \$550. Of course, the trial court had to determine this conflict and did so by finding in favor of the bank. Manifestly, this was only the opinion or judgment of the trial judge, and, while such opinion or judgment would be conclusive against the respondent here in certain instances which could be mentioned, still it cannot be held to be otherwise than hearsay in this proceeding, in which the respondent is entitled, as to all of the several distinct charges formally preferred against him, to be confronted by the witnesses called to support those charges, and to have their testimony taken directly before, and to cross-examine them in the presence and hearing of, the tribunal which must ultimately pass upon the question whether said charges have been sustained by sufficient proof.

[3] 18. This court is in no position to order the transcript of the testimony corrected in the several particulars indicated on pages 24 and 25 of the motion to strike out. We have no way of knowing whether, as respondent contends, the alleged errors are in fact errors or whether the testimony in those particulars was taken down and transcribed by the stenographer as it was given before the referee. We suggest, however, that the attorneys on both sides join in having the stenographer who took the testimony read to them his notes touching the particulars as to which errors are claimed to have been made and agree upon and make such corrections in the particulars referred to as the notes of the reporter may justify.

(35 Cal. App. 788)

PEOPLE v. HANFORD. (Cr. 697.)

(District Court of Appeal, First District, California. Jan. 10, 1918.)

1. PROSTITUTION — 1—INDUCING MINOR TO BECOME INMATE—ELEMENTS OF OFFENSE.

Under Juvenile Court Law (St. 1915, p. 1246) § 21, providing that any person who shall induce or endeavor to induce any person under the age of 21 years to so live as would cause such person to become or remain a prostitute, within section 1, subds. 1-13, inclusive, shall be guilty, where defendant knowingly permitted prosecuting witness, a minor, to commit acts of prostitution in defendant's house and encouraged the commission of the same, she was guilty, though prosecuting witness may have been previously immoral.

2. WITNESSES — 288(2)—PARTS OF DOCUMENT — RIGHT OF ADVERSE PARTY.

Where defendant's counsel during cross-examination of prosecuting witness read into the record a certain portion of her testimony given before the judge of the juvenile court, the prosecuting attorney had the right on redirect examination to read the portion omitted by defendant's counsel.

3. PROSTITUTION — 4—REPUTATION OF PLACE — ADMISSIBILITY.

The character of a house of prostitution may be established by evidence of its general reputation.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Jennie Hanford was convicted of violating Juvenile Court Law, § 21, and appeals from the judgment of conviction and from an order denying her motion for new trial. Affirmed.

Walter J. Thompson and Edward Lomasney, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LENNON, P. J. Defendant was charged by an information filed in the superior court of the city and county of San Francisco with the crime of violating the provisions of section 21 of the Juvenile Court Law. She was tried, convicted, and sentenced to imprisonment in the county jail of said city and county. Defendant has appealed from the judgment and the order denying her motion for a new trial.

The evidence is sufficient to establish the crime charged. It shows that the defendant knowingly permitted the prosecuting witness to commit acts of prostitution in the defendant's house and encouraged the commission of the same.

[1] It is no defense that the prosecuting witness may have been leading an idle, dissolute, and immoral life prior to and at the time she went to the house of defendant. The statute under which the defendant was convicted in part provides that:

"Any person who shall, by an act or omission, or by threats, or commands, or persuasion induce or endeavor to induce any * * * person, under the age of twenty-one years, to do or to

perform any act or to follow any course of conduct, or to so live as would cause or manifestly tend to cause any such person to become or to remain a person coming within the provisions of any of subdivisions 1 to 13 inclusive of section 1 of this act, shall be guilty of a misdemeanor. * * * St. 1915, p. 1246.

Thus it is apparent that the Juvenile Court Law not only denounces and condemns acts which tend to make a minor a prostitute, but also those which tend to cause one, already a prostitute, to remain a prostitute. In short, the clear purpose and intent of the statute is to reclaim the fallen as well as protect the virtuous.

Complaint is made of the alleged misconduct of the trial court, but the record does not show that the remarks of the court in response to an objection which it is claimed constituted misconduct were objected to or assigned as misconduct. Moreover, the record shows that the objection which provoked the remarks of the court was immediately withdrawn. This, we take it, was an acquiescence in the pertinency and propriety of the court's remarks, which were addressed solely to counsel for the defendant.

[2] Defendant's counsel, during the cross-examination of the prosecuting witness read into the record a certain portion of her testimony given before the judge of the juvenile court. On her redirect examination the prosecuting attorney read into the record a portion of the same testimony given by the witness in the juvenile court which counsel for the defendant omitted to read. This he had a right to do, for "where parts of a conversation or act or writing are proved, other connected parts should be received." Jones on Ev. (2d Ed.) p. 192. Moreover, even if this had been erroneous defendant failed to make either a timely objection or a motion to strike out.

[3] The court did not err in admitting evidence concerning the reputation of the defendant's house. The character of a house of prostitution may be established by evidence of its general reputation. *People v. De Martini*, 25 Cal. App. 9, 142 Pac. 893.

Judgment and order affirmed.

We concur: **KERRIGAN, J.; BEASLY,**
Judge pro tem.

(35 Cal. App. 788)

ZIERATH et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 2510.)

(District Court of Appeal, Second District, California. Jan. 8, 1918.)

1. CERTIORARI — 28(2)—ORDERS REVIEWABLE.

To be reviewable on certiorari, an order of the superior court must have been in excess of the court's jurisdiction.

2. JUDGMENT — 150 — OFFERING DEFAULT — AMENDMENT OF PLEADING.

After default of a defendant, amending of the complaint in a matter of substance opens the default, and judgment cannot be entered un-

less the amended complaint is served on the defendant, but if the complaint is only amended as to form, the default is not opened.

3. JUDGMENT ~~¶~~144—OPENING DEFAULT.

In entering judgment on an amended complaint, not served on a defendant who defaulted, the court necessarily decided that the amendment was not one in substance, and it was without power to set aside the default on a motion based on the theory that the court did not have jurisdiction to enter the judgment, and it makes no difference how erroneous the judgment was.

Certiorari by A. C. Zierath, W. F. McCann, J. B. Giel, T. E. Amlin, and Walter S. Booth, Jr., as trustees for the stockholders and creditors of Zierath Combination Drill Company, to review an order of the superior court of the state of California, in and for the county of Los Angeles and the Judge thereof, setting aside a judgment against A. B. Small in the action of Zierath and others against the Midway Southern Oil Company of Long Beach and others. Order annulled.

Alfred H. McAdoo and David E. Bergman, both of Los Angeles, for petitioners. John E. Daly and James H. Daly, both of Long Beach, for respondents.

CONREY, P. J. This is a proceeding by writ of review whereby petitioners are seeking to have annulled an order setting aside a default judgment entered against one A. B. Small in an action of Zierath et al. v. Midway Southern Oil Co. of Long Beach et al. In that action the plaintiffs as judgment creditors of the corporation sued to obtain judgment against stockholders for the amount due on said previous judgment, but not exceeding as to any stockholder the amount of his liability for the unpaid portion of the amount subscribed by him or by his predecessor in ownership of the stock as a subscribing purchaser of such stock. An amended complaint was filed, in the ninth paragraph of which it was alleged that upon each of the shares of stock of said corporation there has been paid by the subscriber, owner and holder thereof an amount equal to 20 cents and no more per share; also that each of the defendant stockholders agreed with said corporation, at the time when he subscribed to and became the owner and holder of the shares of stock charged to him in the complaint, that he would pay the balance of the par value of said shares of stock so remaining unpaid to said corporation, or for its use, when legally called upon to so do. On March 1, 1915, the summons and a copy of this amended complaint were served upon the defendant A. B. Small, and his default for not appearing in the action was duly entered on January 19, 1916. No judgment was entered against him, except as hereinafter stated. On November 17, 1916, an amended complaint was filed in two counts. The first count duplicated the allegations of the first amended complaint. The second count was a copy of the first

count, except that it omitted the ninth paragraph and substituted therefor other allegations. These substituted allegations described certain transactions whereby all of the capital stock of the corporation, except five \$1 shares theretofore issued was originally issued to C. R. Faulstick as fully paid and nonassessable stock at the par value of \$1 per share; the defendants being transferees of portions of that stock. It was alleged that the stock was so issued in consideration of the transfer by Faulstick to the corporation of certain interests in real property; that said property was not at that time worth any sum substantially near the value at which it was received, and that neither Faulstick nor the directors of the company who consummated said transaction with him either knew, thought, or believed that said interests in real property had a market value of the sum of \$1,000,000, at which it was received, or a market value substantially near said sum. Further allegations were made tending to show that said transaction and the issuance of said stock for said insufficient consideration was intended to operate as a fraud upon future creditors of the corporation. The allegations of said substituted paragraph did not admit that the consideration paid to the corporation for said stock was equal in value to 20 cents per share of the stock or equal to any other specified sum.

The second amended complaint having been served upon some of the defendants, but not upon the defendant A. B. Small, and some of those defendants having answered, the case came on for trial, and at the conclusion thereof findings were filed and judgment was entered against certain of the defendants named in the complaint. We may disregard the findings, as they would be surplusage so far as a defaulting defendant was concerned. The judgment recited that the summons and complaint and amended complaint were duly and regularly served upon the defendant A. B. Small, and that his default had been duly and regularly entered. That this recital was not intended to assert that the second amended complaint was served upon Small is made clear by the fact that other recitals of the judgment show that the second amended complaint was served upon other defendants therein named. It is conceded by petitioners herein that the second amended complaint in that action was not served upon the defendant A. B. Small. The judgment was entered on September 21, 1917. Thereafter, on October 23, 1917, notice was given on behalf of A. B. Small, and pursuant thereto a motion was duly made for an order to vacate and set aside said judgment as to the defendant A. B. Small. The motion was supported by an affidavit which we may disregard here, since the facts therein stated, so far as necessary to be considered here, appear in the judgment

roll. On November 16, 1917, the court entered a minute order, to the effect that said motion "to vacate and set aside judgment as to said defendant Small is by the court granted." It is this order which the petitioners seek to have reviewed and annulled.

[1] Petitioners necessarily rely upon the proposition that the order in question was in excess of the court's jurisdiction. If in making said order the court acted in an unauthorized mode and thereby exceeded the bounds of its power, its action may be reviewed on certiorari. *Carpenter v. Superior Court*, 75 Cal. 596, 19 Pac. 174.

[2] The judgment which said order purports to vacate could not be vacated in response to such a motion as made in this case, unless the judgment was one which the court did not have power to render. This in turn depends upon the more specific proposition that the court was without jurisdiction to enter its judgment against the defendant A. B. Small (he not having appeared in the action) without service upon him of a copy of the second amended complaint. "It is settled by a long line of decisions that where, after the default of a defendant has been entered, a complaint is amended in matter of substance as distinguished from mere matter of form, the amendment opens the default, and unless the amended pleading be served on the defaulting defendant, no judgment can properly be entered on the default." *Cole v. Roebbling Construction Co.*, 156 Cal. 443, 446, 105 Pac. 255, 257. Petitioners herein contend that the second amended complaint did not contain any amendment of a substantial nature, or which could in any manner affect the rights of the defendant A. B. Small. We are referred to the cases of *R. H. Herron Co. v. Shaw*, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265, and *Harrison v. Armour*, 169 Cal. 787, 147 Pac. 1166. These were actions similar to the action under consideration here. In *Harrison v. Armour* the shares of the corporation were \$1 each, and it was alleged that no more than 25 cents per share had been paid on the stock subscription. The court said (169 Cal. 792, 147 Pac. 1168) that under the allegations of the complaint "it would have been open to the plaintiff to prove that the patent rights, although turned in at a valuation of \$60,000, were and were known or believed by the parties to be worth much less." So the petitioners argue here that the new matter contained in the second count of the second amended complaint consisted of nothing more than evidentiary matter which might have been proved under the allegations of the first amended complaint, which proof would have been for the purpose of showing that only 20 cents per share had

been paid on account of the stock held by defendant A. B. Small. For reasons which will next appear we find it unnecessary to express an opinion upon this question.

[3] If the second amended complaint differed from the first amended complaint only in matters of form not in substance affecting any right of the defendant A. B. Small, his default would not be opened by the filing of the last amended pleading. *Cole v. Roebbling Construction Co.*, supra; *San Diego Savings Bank v. Goodsell*, 137 Cal. 420, 425, 70 Pac. 299; *Woodward v. Brown*, 119 Cal. 283, 304, 51 Pac. 2, 542, 63 Am. St. Rep. 108. In order to determine that the plaintiffs were entitled to judgment against defendant A. B. Small, it was necessary that the court consider the allegations of the amended complaint and of the second amended complaint and determine that the amendments were merely matters of form and not of substance. The court had jurisdiction of the subject-matter, and by service of the summons and amended complaint it obtained jurisdiction over the defendant A. B. Small. It, therefore, had power to determine the effect of amendments to the pleadings and had jurisdiction to render judgment in accordance with such determination. If the judgment was based upon erroneous conclusions upon the questions thus presented, it was none the less a judgment rendered in the exercise of an established jurisdiction, and could not be set aside except by a mode of procedure provided by law for the review of such judgments. The judgment having been one entered as upon a default, there could not have been a motion for a new trial, nor could there have been a motion for "another and different judgment" under the provisions of section 663, Code of Civil Procedure. The motion to vacate the judgment in question does not purport to have been made to obtain relief under section 473, Code of Civil Procedure. The motion was based, and must have been granted entirely upon the theory that the judgment was void for want of jurisdiction in the court to render any judgment against the nonappearing defendant A. B. Small without service upon him of a copy of the second amended complaint. As we have seen, the court did have jurisdiction to render such judgment. This is so, even though it were conceded now that such action of the court was erroneous. It follows that the court was without jurisdiction to make the order which is here under review.

The order of the court below vacating its judgment against the defendant A. B. Small is annulled.

We concur: WORKS, Judge pro tem.; JAMES, J.

(35 Cal. App. 4)

SPIER v. PECK, County Treasurer.
(Civ. 2512.)

(District Court of Appeal, Second District, California. Jan. 14, 1918.)

1. STATUTES — 181(2) — CONSTRUCTION.

Statutes are to be so construed as not to give rise to an absurdity in their attempted application nor to destroy their efficacy as a whole or in substantial part.

2. STATUTES — 184 — CONSTRUCTION — PURPOSE.

Strong indices to the legislative intent will always be found upon an inquiry into the nature of the evil sought to be remedied by a statute and the object to be accomplished.

3. OFFICERS — 30 — SALARIES — HOLDING TWO OFFICES.

Juvenile Court Act (St. 1915, p. 1225) § 18, providing that all probation officers receiving a salary of \$75 or more per month shall devote their entire time and attention to the duties of their offices, and no such probation officer, while holding such office and receiving salary therefor, shall be a candidate or seek the nomination for any other public office or employment, prohibits probation officers from acting and receiving the salary under appointment as superintendent of the detention home; the prohibition against being a candidate and seeking nomination in view of the requirement of devotion of entire time being against the holding as well as the seeking of another office.

Original application for writ of mandate by Thomas W. Spier against H. E. Peck, as Treasurer of the County of Ventura. Application denied.

Robert M. Clarke, of Los Angeles, for petitioner. Don G. Bowker, Dist. Atty., of Ventura, for respondent.

WORKS, Judge pro tem. Petitioner is probation officer of the county of Ventura and is also acting under appointment as superintendent of the detention home for the same county, both of the offices, or positions, having their existence under what is known as the Juvenile Court Act (Stats. 1915, p. 1225, Deering's Gen. Laws, Act No. 1770a). The law fixes petitioner's salary as probation officer at \$100 per month, and as superintendent of the detention home at \$50 per month. Section 18 of the Juvenile Court Act provides, among other things:

"All probation officers * * * receiving a salary of seventy-five dollars or more per month shall devote their entire time and attention to the duties of their offices, and no such probation officer, * * * while holding such office and receiving salary therefor, shall be a candidate for or seek the nomination for any other public office or employment."

The petitioner presented to the board of supervisors of the county his claim for salary for June, 1917, as superintendent of the detention home, and the claim was allowed. The county auditor approved the demand and issued his warrant for its payment, but the respondent, who is the county treasurer, refused to make payment of the warrant upon its presentation. Thereupon the petitioner

instituted this proceeding to enforce the payment.

[1, 2] The respondent contends that section 18 of the Juvenile Court Act, in that part of it from which we have quoted, disqualifies the petitioner, while holding the post of probation officer, from being superintendent of the detention home and, therefore, from drawing the salary annexed to that position. Can the language forbidding a probation officer to "be a candidate for or seek the nomination for any other public office or employment" receive that construction? Statutes are to be so construed as not to give rise to an absurdity in their attempted application and as not to destroy their efficacy as a whole or in substantial part (*Murphy v. City of San Luis Obispo*, 119 Cal. 624, 628, 51 Pac. 1085, 39 L. R. A. 444; *Hannon v. Southern Pacific R. R. Co.*, 12 Cal. App. 350, 355, 107 Pac. 335; *Maddary v. City of Fresno*, 20 Cal. App. 91, 96, 97, 128 Pac. 340); all rules of construction having their existence, of course, for the purpose of ascertaining the intent of the Legislature, that being the prime object of the construction and interpretation of statutes. Strong indices to the legislative intent will always be found upon an inquiry into the nature of the evil sought to be remedied by a statute or into the object to be accomplished by it. *Bannerman v. Boyle*, 160 Cal. 197, 200, 116 Pac. 732; *Patton v. Los Angeles Pacific Co.*, 18 Cal. App. 522, 525, 123 Pac. 613; *Odell v. Rihn*, 19 Cal. App. 713, 719, 127 Pac. 802; *Glise v. Myers*, 22 Cal. App. 127, 133 Pac. 500.

In one of the cases above cited (*Patton v. Los Angeles Pacific Co.*), a statute was under review which provided:

"An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé, * * * provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of * * * a coemployé engaged in another department of labor from that of the employé injured, or employed upon a machine, railroad train, switch-signal point, locomotive engine, or other appliance than that upon which the employé is injured is employed. * * *"

The facts of the case were that the motorman of an electric interurban car was injured by the negligence of the conductor of another car. The motorman brought suit against the railroad company for damages. His complaint was assailed by general demurrer and in passing on the demurrer the court said:

"The objection urged is that single cars, like those upon which the plaintiff and the negligent conductor were employed, are not to be considered as machines or railroad trains, or to be comprehended within the term 'other appliances' as used in the statute. To our minds, influenced

by the consideration that the statute must be given a fair and reasonable meaning and be liberally construed to effect the purposes of its enactment (*Judd v. Letts*, 158 Cal. 359 [111 Pac. 12, 41 L. R. A. (N. S.) 156]), this contention of appellant is without merit. From the phraseology of the provision quoted it is evident that the Legislature intended to make the law broad in its scope and to preserve the liability of the employer for the employé's benefit in all cases generally where the mechanical device upon which the injured servant is employed is separate and different from that being operated by the negligent employé. By way of closer definition of the department of labor classification, the legislators undertook to and have said in effect that a person is not employed in the same department with another servant where he is at work with or upon a different machine, railroad train, etc.; and in consonance with a rule of fair construction it would be proper to say, if the words 'railroad train' were the only descriptive ones contained in that portion of the statute quoted, that that term as applied to an interurban railway is sufficient to include a single trolley car. Such cars combine in their construction both motors for propulsion and seats for the accommodation of passengers. Used in interurban traffic they perform the same work over long distances as does the steam-propelled train. While a train usually consists of a motor vehicle and cars attached thereto, where these adjuncts are combined in one carriage and serve the same uses, there is no good reason why the one should be said to be a train, within the meaning of the statute, and the other not be so classed. In construing statutes courts are not bound to an interpretation which shall give to words or phrases a literal, close dictionary definition."

In *Odell v. Rihn*, another of the cases we have cited, the litigation was instituted under the following circumstances: At the time the controversy arose section 4014 of the Political Code provided:

"The officers of a township are two justices of the peace. * * * In townships containing cities in which city justices or recorders are elected, there shall be but one justice of the peace, and in townships having a population of less than 5,000 there shall be but one justice of the peace. * * *"

It was contended that the city of Richmond was entitled to two justices of the peace under this section. In disposing of the question the court said:

"We are satisfied that the fifteenth judicial township of Contra Costa county was not at the time of the election in 1910 entitled, under the provisions of section 4014 of the Political Code, to more than one justice of the peace. * * * It is conceded that the judicial township in question consists entirely of the city of Richmond, which, although it has a population of more than 5,000, is provided by charter with a city justice of the peace, who is appointed by the city council. His jurisdiction and duties are concurrent and co-ordinate with those conferred generally upon justices of the peace throughout the state. It is petitioner's contention that the term 'elected' as employed in section 4014, Political Code, should be construed to mean elected by the popular vote of the people. In this contention we cannot concur. Statutes must be read and considered in conjunction with the legislative intent, and then be liberally construed with the object in view of effecting such intent. In restricting the number of justices of the peace to one in townships which include cities in which city justices or recorders are elected, it was evidently the legislative intent not to

burden the people of the state with the expense of maintaining more judicial officers than were actually necessary to the needs of the people. The narrow construction of the statute here contended for by petitioner obviously would result in defeating the legislative purpose and intent in that behalf, and is therefore to be avoided if possible. The words 'elected' and 'appointed' ordinarily are not synonymous. In its limited sense the word 'elected' is usually employed to denote the selection of a public officer by the qualified voters of a community. On the other hand the word 'appointed' is generally understood to mean the selection of a public officer by one person who is empowered by law to make the appointment. In its broadest sense, however, the word 'elected' means merely selected. When used in that sense the word 'elected' is synonymous with the word 'appointed'; and where, as in the case at bar, a public officer has been selected by the votes of several members of a city council, it may be truly said in the broadest sense of the term that he was elected. * * * Having in mind the spirit and purpose of the Code section under discussion, it seems to us that the word 'elected,' as used therein, was not intended to apply solely to the election of a city justice by the votes of the people at large; but included as well the selection of a city justice of the peace by the city council or other legislative body in whom the power of election is conferred by law. In other words, it is our opinion that the appointment of a city justice of the peace by the votes of the city council [of the city] of Richmond was tantamount to the election of such justice of the peace in the sense contemplated by the Legislature, and that therefore the fifteenth judicial township of Contra Costa county was entitled to have but one justice of the peace at the time of the election in 1910."

[3] In the present case we have a potent index to the legislative intent in using the words "be a candidate" and "seek the nomination," in the very language of section 18 of the Juvenile Court Act. In the same sentence in which these words are found, and preceding them, it is declared that probation officers "shall devote their entire time and attention to the duties of their offices." It is therefore manifestly in aid of this provision that probation officers shall not be candidates nor seek nominations for other offices or employments. But this plain legislative intent will be frustrated and the provision be reduced to an absurdity if the language employed is to receive a literal construction. The time to be expended by a probation officer in seeking or being a candidate for another office or employment would ordinarily be inconsiderable when contrasted with the time expended by him in occupying and discharging the duties of the new office or employment, if his seeking, or his candidacy, were successful. Moreover, a literal construction would serve to disqualify a probation officer who sought another office or employment successfully, but would not disqualify one who procured and occupied another post without actually or technically seeking it. We are convinced that the Legislature did not intend such an anomaly to arise through the application of the provision now under examination. When probation officers were

commanded not to seek other places they were disqualified from occupying such places.

The application for a peremptory writ of mandate is denied.

We concur: CONREY, P. J.; JAMES, J.

(35 Cal. App. 773)

JAMES v. P. B. STEIFER MINING CO. et al.
(Civ. 1742.)

(District Court of Appeal, Third District, California. Jan. 8, 1918.)

1. CORPORATIONS §320(1) — STOCKHOLDER'S SUIT—RESTRAINING APPROPRIATION BY DIRECTORS.

Fraudulent appropriation of the funds and the spoliation and destruction of the property of a corporation through the agency of its directors justifies the interposition of equity at the suit, against the corporation and directors, by a stockholder or stockholders, who sustain a fiduciary relation to the corporation whose interests they really represent in the action.

2. CORPORATIONS §110 — STOCKHOLDER'S SUIT—CANCELLATION OF STOCK.

Issuance of corporation stock without consideration, being a violation of the express provisions of Const. art. 12, § 11, and Civ. Code, § 359, and a breach of trust by the directors, may be redressed in suit against the corporation and directors by stockholder for cancellation of such stock; the corporation being concerned in the cancellation of certificates of stock that have been fraudulently issued and are void.

3. CORPORATIONS §110 — STOCKHOLDER'S SUIT—CANCELLATION OF STOCK—PLEADING.

In action by stockholder against corporation and directors for cancellation of stock, the allegation of the issuance of such stock without consideration, and in fraud and damage of said company, and in violation of the laws of the state, while subject to criticism, was sufficient as against general demurrer.

4. CORPORATIONS §312(3) — LIABILITY OF DIRECTORS—FRAUDULENT APPROPRIATION.

Where treasury stock is sold, and the proceeds fraudulently appropriated by one having no right thereto with the approval, sanction, and connivance of the directors, they are liable to the corporation, in action by a stockholder, for the amount.

5. CORPORATIONS §110—CANCELLATION OF STOCK.

Issuance of corporate stock in exchange for worthless land is a fraud against the corporation cognizable in a stockholder's action for cancellation of such stock.

6. CORPORATIONS §320(7)—DEBTS — NOTES GIVEN WITHOUT CONSIDERATION.

In stockholder's action for cancellation of corporation notes and mortgage, allegations that they were given for specified sums, and stating, on information and belief, that the company was not at any time indebted to the payee in any sum whatever, were sufficient to entitle plaintiff to be heard in a court of equity.

7. CORPORATIONS §320(5) — STOCKHOLDER'S ACTION—DEMAND.

Demand upon directors to bring action to recover corporation money or property which they have fraudulently appropriated is not required precedent to action by stockholder, if it appears such demand would have been futile.

8. LIMITATION OF ACTIONS §100(1)—PLEADING—DISCOVERY OF FRAUD—STOCKHOLDER'S ACTION.

In stockholder's action against corporation and directors for fraudulent appropriation, etc., where some of defendants' acts were quite re-

mote, there should have been an allegation as to when their fraudulent character was discovered by plaintiff; the applicable statute of limitations being Code Civ. Proc. § 338, subd. 4, requiring actions for fraud to be brought within three years from its discovery.

9. ACTION §50(9)—STOCKHOLDER'S ACTION—IMPROPER JOINDER.

In stockholder's action against corporation and directors, a complaint stating a cause of action for fraudulent misappropriations, etc., but also alleging false representations of certain defendants inducing plaintiff's purchase of his stock, and illegal levy of assessment on his stock, was demurrable as improperly joining a cause of action for personal wrongs with one for injuries to the corporation.

10. PLEADING §225(1)—SUSTAINING DEMURRER—LEAVE TO AMEND.

Where a demurrable defect in the amended complaint could easily be remedied, it was error to sustain demurrer without leave further to amend.

Appeal from Superior Court, Butte County; Henry C. Gesford, Judge.

Action by Henry T. James, in behalf of himself and all other stockholders desiring to join, against the P. B. Steifer Mining Company and others. From judgment for defendants, plaintiff appeals. Reversed, with directions.

Frank D. McClure, of Minneapolis, Minn., and Franklin P. Bull, of San Francisco, for appellant. Frank Freeman, of Willows, W. M. Brown, of Los Angeles, and George E. Gardner, of Oroville, for respondents.

BURNETT, J. This appeal, coming up on the judgment roll, is from a judgment duly rendered after a demurrer, both general and special, to the amended complaint, had been sustained without leave further to amend. The order does not specify the ground upon which the demurrer was sustained, but merely sustains the demurrer generally.

The grounds of demurrer are: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that several causes of action have been improperly united, namely, a cause of action in favor of and on behalf of the corporation against said defendants other than the corporation and a cause of action in favor of plaintiff stockholders in their personal capacity, for injuries to their personal rights by said defendant; (3) that the complaint is respectively ambiguous, uncertain, and unintelligible. It may be here interjected that defendants also filed an answer denying all material allegations as to fraudulent conduct and controverting any imputation of evil motives on the part of defendants. With the grounds of demurrer in mind we may turn to the complaint.

The first part of the complaint alleges generally the incorporation of the defendant corporation, the names of its directors and officers, the amount and par value of its capital stock. In paragraph 7 it is alleged that there has been issued to P. B., M. V., S. M.,

H. M., Mrs. Barbara A., and Mary C. Steifer each 56,729 $\frac{1}{8}$ shares of the stock of said corporation "without consideration, and in fraud and damage of said company, and in violation of the laws of the state of California." Plaintiff then purports to set forth the elements excusing a demand upon the directors as being useless and futile to bring an action to vindicate his rights and redress his wrongs.

In paragraphs 9 and 10 plaintiff alleges the purchase by him in August and December, 1911, of 825 shares of supposed treasury stock for which he paid \$3,750; that no part of said sum was received by the treasury of said company, "and said money was wrongfully converted from the funds of said company by said M. V. Steifer and Mary C. Steifer and other persons unknown to plaintiff, for their own personal possession and uses, with the approval, sanction, and connivance of the directors of said company, all to the detriment, damage, and fraud of said company, and the stockholders thereof."

Paragraph 11 purports apparently to set forth facts constituting a fraud upon plaintiff (and others named) personally. It avers that in January, 1902, defendants, other than defendant corporation, and others unknown to plaintiff, unlawfully and fraudulently conspired and combined to defraud plaintiff and all others who should purchase stock by organizing a corporation to be known as the P. B. Steifer Mining Company, and placing certain shares on the market for sale and selling the same by false representations. The alleged false representations are then particularly set forth and alleged to be false. Paragraphs 11a and 11b allege that plaintiff and the other stockholders believed the foregoing fraudulent representations; otherwise they would not have purchased stock. Plaintiff, however, does not aver that the stock was not of the value which he gave for it at the time he purchased, nor that he was otherwise damaged by the reliance on said representations.

The complaint then proceeds to set forth the issuance of 347,500 shares of capital stock to P. B. Steifer in return for certain mining land conveyed by P. B. Steifer to the corporation, that said land was worthless, and known to be so by the defendant directors, all of which is a fraud upon the company and a breach of trust. In the same paragraph is alleged the fraudulent expenditure of the corporate money in useless buildings, flumes, and machinery and in the payment of excessive and illegitimate salaries and commissions; that certain shares of stock were sold for sums ranging from \$5 to \$8 per share; but that of said sums the corporation received at times but \$1 a share, and at others nothing, the difference being pocketed by defendants and their confederates. It is then stated that 300 shares of stock were sold to Alice I. Hunt and Louise I.

Hunt upon a guaranty that a dividend of \$1,500 would be paid thereon, or in default thereof the company would loan said Hunts the difference between the dividend and \$1,500; that no dividend was paid, and the officers fraudulently and without authority loaned said Hunts \$952.50. It nowhere appears, however, that said sum has not been repaid nor that the Hunts were not responsible persons. Continuing, the paragraph avers the fraudulent issuance to Mary C. Steifer, without consideration, of thousands of shares of stock, the subsequent sale by the corporation of said stock and payment of exorbitant commissions by the corporation, the proceeds going to Mary C. Steifer, the subsequent borrowing by the corporation of said sum from Mary C. Steifer, and the giving to her of the company's notes and mortgage therefor.

Further alleging details of the transaction last above referred to, in paragraph 13 it is stated that the company gave to Mary C. Steifer its promissory notes (setting forth amounts and terms) and a mortgage to secure payment thereof on all the real and personal property of the corporation, and it is stated, on information and belief, that the company was not at any time indebted to said Mary C. Steifer in any sum whatever.

The rest of the complaint complains of the assessment levied on the stockholders of the corporation. It is averred that said assessment is, by the resolution creating it, for the purpose of paying in part an indebtedness of some \$89,000 alleged to be due Mary C. Steifer, whereas the total corporation debts amounted only to \$7,000, and therefore said assessment is unnecessary; that plaintiff and others have not paid the same, and their stock is advertised for sale; that the said Steifers have never paid the assessment upon their stock, but have fraudulently marked their assessments as paid upon the books of the corporation.

In paragraph 16 it is alleged, on information and belief, that the directors on January 4, 1915, did not levy an assessment upon all the stock of the corporation, to wit, 515,429 shares, but upon 511,949 shares only.

The prayer in substance purports to ask: (1 and 2) That the issuance of the capital stock to the defendants and others named, other than the corporation, be declared illegal and void, and a fraud on the corporation and the shareholders thereof; (3) "that the sale of said capital stock to plaintiff and all other stockholders, other than defendants, was made in furtherance of said conspiracy to defraud them and made upon false and fraudulent representations;" (4) that the mortgage and notes given by the corporation to Mary C. Steifer be declared to have been given without consideration and be declared null and void and canceled; (5) that the assessment be declared unlawfully levied, and that it be set aside and its collection be re-

strained; (6) that the sale of the stock be restrained; (7) that plaintiffs be given costs and general relief.

That the amended complaint states a cause of action in behalf of the corporation against the directors and those co-operating with them cannot be doubted. The case is brought clearly within the rule announced and illustrated by many authorities to which attention is directed in the brief of appellant. It is sufficient to refer to *Woodruff v. Howes*, 88 Cal. 184, 26 Pac. 111; *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; *California Calaveras Min. Co. v. Walls*, 170 Cal. 285, 149 Pac. 595; *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312; *Harvey v. Meigs*, 17 Cal. App. 353, 119 Pac. 941.

[1] The fraudulent appropriation of the funds and the spoliation and destruction of the property of the corporation through the agency of the directors present an obvious instance for the interposition of equity at the suit of a stockholder or stockholders who sustain a fiduciary relation to the corporation whose interests they really represent in the action. The general principle is stated in *High on Injunctions*, vol. 2, § 1203, as follows:

"The protection of the rights of shareholders in incorporated companies against the improper or illegal action of other shareholders, or of the officers of the company, is a favorite branch of the jurisdiction of equity by injunction. And it may be asserted as a general rule that courts of equity may enjoin, in behalf of the stockholders of an incorporated company, any improper alienation or disposition of the corporate property for other than corporate purposes, and will restrain the commission of acts which are contrary to law and tend to the destruction of the franchise, as well as the improper management of the business of the company, or a wrongful diversion of its funds or from depriving plaintiff of his rights as a corporation."

And it is equally clear from the authorities that a court of equity, as far as it can be done, will compel the restitution and restoration of the funds or property of the corporation that have been misappropriated or destroyed by the directors and those acting in concert with them. To make it manifest that such is the case before us we may recall more specifically a few of the facts set forth in the amended complaint.

[2, 3] The allegation in the seventh paragraph as to the issuance of over 300,000 shares of the capital stock without consideration affords an instance of the violation of article 12, § 11, of the Constitution of the state and section 359 of the Civil Code, and the directors thereby committed a breach of trust to be redressed in an action of this character. Naturally the corporation is concerned in the cancellation of certificates of stock that have been fraudulently issued and are void. *Cortelyou v. Imperial Land Co.*, 156 Cal. 376, 104 Pac. 695. The form of said allegation is subject to criticism, but the averment should be deemed sufficient as against a general demurrer.

[4] In the ninth paragraph there is an imperfect attempt to allege that treasury stock was sold to plaintiff and the proceeds fraudulently appropriated by M. V. Steifer with the approval, sanction, and connivance of the directors of the company. If true, the directors would, of course, be liable to the corporation for the amount of the sale, and it could be recovered in this action.

[5] In the twelfth paragraph it appears that the defendants, other than the corporation, issued to said P. B. Steifer 347,500 shares of the capital stock for the right, title, and interest of said Steifer in and to certain alleged mining land when said defendants knew that said right, title, and interest of said P. B. Steifer "was worthless and without value, and that the transfer of said capital stock to said P. B. Steifer was without consideration," etc. Therein, as we view it, is presented, though somewhat artificially, another instance of fraud against the corporation and cognizable in this proceeding. In the same paragraph is set forth, as we have seen, the useless expenditure of a large amount of the funds of the corporation in the erection of buildings that were not designed or needed for the legitimate purposes of the corporation, and also that large blocks of treasury stock were sold and the money derived therefrom converted to their own use by said defendants; that they also paid to themselves large sums of money for traveling expenses, hotel bills, and salaries out of all proportion to the expenses incurred and the services rendered; that certain shares of stock belonging to the corporation were sold, and only a portion of the proceeds accounted for; that thousands of shares were issued to Mary C. Steifer without consideration; that portions of said stock were sold by the secretary of the corporation, and he was paid therefor out of the funds of the company a large sum for commissions; and that a note and mortgage were given to said Mary C. Steifer to cover money borrowed from her, but which she had received as the proceeds of the sale of said stock fraudulently issued to her as above stated.

[6] In the thirteenth paragraph there is the additional allegation that two notes and a mortgage were given to said Mary C. Steifer for the sum of \$49,837.07 and \$40,000, respectively, whereas the corporation was not indebted to her in any sum whatever. The foregoing are deemed sufficient specifications of fraudulent transactions affecting the interests of the corporation to establish the right of plaintiff to be heard in a court of equity in this kind of proceeding. As indicated, some of the allegations are subject to verbal criticism, but we think respondents seek to apply too strictly the technical rule of pleading. One or two specifications may be noticed briefly.

[7] The failure of plaintiff to make demand upon the directors to bring the action

is sufficiently excused. Of course, it is improbable that they would be guilty of such stultification as to sue themselves to recover for the corporation money or property which they had wickedly and fraudulently appropriated and sequestered. The facts alleged show that such demand would have been ignored or scornfully refused. It is well settled that, where it appears that a demand, if made, would have been futile, it is not required. We may add that the answer furnishes additional confirmation that no such suit would have been brought by the directors. Therein they disavow any corrupt motive, deny any improper disposition of the property of the corporation, and affirm the utmost good faith in all their transactions relating to the affairs of the company.

"While it is a general rule that a member or stockholder of a corporation cannot have redress from any wrong or injury to the corporation until he has made an earnest effort to secure proper action by the managing body of the corporation, yet when it appears that it would be futile and useless to make a demand upon the corporation or upon its trustees or officers to commence a suit to obtain relief, or that the trustees are parties to the suit complained of and claim the right to do what they did, no such demand may be made." *Ashton v. Dasha-way Ass'n et al.*, 84 Cal. 61, 22 Pac. 600, 23 Pac. 1091, 7 L. R. A. 809; *Woodruff v. Howes*, supra; *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680; *Simon v. Weaver*, 143 Wis. 330, 127 N. W. 950.

[8] Nor can it be maintained that the action is barred by the statute of limitations or by the laches of plaintiff. The suit was brought certainly within a reasonable time after the commission of some of the reprehensible acts. This is especially true of the execution of the notes and mortgages to said Mary C. Steifer. Some of the other instances were quite remote, and there should have been an allegation as to when discovery of their fraudulent character was made by plaintiff. The pleading is silent as to that point. In the *Whitten Case*, supra, it is declared that a stockholder who institutes such an action as this does so "in a purely representative character and as a trustee to redress corporate injuries," and that the provision of the statute of limitations applicable to such action is subdivision 4 of section 338 of the Code of Civil Procedure, providing that actions for relief on the ground of fraud or mistake must be commenced within three years, but the cause of action is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

While the complaint as to some of the specifications is therefore defective in this particular, yet upon the whole there is a sufficient designation of fraudulent acts within a short period anterior to the filing of the complaint to avert this general attack upon the pleading.

[9] As to the misjoinder of causes of action it is undoubtedly true that certain acts of a personal nature resulting in injury to

plaintiff individually, and not producing any wrong to the corporation, have been set forth in the complaint in connection with those of the nature to which we have referred. Such, for instance, is the purchase by plaintiff of his stock by reason of the false representations of said defendants. It does not appear that the corporation was damaged by such purchase. Nor can it be held that the corporation would be benefited by the annulment of said purchase. The disposition of the funds arising from the purchase is manifestly of concern to the corporation upon the theory that it was treasury stock, but if plaintiff by reason of false representations paid for the stock more than it was worth, that is a matter of his personal interest, and his wrong should be redressed in a personal action against those who made such representations. The matter of the assessment upon plaintiff's stock involves also, as we view it, a cause of action personal in its nature. The corporation would hardly be in a position to complain because the stockholders paid into its treasury more money than was needed. The individual stockholder is wronged when he is called upon to pay an assessment illegally levied upon his stock, and he may, under certain circumstances, restrain the sale to enforce such assessment, but such contingency does not constitute the basis for an action by or on behalf of the corporation. The observation herein does not refer to the allegation in the complaint as to the failure of the directors to assess a certain number of shares of the capital stock and their conduct in wrongfully crediting payment upon certain other shares. These latter, of course, are of corporate concern, and are properly included in an action like this.

As to this feature of the case we find some profitable suggestions in the opinion of *Turner v. Markham*, 155 Cal. 562, 102 Pac. 272, wherein it was held that:

"An action brought by a stockholder for the benefit of a corporation is in its nature and essence to recover redress for some legal wrong which the corporation itself has suffered and to prevent a failure of justice," but "if the corporation itself has suffered no wrong cognizable at law or in equity, it matters not how just and how grievous may be the complaint of the stockholder, nor how complete may be the proof of his individual loss, damage, or injury, but he will be compelled to resort to his individual action to obtain a personal recovery."

Therein is an illustration somewhat in point here to this effect:

"If A. upon the street sells to B. his own stock under the representation to B. that it is treasury stock, the corporation is not injured, nor is A. estopped in an action by the corporation from asserting that the stock was his own. B., to whom the representations were made, may have suffered by them, may have his cause of action for redress, and may insist upon an estoppel against A., but that estoppel only runs for his benefit and to prevent A. from taking advantage of the wrong which he has perpetrated not upon the corporation, but upon B."

[10] Without going further, we think it can be said that a cause of action for personal wrongs has been improperly joined with one for injuries to the corporation, and that the demurrer upon that ground was well taken. But it is manifest that this defect can be easily remedied, and we are satisfied that plaintiff should have been allowed to amend the complaint.

In *Schaake v. Eagle, etc., Can Co.*, 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759, it was held that:

"If a complaint states a cause of action, it is an abuse of discretion, apparent upon the face of the record, to sustain demurrers thereto on any ground without granting leave to amend. The fact that the complaint had been once before amended does not justify a refusal of leave to amend in such case. Where the order refusing leave to amend a complaint stating a cause of action was inserted in the order sustaining demurrers thereto, it cannot be presumed that the plaintiff asked leave to amend in advance of the ruling. The order is deemed excepted to by force of the statute, and the plaintiff is not required to move to vacate or modify it in order to have the abuse of discretion reviewed upon appeal."

We think the judgment should be reversed, with direction to allow the plaintiff to amend his complaint if he so elects.

It is so ordered.

We concur: **CHIPMAN, P. J.; HART, J.**

(19 Ariz. 379)

**TRUAX et al. v. BISBEE LOCAL NO. 380,
COOKS' AND WAITERS' UNION
et al. (No. 1544.)**

(Supreme Court of Arizona. March 5, 1918.)

1. PLEADING — 8(3)—CONCLUSIONS.

In complaint alleging that defendants "unlawfully and maliciously conspired and combined" to boycott plaintiffs in their restaurant, the quoted words are mere adjectives, describing the pleader's conception of the combination formed by defendants to prosecute the strike to a successful conclusion.

2. CONSPIRACY — 8 — INTERFERENCE WITH EMPLOYER—STRIKE.

The formation of a combination for the purpose of declaring a strike, and by concerted action of the persons combining prosecuting such strike to a successful conclusion, amounts to an unlawful and malicious conspiracy and combination only where the object is the accomplishment of a crime or some unlawful purpose, or a lawful purpose by criminal or unlawful means.

3. TRADE UNIONS — 8—PEACEFUL STRIKES.

The right of workmen to organize a union of their craft for the purpose of improving working conditions of the members and to maintain such improved conditions by peaceful means cannot be questioned.

4. TRADE UNIONS — 8—STRIKES.

Where men in plaintiffs' employ who are members of defendant union quit their employment because plaintiffs refused to pay them satisfactory wages and allow satisfactory hours within which to work, a strike through defendant to induce plaintiffs to grant the demands of the employees was lawful.

5. INJUNCTION — 101(1) — INTERFERENCE WITH EMPLOYER—PUBLICATION OF EXISTENCE OF STRIKE.

The mere publication of the existence of a strike by trade union and of its causes in a thorough manner is no ground for equitable interference on suit of employer.

6. MASTER AND SERVANT — 338 — CAUSING EMPLOYEES TO QUIT SERVICE.

Where no contract existed requiring members of defendant union in plaintiffs' service to continue work, defendant union violated no right of plaintiffs' by causing such members to quit their employment.

7. TRADE UNIONS — 8—BOYCOTT.

The members of defendant union violated no right of employers by refusing to deal with them, there being no vested right in patronage of union members.

8. MASTER AND SERVANT — 338—INTERFERENCE WITH EMPLOYERS.

Plaintiffs, employers, had the legal right to conduct their business in their own way, and any attempt to interfere therewith violated a legal right.

9. MASTER AND SERVANT — 338 — INTERFERENCE WITH EMPLOYERS.

An appeal, by one deeming himself injured by the system adopted by employers in conducting their business, to his friends and to members of and sympathizers with a union to which he belongs, requesting such persons to cease dealing with the employers, cannot fairly be termed an interference with the methods adopted by the employers for conducting their business.

10. INJUNCTION — 101(2)—PEACEFUL PICKETING.

Under Civ. Code 1913, par. 1464, prohibiting courts from granting restraining orders to prohibit any person or persons "from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working, or from ceasing to patronize or employ any party to such dispute, or from recommending, advising, or persuading others by peaceful means so to do" peaceful picketing, cannot be restrained.

11. INJUNCTION — 130—PEACEFUL PICKETING—QUESTION OF FACT.

Under Civ. Code 1913, par. 1464, whether picketing is peacefully carried on is a question of fact.

12. APPEAL AND ERROR — 1010(1)—FINDINGS SUPPORTED BY SUBSTANTIAL EVIDENCE — REVIEW.

When the trial court has determined that picketing is peaceful, and there is substantial evidence in the record in support of such determination, the appellate court will not interfere.

13. INJUNCTION — 128 — PEACEFUL PICKETING—EVIDENCE.

Evidence held to justify court's finding that defendants were engaged in "peaceful" picketing about plaintiffs' place of business.

14. INJUNCTION — 101(1) — INTERFERENCE WITH EMPLOYERS—FREEDOM OF SPEECH.

Under Const. art. 2, § 6, providing that "every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right," a court of equity cannot restrain members of a labor union from speaking, writing, and publishing on the subject of dispute between the union and employers of its members, although the members are unable financially to respond in damages for abuse of the right.

Appeal from Superior Court, Cochise County; Alfred A. Lockwood, Judge.

Action by William Truax and another, co-partners doing business under the firm name and style of William Truax, against the Bisbee Local, No. 380, Cooks' and Waiters' Union, and others. Judgment dismissing the action, and plaintiffs appeal. Affirmed.

Alexander Murry and Clifton Mathews, both of Bisbee, for appellants. William B. Cleary, of Bisbee, for appellees.

CUNNINGHAM, J. This action arises out of a dispute between the plaintiffs and defendant Bisbee Local, No. 380, Cooks' and Waiters' Union, with regard to wages and hours of employment of cooks and waiters in plaintiffs' restaurant business. The plaintiffs had in their employ 10 members of the said defendant union at the union wage scale and hours. On or about April 9, 1916, plaintiffs notified all of their employes that the rate of wages and hours of employment would be changed and effective on April 10, 1916. The difference between the wages paid up to the 10th day of April, 1916, and the wages the plaintiffs proposed to pay thereafter and the hours required, nowhere appears in the record.

The defendant union contended for a continuation of the same hours and wages per day. No agreement with respect to said proposed changes in wages and hours of work having been reached by the defendant union and the plaintiffs, on April 10, 1916, all of the defendant union members quit plaintiffs' employment. Thereupon defendant union declared a strike existed, and proceeded to advertise such strike. In advertising the said strike the defendant union put out "pickets," and caused the said pickets to carry banners near the front entrance of plaintiffs' business place, the English Kitchen. The said banners had printed thereon in large letters, "so that the wording thereon could be seen from across the street, and from a considerable distance up and down the street," the following: "The English Kitchen Unfair to Cooks and Waiters and Warren District Trades Assembly." This banner and similar banners were carried up and down the street in front of said English Kitchen during the days and during the nights until the business closed. For a period of four days immediately following the strike similar banners were carried about the district on burros. Also handbills or circulars were handed to persons on the street near the said place of business. The members of defendant union or sympathizers with their actions in the premises frequently talked about the matter, and loudly advised all friends of organized labor to desist from patronizing the English Kitchen.

The plaintiffs exhibit, with their supplemental complaint, 14 of said circulars distributed about the streets, 11 of which close with the appeal, "Help us win," or words to the same effect. The other three circulars

contain statements of the strike situation as other purported incidents are supposed to affect it.

The exhibits are very similar in language used, but no good purpose will be served in producing them here. For the purpose of illustration of the appellants' contention, I present Exhibits D and K as more nearly covering all of such complaint. Exhibit D is as follows:

"12 Hours Bill Truax.

"Billie Truax contends that it is impossible to operate a restaurant on the eight-hour basis and make it pay. Witness every other restaurant in the Warren district operating satisfactorily on the eight-hour basis.

"Why does Bill Truax employ scab Mexican painters? The truth is very obvious, it is cheaper and hastens the day when he 'has it made,' and can return to that dear Los Angeles, be a gentleman, perhaps have a Japanese valet, a Chinese cook, and an imported Jamaican chauffeur.

"Don't overlook the fact that Bill Truax's past record relative to Union Labor is not an unblemished tablet of stone, but nevertheless it is quite as enduring, and he will find it writ in letters large wherever he tries to do business in this U. S. A.

"The need and the necessity of the workers to organize and conduct their negotiations with the employers on a collective bargaining basis is denied by few. That is just where it 'gets to' Bill Truax; his autocratic methods in handling his help, chasing them down the street with a butcher knife, and other stunts of a like nature will have to go, and believe us, it hurts.

"Remember either yourself, your father, brother, or even your sister may some time want to better their economic conditions, and we pledge ourselves to help you if we can, and not a single member of the allied trades or Cooks' and Waiters' Union will ever scab on you. Help us win.

"Cooks' and Waiters' Union and Warren District Trades Assembly. Ore—Union—Printers."

Exhibit K is as follows:

"To every man, woman, and child and all lovers of fair play:

"We are fighting the most consistent 'bad actor' in the district, Wm. Truax.

"Wm. Truax fought the eighty per cent. law. (Please don't overlook this fact.)

"Wm. Truax always favored hiring foreigners almost exclusively.

"Wm. Truax now sees the possibility of the Greek peril.

"We say better an eight-hour camp and a fair wage than a 10 or 12 hour camp and a fair wage a la Bill Truax.

"Wm. Truax is not being discriminated against, but we do want gilt-edged assurance that Bill Truax will keep and abide by the terms of his next contract with the Cooks' and Waiters' Union.

"Wm. Truax initiated this fight, and we are going to see it through now that it has been forced upon us. When you patronize Bill Truax you are aiding and abetting a diminutive but potential force for evil in tearing down the wages and hours in this district.

"Help us win.

"Cooks' and Waiters' Union and Warren District Trades Assembly. Union—Ore—Printers."

By the use of the circulars, handbills, and banners and the street talks, the defendants and their sympathizers advertised the existence of the strike, and appealed to the pub-

lic in general, and to all persons allied with and friendly to organized labor in particular, to help the defendant union win the strike. The nature of this help requested at all times was to cease patronizing the plaintiff's business, the English Kitchen Restaurant, until the strike should be settled. The defendants made known to the general public the existence of the strike and its cause by stating that the plaintiffs are "unfair" to organized labor.

These conditions existing, and defendants threatening to continue along the same course of publicity by the use of the same means to win the strike, and the plaintiffs' business having diminished in volume, this action was commenced to restrain defendants from their activities above referred to. In their complaint the plaintiffs allege that on or about the 10th day of April, 1916, the defendants named, and numerous other persons, whose names are unknown to plaintiffs, and all of whom were, and now are, acting in concert with the defendants, "unlawfully and maliciously conspired and combined to inaugurate, and did inaugurate, in the said city of Bisbee, a deliberate and active campaign to boycott plaintiffs and their restaurant, the English Kitchen, and conspired and combined to induce, and by threats, menace, coercion, intimidation, and persuasion did induce, large numbers of plaintiffs' customers, patrons, and other persons * * * to quit or refrain from patronizing and trading with plaintiffs in their said place of business, the English Kitchen, in consequence * * * plaintiffs have suffered injury." The complaint thereafter sets forth a number of alleged specific overt acts in furtherance "of said unlawful conspiracy and combination." The plaintiffs allege that the defendants, their agents and such other persons acting in concert with them, have threatened, and do now threaten, to continue to harass and oppress plaintiffs in the conduct of their said business, and to continue said "unlawful campaign and design to boycott plaintiffs and their said restaurant, the English Kitchen." The complaint further alleges that for plaintiffs to seek to recover damages from said defendants would involve a multiplicity of suits; "that * * * each and all of said defendants are insolvent, and therefore each and all of said defendants are and will be wholly unable to respond in damages to these plaintiffs for any injury or damages to these plaintiffs from their aforesaid wrongful and unlawful acts and conduct." The relief demanded is a writ of injunction enjoining, restraining, and prohibiting defendants, etc., "from in any manner or by any means conspiring or combining to boycott the business of plaintiffs, and from threatening or declaring any boycott against said business, and from abetting, aiding, or assisting in any such boycott, and from, directly or indirectly, threatening, coercing, menacing, intimidating, or persuading any per-

son or persons whomsoever from buying from or otherwise dealing with plaintiffs, and from printing, publishing, or displaying any sign, banner, or other device for the purpose of advertising or in furtherance of any boycott against plaintiffs' business, and from referring, either in print or otherwise, to plaintiffs as unfair, in furtherance of such boycott."

The defendants made answer by demurring to the complaint upon the grounds that the facts stated do not authorize equitable relief; they admit the existence of the union; they admit that the strike was declared and maintained by the union, and by friends of the union acting in concert, to the end of causing the plaintiffs to comply with the demands of the defendant union and its members, former employés of plaintiffs. Defendants deny that their intentions, purposes, and motives in the use of the means employed are unlawful, and they allege that the purpose of the strike and boycott was and is for that of improving the conditions and hours of employment of the members of defendant union.

The cause was heard by the court on the pleadings, stipulations, and oral testimony. Wm. Truax, a witness in behalf of plaintiffs, and one of the plaintiffs, testified, in substance, that members of the defendant union interfered with plaintiffs' business by going to certain business men in Bisbee, and telling such business men that if any of their (such business men's) employés are caught going into the English Kitchen that they (the union) would put a ban on them (such business men); also, the plaintiffs' business was interfered with by the defendants' causing banners to be carried up and down the street in front of plaintiffs' business place and by defendants declaring to people that plaintiffs are "unfair" to organized labor and to the union. The banners were displayed in front of plaintiffs' business place about 12 hours a day for a week or so up to the time witness was called to testify. The defendants' answer concedes these facts. This witness further testifies as follows:

"At the time this trouble came up I had ten of the members of the waiters' union working for me. We made them a proposition of a scale of wages to go into effect on Tuesday morning. This trouble did not arise out of any objection that the ten men working for me had. They were some outsiders. These ten men working for me were satisfied with what they were doing. * * * These ten men went out. * * * At the time that the dispute arose it was between ourselves and the union and the cooks and waiters in Bisbee. * * * When we and the union did not come to terms, they quit. * * * We had a difficulty over something with the union itself, and we and the union did not agree, and then because we did not agree with the union these men quit. * * * and since that time we and the union have failed to come to an agreement. That is the situation. * * * I never saw them have any fights in front of our place. * * * So far as I know, everything that was done there was done quietly, with the exception of going in and telling people as I stated."

[1, 2] The use of the words, "unlawfully and maliciously conspired and combined," are mere adjectives describing the pleader's conception of the nature of the combination formed by the defendants for the purpose of declaring a strike, and, by concerted action of the persons combining, prosecute such strike to a successful conclusion. Such organized concerted action amounts to an unlawful and malicious conspiracy and combination only in such cases as the object of the combination is to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419.

[3] The right of workmen to organize a union of their craft, for the purpose of improving the working conditions of the members of such organization, and to maintain such improved conditions by peaceful means, is so firmly fixed in the decided cases and in reason that such rights cannot now be seriously questioned by an enlightened court. See *Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.)* 62 Fed. 802, 817; *Nat. Protective Association v. Cummings*, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165; *Hall v. Johnson (Or.)* 169 Pac. 515.

The purpose of the defendant *Bisbee Local, No. 380, Cooks' and Waiters' Union* in organizing is beyond dispute, and such purpose is no other than to improve the working conditions of members of the organization. Consequently the agreement holding the defendants to a concerted action, and the purpose of the agreement, are, without question, both lawful. We are left to inquire whether the means adopted to accomplish such lawful purpose of bettering the working conditions of cooks and waiters is lawful. The means adopted to accomplish such purpose was the strike, a so-called boycott of the plaintiffs' business, and the placing of pickets near the front entrance of plaintiffs' restaurant.

[4] The circumstances leading up to the strike are detailed by the plaintiff *William Truax*, testifying as a witness as above set forth. Ten of the members of defendant union were working for plaintiffs prior to April 10, 1916. On the 9th day of April, 1916, plaintiffs notified their employes that beginning on the 10th, the succeeding day, the wages of employes and the hours of employment would become different from the wages and hours theretofore paid and required. These changes had been the subject of discussion with the defendant union officers. The plaintiffs and the union had a "difficulty" over "something," and we and the union did not agree, and then because we did not agree with the union these men quit." The fair inference to be drawn from this testimony is that the difficulty referred to is the

dispute with regard to the scale of wages and hours of employment. These are the matters the plaintiffs and defendant union were not able to agree upon. The fact remains that the men in plaintiffs' employ, who are members of defendant union, quit such employment because the plaintiffs refused to pay them satisfactory wages for their work, and refused to allow such employes satisfactory hours within which to perform their work. Hence the strike to induce the plaintiffs to grant the said demands of the employes, made by and through the defendant *Cooks' and Waiters' Union*, was lawful in the circumstances shown to exist and the object sought. See *Railroad Co. v. Bowns*, 58 N. Y. 573; *Longshore Printing Co. v. Howell*, 26 Or. 527, 38 Pac. 547, 551, 28 L. R. A. 464, 46 Am. St. Rep. 640.

The means employed by the promoters of the strike, viz., the alleged boycott, and the activity of the union pickets engaged in advertising the existence of the strike and boycott, are questions of greatest difficulty. The questions presented in connection with these matters have been before the courts in a great number of cases, and the courts of equal respect have arrived at opposite conclusions. These conflicting decisions cannot be reconciled upon any principle of law. The definitions of "boycott," as the word has been defined in the many cases, are nearly as varied as the cases defining the term. The Supreme Court of California in *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324, adopts a meaning for the word which meets with my approval. That court says:

"After striking, the employe may engage in a 'boycott,' as that word is here employed. As here employed, it means not only the right to the concerted withdrawal of social and business intercourse, but the right, by all legitimate means of fair publication and fair oral or written persuasion, to induce others interested in, or sympathetic with, their cause to withdraw their social intercourse and business patronage from the employer. They may go even further than this, and request of another that he withdraw his patronage from the employer, and may use the moral intimidation and coercion of threatening a like boycott against him if he refuse so to do."

Referring to opposing authorities, with discussion, the court continues:

"In this respect this court recognizes no substantial distinction between the so-called primary and secondary boycott. Each rests upon the right of the union to withdraw its patronage from its employer, and to induce, by fair means, any and all other persons to do the same, and, in the exercise of those means, as the unions would have the unquestioned right to withdraw their patronage from a third person who continued to deal with their employer, so they have the unquestioned right to notify such third person that they will withdraw their patronage if he continues so to deal. However opposed to the weight of federal authority the views of this court are, that they are not unique may be noted by reading *National Protective Association v. Cummings*, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; *Lindsay v. Montana Federation of Labor*, 37 Mont. 264, 96 Pac. 127, 18 L. R. A. (N. S.)

707 [127 Am. St. Rep. 722], where the highest courts of these states formulate and adopt like principles. * * * To say that a boycott is a 'conspiracy' immediately implies illegality, and puts the conduct of the boycotters under the ban of the law. So, also, does the definition which describes boycotting as 'illegal coercion,' designed to accomplish a certain end. As we have undertaken to define 'boycott,' it is an organized effort to persuade or coerce, which may be legal or illegal, according to the means employed."

The means used to "coerce and intimidate" the plaintiffs in this case was the inauguration of a campaign of publicity, advertising the existence of the strike by the display of banners, by pickets, and the distribution of circulars and loud talking on the streets. The facts advertised and given publicity are that a strike against the English Kitchen existed; that the said strike was declared and maintained by the defendant Cooks' and Waiters' Union and the Warren District Trades Assembly; that the English Kitchen proprietors are "unfair" to organized labor, because said proprietors had refused and still refuse to grant union employes fair wages and fair working hours; upon these facts the defendants claim that, if the public in general and the union members in particular would cease to deal with plaintiffs, such persons so ceasing to deal with plaintiffs would thereby help win the strike.

The plaintiffs complain of injury to their business caused by the said campaign of publicity, conceding in their testimony that a strike exists and arose because of plaintiffs' refusal to grant the wages and hours demanded by defendant union for union members in plaintiffs' employ. Thereby the plaintiffs concede the existence of the facts advertised by the defendants.

No right of plaintiffs is violated by publishing facts. Certainly, if a dispute between plaintiffs and a labor union exists, and one of the plaintiffs so testifies, plaintiffs have no legal right to enforce the union to keep the facts secret. The extent of the publicity given such dispute is unimportant and violates no right of plaintiffs, either civil or criminal. If the publicity given the existence of the dispute results in a loss of patronage and business to plaintiffs, such loss is attributable to the dispute, and not attributable to the publicity given to the dispute.

[5] Consequently the mere publication of the existence of a strike and of its causes in a thorough manner is no ground for equitable interference. Actionable language used and false statements made by one party to the dispute, tending to injure the other party to such dispute in advertising such dispute, is a matter that I will notice below. The appeal of defendants to the friends of organized labor and to the general public to cease patronizing the plaintiffs, made in connection with the publication of the strike, is the boycott complained of in this action.

[6] In this connection it is well to remem-

ber that the defendant union violated no rights of the plaintiffs in causing union members in plaintiffs' service to quit such employment. The workmen had the right to quit separately or in a body, without question, no contract to continue in the service being in existence, and having been forced to quit the service by the union would give plaintiffs no right to complain.

[7] Likewise, the members of defendant union violated no right of the plaintiffs by refusing to deal with the plaintiffs. The plaintiffs had no vested right in the patronage of union members. As a consequence the union members, singly or as a body, had and have the legal right to refuse to transact any business with the plaintiffs for no cause whatever, and by such refusal no right of the plaintiffs is violated.

[8, 9] Plaintiffs have the legal right to conduct their business as suits them, and any attempt on the part of any one to interfere with the free conduct of that business violates a right. An appeal by one deeming himself injured in some manner by the system adopted by the plaintiffs in conducting their business, to his friends and to members of and sympathizers with a union to which such an one belongs, requesting such friends, members, and the general public to cease from dealing with plaintiffs, cannot fairly be termed an interference with the methods adopted for the conduct of plaintiffs' business. I readily concede that if such an appeal is heeded, the result that naturally would follow would be a loss of profit in business transacted; but this effect, while persuasive of the advisability of a change in business methods, would in no sense be an interference with plaintiffs' methods of conducting their business. Consequently I am of the opinion that the defendants violated no right of the plaintiffs in declaring, through their advertising and publicity campaign, a concerted intention to cease all business and social intercourse with the plaintiffs during such time as the said labor dispute remained unsettled; and their appeal to organized labor in particular and the public in general to do likewise violated no legal right of the plaintiffs.

Plaintiffs' right to conduct their business according to their own plans and methods, without interference from any one, may be or may not be violated by "picketing." The defendants are charged with "causing certain persons to parade up and down Main street immediately in front of said 'English Kitchen,' bearing a certain banner printed in large letters, * * * the following inscription, to wit, 'The English Kitchen Unfair to Cooks and Waiters and Warren District Trades Assembly'; that this banner and similar banners are borne by the persons having them in their possession during the day, and at night until said restaurant is closed, up and down the street for a space of about 15

or 20 feet immediately in front of said English Kitchen, and not more than 5 feet from the front entrance thereof, the same being the only entrance open to the general public." Plaintiffs do not charge that these men on parade in front of plaintiffs' place of business are placed there for the purpose of watching and annoying the men working for plaintiffs, not members of the union, and in that manner interfering with plaintiffs' business. The evidence coming from plaintiffs is that the persons placed near their place of business acted at all times peaceably. The alleged purpose for which the men were placed near plaintiffs' business entrance was to advertise the strike and influence prospective customers from patronizing plaintiffs.

Cases that have held picketing to be per se illegal, and that there can be no such thing as peaceable picketing (*Pierce v. Stablenen's Union*, 156 Cal. 70, 103 Pac. 324; *Barnes & Co. v. Chicago Typographical Union*, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018, 13 Ann. Cas. 54; *St. Germain v. Bakery, etc., Union*, 97 Wash. 282, 166 Pac. 665, L. R. A. 1917F, 824; *Hall v. Johnson* [Or.] 169 Pac. 515), deal with a state of facts wherein the purpose of the picketing was to watch and influence the employes working or persons seeking employment, and by causing men who were working to quit work, or preventing those seeking work from working. No case has been brought to my attention wherein the "picketing" was intended solely to affect prospective patrons and customers by causing such patrons and customers to change their minds and trade elsewhere. No court, so far as I have observed, has held such acts of union men "picketing." Yet the union agent who displays a banner advertising the existence of a strike against the place of business in front of which the banner is displayed and paraded is commonly referred to as a "picket." Under the evidence in this case, as given by Wm. Truax, one of plaintiffs, the person carrying the display banners immediately in front of plaintiffs' business place "walks back and forth and does not say anything. He never speaks to any one. One of them that carries the banner makes signs and in other ways attracts the attention of people, singing and whistling." On cross-examination the witness says: "I never saw them have any fights in front of our place or grab hold of anybody and pull them out. So far as I know, everything that was done there was done quietly, with the exception" of what witness was told by others.

Conceding that the persons who carried the banners were "pickets," then the purpose of such picketing was to advertise and make known to the public in general that a strike was on against the English Kitchen for the reason that the English Kitchen is "unfair" to organized labor. Whatever interference

with plaintiffs' business the presence of the banner carriers caused, that interference did not arise from any boisterous conduct of the carriers. Their conduct was at least peaceable. Their presence near the English Kitchen is the only ground for complaint.

[10] By the express terms of Civ. Code 1913, par. 1464, the courts are prohibited from restraining orders or injunctions the issuance of which prohibits any person or persons "from attending at or near a house or place where any person resides, or works or carries on business, as happens to be for the purpose of peaceably obtaining or communicating information, or of peaceably persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising, or persuading others by peaceful means so to do. * * *"

In the absence of this statute, a serious question would likely exist in this jurisdiction whether, as a matter of law, in the nature of things "peaceful" picketing may exist; but with paragraph 1464, supra, on our statute books, that question is eliminated as a question of law, and expressly made a question of fact during the existence of a labor strike; and, before the courts are permitted to interfere by injunction, the necessity must appear to prevent irreparable injury to property or property rights, and picketing in a peaceful manner creates no such necessity for injunction interference by the courts.

[11, 12] Whether the picketing is peacefully carried on is a question of fact in this jurisdiction and, as is the case in all such matters, when the trial court has determined the question, and substantial evidence in support of the determination reached appears in the record, the appellate court will not interfere.

[13] Under the evidence in this record, the court was justified in finding as a fact that the defendants were engaged in peacefully picketing about the plaintiffs' place of business.

[14] Conceding that the statements on the banners, circulars, and language used in loud street talks, to the effect that plaintiffs are "unfair to organized labor"; that one of the plaintiffs, armed with a butcher knife, has a habit of chasing employes on the street; that plaintiffs habitually violate contracts with their employes, and other statements attributing to plaintiffs acts and characteristics which in their nature tend to bring plaintiffs into disrepute, contempt, or ridicule, yet the statements made are statements spoken or written and published on the subject of the strike pending by persons interested therein; and—

"Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Section 6, article 2, State Constitution.

If a court of equity may restrain and prohibit members of a labor union from speak-

ing, writing, and publishing on the subject of a dispute between the union and employers of its members, then the members of a labor union are not such persons as are within the contemplation of the said constitutional provision. Certainly, if the court issues its extraordinary writ of injunction prohibiting the defendants from displaying banners, circulars, and talking on the streets with respect to the strike, then, while the restraining order exists, the defendants restrained by the terms of such order are deprived of a constitutional right enjoyed by all other citizens of the state. Can a court of equity thus suspend the constitutional rights of a citizen because such citizen happens to be insolvent and unable financially to respond in damages for the abuse of that right? What degree of wealth is required to authorize a citizen to enjoy all of his constitutional rights without interference by the courts? The answer is that the matter of financial worth does not limit the constitutional right to speak, write, and publish on all subjects. If this right is abused to the harm of another, the remedy given is an action for damages, and that remedy is deemed adequate. If the public suffers injury because the things written, printed, and published are maliciously false, and in their nature tend to bring any person into disrepute, contempt, or ridicule, the remedy is by a criminal action of libel. Section 221, Pen. Code 1913.

In *Lindsay & Co. v. Montana Federation of Labor*, 37 Mont. 264, 96 Pac. 127, 18 L. R. A. (N. S.) 707, 127 Am. St. Rep. 722, the court, having before it the interpretation of a similar constitutional provision, used the following language:

"The guaranty of this section extends as fully to the poorest as to the wealthiest citizen of the state; and, though an abuse of the liberty so guaranteed may result in loss for which there cannot be any adequate compensation, the framers of our Constitution in preparing it, and the people in adopting it, doubtless concluded that it was better that such results be reached in isolated cases than that the liberty of speech be subject to the supervision of a censor. To declare that a court may say that an individual shall not publish a particular item is to say that the court may determine in advance just what the citizen may or may not speak * * * upon a given subject, is, in fact, to say such court is a censor of speech as well as of the press. Under similar constitutional provisions the Supreme Courts of California and Missouri have reached the same conclusion. *Dailey v. Superior Court*, 112 Cal. 94, 44 Pac. 458, 32 L. R. A. 273, 53 Am. St. Rep. 160; *Marx & Haas Jeans Clothing Co. v. Watson*, 168 Mo. 133, 87 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440."

I think this is the sound interpretation to be given the constitutional provision *supra*. The fact that the person attacked by the wrongful speech, writing, or printing, if injured, may recover damages by a civil action he is thereby given a complete remedy, and the remedy furnished is adequate for the

purposes, and equity may not be invoked because the offending person or persons are financially unable to respond in damages, or because a great number of lawsuits must be commenced.

The court was correct in its findings, and the order dismissing the action necessarily followed. I find no reversible error in the record, and I am therefore of the opinion that the judgment should be affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

(19 Ariz. 402)

SUPERIOR & PITTSBURG COPPER CO. v. DAVIDOVICH. (No. 1543.)

(Supreme Court of Arizona. March 5, 1918.)

1. MASTER AND SERVANT \S 347—EMPLOYERS' LIABILITY LAW—CONSTITUTIONALITY.

The Employers' Liability Law (Civ. Code 1913, pars. 3153-3162) is a valid enactment within the police power of the state.

2. NEW TRIAL \S 102(3)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

In a miner's action under the Employers' Liability Law for injuries to his eye, where it appeared, on plaintiff's cross-examination, on the second day of the trial, that he had worked in a particular city the first two or three months he was in this country, and, within a few days after close of trial, the defendant sent its attorney to that city to investigate plaintiff during his residence there, and the visit resulted in the discovery of evidence relied on for new trial, the diligence shown by defendant in securing the evidence was sufficient to permit an inquiry into its materiality as newly discovered evidence.

3. NEW TRIAL \S 159—NEWLY DISCOVERED EVIDENCE—QUESTION FOR TRIAL COURT.

In considering motion for new trial on the ground of newly discovered evidence, the trial court must inquire whether the proposed new evidence actually exists, whether such evidence tends to establish any material issue raised in the pleading on the main case, and whether such evidence will probably cause a determination different from that reached on former trial.

4. MASTER AND SERVANT \S 385(1)—EMPLOYERS' LIABILITY LAW—RIGHT OF ACTION—CONCESSION OF INJURY.

Where an employer, sued for injuries under the Employers' Liability Law, concedes that the servant was injured by an accident in a slight measure at least, the servant is entitled to recover damages for whatever injury he actually suffered.

5. NEW TRIAL \S 108(4)—NEWLY DISCOVERED EVIDENCE—REDUCING AMOUNT OF RECOVERY.

Proposed evidence to reduce the amount of the recovery must be of so convincing a character that, had it been offered at the trial, the verdict would be clearly excessive.

6. NEW TRIAL \S 108(4)—NEWLY DISCOVERED EVIDENCE TENDING TO REDUCE DAMAGES.

In an action under the Employers' Liability Law, the servant claiming injuries to his eye whereby he lost its sight, and judgment going for him, where the employer, which conceded some injury, after trial produced evidence tending to show that the servant had lost his eyesight in one eye as the result of a previous accident, but such proposed evidence was rebutted by affidavits offered by plaintiff, and it was not certain that the proposed evidence, if offered on another trial, would reduce the verdict if the jury believed it true, nor was it convincingly

shown that such evidence actually existed, the trial court properly denied new trial for newly discovered evidence.

7. NEW TRIAL \S 161(4)—RIGHT TO COMPLAIN OF CONDITIONS.

Defendant cannot complain of the terms of the court's order granting it new trial on condition that it pay plaintiff's expenses of new trial, where, by its silence, it effectively rejected the conditions prescribed.

8. WAR \S 10(2)—RIGHT TO SUE—CHANGE OF STATUS TO ALIEN ENEMY PENDING APPEAL.

An injured servant does not lose his capacity to sue under the employers' liability law by reason of a probable change in his status from that of alien friend to that of alien enemy, taking place since the employer's appeal was perfected.

Appeal from Superior Court, Cochise County; Alfred C. Lockwood, Judge.

Action by Steve Davidovich, sometimes known as Steve Davis, against the Superior & Pittsburg Copper Company, a corporation. From a judgment for plaintiff, and from denial of its motion for new trial, defendant appeals. Judgment affirmed.

This action was commenced by the appellee, relying upon the Employers' Liability Law (chapter 6, tit. 14, Civil Code of Arizona 1913), to recover damages for alleged injuries to and loss of the sight of his left eye, alleged to have been sustained on the 6th day of May, 1914, while engaged in his duties operating a machine drill under ground in the appellant's mine, in the course of his employment. The appellant defends the action upon the grounds that, because the complaint fails to set forth facts showing that defendant was negligent in some manner, or that the alleged injuries resulted from some fault of defendants, no cause of action is stated; that the said Employers' Liability Law purporting to give a right of action for accidental injuries occurring without negligence or other fault of the employer, is void for the reason such statute in effect attempts to deprive the employer of his property without due process of law, and to deny him the equal protection of the law, and therefore is in conflict with the Constitution of the United States, section 1 of the Fourteenth Amendment. The defendant concedes that mud and dirt were cast into plaintiff's said eye at the time of such accident, and that the plaintiff suffered slight injuries therefrom, but defendant denies that the said accident caused plaintiff the loss of his eyesight. On the other hand, defendant contends that plaintiff's eyesight was destroyed as a result of an injury received several years prior to the 6th day of May, 1914. The court overruled defendant's objections to the constitutionality of the Employers' Liability Law, and the cause went to trial upon the issues of fact. This trial resulted in a verdict for the plaintiff for \$10,000, and a judgment accordingly. The defendant timely moved for a new trial, alleging a number of grounds, including that of evidence newly discovered. This ground was

pressed in the court below upon affidavits, and resisted by counter affidavits. The motion was overruled upon all grounds. Ruling upon the issues raised upon the grounds of newly discovered evidence, the court, on the 20th day of May, 1916, entered an order—"that upon the defendant advancing all necessary costs to be incurred by the plaintiff in a new trial, such costs not to exceed the sum of \$2,000, and to be retaxed against the plaintiff in the event that defendant prevail in the trial, a new trial would be granted; counsel for defendant to have ten days in which to consider and file his acceptance or rejection in writing."

On June 22, 1916, another order was made, reciting that defendant wholly failed to comply with said former order of May 20, 1916, and therefore, the court formally denied the motion for a new trial. The defendant appeals from the judgment and from the denial of its motion for a new trial by operation of law, and by the order of the court of June 22, 1916.

Knapp & D'Autremont, of Bisbee, and H. E. Pickett, of Douglas, for appellant. Fred Sutter and Wm. B. Cleary, both of Bisbee, for appellee.

CUNNINGHAM, J. [1] The questions of the constitutionality raised on this record have been considered and decided adversely to the appellant's contention in *Superior & Pittsburg Copper Co. v. Tomich*, decided July 2, 1917, 19 Ariz. —, 165 Pac. 1101, and in *Inspiration Consolidated Copper Co. v. Mendez*, decided on the same date, 19 Ariz. —, 166 Pac. 278, 1183, I adhere to the decisions there reached, that is chapter 6 of title 14, Employers' Liability Law, is a valid enactment within the police power of the state.

[2] The appellant assigns as error the order of the court denying defendant's motion for a new trial on the ground of material evidence discovered after the close of the trial. The proposed new evidence is presented in affidavits filed in support of the motion. The following circumstances lead to the discovery of such evidence: During the cross-examination of plaintiff on the second day of the trial, he stated that he worked in Globe in 1913. That he came to this country about a year before he got hurt. That he stayed at Globe for the first two or three months. "Before I came to this country I lived in Austria all my life." Appellant asserts that prior to the commencement of the trial, its counsel had wholly failed to trace the plaintiff's movements before he reached Bisbee. Upon learning from plaintiff while he was testifying on the stand that he had resided at Globe before coming to Bisbee, a search for evidence at Globe was commenced. The trial closed on February 12, 1916, and within a few days thereafter one of defendant's counsel visited Globe for the purpose of investigating the plaintiff while residing there. The result of that investigation was the discovery of the alleged evidence relied

upon for a new trial. Prior to the trial defendant's attorneys had communicated with eye specialists about the state, making inquiries as to whether plaintiff had been treated by them, but this manner of search for evidence brought no results. The diligence shown by the defendant is sufficient for the purposes of this case to permit an inquiry into the materiality of the evidence alleged to have been discovered.

The alleged newly discovered evidence is presented by affidavits of the general foreman, two shift bosses, and a mine clerk of the Old Dominion mine at Globe and affidavits of a miner and another person. The facts proposed to be established by these witnesses on a new trial are: That about 7 to 10 years prior to the dates of the affidavits (March, 1916) the plaintiff's eye was injured by an explosion on the 1,200-foot level in the Old Dominion mine. That the injury caused the loss of the eyesight. That plaintiff admitted to certain of the witnesses that he was blind in one of his eyes caused from the said accident. The general foreman in his affidavit identifies the plaintiff as the man who was injured at the time of the accident referred to, and positively states that thereafter the man so injured was blind in one of his eyes. The other witnesses describe the man to whom they refer, and allege that they can identify the man if they should again see him.

The plaintiff offered rebutting affidavits, some of which tend to controvert the general foreman's statements of positive identification of plaintiff, and other affidavits positively contradict the facts proposed to be established by the witnesses, viz. that plaintiff was injured in an accident in the Old Dominion mine by which plaintiff lost the sight of an eye, that plaintiff was blind of an eye prior to the 6th day of May, 1914, and that plaintiff admitted to any witness that he lost the sight of his eye prior to May 6, 1914, from any cause. At the hearing of the motion, the plaintiff also offered the oral testimony of a doctor who examined plaintiff physically on the 27th day of April, 1914, who certified the result of such examination. In connection with the examining doctor's testimony, his examination certificate was introduced. This certificate as written by the doctor at the time of the examination discloses that the sight of both eyes was "O. K." The doctor in his oral testimony would discredit the force of his own certificate by stating that he usually made no examination of the eyesight, but relied upon the answer of the person being examined, as to the condition of the eyes.

[3, 4] The trial court on the hearing of the motion denied the same. The matters of inquiry before the trial court were whether the proposed new evidence actually exists, whether such evidence tends to establish any material issue raised in the pleading on the

main case, whether the said evidence when offered for the consideration of the jury with all the other evidence theretofore offered will probably cause a determination different from that reached on the former trial. The last subject of inquiry need be noticed here, the preceding subjects may be deemed established. If the proposed evidence involved is given the full probative effect claimed for it, that effect is: That the loss of the sight of an eye was not one of the results of the accident to plaintiff on May 6, 1914, and therefore not an element of damage in this case. The proposed newly discovered evidence, therefore, relates entirely to the matter of the measure of damages. The defendant in its answer concedes that plaintiff was injured by an accident on May 6, 1914, in a slight measure by mud and dirt striking his eye. Consequently the plaintiff on defendant's said admission, is clearly entitled to recover damages for the injury he actually suffered.

[5] In a personal injury case, the damages recoverable for injuries to a blind eye caused from mud and dirt striking the sightless member cannot be definitely weighed or measured. Whether the jury based a large or a small, or no portion of the amount of this verdict on the loss of the eyesight cannot be determined with exactness. It is a fair presumption that this element of damages was one carrying the large share of the damages given. It is fair to presume that the verdict in this case might have been a sum materially less in amount than given had the jury believed that plaintiff did not lose the sight of his eye in the accident. It is fair to presume that, on a new trial with the evidence offered at the former trial and with the proposed new evidence, the jury could find a verdict for an amount of damages materially less than the amount found at the former trial. The rule is that "proposed evidence to reduce the amount of the recovery only must be of so convincing a character that, had it been offered at the trial, the verdict would be clearly excessive." 29 Cyc. 904, and cases note 63.

[6] The proposed evidence tends to contradict the evidence offered upon the same subjects by the plaintiff. On the other hand, the proposed evidence is rebutted by affidavits offered by the plaintiff. It is not at all certain that the proposed evidence, if offered on another trial, would reduce the verdict, if the jury believed the proposed evidence true; neither is it convincingly shown that such proposed evidence actually exists. The trial court clearly believed that the preponderance of the evidence was with the plaintiff, and that a different result would not follow from a new trial. In this I think the court was right. The appellate court is not justified in disturbing an order of the lower court refusing a new trial, unless the lower court has by its order clearly abused the

discretion given to it in such matters. Certainly this record discloses no abuse of discretion in this particular.

[7] The order made on the 20th day of May, 1916, granting to the defendant a new trial on conditions named in the order, is the subject of a bitter attack by appellant. Such attack is aimed at the conditions imposed. The only harsh feature of the order of which complaint is made is the requirement as a condition precedent to a new trial that defendant advance to the plaintiff money with which plaintiff may pay his costs incurred on a new trial. The evident purpose of the order was to place within the reach of plaintiff a sum of money sufficient to meet plaintiff's necessary costs of a new trial. The order does not require the defendant to deliver the money so advanced to the absolute possession of the plaintiff, and doubtless if the defendant had been sufficiently interested and so requested, the court would have made the order more specific by designating a trustee to handle the money advanced and otherwise hold dominion over the money as a fund in custody of the court. The appellant has no grounds for complaint of the terms of the order in question, for the reason it by its silence effectively rejected the conditions prescribed. No possible harm in the circumstances could overtake appellant by means of the conditions attached to the order made on May 20, 1916, and the order denying a new trial became effective ten days after the order of May 20, 1916, was entered, viz. on the 30th day of May, 1916—on that date the motion for a new trial was overruled.

[8] I have considered all other questions raised by the appellant, and a question presented by the record involving plaintiff's capacity to sue, by reason of a probable change of his status from that of alien friend to that of alien enemy, taking place since the appeal in this cause was perfected. I find no reversible error in the record, and upon the whole case, I am of the opinion the judgment must be affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

(19 Ariz. 395)

FARMER et al. v. DAHL et al. (Civ. 1609.)

(Supreme Court of Arizona. March 5, 1918.)

1. MUNICIPAL CORPORATIONS \S 313—PAVING IMPROVEMENT—ABANDONMENT BY COUNCIL.

Under Yuma City Charter, art. 10, \S 6, providing that the city council shall determine its own rules of procedure, and article 11, \S 1, providing that the mayor shall sign the minutes of the council's meetings after they have been entered by the recorder and approved by the council, where the city council had hearing on the protest of property owners liable to assessment for paving work, and, as shown by the motion as entered by the clerk, motion was made and unanimously carried abandoning the work,

but at the next regular meeting of the council, a week later, and before the minutes of the prior meeting were approved by the council and signed by the mayor, they were amended to show that the work was not abandoned, but that the bid of a construction company was rejected and its cash deposit returned, the city council did not abandon the proposed work, thereby losing jurisdiction, the first action of the council having been limited to rejection of bids, as expressed in its amended minutes.

2. MUNICIPAL CORPORATIONS \S 323(1)—PAVING IMPROVEMENT—CHANGING GRADE OF STREET—DAMAGE TO ADJUTING OWNERS—RIGHT TO COMPLAIN.

Taxpayers seeking to enjoin execution of a paving contract may not complain that the work will materially change the established grade of street, where they themselves are not owners abutting on such street.

3. MUNICIPAL CORPORATIONS \S 465—STREET IMPROVEMENTS—OMISSION OF LOTS BELONGING TO CITY—STATUTE.

By Civ. Code 1913, par. 1958, the total expense of all work done shall be assessed on lots lying within the limits of the assessment district without regard to lots, pieces, or parcels of land omitted because owned by the federal government, state, or city, and used in the performance of any public function.

4. MUNICIPAL CORPORATIONS \S 864(3)—PAVING IMPROVEMENT—PAYMENT BY CITY—STATUTE.

Under Civ. Code 1913, paras. 1953-1977, a city's obligation to pay for a specific paving improvement on the ground that its property is benefited does not accrue until after the work, under the contract, has been completed and accepted, and it is not made a condition precedent that the city shall have on hand funds to meet the obligation at the time of incurring it; paragraph 1958 simply requiring that when the money is paid it shall be paid out of the city's general fund, unless otherwise designated in the resolution of intention.

5. MUNICIPAL CORPORATIONS \S 330(4)—PAVING IMPROVEMENT—SPECIFICATION OF PATENTED PAVING—STIFLING COMPETITION—STATUTE.

A city's contract for a paving improvement was not fraudulent and void as stifling competition because specifying "Warrenite" patented paving, the statute providing in Civ. Code 1913, par. 1974, subd. 4, that patented material might be used, while the owners of the patented pavement called for had filed a license agreement with the city recorder agreeing to furnish the pavement to all bidders on equal terms.

Appeal from Superior Court, Yuma County; Frank Baxter, Judge.

Suit by Raymond R. Farmer against E. W. Dahl and the O. & C. Construction Company, a corporation, wherein the J. W. Dorrington Investment Company intervened as plaintiff. From judgment dismissing the complaints of plaintiff and intervener, they appeal. Judgment affirmed.

Clement H. Coleman, O. A. Lindeman, and Wupperman & Wupperman, all of Yuma, for appellants. John L. Gust, of Phoenix, for appellees.

ROSS, J. This is an injunction proceeding brought by the appellant Farmer, as a resident property owner and taxpayer of the assessment district hereafter described of the city of Yuma, to restrain appellee Dahl,

street superintendent, from executing a paving contract theretofore awarded to appellee O. & C. Construction Company by the city council of the city, and is based upon certain alleged infirmities in the preliminary statutory proceedings of the council leading up to and antedating the letting of the contract.

Appellant the J. W. Dorrington Investment Company intervened in the suit, and in its complaint sets forth practically the same grounds as the appellant Farmer. Upon the trial before the court, the temporary restraining order issued at the instance of appellant Farmer was dissolved and judgment dismissing the complaints of both the appellants was entered.

(1) It is insisted by appellants that the city council abandoned the proposed work and thereby lost jurisdiction. This contention is based upon the following condition of the record: On March 27, 1917, as provided in paragraphs 1955 and 1956, c. 3, tit. 7, Civil Code, entitled "Improvements of Streets," the city council passed and thereafter caused to be published a resolution of intention to pave and otherwise improve certain portions of First street and Second avenue of said city of Yuma, as one improvement, to be constructed under one contract and charged against an assessment district therein described by lots, blocks, and streets. No protests against said work, nor objections as to the extent of the proposed assessment district, were filed with the city clerk within the time as provided in paragraph 1957, or at all, whereupon the city council assumed jurisdiction as therein granted, and "by resolution, ordered the improvement described in the resolution of intention to be done." The superintendent of streets advertised for bids for the proposed improvement and on May 3, 1917, a contract to do the work was awarded by the council to the O. & C. Construction Company. A protest against the execution of the contract was filed with the council within the time provided in paragraph 1960, alleging that the call for bids was not published the required length of time, and that the opening of bids and the award were premature. At the same time another paper was presented to the council signed by a large number of property owners liable to assessment for the proposed work, asking the council to abandon the work and proceedings. On May 15, 1917, the council had a hearing upon the protest, and at the same time considered the petition asking that the work be abandoned. The action at this meeting is one of the bones of contention. It is the contention of the appellants that a motion was made and unanimously carried abandoning the work, and they rely upon the motion as entered by the clerk as sustaining their position. However, at the next regular meeting of the council on May 22d, and before the minutes of May 15th were approved by the council and signed by the mayor, they

were amended to show that the work was not abandoned, but that the bid of the O. & C. Construction Company was rejected and its cash deposit returned.

(2) It is contended by appellants that the established grade on First street between Madison avenue and Second avenue would be materially changed by the proposed work, to the damage of the abutting property owners, and that before this can be done, the damages must first be ascertained and paid.

(3) Objection is made to the proceedings because the resolution of intention included the improvement of a street in front of a piece of land owned by the city of Yuma, without including in the assessment district the abutting property so belonging to the city.

(4) Appellants contend that the proceedings are not legal, in that certain lands belonging to the city and being used for, and dedicated to, a public use, were included in the assessment district without the city having funds in its treasury to pay for the improvement properly chargeable to the city.

(5) Lastly, it is contended that, inasmuch as the calls for bids specified that the improvement should be of a bitulithic surfacing known as "Warrenite," a patented process owned and controlled by Warren Bros. Company, it prevented competition and gave to the O. & C. Construction Company a monopoly in the bids, contrary to law.

After the city council had rejected the first bid of the O. & C. Construction Company, the proposed work was again advertised and the bid of the O. & C. Construction Company again accepted. Notice of the award of the contract to the O. of C. Construction Company was again published as required by paragraph 1960, and within the 15 days allowed by law appellant Farmer again protested, setting forth as ground of protest the five objections heretofore enumerated. We will consider the points made by the appellants in the order above named.

It is provided by the city charter that when local improvements are made, "the laws of the state of Arizona in force at the time of the improvement shall govern and control, and all proceedings shall be in conformity therewith." Section 19, art. 3, City Charter. Chapter 13, tit. 7, supra, vests incorporated cities, towns, and villages "with power to make local improvements by special assessments or by special taxation of property benefited." Section 6, art. 9, Constitution.

[1] First. The trial court, in its findings, found that the city council, by its action at its meeting of May 15th, did not abandon the whole proceedings for the work contemplated in its resolution of intention, and that its action on the 22d of May, in amending the minutes before they were approved, was lawful. Section 1, art. 11, of the City Charter, among other things, provides: "He [the mayor] shall sign the minutes of its meet-

ings after they have been entered in the minutes by the city recorder and approved by the council." The minutes of May 15th, as recorded by the clerk of the city council, were not approved by the council, nor signed by the mayor.

Section 6 of article 10 of the charter provides: "The council shall determine its own rules of procedure." No irregularity in the manner pursued in amending the minutes is shown. For aught that appears, the course followed by the council was that prescribed by its rules for the conduct of its business. The record is that the motion of May 15th was an oral one and entered by the clerk according to his understanding. The council, finding it incorrect, according to the understanding of its members, at the next regular meeting and before it was approved and signed by the mayor, corrected it to conform to the motion as made and passed by the council. As a fact, after hearing evidence upon the question, the court found that the council by its resolution of May 15th only intended to reject the bid theretofore awarded to the O. & C. Construction Company, because the publication for bids was not in accordance with law, and the bids were prematurely opened. If the action of the city council was limited to a rejection of the bids as found by the court and as expressed in its amended minutes (and we think we are bound by these records), it must follow that the council did not lose jurisdiction as contended.

[2] Second. If it be conceded, as contended by appellants, that the grade on First street between Madison avenue and Second avenue had theretofore been established, and that the proposed work would materially change such grade, whatever might be the rights of abutting property owners affected by such change of grade, the appellants may not complain for the reason that it is not shown that either of them owns any property facing on First street at such point. In other words, they fail to show that they will be in any way damaged even if a change of grade is effected.

[3] Third. The third point made is to the effect that a piece of land belonging to the city and used in the performance of a public function was excluded from the assessment district, notwithstanding it faced upon and was benefited by the proposed improvements. This feature is expressly taken care of by paragraph 1958, wherein it is provided that in such circumstance—

"the total expense of all work done shall be assessed on the remaining lots * * * lying within the limits of the assessment district, without regard to such omitted lots, pieces or parcels of land."

[4] Fourth. The contention that the city had no funds in its treasury available to apply to the payment of its proportion of the assessment by reason of a piece or parcel of its land used in the performance of a pub-

lic function being within the assessment district, we do not think is well taken.

The appellants rely upon section 9 of article 10 of the City Charter, which provides:

"The council shall not create, audit, allow or permit to accrue any debt or liability in excess of the available money in the treasury that may be legally apportioned and appropriated for such purpose, except in the manner provided in this charter for incurring indebtedness. No money shall be drawn or evidence of indebtedness be issued unless there be at the time sufficient money in the treasury legally applicable to the payment of the same except as in this chapter provided."

Doubtless this language is broad enough to forbid the city council from incurring the proposed debt, providing it was intended to cover debts or obligations arising out of contracts to improve the city's streets. We think it clear that it was not so intended because, in subdivision 7 of section 7 of said article 10, this language is employed:

"No action providing for any specific improvement, for the appropriation or expenditure of any public money, except a sum less than five hundred (500) dollars, for the appropriation, acquisition, sale or lease of public property; for the levying of any tax or assessment; for the granting of any franchise; for establishing or changing fire limits; or for the imposing of any penalty, shall be taken except by ordinance; provided that such exceptions be observed as may be called for in cases where the council takes action in pursuance of a general law of the state."

Everything that the council did in the matter of paving First street and Second avenue was done "in pursuance of a general law of the state," to wit, chapter 13, tit. 7, supra. The city council, having ordered the work to be done, the general law creates the liability in the following language:

"In the event that the legislative body shall, in such resolution of intention, declare that said lots, pieces or parcels of land so owned as aforesaid [that is, by the city], or any of them, shall be included in the assessment, or in the event that no declaration is made respecting such lots, pieces or parcels of land, then said municipality shall be liable for such sum or sums as thereafter may be assessed against such lots, pieces or parcels of land so owned and used, which shall be payable by the said city out of the general fund, unless the legislative body shall in its resolution of intention designate another fund." Paragraph 1958.

Under the improvement statute, the obligation to pay for specific public improvements does not accrue until after the work under the contract has been completed and accepted. The general law does not make it a condition that the city shall have on hand funds to meet this obligation at the time of incurring it. It simply requires that, when it is paid, it shall be paid out of the general fund, unless otherwise designated in the resolution of intention.

[5] Fifth. Under the facts of this case, the specification that the work should be of the "Warrenite" patented paving does not stifle competition and render the proposed contract fraudulent and void. In the first place, it is provided in subdivision 4, par. 1974, that patented material may be employ-

ed in any improvement or work done under that chapter. It is further shown that this specification does not stifle competition, for the reason that Warren Bros. Company, owners of the patented pavement called for, had filed a license agreement with the city recorder of the city of Yuma, by which they agreed to furnish the patented pavement to all bidders on equal terms. If all bidders could, upon equal terms, obtain from the Warren Bros. Company the patented material called for in the specifications, that is, a showing that the element of competition was present and, at the same time, the city was enabled to secure that kind of pavement, in its opinion, best suited to its climatic conditions. *Sherrett v. City of Portland*, 75 Or. 449, 147 Pac. 382.

We conclude that the assignments are without merit, and the judgment is therefore affirmed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

(19 Ariz. 361)

DUFF v. STATE. (No. 430.)

(Supreme Court of Arizona. March 5, 1918.)

1. CRIMINAL LAW § 650—EXPERIMENTS.

In a prosecution for a violation of the prohibition amendment, where the state's witnesses had testified as to the amount of ice in each glass containing liquor, when served to them, the admission of a drinking glass containing a piece of putty to represent the ice and to illustrate the liquid contents when the ice was subtracted was proper; it not being the duty of the court to require the prosecution to have the ice brought into the courtroom, cracked there, and the precise amount of ice placed in each glass.

2. CRIMINAL LAW § 1169(5)—ADMISSION OF EVIDENCE—CURE BY INSTRUCTIONS.

In such prosecution, any error in proving, by the sheriff, how much money the county had paid out for detective services and the profit to the county was cured by its exclusion and by an instruction not to consider it.

3. CRIMINAL LAW § 555—DETECTIVE EVIDENCE—WEIGHT AND SUFFICIENCY.

In such prosecution, an objection that the evidence against defendant was largely furnished by hired detectives, and that for that reason its weight and credibility were undermined, was without force, as such fact would have aided the defendant more than it would have harmed him.

4. CRIMINAL LAW § 372(2)—EVIDENCE—OTHER OFFENSES—SCHEME OR PLAN.

In such prosecution, the admission of other acts similar to the one alleged in the information was proper, where it tended to show a scheme or plan resorted to as a subterfuge to evade the law and to corroborate and throw light on the offense charged, and where effect was limited to showing such scheme or subterfuge.

5. CRIMINAL LAW § 742(1)—DETECTIVE EVIDENCE—PROVINCE OF JURY.

In a prosecution for the violation of the prohibition amendment, the weight and credibility of the testimony of the prosecuting witnesses, detectives employed by the county, by reason of their interest and character was for the jury.

6. CRIMINAL LAW § 37—DETECTIVES.

There is no law forbidding the employment of detectives to engage in the discovery and suppression of crime.

7. INTOXICATING LIQUORS § 236(1)—OFFENSES—SUFFICIENCY OF EVIDENCE.

In a prosecution for the violation of the prohibition amendment for the sale of whisky, held that there was substantial evidence in the record to support a conviction.

Appeal from Superior Court, Yavapai County; Frank O. Smith, Judge.

Larry Duff was convicted of a violation of the prohibition law, and he appeals. Affirmed.

Robert E. Morrison, of Prescott, for appellant. Wiley E. Jones, Atty. Gen., and Geo. W. Harben and R. W. Kramer, Asst. Attys. Gen., for the State.

FRANKLIN, C. J. The appellant was convicted of a violation of the prohibition amendment. On the 22d day of May, 1918, about 10 o'clock in the evening, one R. H. Bryant and his wife went into Birch Bros. restaurant in the city of Prescott, entering the restaurant through a rear door and occupying one of the booths reserved for patrons of the place. It appears that in connection with this restaurant the Birch Bros. have a room equipped with bar fixtures, pool tables and other paraphernalia usually found in a saloon, the bar being used ostensibly for the purpose of selling soft drinks or nonintoxicating beverages. The appellant, Larry Duff, was employed by Birch Bros. to sell and serve beverages at this bar, and, on a call from patrons in the booths adjoining the restaurant to take drinks into those private rooms for them. It appears from the testimony of the prosecution that the plan or scheme of the Birch Bros. to evade the law was to sell whisky, or other intoxicating liquors, to the patrons of the place under the subterfuge of selling ginger ale. On the evening in question, Bryant and his wife purchased from appellant 14 drinks. These drinks were served in glasses each containing about six ounces of liquid. Seven of the drinks were served to Bryant, and an equal number to his wife. Appellant admits serving these drinks to the Bryants on this occasion, but unequivocally asserts that the glasses placed before them contained nothing but ginger ale, with the addition of a suitable amount of ice to each glass thereof; that he served them with no intoxicating liquor whatever. The Bryants, however, are equally positive that the ginger ale contained in the glasses served to them by Duff contained intoxicating liquor disguised in the ginger ale. They drank portions of the liquid out of each of the glasses, and, when testifying, described with minute particularity the intoxicating effect of the liquor. In addition to this, the Bryants brought with them into the booth an empty

pint bottle. In this empty bottle they poured portions of the liquid from each of the glasses served to them by Duff until the bottle was nearly full, whereupon they took it to their room in the hotel and, after pouring a small part of its contents into a smaller bottle, sealed up the larger bottle with its contents. This liquor was afterwards analyzed by a chemist, and found to contain approximately 40 per cent. alcohol. These bottles of liquor were put in evidence over the objection of appellant; the ground of objection being that they were not sufficiently identified. There is no merit in the objection because the identity of the exhibits was established with a great degree of precision.

[1] Appellant complains because the court allowed a drinking glass containing a piece of putty to be admitted in evidence. The Bryants had testified as to the amount of ice that was in each glass containing the liquor when served to them. The purpose of the putty was merely to represent the approximate amount of ice in each glass and illustrate to the jury the liquid contents thereof when the quantity of ice was subtracted. The Bryants testified clearly as to the amount of ice served with each drink, and the exhibit had slight, if any, probative force, but the jury were entitled to have the benefit of the exhibit for what it was worth. The argument that it was the duty of the court to require the prosecution to have ice brought into the courtroom, cracked there and the precise amount placed in each glass, is not convincing.

[2] The county attorney, against the objection of appellant, offered to prove by the sheriff of Yavapai county how much money the county had paid out for detective services in the prosecution of bootleggers and the amount of profit the county had earned since the 1st day of January, 1915, by reason thereof. This is assigned as error, but the court rejected the offer of proof, and very emphatically told the jury to disregard it and not give it any consideration in arriving at their verdict. Conceding that it was error to make such an offer, it was cured by the ruling of the court and its instruction to the jury.

[3] One of the most vigorous attacks upon the evidence for the prosecution was that it was largely the product of hired detectives, and, for that reason its weight and credibility was undermined. It occurs to us that this offer made by the prosecution, if permitted, would rather have aided this contention of the defense than otherwise.

[4] Over the objection of appellant, the court permitted evidence of other acts than the one alleged in the information, but of a similar nature. According to the testimony for the prosecution, the plan or scheme adopted for the disposal of intoxicating liquor was to disguise such liquor in ginger

ale. This was but a mere subterfuge by which the illicit traffic in the forbidden thing was accomplished. The appellant denied the sale of intoxicating liquor altogether. His claim was that he sold ginger ale and nothing else. The principle upon which proof of other acts of a similar nature is allowed in cases of this kind may be readily understood, but it is the practical application of the principle to the concrete case that is attended with difficulty. In those cases where the evidence shows that the defendant has concocted a scheme or plan and is resorting to a subterfuge to evade the law, this class of testimony will be permitted to show the system or plan, to uncover the subterfuge, "in corroboration of and to throw light on the offense charged." In *Cluff v. State*, 16 Ariz. 179, 142 Pac. 644, the principle was thus clearly stated:

"The law recognizes that it is almost impossible to secure convictions for violations of the local option and other liquor laws, if the evidence is confined to a single sale, as ordinarily the criminal act is witnessed only by the buyer and seller; but observation and common knowledge teach that isolated and secret sales make up and constitute the business, or sometimes an important feature of the business, of the accused in these cases, and for that reason the facts and circumstances of other sales than the particular one charged are admitted as in corroboration of and to throw light on the offense charged. *Childress v. State*, 48 Tex. Cr. 617, 90 S. W. 30; *State v. Peterson*, 98 Minn. 210, 108 N. W. 6."

While in that case the discussion arose upon an instruction and the observations made were limited to the particular assignment of error then before us, we are convinced, in the light of the further consideration afforded, that the principle may be extended to the admissibility of the evidence. The most serious objection to be made against this class of evidence is that the jury might thereby find the defendant guilty under the proof of other similar acts when they would not find him guilty of any particular disposition of the liquor. This is to be obviated, however, by the instructions of the court limiting the effect of the evidence and the consideration thereof to the purpose for which it was offered, and on which account it was alone relevant and material. After doing this and further telling the jury that the question as to whether or not the defendant has been guilty of any other offense is not a question for them to determine, the court said:

"The question before you is whether or not the defendant committed the particular crime as alleged in this information in this case; and, if you fail to find beyond a reasonable doubt that the defendant committed this particular crime as charged in the information, even though you believe he is guilty of these offenses, then I charge you, you must find him not guilty in this case."

In this we perceive no error. Indeed, the court had previously told the jury that before they may consider the evidence of other sales of intoxicating liquor, they must be satisfied beyond a reasonable doubt that the

defendant did sell the particular intoxicating liquor as alleged in the information, which robbed the evidence of other sales of any probative force whatsoever, and obviously is more favorable to defendant than he was entitled.

[5-7] The prosecuting witness to whom the liquor was sold is a detective who was employed by the county to detect violations of the liquor law. We are asked to scrutinize inconsistencies in the testimony that are inevitable in the record of every case, to destroy the weight and credibility of the testimony on account of the interest and character of the prosecuting witness, and reconcile the conflicts and resolve all doubts in favor of the defendant. This is all matter for argument to a jury, and it was their exclusive province to determine it. They have determined it against the defendant upon substantial evidence, and there it must end. There is no law forbidding the employment of detectives to aid in the discovery and suppression of crime. Such a method is not inherently bad. Its credibility and weight is therefore for the consideration of the jury. The trial court is not permitted to tell the jury that such testimony is unworthy of belief, that it should be viewed with suspicion, or that it should be closely scrutinized. Under the Constitution, the trial court is forbidden to comment upon the testimony of witnesses. It is sufficient that the evidence has been considered worthy of belief by the jury. Our duty is limited, then, to ascertaining if there be any substantial evidence in the record to support such a verdict, and we so find. Other assignments are made, but they are not of sufficient moment to require further discussion.

Upon the whole case, substantial justice has been done, and, there being no reversible error, the judgment is affirmed.

ROSS and CUNNINGHAM, JJ., concur.

(19 Ariz. 366)

BIRCH v. STATE. (Cr. 428.)

(Supreme Court of Arizona. March 5, 1918.)

1. INTOXICATING LIQUORS \S 198—OFFENSES—PRELIMINARY EXAMINATION.

In prosecution for disposing of intoxicating liquor, a preliminary examination before a committing magistrate is unnecessary.

2. CRIMINAL LAW \S 404(4)—EVIDENCE—DEMONSTRATIVE EVIDENCE—IDENTITY.

In a prosecution for the unlawful sale of whisky the admission of the bottle in evidence, after it was definitely traced from the hands of defendant right into the courtroom, was not objectionable on the ground that it had not been properly identified.

3. CRIMINAL LAW \S 372(2)—EVIDENCE—OTHER OFFENSES.

In prosecution for unlawful sale of whisky, the admission of evidence of other sales of a similar nature to that charged in the information was proper, where the evidence for the state was to the effect that defendant showed a

desire for secrecy, and disposed of it surreptitiously and by a roundabout way, calculated to evade detection, and where it was limited to showing a plan or schema.

4. CRIMINAL LAW \S 555—DETECTIVE EVIDENCE—PROVINCE OF JURY.

In prosecution for the unlawful sale of whisky the testimony of the detectives to whom it was sold was not unworthy of belief merely because of their employment and interest in the case, its weight and credibility being for the jury.

5. INTOXICATING LIQUORS \S 233(3)—OFFENSES—EVIDENCE—UNITED STATES LICENSE.

In a prosecution for selling whisky in violation of the prohibition amendment, evidence that defendant had been granted a license by the United States to retail intoxicating liquor was admissible, as the acquisition or possession of instruments, or other means of doing an act, is always a relevant inquiry.

6. CRIMINAL LAW \S 1159(4)—SUFFICIENCY OF EVIDENCE—APPEAL.

Unless the evidence is inherently improbable or bad, the Supreme Court cannot reject the evidence for the state and decide the case upon the evidence for the defendant, as the weight and credibility of testimony must be decided by, and any conflict reconciled by, the jury.

7. CRIMINAL LAW \S 1163(1)—APPEAL—REVERSAL.

Cases may be reversed in the Supreme Court only where the record affirmatively shows error prejudicial to some substantial right of a defendant.

Appeal from Superior Court, Yavapai County; Frank O. Smith, Judge.

Bob Birch was convicted of disposing of intoxicating liquor, and he appeals. Affirmed.

Robert E. Morrison, of Prescott, for appellant. Wiley E. Jones, Atty. Gen., Geo. T. Harben and R. W. Kramer, Asst. Attys. Gen., and John H. Campbell, of Tucson, for the State.

FRANKLIN, C. J. Appellant was convicted of disposing of intoxicating liquor to one S. E. Terry, and appeals. According to the testimony the defendant conducted a business located on Montezuma street in the city of Prescott. His establishment is a two-story building in which there is a barroom and restaurant on the first floor. Adjoining the restaurant and used in connection therewith are several private rooms or booths. A stairway leads from the lower to the upper floor. The upper part of the house consists of rooms, most of which are used for lodging guests, but some of them are set apart for gambling at games with cards. The prosecuting witness, S. E. Terry, and his brother, W. W. Terry, were employed by Yavapai county to obtain evidence of violations of the liquor law. At a time about midnight, either the last hour of the 22d or the first hour of the 23d of May, 1918, it is not exactly clear which, these men purchased a pint bottle of whisky from appellant at his place of business.

[1] Appellant complains of the insufficiency of the information because it is not shown

that he was committed to answer for the offense after a preliminary examination before a committing magistrate. We have held that in this class of cases a preliminary examination before a committing magistrate is unnecessary. *Mo Yaen v. State*, 18 Ariz. 491, 163 Pac. 135, L. R. A. 1917D, 1014.

[2-4] Objection is made to the introduction of the bottle of whisky in evidence because it was not properly identified. It would be difficult to imagine how an exhibit in a case could be more clearly identified. The bottle of whisky was definitely traced from the hands of appellant right into the courtroom. It is urged that the court erred in allowing evidence of other sales of a similar nature to the one charged in the information. Appellant denied ever making any sale of whisky to Terry. The evidence for the state is to the effect that the behavior of appellant showed a desire for secrecy. The method adopted by him for disposing of whisky was surreptitious and by a secret and roundabout way well calculated to evade detection. It was urged persistently and with vigor that the prosecuting witnesses were detectives and, by reason of their employment and interest in the case, unworthy of belief. In the case of *Cluff v. State*, 16 Ariz. 179, 142 Pac. 644, we said:

"Most of the sales testified to in this case were sales made to the prosecuting witness. The appellant denied ever making any sale to him. This being the issue, why was not proof of other sales to the prosecuting witness than the one relied upon relevant, whether supported by his testimony alone or by other witnesses as corroborating evidence of the offense charged? There was no direct testimony of sales by appellant to third parties, except the testimony of the prosecuting witness, and those sales, if believed by the jury to have been made, were relevant as a circumstance tending to show that appellant was in the business of violating the local option law. There is one thing certain from the record, and that is that, if appellant disposed of intoxicating liquors at all, he was doing it secretly and under cover to avoid detection, and, if a plan or scheme of that kind was followed, the evidence of other sales was competent and relevant to corroborate and throw light upon the offense charged, as stated in the instruction."

The court in its charge to the jury was careful to limit this character of evidence to the only purpose for which it is admissible.

The contention here made has this day been decided in *Duff v. State*, 171 Pac. 133, to be without merit.

[5] Objection is made because the state was permitted to show that appellant had made application for and been granted a license by the United States to retail intoxicating liquor. The acquisition or possession of instruments, tools, or other means of doing an act is always a relevant inquiry. It is usually a most significant circumstance. What does one naturally infer when a government license to sell liquor is purchased by another? The natural inference would be that it evidences a design to sell such liquor of course. It is common knowledge that one

does not procure at expense a particular thing as a means for accomplishing a particular purpose without any design to do the act for which such thing is to be used. Like all evidence, its probative value varies as the circumstances of each case are developed.

As in the *Duff Case* just decided, so in this case the testimony of the detectives is vigorously assailed. The thread of their story, however, runs plainly through the record. There are softnesses in it here and there, but in the most solid of rocks little veins of softness are frequently encountered. To what extent these little fissures detract from the weight of solidity of the body is for the jury, under the instructions of the court. The witnesses were subjected to a most searching cross-examination conducted with that skill and vigor with which appellant's attorney is so well equipped. Every matter favorable to appellant's contentions has been brought out and developed both in the trial court and here on appeal.

[6] The character of the witnesses, their employment, the influences which surrounded them, and their interest in the result of the prosecution were with clarity and in detail laid before the triers of fact. Yet, notwithstanding all this, the jury believed the story of the prosecution and discredited that of the defense, and this with the sanction of the trial judge. Unless it is inherently improbable or bad, this court cannot reject the evidence for the state and decide the case upon the evidence for the defendant. There is nothing inherently improbable in the testimony that appellant surreptitiously disposed of a bottle of whisky. The docket of this court shows that it is not an uncommon thing for men to violate the liquor law. It is an oft-repeated speech of this court that the weight and credibility of testimony must be decided and any conflict in the evidence reconciled by the jury. The court is concerned with the admissibility of evidence in order to guard the jury against erroneous persuasions.

The artificial rules of procedure governing the admissibility of evidence, however, are not the ultimate object of judicial investigation. As Mr. Wigmore says, the procedural rules are devised as a mere preliminary aid to the main activity, viz. the persuasion of the jury's mind by safe materials. It is the proof, then, that assumes the important place in judicial investigation and relatively the most important place. It is upon the proof that the chief duty of counsel is focussed in contentious persuasion—mind to mind, counsel to juror, the state against the defendant—each partisan seeking to move the mind of the impartial tribunal. The judgment of a tribunal so constituted to try the fact, being the outgrowth of these conditions and nourished in such an atmosphere, is not, within its peculiar jurisdiction, lightly to be disregarded.

[7] Intoxicating liquor is considered a most

serious evil by the people of this state, and they have adopted most drastic measures to suppress it. Those who have any regard for their freedom and reputations must resist the temptation to engage in the traffic. Cases may be reversed in this court only where the record affirmatively shows error prejudicial to some substantial right of a defendant, and there is no such showing in this case.

Some assignments of error are made which have been carefully considered, but, in our judgment, they are without merit, and brevity forbids any particular discussion. Upon the whole case, the judgment must be affirmed; and it is so ordered.

ROSS and CUNNINGHAM, JJ., concur.

(19 Ariz. 371)

PRIESTLY v. STATE. (Cr. 436.)

(Supreme Court of Arizona. March 5, 1918.)

1. JURY \S 85 — IMPARTIALITY — DISCRETION OF TRIAL COURT.

Whether the existence of a state of mind on the part of a juror is such as will prevent him from acting with impartiality is ordinarily a matter which must be left largely to the wise discretion of the trial court.

2. CRIMINAL LAW \S 1152(2) — SELECTING JURORS—REVERSIBLE ERROR.

Where the exercise of the trial court's discretion in determining the impartiality of jurors is clearly erroneous, the appellate court is bound to interfere.

3. CRIMINAL LAW \S 1168½(6)—COMPETENCY OF JURORS—SERVICE IN SAME CASE.

In prosecution for an unlawful sale of intoxicating liquor, where the principal defense was the incredibility of the testimony of three detectives, whose testimony was relied on for a conviction and the credibility of defendant's impeaching witness, it was reversible error to compel defendant to select a jury from a panel, including five jurors who had a day or two before rendered a verdict of guilty against another defendant, charged with an illegal sale, in which the defense was the same, and in which the testimony of the same three detectives was relied on for a conviction, in view of Const. art. 2, § 1, providing that a frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government, and section 24, providing that in criminal prosecutions the accused shall have the right to trial by an impartial jury; defendant being forced, having exhausted his peremptory challenges, to accept a trial jury composed of a portion of the jury which sat in the first case.

4. JURY \S 97(1) — SELECTION — DUTY OF COURT.

It is the duty of the trial judge to see that an unbiased, unprejudiced, and impartial jury is selected in every case.

Appeal from Superior Court, Yavapai County; Frank O. Smith, Judge.

Stanley Priestly was adjudged guilty of a misdemeanor and appeals. Reversed, with directions to grant a new trial.

Robert E. Morrison and Allen Hill, both of Prescott, for appellant. Wiley E. Jones, Atty. Gen., and Geo. W. Harben and R. W. Krammer, Asst. Attys. Gen., for the State.

FRANKLIN, C. J. Stanley Priestly was adjudged guilty of a misdemeanor, and appeals. He was charged with selling intoxicating liquor to one C. J. Cooper, and asks a reversal of the judgment of conviction mainly upon the ground that he was not accorded a fair and impartial trial in the superior court.

The panel from which a jury was to be selected to try his case contained five men who, a day or two previously, had sat as jurors and rendered a verdict of guilty against the defendant in the case of State v. Larry Duff,¹ in which case the defendant was charged with selling intoxicating liquor to one R. H. Bryant. These men, Cooper and Bryant, are detectives, and, together with one S. E. Terry, were employed by Yavapai county to obtain evidence against those suspected of violating the liquor law. In this business Cooper, Bryant, and Terry were working together. It was on the testimony of these three detectives that the state relied for a conviction in each case. In the case of State v. Duff, the testimony of the prosecuting witness, Bryant, was corroborated by the testimony of Cooper and Terry, and in the case of State v. Priestly, the testimony of the prosecuting witness Cooper was corroborated by the testimony of Bryant and Terry. The main, if not the sole, defensive matter in both of these cases was the incredibility of the testimony of these three detectives, Bryant, Cooper, and Terry, and the credibility of the impeaching witnesses for the defendant. Except the names of the defendant, the evidence in each case was substantially the same and from the mouths of practically the same witnesses. According to the testimony, both Duff and Priestly were working as bartenders for Bob Birch in his place of business on Montezuma street in the city of Prescott. The character of Birch's establishment became an important issue in each case, and was the subject of a mass of testimony pro and con. The testimony for the prosecution discloses that each of the defendants sold intoxicating liquor disguised in ginger ale; that it was the plan or scheme of Birch and these defendants, concocted by them to evade the law, to dispose of intoxicating liquor in this kind of a disguise. The character of the place in which these defendants were thus employed, the kind of persons who frequented there and patronized it, and the conduct of the employes and such persons thereabouts, all this was gone into by the prosecution with much detail of circumstance. In each case, to throw light upon the particular charge being tried and to corroborate the testimony given to prove the specific sale for which a conviction was asked at the hands of the jury, other sales of a similar nature were testified to by the three detectives. So connected and mingled were these offenses and the circumstances related by the witnesses

that the trial of the case of Duff was practically a trial of the case of Priestly. Substantially the only difference in the two cases was the application of practically the same testimony by practically the same witnesses to different defendants. The conflict in the testimony for the state and that for the defendant, in each case was sharp. The defensive matter in both cases was almost wholly upon the weight and credibility to be given by the jury to the testimony of the respective witnesses. Timely exception was made to the disqualification of these five jurors to be upon the panel, and they were each challenged for cause. Counsel for defendant put upon the record before the trial court with clearness and in detail the similarity of the case of State v. Duff, which these jurors had tried, with the case of State v. Priestly, the trial of which they were entering upon. These jurors, however, notwithstanding the similarity of the cases and their conviction in the Duff Case upon practically the same evidence from the mouths of the same witnesses, were each emphatically of the opinion, in answer to questions put to them, that their knowledge of the Duff Case, together with their verdict under oath, would not influence them against Priestly, but that each could give Priestly a fair and impartial trial relieved from any conviction they may have entertained in the Duff Case. The challenges for cause were each overruled, and, after exhausting his peremptory challenges, appellant, Priestly, was forced to accept on the panel for the trial of his case a portion of the jury who had theretofore sat upon the previous case against Duff.

The Declaration of Rights in the Constitution of Arizona, art. 2, § 24, provides:

"In criminal prosecutions, the accused shall have the right * * * to have a speedy trial by an impartial jury."

[1, 2] This constitutional guaranty to persons accused of crime, that they shall have a fair trial by an impartial jury, inures to the benefit of every accused, irrespective of his guilt or condition in life. Whether the existence of a state of mind on the part of the juror is such as will prevent him from acting with entire impartiality is ordinarily a matter that must be left largely to the wise discretion of the trial court. But when the exercise of such discretion in a given case appears to be clearly erroneous under well-settled principles of law, the appellate court is bound to interfere.

[3] The first admonition found in our Constitution, art. 2, § 1, is that:

"A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."

The benign policy of the law that causes shall be submitted to tribunals indifferent as between the parties must not be frittered away in exposition, nor the operation of so just and fundamental a principle be nullified in the practical administration of justice,

however happy the breach in its observance may appear to those in any particular instance wherein a conviction would appear justifiable to such, though this fundamental right had been invaded. The right of trial by jury is justly dear to the American people. Our fathers brought the right to this country. They knew that men accused of crimes had been broken upon the wheel after being tortured into a confession at the rack. They and their forbears had experienced the practices of the Star Chamber and verdicts of guilty at the "Bloody Assizes" by a packed jury, with the brutal and odious Jeffreys upon the bench to serve, not justice, but a monarch ambitious for autocratic power. With these horrors fresh in mind, or not in a remote historical sequence, it is not to be wondered at that the basic principle sounded in the Great Charter as the "bulwark of English liberties" has become the very warp and woof of our institutions. That as a people we have watched with jealousy and deep concern any tendency to encroach upon or impair any of the essential elements of the trial by jury, viz. number, impartiality, unanimity. We know the blood and treasure it has cost to get and keep this birthright of every American, of every free man. Of the suffering and ignominy that has been endured for the want of it; of the evils tyranny and the lust of power have visited upon the weak and helpless who were without its protectingegis. Upon occasion, as individuals, we may feel some of that indifference to the sacredness of this institution which a long-continued possession and use are not unlikely to beget, and in such a mood speak half mockingly of the endearing words "bulwark," "palladium," etc., with which this great humane right has been enshrined in our language, to look upon such as mere ebullitions fitted for a Fourth of July oration. But, after all, each realizes the great importance of the trial by jury and the necessity for preserving it in its purity and dignity with none of its substantive attributes impaired.

I shall advert to the case of State v. Holt, 90 N. C. 749, 751, 47 Am. Rep. 544, 546, 547, for some observations of eminent men upon the subject. Said Merrimon, J.:

"Judge Story, in his Commentaries on the Constitution, thus points out its great purpose and the ends it suberves: 'Par. 1780. The great object of a trial by jury in criminal cases is to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter than the former. The sympathies of all mankind are enlisted against the revenge and fury of a single despot, and every attempt will be made to screen his victims. But how difficult is it to escape from the vengeance of an indignant people, roused to hatred by unfounded calumnies, or stimulated to cruelty by bitter political enmities, or unmeasured jealousies! The appeal for safety can under such circumstances scarcely be made by innocence in any other manner than by the se-

vere control of courts of justice, and by the firm and impartial verdict of a jury sworn to do right, and guided solely by legal evidence and a sense of duty. In such a course there is a double security against the prejudices of judges who may partake of the wishes and opinions of the government, and against the passions of the multitude who may demand this victim with their clamorous precipitancy. So long, indeed, as this palladium remains sacred and inviolable, the liberties of a free government cannot wholly fail. But to give it real efficiency, it must be preserved in its purity and dignity, and not with a view to slight inconveniences, or imaginary burthens, be put into the hands of those who are incapable of estimating its worth, or are too inert, or too ignorant, or too imbecile to wield its potent arm.

"It is scarcely to be supposed that in this country any serious danger could arise to the citizen or to the country generally from an open or flagrant violation of the fundamental right in question. Occasional instances have occurred in times of public danger and trouble wherein the citizen was deprived of his right to a trial by jury, and his life was unlawfully sacrificed, but such cases have been few, and have met with very general condemnation. A greater danger arises from practices and precedents that insidiously gain a foothold and power in courts of justice, by inadvertence and lack of due consideration. The great importance of trial by jury is sometimes lost sight of, even in courts of justice, in the disposition of petty misdemeanors, cases of no great moment, and what are called 'plain cases.' In the economy of time, the hurry of business, lack of attention, hasty consideration, irregular and unwarranted methods of trial are adopted, allowed, tolerated, and thus vicious practices spring up, creating sources of danger to constitutional right. It is the province and the duty of the courts to keep strict watch over and protect fundamental rights, in all matters that come before them. Those who administer the law should never forget that decided cases make precedents, precedents oftentimes of little moment in themselves, but which, in their accumulated power may, in some emergency, overturn principle and subvert the right of many people.

"Mr. Justice Blackstone, in commenting upon the great excellence of trial by jury, thus points out the evil to which we advert: 'So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolable, not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations, which may sap and undermine it by introducing new arbitrary methods of trial by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), yet, let it be again remembered that delays and little inconveniences in the form of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon the sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution, and that, though begun in trifles, the precedents may gradually increase and spread, to the utter disuse of juries, in questions of the most momentous concern.'"

[4] The tendency of legislation is to increase the dignity of the jury and lessen the power of the courts to influence or control their verdicts. It is indispensable, therefore, to the due administration of the law that this important right be carefully guarded. No higher duty rests upon the trial judge than to see that an unbiased, unprejudiced, and impartial jury should in every case be

provided. If jurors objectionable in the particulars here stated are permitted to serve, this case must become a precedent for others sure to follow, and thus the impairment of the right will insidiously gain such a foothold that the right itself would in time become the mere echo of a voice, a shadow, not substance, and as "idle as a painted ship on a painted ocean." These objectionable jurors are no doubt good men and representative citizens, perfectly conscientious in the belief they expressed of an ability to be indifferent between the state and the defendant, notwithstanding the knowledge they had obtained of the facts and witnesses in a court of justice where they had sat as jurors and given their verdict. So, too, the action of the learned trial judge, we are persuaded, was dictated by a proper sense of propriety and decorum. But the weakness and error in the ruling lay in the trial judge having that confidence in the ability of the jurors to be entirely impartial under the circumstances, which confidence the jurors had expressed, each in himself. Having passed upon the credibility of witnesses in a similar case upon substantially the same testimony, and having theretofore rendered a verdict on their oaths, it is not to be believed that they could sit upon this case with such an opinion previously formed without it influencing their action.

"Answers by these jurors to categorical questions, though doubtless intended to be truthful, are less convincing than the known nature and tendency of the human mind." State v. Hammon, 84 Kan. 137, 140, 113 Pac. 418, 419.

We quote from the syllabus to the case of Edgar v. State, 59 Tex. Cr. R. 488, 129 S. W. 140:

"In a prosecution for the unlawful sale of intoxicating liquors, where the principal matter of defense was an attack on the credibility of the prosecuting witness, it was error to compel the defendant to select a jury from a panel including six jurors who had previously sat in a similar case, in which almost the sole defensive matter was the credibility of the same prosecuting witness."

Other authorities may be consulted: Green v. State, 54 Tex. Cr. R. 3, 111 S. W. 933; Hardgraves v. State, 61 Tex. Cr. R. 422, 135 S. W. 144; People v. Mol, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 871, 4 Ann. Cas. 960; Boucher v. State, 4 Okl. Cr. R. 576, 111 Pac. 1006; Wickard v. State, 109 Ala. 45, 19 South. 491; Roberts v. State, 4 Ga. App. 378, 61 S. E. 497; 24 Cyc. 278, 279.

Other questions are raised which have been determined in the cases of Duff v. State, 171 Pac. 133, and Birch v. State, 171 Pac. 135, just decided, and therefore require no particular discussion.

Appellant, Priestly, was not accorded his right to a trial by an impartial jury within the constitutional provision. The case must be reversed, with direction to grant a new trial. It is so ordered.

ROSS and CUNNINGHAM, JJ., concur.

(24 N. M. 323)

MCBRIDE v. CAMPREDON. (No. 2092.)(Supreme Court of New Mexico. Jan. 28, 1918.
Rehearing Denied March 2, 1918.)*(Syllabus by the Court.)***1. BROKERS — 31—FAILURE TO PRESENT OFFER TO PRINCIPAL—SALE TO PURCHASER.**

A real estate broker, after finding a prospective purchaser of property at a given price, intrusted to him for sale, cannot, without disclosing the offer to his principal, purchase the property at a reduced price and sell the property to the purchaser at the enhanced price and retain the profit so realized.

2. MORTGAGES — 294 — EQUITY OF REDEMPTION—PURCHASE BY MORTGAGEE.

While the law will permit a mortgagee to purchase the equity of redemption of a mortgagor, yet to give validity to such a sale it must be shown that the conduct of the mortgagee was in all things fair and frank, and that he paid for the property what it was worth.

Appeal from District Court, Socorro County; Mechem, Judge.

Action by Millard F. McBride against Julius Campredon. Judgment for plaintiff, and defendant appeals. Affirmed.

M. C. Spicer, of Socorro, for appellant. Nicholas & Nicholas and A. R. Macdonell, all of Socorro, for appellee.

ROBERTS, J. This suit was brought by appellee to recover the sum of \$300 alleged to be due from appellant by reason of the sale of certain ranch property owned by appellee. Trial was had in the district court of Socorro county, and the court, after making certain findings of fact and stating conclusions of law, entered its judgment for \$300 in favor of appellee and against appellant, from which judgment this appeal is prosecuted.

Appellant has stated 12 assignments of error which he discusses under several different points, based upon findings of fact made by the court and requested findings refused, and conclusions of law stated. It is not necessary to set forth in detail the points discussed. We shall state the facts as they appear to us from a careful review of the evidence, and apply the principles of law applicable to such facts, which, when so done, will dispose of all meritorious questions presented by appellant. The facts are as follows:

In June, 1915, appellee was the owner of a possessory right to certain unsurveyed government land, together with improvements thereon. At this time he was indebted to the Chambon estate, which was operating a general store of which appellant was the general manager. Appellant had also become his surety on certain promissory notes in the sum of \$300 or \$400, and appellee also owed appellant, individually, certain sums of money. The total indebtedness owing by

appellee to appellant, and for which he was surety, amounted to probably between \$1,000 and \$1,200. To secure appellant for becoming surety on the notes to the bank and the other indebtedness owing to appellant and the Chambon estate, appellee executed and delivered to appellant a quitclaim deed for his possessory rights to the unsurveyed government land and to the improvements thereon and certain personal property. At the time of making the deed appellant gave to appellee a contract signed by him, by which he agreed to reconvey the premises to appellee upon the payment of the indebtedness secured thereby within one year from the date of the execution of the deed. All parties agree that the deed, while absolute on its face, was, in legal effect, a mortgage.

At the time of the execution of the deed appellee says in his testimony that appellant agreed with him that the premises therein described were of the value of \$2,500, and that appellee should endeavor to make a sale of the same for such sum, and that he (appellant) would undertake to assist appellee in bringing about such sale. That he so agreed to undertake to assist appellee in making the sale is not denied by appellant in his testimony.

In September or October a Mr. Cox was desirous of purchasing a place for a cattle ranch. He had had some conversation with a man named Taylor prior thereto relative to appellee's ranch. At the time in question a certain real estate agent in Socorro, named Bunton, had made an agreement with McBride, appellee, that he would undertake to find a purchaser for the possessory claim and improvements in question. Bunton saw appellant and talked with him relative to his agreement with McBride to find a purchaser, and told appellant that as he held the legal title he would not undertake to find a purchaser unless appellant would agree to pay him his commission. This, he says, appellant agreed to do. Thereafter Bunton took Cox to see the McBride ranch and improvements. They saw appellee and talked with him about the sale, and offered him \$1,800 for the possessory claim and improvements, which appellee refused to accept. Before returning to Socorro they visited a neighbor of appellee's, a man named Taylor. Taylor was on very intimate terms with appellee, and told Bunton and Cox that if they wanted to buy the ranch they should let him buy it for them. He said he thought he could buy the ranch for \$1,800. Either at Taylor's ranch or after the parties reached Socorro Cox gave a blank check to Taylor, signed by himself, with instructions to fill in the amount of \$200 and the name of the payee in case he was able to buy the ranch for \$1,800. Taylor accompanied Bunton and Cox to Socorro, and Cox and Taylor talked to appellant relative to the proposed pur-

chase of the property by Cox. Appellant and Taylor went to the McBride place to see him relative to the sale of the ranch. While possibly there is no direct evidence of the fact that appellant knew that Taylor had the blank check and was authorized to pay \$1,800 for the possessory claim and improvements, all the facts and circumstances in evidence go to show that he had such knowledge. Taylor and appellant failed to find McBride at home, and appellant returned to Socorro with instructions to Taylor to see appellee at once, and tell him that appellant was willing to pay him \$1,500 for his possessory claim and improvements. Taylor saw appellee and informed him of appellant's willingness to pay him the sum of \$1,500 for his claim and improvements, but did not tell him that Cox was willing to pay \$1,800 for the ranch, or that he had the check for \$200 with which to make the first payment. Taylor also told appellee that it was to his interest to sell the ranch to appellant; that if he did not sell it at that time a judgment owned by a man named Montoya would take his equity of redemption, and Taylor also made other statements to him relative to some government scrip which he had purchased. Appellee accompanied Taylor to Socorro, and the two men visited appellant, and appellant agreed to pay appellee the sum of \$1,500 for the ranch property, deducting from such sum the indebtedness secured by the deed, and to pay the balance in cash. Appellee agreed to accept the offer, and \$50 was paid in cash at that time, and the indebtedness was liquidated by appellant, and later the balance due appellee, amounting to \$300, was paid by appellant by check. No new deed was executed by appellee, but it was agreed between the parties, orally, that the equity of redemption should be surrendered by appellee, and that the former deed should pass fee-simple title to appellant. A short time afterwards Taylor delivered to appellant Cox's check for \$200, and later, when Cox returned to Socorro, appellant delivered to him a quitclaim deed, Cox's wife being named as grantee, to the possessory claim and improvements, and received from Cox the balance of the purchase price, amounting to \$1,600. Appellant and Taylor divided the profit of \$300 equally. Some two or three months later appellee discovered the deception that had been practiced upon him, and instituted this action to recover the sum of \$300, being the difference in amount between the sum paid by appellant and the amount for which appellant sold the premises.

[1] The judgment of the district court awarding appellee a recovery of said sum of \$300 was correct upon either of two theories. When appellant undertook with appellee at the time of the execution of the deed in question to assist appellee in making a sale of the premises, the relationship of principal

and agent came into existence, and appellant was bound to observe the utmost good faith toward his principal in dealing with the property in question. A real estate broker, after finding a prospective purchaser of property at a given price, intrusted to him for sale, cannot, without disclosing the offer to his principal, purchase the property from the principal at a reduced price and sell the property to the purchaser at the enhanced price and retain the profit so realized. The law will not countenance such a breach of fair dealing. *Craig v. Parsons*, 22 N. M. 293, 161 Pac. 1117. In 2 C. J. 706, it is said:

"As a general rule an agent is not permitted to enter into any transaction with his principal on his own behalf respecting the subject-matter of the agency, unless he acts with entire good faith and without any undue influence or imposition, and makes a full disclosure of all the facts and circumstances attending the transaction."

See, also, 2 *Mechem on Agency*, § 2411.

Here, prior to the transaction in question, appellant had refused to purchase the property from appellee, and had stated that he did not want it at any price, but that he would help appellee sell it, and apparently was endeavoring to do so, because he agreed with Bunton that he would pay him a commission if he would effect a sale. When he discovered, however, that Cox was willing to pay \$1,800 for the property, and that Taylor had in his possession a check for \$200 which he could turn over to appellant, and thereby assure him that the sale would be completed, without disclosing the facts to his principal, he induced him by questionable means to surrender to him the equity of redemption for the sum of \$1,500. Clearly he had no right to retain the profit under the principles discussed.

[2] But assuming, for the sake of argument, that appellant was not the agent of appellee, and that the principle applicable to such relationship did not apply, yet the judgment of the court is nevertheless sustainable. Appellee was induced to surrender to appellant his right of redemption to the property in question by undue influence and by unconscionable advantage taken of appellee by appellant. Taylor was intrusted by appellant with the duty of communicating to appellee his offer of \$1,500 and inducing the appellee to accept the offer, with an understanding between Taylor and appellant that they would divide the profits should they succeed in inducing appellee to surrender his equity of redemption. Taylor represented to appellee that, unless he sold to appellant at once at the price offered, he would lose his equity of redemption under a judgment which had either been taken or was about to be taken against him; also that he might have trouble with the United States government, or other parties, over some scrip transaction. While the law will permit a mort-

gagagee to purchase the equity of redemption of a mortgagor, yet to give validity to such a sale it must be shown that the conduct of the mortgagee was in all things fair and frank, and that he paid for the property what it was worth. As stated in *Villa v. Rodrigues*, 12 Wall. 323, 20 L. Ed. 406:

"He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved require that such should be the law."

See, also, *Wagg v. Herbert*, 19 Okl. 525, 92 Pac. 250; 27 Cyc. 1374. In the case of *Cassem v. Heustis*, 201 Ill. 208, 66 N. E. 283, 94 Am. St. Rep. 160, the court said:

"This court has held, it is true, that, where an absolute deed of land is given as security for an indebtedness, a bona fide agreement may be made between the mortgagee and the mortgagor, by the terms of which the equity of redemption of the mortgagor may be extinguished and the entire estate vested in the mortgagee, but such an agreement for the extinguishment of the equity of redemption will never be sustained, unless the transaction is fair and unaccompanied by any oppression or fraud or undue influence. A court of equity will never allow the mortgagee to avail himself of his position to obtain an advantage over the mortgagor by securing such an agreement for the vesting of the entire estate in himself. Contracts between the mortgagor and mortgagee for the purchase or extinguishment of the equity of redemption are always regarded with jealousy by courts of equity. *West v. Reed*, 55 Ill. 242; *Seymour v. Mackay*, 126 Ill. 341 [18 N. E. 552]; *Scanlan v. Scanlan*, 134 Ill. 630 [25 N. E. 652]. In order to determine whether such a contract for the extinguishment of the equity of redemption, if it exists, is or is not fair and just to the mortgagor, the relations between the parties will be inquired into. *Sutphen v. Cushman*, 35 Ill. 186; *Conant v. Riseborough*, 139 Ill. 390 [23 N. E. 789]; *Burton v. Perry*, 146 Ill. 71 [34 N. E. 60]."

See, also, *Lynch v. Ryan*, 132 Wis. 271, 111 N. W. 707, 112 N. W. 427. In this case appellant having parted with the legal title and the purchaser not having notice of the fraud practiced upon appellee, clearly appellant is liable to appellee for the profits realized by him in the transaction.

For the reasons stated, the judgment of the court awarding appellee a recovery of the profits made by appellant was right, and its judgment will be affirmed; and it is so ordered.

PARKER, J., concurs. **HANNA, C. J.**, being absent, did not participate.

(24 N. M. 314)

BUNTON v. CAMPREDON. (No. 2091.)
(Supreme Court of New Mexico. Jan. 28, 1918.
On Motion for Rehearing, March 2, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §1010(1)—FINDINGS OF COURT.

Findings of fact by the court, sitting as a jury, will not be disturbed, if supported by substantial evidence.

2. FRAUDS, STATUTE OF §23(4)—DEBT OF ANOTHER—"ORIGINAL PROMISE OR UNDERTAKING."

A promise to pay for services rendered to a third person at the promisor's request is an original undertaking, not within the statute of frauds.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Original Promise; Second Series, Original Undertaking.]

3. BROKERS §53—COMMISSION—SUFFICIENCY OF SERVICES.

It is not the broker who first speaks of property, but the broker who is the procuring cause of the sale, be he the first or the second who engaged the attention of the purchaser, who is entitled to the commission.

On Motion for Rehearing.

(Additional Syllabus by Editorial Staff.)

4. FRAUDS, STATUTE OF §23(1)—DIRECT OR COLLATERAL PROMISE—CONSTRUCTION.

Whether a promise is a direct or collateral undertaking does not depend solely upon the words used in making the promise or upon the form of expression, but upon the words, the situation of the parties, and the circumstances of the transaction, the question being whether the parties understood the language as being a collateral or a direct promise.

Appeal from District Court, Socorro County; Mechem, Judge.

Suit by W. B. Bunton against Julius Campredon. Judgment for plaintiff, and defendant appeals. Affirmed.

M. C. Spicer, of Socorro, for appellant. Nicholas & Nicholas, of Socorro, for appellee.

ROBERTS, J. Appellee sued appellant for \$90, alleged to be due as a commission for effecting the sale of certain real estate. He recovered judgment for this amount, to review which appellant prosecutes this appeal.

M. F. McBride had a possessory claim to certain unsurveyed government land upon which land he had erected fences, houses, and other improvements. He was indebted to the Chambon estate, of which appellant was general manager, and appellant had become McBride's surety upon certain notes executed by McBride. He had also loaned McBride certain other moneys. To secure the indebtedness owing the Chambon estate and his liability to appellant, he executed to appellant a quitclaim deed to his possessory claim and improvements, and took back from appellant a written agreement that he should have the right to redeem the land at any time within one year from the date of the deed. In other words, the deed was to have the effect of a mortgage. The deed was

made some time in June, 1915. In September appellee entered into a written contract with McBride, by which he undertook to find a purchaser for the possessory claim and improvements as a real estate broker. Later, in going through the records in the county clerk's office, appellee discovered the quitclaim deed made to appellant by McBride. At this time appellee met Berry Cox, learned that he desired to purchase a cattle ranch, and found that it would probably suit him. The McBride ranch was located some distance from Socorro, and it was necessary to hire an automobile in order to take Cox out to the ranch. Appellee knew nothing of the agreement between appellant and McBride to the effect that the deed was to be a mortgage. He called on appellant and told him that he had made an agreement with McBride, and that he had a prospective purchaser for the ranch; but in view of appellant's quitclaim deed to the property, he would not take the prospective purchaser out to the ranch, and trust to McBride's paying his commission. Thereupon appellant told appellee to go ahead and consummate the sale if possible, saying, "And if you make the sale I will pay the commission." Thereupon appellee hired an automobile and took Cox to see the ranch. Cox was well satisfied with it, and offered McBride \$1,800 for the place. McBride refused to sell at that price. Appellee and Cox, on the return trip to Socorro, stopped at Jim Taylor's house. Taylor was a neighbor to McBride, and had told Cox some time before that the McBride place was for sale. The parties told Taylor of their negotiations with McBride, and Taylor stated that if they wanted to buy the McBride place they should have come to him; that he could get him to sell it. Taylor accompanied appellee and Cox to Socorro, and Cox gave Taylor a blank check with his name signed to it, and authorized him to fill in the check for \$200 in case he was able to effect the purchase of the McBride holdings. The parties called on appellant and told him about the negotiations, and appellant and Taylor arranged to go out to the McBride ranch. Cox left Socorro; Taylor and appellant went to the McBride place, and failed to see McBride, who was absent. Appellant authorized Taylor to say to McBride that appellant was willing to pay him \$1,500 for the ranch, and told Taylor that if he could buy the ranch for this sum he would divide the profits with him, on the sale to Cox. Appellant returned to Socorro and Taylor, within the next day or two, saw McBride, and told him of appellant's offer, and advised him to let appellant have the place, telling him that if he did not do so a judgment obtained, or about to be obtained, by a man named Montoya would exhaust his equity in the place, and also telling him of certain trouble which he might have with the federal authorities relative to some scrip.

McBride agreed to accept the offer and accompanied Taylor to Socorro, where the parties visited appellant, and appellant's offer was accepted by McBride, and an oral agreement was made by which McBride surrendered his equity in the property. Appellant paid McBride \$50 in cash, canceled his indebtedness, and a month or two later paid him the balance in cash. On the same day, or shortly thereafter, Taylor delivered to appellant Cox's check for \$200, and later, when Cox returned to Socorro, he paid appellant the balance of the purchase price of \$1,600, and took a deed from appellant to the property in the name of his wife.

The trial court found that appellee had effected the sale of the property to Cox, and that he was entitled to recover a commission on such sale from appellant, and that \$90 was a reasonable commission.

Appellant's first contention is that findings of fact numbered 6, 7, and 9, adopted by the court, are not supported by substantial evidence.

As to the sixth finding, it is contended that there is no evidence to support that part thereof which found that Jim Taylor was acting as the agent of appellant in attempting to make a sale of the McBride ranch, and that McBride agreed to sell the property for the sum of \$1,500, understanding at the time he did so that Cox was purchasing it. Appellant's own testimony, however, shows clearly that Taylor was acting for him and under his directions in the negotiations with McBride.

As to the second contention, McBride testified positively that he understood the ranch was being sold to Cox by appellant, for him.

The seventh finding was that, in pursuance of negotiations theretofore had, a deed was executed by appellant to one Texanna Cox, the wife of said Berry Cox, for a consideration of \$1,800, which was paid either by said Texanna Cox or her husband to appellant. This finding is clearly supported by the evidence. In fact there is no evidence to the contrary.

[1] By the ninth finding of fact the court found that 5 per cent. of the amount realized on the sale was a reasonable amount for the services rendered by appellee. This finding is supported by the direct and uncontradicted evidence of appellee. Findings of fact by the court, sitting as a jury, will not be disturbed, if supported by substantial evidence. *Richardson v. Pierce*, 14 N. M. 334, 93 Pac. 715; *Eagle Mining Co. v. Hamilton*, 14 N. M. 271, 91 Pac. 718; *Hancock v. Beasley*, 14 N. M. 239, 91 Pac. 735; *Candelaria v. Miera*, 13 N. M. 360, 84 Pac. 1020; *Ortiz v. Bank*, 12 N. M. 519, 73 Pac. 529; *Carpenter v. Lindauer*, 12 N. M. 388, 73 Pac. 57; *Rush v. Fletcher*, 11 N. M. 555, 70 Pac. 559.

It is next contended that the court erred in refusing to adopt appellant's requested findings of fact numbered 4 and 5. Requested finding numbered 4 was to the effect that

James Taylor had been negotiating with Berry Cox prior to October 10, 1915, for the sale of the McBride ranch to the said Cox, and succeeded in getting appellant to purchase the McBride ranch, which purchase was made by appellant on or about October 14 or 15, 1915, at the agreed price of \$1,500; and the fifth finding of fact was to the effect that Taylor thereafter negotiated the sale of said ranch from appellant to Berry Cox for the price of \$1,800. As to the fourth requested finding, it is sufficient to say that appellant himself testified that Taylor was acting for him in making the deal with McBride, and the court did not err in refusing to find to the contrary. The fifth finding of fact requested by appellant was properly refused by the court. The evidence of Cox is to the effect that the blank check was given to Taylor as a first payment on the ranch on the day after Cox and Bunton went out to the ranch, on or about October 11, 1915, three or four days prior to the sale which appellant claims was made to him by McBride. Appellant's testimony shows that he knew Taylor had this check in his possession before he "purchased" the ranch from McBride.

[2] It is next contended that the oral agreement between appellee and appellant, whereby appellant agreed to pay appellee's commission if he sold the McBride property to Berry Cox, is within the prohibition of the statute of frauds and void. The agreement, however, was not an undertaking to answer for the debt, default, or miscarriage of McBride. It was a direct undertaking on the part of appellant to pay the commission. A promise to pay for services rendered to a third person at the promisor's request is an original undertaking, not within the statute of frauds. *Sinclair v. Bradley*, 52 Mo. 180; *Brown v. George*, 17 N. H. 128; *Hazeltine v. Wilson*, 55 N. J. Law, 250, 26 Atl. 79; *Black v. White*, 13 S. O. 37; *Lyons v. Daughtery* (Tex. Civ. App.) 26 S. W. 146; *Arbuckle v. Hawks*, 20 Vt. 538. See, also, 20 Cyc. 180. Appellant contends that if the promise was an original undertaking, there was no consideration to support it, but this is clearly without merit.

[3] Appellant's fourth proposition is that appellee failed to procure a purchaser for the property upon terms acceptable to McBride. This point is without merit. While McBride, upon the first visit did refuse to accept the offer made by Cox, he was induced to accept it by representations made to him by Taylor, and later did so. Appellant contends that Taylor had been employed by McBride as agent to sell the property, and that he was the procuring cause of the sale. This contention is, however, not supported by the evidence. It is not the broker who first speaks of the property, but the broker who is the procuring cause of the sale, be he the first or second, who engaged the attention of the purchaser, who is entitled to the com-

mission. *Patten v. Willis*, 134 Ill. App. 645, 9 C. J. 618.

Finding no error in the record, the judgment will be affirmed; and it is so ordered.

PARKER, J., concurs. HANNA, C. J., being absent, did not participate.

On Motion for Rehearing.

ROBERTS, J. Appellant has filed a motion for rehearing, and presents one point only which requires further discussion. He insists that the court, in passing upon the question raised in appellant's brief that the oral agreement between appellant and appellee was an undertaking to answer for the debt, default, or miscarriage of McBride and was within the statute of frauds, failed to consider the findings made by the court; that such findings show appellant's promise was a collateral undertaking. The court found, among other things:

"Defendant at said time agreed orally to protect plaintiff in his commission on the sale of the McBride ranch if he (plaintiff) made a sale thereof to Berry Cox."

This, appellant argues, is a direct finding that the oral agreement was a collateral undertaking, and it must be conceded that the finding, standing alone, lends support to appellant's contention. The findings, however, are to be construed together, and in other findings made by the court the situation of the parties was found and all the facts in the case fully set forth.

[4] The question as to whether a promise is a direct or collateral undertaking is not solely dependent upon the words used, but is to be ascertained from the words used in making the promise, the situation of the parties, and all the circumstances surrounding the transaction. The character of the promise does not depend wholly upon the form of expression, but largely upon the situation of the parties, and the question always is what the parties actually understood by the language, whether they understood it to be a collateral or a direct promise. *Davis v. Patrick*, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826. In a note to the case of *Mankin v. Jones*, 15 L. R. A. (N. S.) 214, the author says:

"This intention should be gathered from the entire transaction, and will control regardless of the language used in creating the obligation."

In the present case the findings made by the court, relied upon by appellant, were not justified by the language used by either party, as shown by the testimony. Appellee testified that appellant said that he would pay the commission, while appellant's testimony was to the effect that he would see that the commission was paid. The court, after setting forth its findings and all the material facts relative to the situation of the parties, gave judgment for appellee, which could only have been done upon the assumption that the promise was a direct undertaking. We think the

surrounding facts and circumstances justified the court in concluding that the promise to pay was a direct undertaking, for which reason the former opinion will be adhered to, and the motion for rehearing will be denied.

HANNA, C. J., and PARKER, J., concur.

(51 Utah, 480)

RUPING v. OREGON SHORT LINE R. CO.
(No. 3112.)

(Supreme Court of Utah. Feb. 9, 1918.)

1. EVIDENCE ⇨507—EXPERT—MATTER OF COMMON KNOWLEDGE.

That railway spike heads will fly off when struck too hard or when struck a slanting blow is so self-evident that it was error to admit expert testimony to that effect.

2. APPEAL AND ERROR ⇨1050(1)—HARMLESS ERROR—EVIDENCE.

Such error was not alone sufficient to require reversal.

3. MASTER AND SERVANT ⇨279(8)—NEGLIGENCE—EVIDENCE.

In section hand's action for loss of eye when hit by head of spike driven by fellow servant, evidence held insufficient to show negligence of the master or fellow servant.

4. MASTER AND SERVANT ⇨280—ASSUMPTION OF RISK.

In section hand's action for loss of eye when hit by head of spike driven by fellow servant, evidence held to show that the injury was one usually incident to the service, and the risk of which was assumed by plaintiff.

Appeal from District Court, Salt Lake County; George F. Goodwin, Judge.

Action by C. W. Ruping against the Oregon Short Line Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, and new trial granted.

Geo. H. Smith, J. V. Lyle, and B. S. Crow, all of Salt Lake City, for appellant. Willard Hanson, of Salt Lake City, for respondent.

GIDEON, J. The plaintiff instituted this action to recover compensation for injuries alleged to have been sustained by the negligence of the defendant on or about July 21, 1916. The negligence alleged is that, while the plaintiff and other workmen of the defendant were engaged in driving spikes on defendant's railroad at or near Nyssa, Ore., one of the employes of said defendant carelessly struck and drove one of the spikes, hitting the same with such force that the head of the spike was knocked off and flew and hit plaintiff in the eye, causing the loss of the eye and otherwise injuring plaintiff. It is further alleged that at the time the plaintiff was engaged in interstate commerce. Defendant in its answer admits the employment of the plaintiff at the time mentioned, and that he was engaged in the work stated, admits that certain injuries were received by plaintiff, but denies the negligence of defendant. As a further defense it alleged

that whatever injuries were received were caused by the carelessness and negligence of plaintiff, and that the cause of such injuries was directly contributed to by the negligent acts and omissions of plaintiff, and that they were in no way caused or contributed to by the negligence of defendant; that the injuries and accident causing the same were the result of dangers usually and ordinarily incident to the service and employment in which plaintiff was engaged; that the said dangers were open to plaintiff's observation, and known to and appreciated by him, or could have been known to and appreciated by him by the exercise of ordinary care; that whatever injuries were received were the result of the acts and negligence of a fellow servant of the plaintiff. On the issues thus made, trial was had before the court and a jury, resulting in a verdict for plaintiff. The defendant appeals.

It appears from the record that the plaintiff and one Caccia were repairing defendant's railroad track as section men and were, on the day in question, tightening or driving spikes which held the rails to the ties. Such spikes, at the place where the plaintiff was working, had become loosened, were pulled out, and standing, some one-half and others an inch or less, above the tie. It was the duty of plaintiff and his co-workers to tighten or drive the spikes so that the heads would come in contact with the rails and hold the same in place. Some ten minutes prior to the accident complained of, plaintiff's fellow workman, Caccia, had so struck a spike that part of the head thereof was knocked off and passed immediately under plaintiff's chin. At that time plaintiff cautioned Caccia to strike the spike a direct blow so that in hitting it he would not strike the spike too hard or in a glancing manner. After having explained to his fellow workman how to drive the spike plaintiff, as stated by him, "kind of watched him there for a few licks, then I started in too. * * * He done it fine." Plaintiff then returned to his work, and was about one-half rail length distant from Caccia when the accident occurred. Plaintiff further testified that at the moment of receiving the blow or instantly thereafter Caccia said, "I did it wrong."

It is admitted on the part of defendant that the plaintiff was engaged in interstate commerce at the time of the injury. This action is therefore prosecuted under the federal Employers' Liability Act.

During the trial an experienced railroad man, one familiar with railroad construction, laying track, etc., was permitted to testify on behalf of the plaintiff as an expert as to the right or proper method to use in driving railroad spikes. At the close of plaintiff's testimony defendant moved the court for a nonsuit, basing that request on the ground that no negligence either of the de-

fendant or its employé had been shown, which motion was overruled by the court.

At the close of the case defendant requested an instruction directing a verdict in his favor, claiming that the injury was the result of the usual and ordinary risk incident to the service in which plaintiff was engaged. The court refused to give that instruction. The admission of the expert testimony, the refusal of the court to grant a nonsuit, and the refusal of the court to direct a verdict in defendant's favor, are all assigned as error.

[1, 2] In effect, the testimony of the expert on behalf of the plaintiff, as well as that offered in rebuttal on the part of the defendant, was that the right and proper way to drive spikes is by a direct and square blow on the head. That is a matter that is self-evident, and any ordinary man would know that as a matter of common knowledge, and is not a question upon which reasonable men would differ. That spike heads or parts thereof are liable to break off even if struck a direct blow is also self-evident. The court for that reason erred in overruling defendant's objection to that testimony. However, that alone would not be sufficient to order a reversal of the case. The further assignments that no negligence was shown on the part of the defendant or its employé, and that the injury was the result of the risk ordinarily incident to the service in which the plaintiff was engaged, are the controlling questions presented on this appeal. It is the contention of the appellant that there is nothing in the testimony showing negligence on its part or on the part of its employé. That the mere fact that the head of the spike flew off and struck plaintiff did not constitute negligence; that in the ordinary manner of doing work of that nature such accidents are likely to happen and do happen without any negligence either on the part of the employer or the employé; that it is likely to happen at any time with the most careful workman, and for that reason is one of the ordinary or usual risks incident to that particular employment. It is further contended that it is a physical impossibility to expect any one in driving railroad spikes, however careful or competent, to at all times strike them a direct blow, and that, even if that were possible, the heads or parts of the same are likely to and do break off and are thrown at times away from the place where the spike is being driven, and any one working near is liable to be injured. It is not claimed that defendant was negligent in employing an unskilled workman. Respondent insists, as I understand his contention, that his fellow workman Caccia struck the spike at the time

of the injury a glancing and heavy blow, and that by reason thereof the head flew off and caused the injury, that to drive the spike in place no such force was required and that it was negligence on the part of plaintiff's fellow workman to so strike the spike, and that it was negligence for which the employer is liable. As indicated, the only direct or affirmative testimony tending to show negligence on the part of the defendant or its employé is the statement of the fellow workman, Caccia, at the time of or immediately after the happening of the accident, that "I did it wrong." In his further testimony he stated that he did not know whether he struck the spike a direct or glancing blow; that he tried to strike it right or directly on the head.

[3, 4] All the members of this court agree that the district court erred in the admission of the so-called expert testimony. The majority agree that the court should have granted the motion of the defendant for a nonsuit for the reasons stated by appellant, and that at the close of the testimony the court should have granted the defendant's request for a directed verdict for the reasons assigned, namely, that the injury was the result of the ordinary or usual risk incident to that employment, and a risk assumed by the plaintiff when he entered that employment and continued therein.

The writer is of the opinion that there is testimony in the record tending to show that the injury was caused by the negligence of a fellow servant, slight as that testimony may be, that, even if it be admitted that the employment is inherently dangerous, and that accidents may happen and do happen in doing such work in a careful manner, nevertheless, when there is testimony showing or tending to show that the injury resulted, not from the inherent danger of the employment or method or manner of doing the work, but from the negligence of a fellow servant in pursuing that particular method or manner, that it is then a question to be submitted to the jury. *C. & O. R. R. v. Proffit*, 241 U. S. 468, 469, 36 Sup. Ct. 620, 60 L. Ed. 1102.

But, as stated, it is the unanimous judgment of the other members of the court that the contentions of the appellant should prevail and the case must therefore be reversed and a new trial granted. There are other assignments of error which, in view of the conclusion reached, it is unnecessary to consider.

Reversed and remanded, and a new trial granted. Neither party to recover costs on this appeal.

FRICK, C. J., and McCARTY, CORFMAN and THURMAN, JJ., concur.

(51 Utah, 500)

TAYLOR v. PALOMA GOLD & SILVER MINING CO. (No. 3075.)

(Supreme Court of Utah. Feb. 14, 1918.)

1. APPEAL AND ERROR ¶665 — RECORD — ABSTRACT—BILL OF EXCEPTIONS.

Where the printed abstract showed an extension of time to file a bill of exceptions, and such statement was challenged, the court must examine the record to determine whether the bill was in fact filed as stated within the required time.

2. APPEAL AND ERROR ¶511(3)—JUDGMENT ROLL—WHAT CONSTITUTES.

An unsigned order purporting to extend the time for filing a bill of exceptions is not a part of the judgment roll, and cannot be considered for any purpose when it appears in the judgment roll alone. *Dayton v. Free*, 46 Utah, 277, 148 Pac. 408; *Hutchison v. Smark*, 169 Pac. 186; *Swanson v. Sims*, 170 Pac. 774.

3. APPEAL AND ERROR ¶511(3)—SCOPE OF REVIEW—RECORD—SUFFICIENCY.

Orders extending time for filing bill of exceptions are of no force or effect unless properly certified by the trial court as a part of the bill of exceptions.

4. APPEAL AND ERROR ¶662(1)—SCOPE OF REVIEW—RECORD—BINDING EFFECT.

In determining whether the bill of exceptions has been filed within the required time, the court on appeal is bound by what the record shows in regard thereto.

5. APPEAL AND ERROR ¶671(1)—SCOPE OF REVIEW—RECORD—SUFFICIENCY.

Where the record affirmatively shows that bill of exceptions was not filed within the time originally specified, and no valid order extending the time appears, the appeal must be considered on the judgment roll alone.

6. APPEAL AND ERROR ¶907(3)—SCOPE OF REVIEW — RECORD—SUFFICIENCY—PRESUMPTIONS.

In the absence of proper bill of exceptions the court must presume that the evidence justified the findings, and the findings must be sustained.

Appeal from District Court, Salt Lake County; F. C. Loofbourow, Judge.

Suit by S. H. Taylor against the Paloma Gold & Silver Mining Company. Judgment for defendant, and plaintiff appeals. Affirmed.

W. R. Hutchinson, of Salt Lake City, for appellant. Walton & Walton, of Salt Lake City, for respondent.

FRICK, C. J. Plaintiff commenced this action to compel the defendant a mining corporation, to transfer upon its stock books certain shares of the capital stock of said corporation, of which he claimed to be the owner, and to issue to him new stock certificates for the ones which he presented for transfer. The defendant in its answer denied that plaintiff was the owner of said stock, and also interposed affirmative defenses in which it averred that the plaintiff never obtained title to said stock; that he obtained the same unlawfully; and further pleaded that the plaintiff and defendant had fully compromised and settled plaintiff's claim to said stock and that for that reason he was not entitled thereto.

In other words, the defendant pleaded an accord and satisfaction respecting plaintiff's claim to said stock. Plaintiff filed a reply in which he reiterated his right and title to the stock; admitted the settlement and accord and satisfaction set forth by the defendant, but averred that the same was obtained by fraud and duress and was not binding.

Upon substantially the foregoing issues a trial to the court resulted in findings of fact in favor of the defendant upon all the issues, including the alleged accord and satisfaction and the fraud and duress pleaded by the plaintiff. Judgment was accordingly entered in favor of the defendant, and the plaintiff appeals.

All the assignments of error, except two, assail the findings of fact, and the two referred to assail the correctness of the conclusions of law and judgment. This requires us to examine into the evidence. The defendant challenges our right to do that for the reason that plaintiff's proposed bill of exceptions was not served, settled, and allowed within the time required by our statute. The defendant has filed a motion to strike the bill for the reason just stated.

[1, 2] The record shows that the motion for a new trial was denied December 30, 1916. The record also shows that the same was denied while plaintiff's counsel was present in court and that he at that time, and as a part of the order denying the motion for a new trial, obtained the following order: "Plaintiff is given 30 days in which to prepare, serve, settle, and file his bill of exceptions herein." That order gave the plaintiff until the 30th day of January, 1917, in which to do the things specified therein. The bill of exceptions was, however, not served until the 3d day of April, 1917, and was not settled and allowed by the court until the 18th day of April, 1917. We take notice of the order overruling the motion for a new trial merely because by Comp. Laws 1907, § 3197, as amended by chapter 94, Laws Utah 1911, p. 136, such an order is made a part of the judgment roll. Counsel for plaintiff, in his printed abstract, states: "Orders extending time to prepare, serve, and file bill of exceptions entered January 27 and March 24, 1917." Such a statement in the printed abstract, unless challenged by the adverse party, would ordinarily be considered as sufficient. Where, however, the adverse party challenges the correctness of such a statement, we are required to examine into the record to determine whether the bill of exceptions was in fact settled and allowed within the time required by our statute. As counsel states in the abstract, there is inserted in what purports to be the judgment roll a pretended order extending the time to prepare and file plaintiff's bill of exceptions. That order is, however, not a part of the judgment roll and we cannot consider it for any purpose. Day-

ton v. Free, 46 Utah, 277, 148 Pac. 408; Hutchison v. Smart, 169 Pac. 166; Swanson v. Sims, 170 Pac. 774.

[3] The record in this case, in and of itself, is strong, if not conclusive, evidence that the rule in the foregoing cases is sound and should not be departed from. The order which it is claimed was made on the 27th day of January, 1917, is not signed by any one nor filed in any case, and is not authenticated in any way. Any person could at any time insert such an order among the papers which, under section 3197, supra, constitute the judgment roll. While we are not intimating that the order in question was improperly inserted in this record, yet what we do say is that such orders are of no force or effect whatever unless they are properly authenticated by the trial court by making them a part of the bill of exceptions. We cannot consider them because they are not a part of the judgment roll, nor can we consider them as a part of the bill of exceptions unless the trial court has authenticated them as being properly made a part thereof.

[4] When the adverse party challenges our right to examine into the evidence because the same has not been properly settled in a bill of exceptions, we are required to examine the whole record to determine whether the bill has been settled within the time required by our statute and we are bound by what the record discloses respecting that matter.

[5] The record in this case affirmatively shows that the plaintiff's bill of exceptions was not settled within the time required by our statute, and, further, the record does not show any proper order extending the time within which the bill of exceptions could be settled and allowed under the statute. The record shows that defendant's counsel challenged plaintiff's right to settle the bill of exceptions when it was served. It was an easy matter, therefore, to have the alleged orders extending the time within which to settle and allow the bill made a part of the bill and to have the trial court certify to their correctness. Had that been done, defendant's motion to strike would necessarily have to fail. For the reasons just stated we are not permitted to consider plaintiff's proposed bill of exceptions in this case, and hence the motion to strike must prevail. The appeal must therefore be considered on the judgment roll alone.

[6] As before stated, the principal assignments challenge the sufficiency of the evidence to sustain the findings of fact. In the absence of a proper bill of exceptions we are bound to presume that the evidence justified the findings, and hence they must be sustained. The other assignments relate to the conclusions of law and judgment. After examining the findings we are forced to the conclusion that neither of the foregoing assignments can prevail. The conclusions of law

are clearly supported by the findings, and the judgment follows the conclusions of law.

In view of the foregoing there is but one result permissible, and that is to affirm the judgment with costs to the defendant. Such is the order.

MCCARTY, CORFMAN, THURMAN, and GIDEON, JJ., concur.

(51 Utah, 464)

HAMMOND v. WALL (No. 3167.)

(Supreme Court of Utah. Dec. 28, 1917. Rehearing Denied Feb. 8, 1918.)

1. MORTGAGES \S 559(1)—**FORECLOSURE—PERSONAL LIABILITY.**

Under Comp. Laws 1907, $\S\S$ 3498, 3499, 3503, as to sales on foreclosure, the court can impose a personal liability on the mortgagor only after having ordered a sale of the property, and after the sale has been had according to law and a deficiency appears.¹

2. MORTGAGES \S 559(2)—**FORECLOSURE—PERSONAL LIABILITY.**

The remedy pointed out by such statutes cannot be said to be merely cumulative so as to warrant a court of equity in granting any relief known to the courts, since Comp. Laws 1907, \S 2489, provides that the Revised Laws establish the law respecting their subjects; such statutes being mandatory.

3. COURTS \S 18 — **JURISDICTION — LANDS IN OTHER STATE—FORECLOSURE.**

Where lands in Utah and in Idaho were mortgaged, a Utah court, having decreed foreclosure and the sale having been made under an erroneous description, had the power, on proper petition, to reform the deed and mortgage so as to properly describe the lands and to vacate the former sale and satisfaction, but could not foreclose the mortgage on the Idaho lands and order the Utah sheriff to sell the Idaho lands.

4. CONTEMPT \S 21 — **DISOBEDIENCE — VOID COURT ORDER—EFFECT.**

Where a Utah court made a void order for foreclosure of mortgage on lands in Idaho, and further ordered the mortgagor to make a deed to such lands, his refusal to make such deed did not place him in contempt of court, since he was entitled to wait until there had been a legal sale of the mortgaged premises, and the court order was absolutely void.

5. MORTGAGES \S 281.—**SALE BY MORTGAGOR—PURCHASER'S LIABILITY.**

Clause in deed, reciting that the purchaser bought subject to all liens, mortgages and incumbrances, did not constitute upon his part an agreement with the mortgagee to pay the mortgage.

Habeas corpus by L. I. Hammond against I. O. Wall. Petitioner discharged.

Hammond & Hammond, of Salt Lake City, for plaintiff. A. C. Hatch, of Heber, and E. A. Walton, of Salt Lake City, for defendant.

FRICK, C. J. The plaintiff, hereinafter called petitioner, filed his petition in this court, in which he alleged that he was unlawfully restrained of his liberty by the above-named defendant, who is the sheriff

¹ Boucouski v. Jacobsen, 36 Utah, 165, 104 Pac. 117, 26 L. R. A. (N. S.) 898; Coburn v. Bartholomew, 167 Pac. 1156.

of Wasatch county, Utah. The petition was filed November 13, 1917, in which the cause of detention was set forth. Thereafter, and before the hearing, petitioner filed an amendment to the petition in which the cause of the alleged illegality of the detention was more fully set forth. A writ of habeas corpus was duly issued as prayed, to which the defendant made return as provided by our statute.

The arrest and detention of the petitioner, which he alleges are unlawful, are based upon certain proceedings had in the district court of Wasatch county, Utah, in which the Bank of Heber City, a corporation, hereinafter called bank, was plaintiff and J. W. Musser, Rose B., his wife, Barr W. Musser, Leah M., his wife, hereinafter styled mortgagors, and a number of others, including the petitioner, were defendants. The record of the proceedings in the actions out of which this proceeding arises, as it is presented by both the petitioner and the defendant, is very voluminous. The controlling facts, very briefly stated, are as follows: On December 16, 1915, said bank, in an action which was then pending in the district court of Wasatch county against said mortgagors, to foreclose a mortgage, obtained a judgment for the sum of \$10,600, and a decree foreclosing the mortgage which was executed by said mortgagors to said bank on lands a part of which were situated in Duchesne county, Utah, and a part in Franklin county of the state of Idaho. The lands in Duchesne county were subsequently made a part of Wasatch county. The lands in Idaho were described in said mortgage as lots 3 and 4, and the south half of the northwest quarter of section 3, township 15 south, range 38 east of Boise meridian, containing 163.87 acres. The district court of Wasatch county, Utah, entered a decree foreclosing the mortgage on both the Utah and Idaho lands, and ordered the sheriff of the county to sell the same and apply the proceeds of the sale in discharge of such mortgage. The sheriff made return that he had sold the lands lying in Utah and in Idaho to the bank for the sum of \$9,000, of which amount he obtained \$7,200 from the Idaho lands. He therefore credited on the bank's judgment said sum of \$9,000, less the costs, amounting to \$42.20, leaving the amount to be credited on said judgment the sum of \$8,957.80, which was duly credited thereon. After said judgment of foreclosure and the sale of said mortgaged premises the bank discovered that there was a mistake in the description of said Idaho lands, and that the same were described as being in section 3 when in truth and in fact the same were situated in section 2, township and range aforesaid. The bank also discovered that said Idaho lands were erroneously described in the deed by which the mortgagors obtained the title thereto, and that the description in said deed was the same as in the mortgage aforesaid. After the bank discovered said mistakes it then

commenced another action in Wasatch county against all of the defendants in the first action and against some others, in which latter action it set forth all of the foregoing facts, and also set forth that the petitioner, on the 6th day of December, 1915, purchased the Idaho lands from the mortgagors, and that the same were conveyed to him by proper deed of conveyance in which said lands were correctly described as being in section 2, township and range aforesaid, and that the deed to the petitioner contained the following clause, to wit:

"Subject however, to all liens, mortgages, or other incumbrances of any kind or nature whatever now of record in the office of the county recorder of said Franklin county, Idaho, which are existing liens or incumbrances on said property, reference to which records is hereby made for a full and complete description."

The bank also alleged, and the court found, that when the petitioner purchased said lands he had actual notice of the bank's mortgage, and that the consideration he paid therefor was merely a sum equal to the value of the equity of redemption. It also appears from the record that the petitioner thereafter conveyed a portion of said lands to one Harrison Hill, subject, however, to the lien of said mortgage. In view of the court's judgment this feature is not material, and will not be referred to hereafter. In brief, all of the transactions respecting said mortgaged lands are fully made to appear in the bank's complaint, and it was there alleged that all of the parties to said action had actual knowledge of the paramount and prior interest of the bank in said lands, and that whatever interest that was claimed by any one in or to said lands was subject to the interest and right of said bank. The bank prayed for, and obtained, a decree whereby the sale of the Idaho lands and the satisfaction of the former decree to the extent of the sum of \$7,200 received for said Idaho lands was vacated and set aside; the deed and mortgage aforesaid were reformed so as to correctly describe said Idaho lands; that said mortgage as reformed, to the extent that it covered the Idaho lands, was again ordered foreclosed, and said Idaho lands were ordered sold by the sheriff of Wasatch county, Utah, who was appointed as "commissioner of this court"; that "said sale be made as provided by the laws of the state of Utah for the sale of real estate under execution," that said sheriff, after the time for redemption has expired, and "no redemption being made, execute a deed to the purchaser or purchasers of the said mortgaged premises at said sale." The court further decreed that the petitioner and the other defendants, especially naming them, after the period of redemption provided by the laws of Utah has expired and after said sheriff has executed a deed as aforesaid, shall also "make, execute, and deliver to said purchaser or purchasers a good and sufficient quitclaim deed, quitclaiming and conveying

to the purchasers all of the right, interest, claim, and demand of the said defendants and each of them in and to the said premises and every part thereof, and in the meantime each and all of said defendants are enjoined and restrained from transferring or incumbering said lands or the title thereto." There are many other matters referred to in said decree, but the foregoing are sufficient to illustrate the real questions involved in this proceeding.

The sheriff of Wasatch county, as directed, again offered said Idaho lands for sale in said Wasatch county, and again sold the same, and after the period of redemption under the laws of Utah had expired he executed a sheriff's deed for said lands to the purchaser thereof. Thereafter a demand was made upon the petitioner to execute and deliver a quitclaim deed to the purchaser of said Idaho lands, which he refused to do. He was accordingly adjudged to be in contempt of court, and was arrested, and is now being restrained of his liberty for the reasons stated.

The petitioner's counsel contend that he is being unlawfully restrained of his liberty for the reason that the district court of Wasatch county was without power or jurisdiction to foreclose the mortgage on the Idaho lands and to order the sale thereof, and that it exceeded its jurisdiction in requiring him to execute and deliver a quitclaim deed to the purchaser of said lands, etc. Upon the other hand, the defendant insists, with much vigor, that in view that the district court had jurisdiction of the subject-matter and of the person of the petitioner, it had full power and jurisdiction to require him to execute the quitclaim deed. In other words, the contention is that in view that it was adjudged that the petitioner held the title to the Idaho lands subject to the rights of the bank, and that it was alleged that the petitioner had no interest in said lands, but merely held the legal title thereto—that is, that he merely held the equity of redemption—the court had ample power and authority to require him to convey that title to any person who purchased the lands at the sheriff's sale. In this connection counsel concede that the court's order to the sheriff of Wasatch county to sell the Idaho lands, and the sheriff's acts in selling the same, were without authority of law, but they insist that for the reason that the title was not passed by the sheriff's deed the court had the power to require the petitioner to convey the title which he held without right to the purchaser, and that said power especially existed because the order to convey was part of the decree.

[1] Counsel on both sides, in support of their contentions, have referred to numerous cases, to some of which we shall refer later. In view, however, of the peculiar provisions of our statute relating to the foreclosure of mortgages, the cases cited by counsel can be

given but little, if any, effect. Our statute (Comp. Laws 1907, § 3498) provides:

"There can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. Judgment shall be given adjudging the amount due, with costs and disbursements, and the sale of the mortgaged property, or some part thereof, to satisfy said amount, and directing the sheriff to proceed and sell the same according to the provisions of law relating to sales on execution. Such judgment may be docketed at any time."

Section 3499 reads as follows:

"If it appears from the return of the officer making the sale that the proceeds are insufficient, and a balance still remains due, execution may be issued for such balance as in other cases; but no such execution shall issue until after the sale of the mortgaged property and the application of the amount realized as aforesaid."

The only other section that is material here is section 3503, which reads:

"Sales of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in case of sales under execution."

We have had occasion to construe the foregoing sections in *Boucowski v. Jacobsen*, 36 Utah, 165, 104 Pac. 117, 26 L. R. A. (N. S.) 898. In that case, in following the Supreme Court of California, from which state our statute is taken, we, in effect, held that actions to foreclose mortgages under our statute are essentially actions in rem; that until the mortgaged property is sold and the proceeds of sale are applied in discharge of the mortgage, there is no personal liability on the part of the mortgagor, and "that the personal liability of the mortgagor cannot, without his consent, be enforced until after the sale and for the deficiency only." We, in a very recent case, *Coburn v. Bartholomew*, 167 Pac. 1156, reaffirmed the doctrine laid down in *Boucowski v. Jacobsen*. In this jurisdiction, therefore, the courts, in mortgage foreclosure cases, can impose a personal liability on the mortgagor only after having ordered a sale of the mortgaged property and after the sale thereof has been had according to law, and then he may be held liable only in case there is a deficiency. The cases cited by the defendant, in which it is held that where a court of equity has jurisdiction of the subject-matter and of the person of the defendant the court may require him to convey lands situated within a foreign jurisdiction when the suit and the "remedy granted directly affect and operate upon the person of the defendant and not upon the subject-matter, although the subject-matter is referred to in the decree," have no application here. Among the cases referred to by counsel are the following: *Butterfield v. Nogales Copper Co.*, 9 Ariz. 212, 80 Pac. 345; *Noble v. Grandin*, 125 Mich. 383, 84 N. W. 465; *Bevans v. Murray*, 251 Ill. 603, 96 N. E. 546; *Gordon v. Munn*, 81 Kan. 537, 106 Pac. 286, 25 L. R. A. (N. S.) 917; *Bowler v. Bank*, 21 S. D. 449, 113 N. W. 618, 130 Am.

St. Rep. 725; and Title, etc., Co. v. Title, etc., Co., 171 Cal. 173, 152 Pac. 542-553.

[2] As already pointed out, under our statute in mortgage foreclosures, both the suit and the remedy do not and cannot operate upon the mortgagor personally, although he is a defendant in the action unless and until the remedy against the mortgaged property is exhausted. Nor can it be said that the remedy pointed out by our statute is cumulative merely, and that a court of equity may, nevertheless, grant any relief known to such courts. Comp. Laws, 1907, § 2489, in part provides:

"The Revised Statutes establish the law of this state respecting the subjects to which they relate," etc.

The statute is therefore mandatory, and, having spoken upon the subject of mortgage foreclosures, its mandate must be obeyed by all courts. To the extent that the doctrine of the cases last referred to is contrary to our statute they cannot be given effect in this jurisdiction.

Under a statute like ours the doctrine stated by the author of Rorer on Judicial Sales, § 53, is applicable. The author, in speaking of jurisdiction, says:

"Lands lying in one state cannot be reached or sold under order, license, or decree of a court entered in a different state. The jurisdiction is local. The *lex loci rei sitæ* governs."

The same doctrine is laid down by the Supreme Court of Michigan in *Richards v. Boyd*, 124 Mich. 396, 83 N. W. 106. A mere cursory examination and comparison of the two Michigan cases, the one cited by the defendant, to wit, *Noble v. Grandin*, 125 Mich. 383, 84 N. W. 465, and the other cited by the petitioner, namely, *Richards v. Boyd*, 124 Mich. 396, 83 N. W. 106, will at once disclose the distinction courts make between an action, the ultimate purpose of which is to foreclose a mortgage and one which merely "operates directly upon the person of the defendant," as was the case in all of the cases cited by the defendant, and to which reference has been made.

[3] Defendant's counsel, however, insist that the case out of which the present proceeding arises was such as to confer jurisdiction upon the district court to require the petitioner to convey the title to the mortgaged lands in Idaho, since he held the same subject to the rights of the mortgagee, and for the reason that the order requiring him to convey operated directly upon the person of the petitioner of which the court had jurisdiction. There can be no doubt of the court's jurisdiction respecting the matters set forth in the complaint, in so far as they related to the reformation and correction of the deed and mortgage, the vacating of the former sale and the former satisfaction, and in determining the rights and liabilities of the parties to the action, including the petitioner. When the court, however, had granted the bank the relief just outlined

and had reformed and established its mortgage the court was powerless, under our statute, to proceed further. It was powerless to foreclose the mortgage on lands lying in Idaho and to order the sheriff of Wasatch county to sell those lands and to apply the proceeds in satisfaction of the mortgage. The law clothed the sheriff with no such power, and the court was powerless to invest him therewith. The district court had jurisdiction to grant the relief respecting the reformation of the deed and mortgage, since to that extent the action was merely in personam and operated only on the persons interested in the transactions and in the mortgaged premises. 34 Cyc. 904. Moreover, to that extent the relief was merely ancillary to the final remedy, which was to foreclose the mortgage and to subject the Idaho lands to the payment thereof. 4 Pomeroy, Eq. Jur. (3d Ed.) § 1375. Had the district court refrained from further action no one would now be permitted to assail its decree. The court, however, did not stop there, but ordered the sheriff of Wasatch county to do something it had no power to order him to do; and after the sheriff had executed a void order the court, in order to cure any defect in the order it was powerless to make, further ordered the petitioner to execute a quitclaim deed to the purchaser of the mortgaged premises. It is for refusing to obey that order, which the court had no power to make, that the petitioner is adjudged to be in contempt. The record therefore presents a case where a court of equity had jurisdiction of the subject-matter and also of the person of the petitioner, but where the court exceeded its jurisdiction in requiring a party to the action to do something the court could not require of him.

If it shall be held that the district court had the power to make the order of sale and to require the petitioner to execute a quitclaim deed to the purchaser because the petitioner had succeeded to the title of the mortgagors of the mortgaged premises subject to the mortgage after the mortgage was executed, then it follows that the court has the power in any foreclosure suit to compel the holder of the legal title, that is, of the equity of redemption, to convey the same to the purchaser of the mortgaged premises after sale. Indeed, why may not a court, however erroneous such an order may be, order the holder of the legal title to convey the same to the mortgagee before sale? That is in effect what the court did in this case, since the order of sale was stillborn and of no effect. What is true of the order of sale is likewise true of the sale itself. We have a case, therefore, where the court did not have jurisdiction to make the particular order in question, although it had jurisdiction of the subject-matter and of the person of the petitioner. Stating it in another form, the court exceeded its jurisdiction in requiring the petitioner to execute the quitclaim

deed. This case, therefore, clearly falls within the doctrine announced in the following cases: *Ex parte Rowland*, 104 U. S. 604, 26 L. Ed. 861; *Ex parte Lange*, 18 Wall. (U. S.) 176, 21 L. Ed. 872; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211. See, also, *Bailey, Habeas Corpus*, 262 et seq., where will be found a full discussion of the doctrine just referred to.

The case of *Ex parte Rowland* on principle is not distinguishable from the case at bar. In that case the lower court directed certain officials to do an act which, under the law, they did not have the power to do. The officers refused to act, and the court committed them for contempt. The officers instituted proceedings in habeas corpus in the Supreme Court of the United States, and that court held that the lower court had exceeded its authority in making the order, and hence the same was void. In the course of the opinion Mr. Chief Justice Waite, speaking for the court, at page 612 of 104 U. S. (26 L. Ed. 861), said:

"If the command of the peremptory writ of mandamus was in all respects such as the circuit court had jurisdiction to make, the proceedings for the contempt are not reviewable here. But if the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision in this court. *Ex parte Lange*, 18 Wall. 163 [21 L. Ed. 872]; *Ex parte Parks*, 93 U. S. 18 [23 L. Ed. 787]; *Ex parte Siebold*, 100 U. S. 371 [25 L. Ed. 717]; *Ex parte Virginia*, 100 U. S. 339 [25 L. Ed. 676]."

[4] The order of the district court requiring the sheriff of Wasatch county to sell the Idaho lands was utterly void. If the sheriff, therefore, had refused to comply therewith and the court had committed him for contempt and he were here complaining, we, under the authorities above cited, would be required to discharge him. Now, in view of our mortgage foreclosure statute, which we have set forth, there never has been a legal sale of the mortgaged premises, and hence the period of redemption has not expired. Indeed, it has not even commenced. Comp. Laws 1907, § 3263, permits redemption "within six months after the sale." The petitioner, under the statute, had the right to redeem the land as provided in said section. He had the right, however, to wait until the land was legally sold so that he, as the statute prescribes, could ascertain "the amount of his [the purchaser's] purchase." That could be ascertained only after a legal sale of the mortgaged premises.

It must not be assumed that the court's order in this case merely constituted error.

The effect of the order is precisely the same as any order or judgment which is in excess of the pleadings and issues in a case. Where the court transcends the pleadings and issues its orders are not voidable, but void. In attempting to foreclose the mortgage on the Idaho lands the court clearly transcended its powers, and all that was done in that regard was void. After the court had reformed the mortgage and had determined the rights of the parties to the action, it had exhausted its powers. It could not enforce its decree against the lands lying in Idaho any more than it could order the sale of property in Idaho under execution to satisfy a judgment obtained in Utah in a law case. The bank may readily enforce its judgment by suing upon it in the Idaho courts, and may there foreclose the mortgage and sell the lands to discharge the mortgage debt.

[5] Some claim is, however, made by the defendant that the petitioner, in legal effect, had promised to pay the bank the amount due on the mortgage, and that he did not act in good faith in purchasing the lands from the mortgagors, but in doing that intended to defraud the bank. There is, however, nothing in the contention that the petitioner had promised to pay the bank. The clause in the deed, which was the only obligation assumed by the petitioner, was set forth in the bank's complaint. The petitioner did not promise to pay anything or any one, but, as it is expressed in the deed, he bought the land subject to all liens existing against it. The bank did, however, not seek to recover the amount secured by the mortgage from the petitioner, but what it sought to do was to reform the mortgage, and after it was reformed to subject the Idaho lands to the payment of the mortgage debt notwithstanding any claim that the petitioner preferred against said lands. The bank, after having succeeded in having the mortgage reformed, and having it declared a first lien on the Idaho lands, sought more, and the court granted it more, and in doing so the court exceeded its powers and jurisdiction. To the extent, therefore, that the court exceeded its jurisdiction, as hereinbefore explained, the orders of the court are void and of no effect. The judgment committing the petitioner for contempt is therefore void and of no force or effect.

The judgment of this court, therefore, is that the petitioner be, and he hereby is, discharged from further restraint and that he recover his costs of this proceeding.

MCCARTY, CORFMAN, THURMAN, and GIDEON, JJ., concur.

(51 Utah, 504)

MOOSE v. GALIGHER MACHINERY CO.
(No. 3140.)

(Supreme Court of Utah. Feb. 14, 1918.)

MASTER AND SERVANT **236(12)—CONTRIBUTORY NEGLIGENCE.**

A servant, working near an open elevator shaft guarded only by a channel iron 36 inches from the floor, who went on his hands and knees into a cylindrical iron tank to smooth its edges, and in the process rolled it into the shaft, was negligent.¹

Gideon, J., dissenting.

Appeal from District Court, Salt Lake County; Geo. F. Goodwin, Judge.

Action by J. E. Moose against the Galigher Machinery Company, a corporation. Judgment on verdict for plaintiff, and defendant appeals. Reversed.

Stephens & Smith and James A. Stump, all of Salt Lake City, for appellant. Willard Hanson, of Salt Lake City, for respondent.

CORFMAN, J. Plaintiff brought this action to recover damages for personal injuries alleged to have been sustained by him while in the employ of the defendant. The complaint charges negligence on the part of the defendant. The answer of defendant denies all negligence on its part, and for affirmative defense alleges negligence of the plaintiff, assumption of risk, and carelessness and negligence of plaintiff's fellow servants.

The facts as developed by the testimony given at the trial were, substantially, as follows: On the 22d day of May, 1916, the plaintiff was employed by defendant as a sheet metal worker in its two-story building used for manufacturing purposes in Salt Lake City. This building was equipped with an elevator running from the first to the second floor, and was operated and used by defendant's employes in carrying freight consisting of heavy articles and material from one floor to the other. On the second floor of said building a channel iron was used as a guard rail across the elevator door or opening leading into the elevator shaft. This guard rail when up was held in place by two iron brackets about 35 inches from the floor. The space inside the elevator shaft, from guide to guide on which the elevator run, was 10 feet 4 inches. Immediately in front of the elevator shaft on the second floor and adjoining the same a floor space about 14 feet square was smoothly surfaced with cement or concrete, and it was customary for workmen to there assemble the material used and do their work in the construction of different articles manufactured out of sheet metal. On the said 22d day of May, at about 4:30 o'clock p. m., the plaintiff was engaged in making a galvanized iron cylindrical tank

about 4 feet high and 4 feet 3 inches in diameter on the above-mentioned floor space, and after doing a portion of his work he turned the tank over from an upright position to its side, as was customary, and then proceeded to go inside the tank and continue his work. While inside he rolled the tank towards and into the open elevator shaft and, with the tank, fell down to the first floor, thereby sustaining the injuries of which he complains in this action. How the plaintiff performed his work, and the conditions and circumstances attending the accident complained of, can be more explicitly stated from the plaintiff's own testimony. We quote from the abstract:

"At the time of my injury I had worked for the company about 4 years and 6 months, and all the time in the same class of work. Was paid \$4.50 per eight hours. Am acquainted with the Galigher Machinery Company's place of business. It is in the same place as it was when I began working there. The majority of the time I worked on the second floor of the building, probably a day or two or once a month I would have some sheets or something to cut downstairs, but the greater part of the time I worked on the second story of the building. * * * I was working in iron tanks on the day of the injury. * * * The tank I was working in was 4 feet, 3 or 4 inches in diameter, and 4 feet high. * * * There was more space over on the cement floor. It was clean. I had about 14 feet square to work in. * * * This cemented place was a good place to do the work. I had been doing this kind of work when anything of the kind was needed all the time I worked there. It was very customary to work on this cement floor, because we had a smooth surface to work on and it was close to the rolls and to the punch. It was also handy to take the tank down when completed. You didn't need to roll it the full length of the shop and move three or four tons of stuff to get there. The light was always good there when I had no good light in other places. Others always worked there when they could catch it, when there wasn't some one already there. The one who got there first was the lucky man. I was working immediately in front of the elevator shaft. No one had ever made any objection to my working there. It was necessary, after tipping the tank over, to go inside to do my work. I generally kneel on my knees, spread my legs a little, and roll the tank with my knees either way, to make it conform with where you are pounding on the floor. That is the way I was doing on the day of the accident. A channel iron 2x3, I judge, and 15 or 16 feet long, is at the elevator shaft to keep the tank from going down. This iron went across the shaft, as shown in Exhibit B. It was a heavy piece, and was held in place by two brackets. The ends projected on each side beyond the brackets 3 or 4 feet, I should judge, so it would be necessary to lift the iron to get it out of the brackets. It would require some human force to remove it. Up to the day of the accident this channel iron was kept in place; that is, during the 4½ years I had worked there. I had heard something said about keeping it in place. I heard it from Mr. Davis, our foreman, and from a former foreman, Mr. King, and also heard Mr. Galigher say it. Mr. Davis had been foreman about 1 year, I think, and the former foreman before him was Sid King. Mr. Galigher is general manager of the company, I believe. I heard Mr. Galigher say that it must be kept up at all

¹ Roth v. Eccles, 28 Utah, 456, 79 Pac. 918; Fritz v. Electric Light Co., 18 Utah, 493, 56 Pac. 90.

times. I heard him give these instructions. I heard Mr. Davis say the same thing to a number of employés. By being kept up, I understood that the channel iron was to be kept in the brackets. During the 4½ years prior to the day of the accident, I judge I had probably seen the iron out once or twice, and during that time I had heard Mr. Davis say that it must be kept up. Ordinarily I saw it kept up. * * * I judge it was a little after 4 o'clock in the afternoon of the day of the accident that I put the tank on the cement floor. * * * Up to the time of the accident there were probably three or four others working on that floor. I had a helper whose name was Champion, I think. * * * Mr. Rasmussen, I believe, and his helper were working on that floor that afternoon. During the afternoon I saw some one using the elevator, I believe his name was Larson. Believe he was loading pipe of some kind on the elevator. * * * In using the elevator persons would load it and take it down and unload it and come back and get another load. Goods would be loaded on the elevator and taken down. It is simply an order being filled. I saw Mr. Larson taking pipe of some kind down. As he would carry this he would come right up where I worked. That is the only way he could go to the elevator. He would load the elevator, take it down, and come back as required. I saw him doing that a number of times that afternoon. It was probably 4:30 or 4:40 that afternoon when the tank was turned down and I went into it. Prior to that the tank had been standing upright. It was probably 4:20 or 4:25 when I got into the tank while it was standing upright. I wasn't in it very long then, as it didn't take very long to do what I had to do. When I got into the tank standing upright I climbed over the north side of it. I noticed the elevator at the time. I couldn't help but notice it as I was looking right straight to it when I jumped into the tank. The bar was then up in its place. I don't know how the elevator was; I didn't see it, I guess it was clear down on the bottom floor. The elevator had to be below or I could have seen it. The elevator could be about a foot above the floor, but if it had been above at that time I could have seen it. After doing my work in the tank while standing upright, I came out again and saw my helper and sent him for two iron horses to stand the tank on so I could rivet it. He had to go down the stairway for the horses. He left me there and started for the stairway. At about the time I sent my helper for the horses I saw the man loading the elevator. He was going by me towards the elevator. Q. With what? A. I don't know. I don't think he had anything at the time; he might have had a piece of pipe; I didn't pay much attention. He was the same man who had been using the elevator that afternoon, and he was going towards the elevator right past my tank. I then went in the tank; the tank having been turned over. The open end of the tank was towards the northeast. I went into it and got on my knees and was pounding down the rough edges. As you do that work you have to move the tank to conform with where you are pounding on the floor. The tank rolls with you on the inside. About all you can see is a shadow or anything like that. The only way of seeing out would be through the end. I was facing the bottom of the tank watching my work, and the tank was rolling with me in it. I went into the elevator shaft and the tank struck the top of the cage after it pitched down. The tank struck nothing in going into the shaft, and it didn't go over anything. The tank couldn't go over the bar if one end were down on the cement floor. The tank was not stopped, and there wasn't even a jar in going into the shaft. I was in the bottom of the tank. The tank struck bottom down, I think."

On cross-examination plaintiff testified:

"Q. Then when you got into the tank, when it was down, the bar was up, was it? A. I don't know; I didn't look. Q. You didn't look? A. Not when I went into the can; when it was down I had no occasion to. I didn't notice whether the bar was up or not after I put the tank down. I didn't get out of the tank after I laid it down and before it fell. I worked on my hands and knees, with my face towards the bottom of the tank, so that I was in a stooped position."

It further appears from the testimony that the plaintiff was at the time of the accident 46 years of age, able bodied, in good health, and earning as a mechanic \$4.50 per day. As a result of the accident, he sustained injuries to his arm, head, and spine, and suffered a great deal of pain. Since the accident and up to the time of trial in January, 1917, plaintiff was unable to do any hard manual labor. As to whether his injuries are permanent or only temporary the testimony is not clear.

There was no material conflict in the testimony, except as to the presence of the employé Larson near the elevator immediately prior to the accident. Mr. Larson testified that he used the elevator at about 1:30 o'clock, that he put up the guard rail when through using the elevator at about 2:00 p. m. and during the remainder of the afternoon was engaged in duties elsewhere, and did not go near the elevator. Other witnesses corroborated Larson's statement.

Trial was to a jury, resulting in a verdict for the plaintiff, and judgment was entered thereon in the sum of \$8,500. Defendant appeals.

Errors are assigned in the refusal of the court to grant defendant's motion for a nonsuit at the close of plaintiff's testimony in chief; the court's refusal to give and in the giving of certain instructions, among them the failure to direct the jury to return a verdict for the defendant; the denial of defendant's motion for a new trial on the ground of the insufficiency of the evidence to support the verdict, and that the judgment entered thereon was against law; and that the verdict and the judgment entered thereon was excessive.

To our minds the one controlling question presented by this appeal is whether or not, under the conditions and circumstances attending the accident complained of, plaintiff himself was not guilty of gross carelessness and negligence that was the proximate cause and directly contributed to the injuries he received. It conclusively appears from the record that the elevator was properly constructed and equipped with appliances, and on the day of the accident was in good condition and repair; that it was used exclusively for the purpose of carrying freight from one floor to another in the building where the plaintiff was employed to do his work. It also appears that the plaintiff was thoroughly familiar with its use and the

method employed in its operation. That the defendant exercised ordinary care and prudence in furnishing the plaintiff a reasonably safe place in which to perform his work, there can be no doubt, and it is not contended otherwise.

The contention is made, however, by respondent, that the place where the plaintiff was called upon to do his work was not maintained in a safe condition, and was rendered unsafe by reason of some person, presumably an employé of the defendant, neglecting to put up the guard rail before lowering the elevator, and for this neglect the defendant was chargeable. In support of this contention, plaintiff has cited in his brief the following cases, which he contends are in point, and apply to the case at bar, to wit: *Glennon v. Star Co.*, 130 App. Div. 491, 114 N. Y. Supp. 1044; *National Syrup Co. v. Carlson*, 155 Ill. 210, 40 N. E. 492; *Johnson v. Bruler*, 61 Pa. 58, 100 Am. Dec. 613; *Maguire v. Little* (R. I.) 13 Atl. 108; *Barber Asphalt Paving Co. v. Austin*, 186 Fed. 443, 108 C. C. A. 365; *Hoffman v. Clough*, 124 Pa. 505, 17 Atl. 19; *Security Cement & Lime Co. v. Bowers*, 124 Md. 11, 91 Atl. 834; *Raferty v. Central Park, etc., R. R. Co.*, 14 Misc. Rep. 560, 35 N. Y. Supp. 1067; *Eastland v. Clarke*, 165 N. Y. 420, 59 N. E. 202, 70 L. R. A. 751; *Day v. Emery, etc., Co.*, 114 Mo. App. 479, 89 S. W. 903; *Moore v. Pac. Coast Steel Co.*, 171 Cal. 489, 153 Pac. 912; *Hennessey v. Wabash Mills Co.*, 235 Pa. 31, 83 Atl. 706; *Hillebrand v. Standard Biscuit Co.*, 139 Cal. 233, 73 Pac. 163. We have examined the cases cited by counsel, and they announce and adhere to the well-established doctrine that it is not only the duty of the master to provide a reasonably safe place for his servant to perform his work in, but he must use due diligence, and care in keeping the place safe, so that the servant will not be unnecessarily exposed to danger. In the case at bar we think that the conditions and circumstances under which the accident happened and the plaintiff here sustained his injuries are so materially different that the cases cited by plaintiff are not in point and do not apply. The testimony shows that the plaintiff was thoroughly familiar with the building in which he worked, that practically all of his work was performed on the second floor; that he knew the manner in which the elevator was operated and the purposes for which it was being used by the employés of the defendant. During the long period of his employment prior to the accident, he states that he repeatedly heard the foreman and general manager of the plaintiff instruct the employés that the guard rail of the elevator must be kept up at all times, in the brackets which held it in place; that ordinarily it was kept up, but on one or two occasions he had seen the guard rail out of the brackets. The plaintiff further testified that it was apparent to him that some em-

ployé of the defendant was using the elevator immediately before he entered into the tank to finish his work; that he did not take notice whether the bar was up or down when he entered the tank after turning it on its side; that he immediately proceeded to roll the tank, in doing his work, down the open shaft of the elevator, and thus sustained the injuries of which he complains.

We are not prepared to say that, ordinarily, in cases of an accident, the defendant would not be chargeable with the failure of its employé, whose identity is only presumably disclosed, to keep the guard rail of its elevator in place, but we are very firm in our opinion that under all the circumstances and conditions attending plaintiff's accident, he must, as a matter of law, be held guilty of his own gross carelessness, more especially in failing to look and ascertain the condition of the elevator shaft before proceeding in the extremely hazardous, not to say ridiculous, manner in which he did do his work. The plaintiff knew from experience that there was the possibility of some employé, or other person, leaving the guard rail down and the open elevator shaft exposed. He states that he entered the tank without taking any notice of the condition of the elevator shaft, or whether or not the guard rail was in place. He then proceeded to roll the tank with himself in it toward and into the open shaft when he could just as well and conveniently have rolled it in three other directions with perfect safety. *Roth v. Eccles*, 28 Utah, 456, 79 Pac. 918; *Fritz v. Electric Light Co.*, 18 Utah, 493, 56 Pac. 90; *Reed v. Stockmeyer*, 74 Fed. 186-189, 20 C. C. A. 381; *Oleksy v. Midland Linseed Co.*, 168 Fed. 896, 94 C. C. A. 308; *Labatt, Mast. & Serv.* (2d Ed.) § 1249.

We do not deem it necessary to discuss nor pass upon in detail all of the questions raised by appellant's brief and argument, for they all go to the question of the right of the plaintiff to recover of the defendant for the injuries plaintiff sustained under the conditions and circumstances attending the accident of which he complains.

We are of the opinion that the trial court erred in refusing, at the conclusion of all the testimony in this case, to direct the jury to return a verdict in defendant's favor as requested.

It is therefore ordered that the judgment of the district court be reversed. Defendant to recover costs.

FRICK, C. J., and McCARTY and THURMAN, JJ., concur.

GIDEON, J. (dissenting). In the majority opinion it is conceded that it was the duty of the employer to furnish the plaintiff as a workman with a reasonably safe place in which to work. From the statement of facts it appears that plaintiff, and the other workmen, had been working at the place in ques-

tion for more than 4½ years in exactly the same kind of work that the plaintiff was then doing. The statement also shows that it was necessary to keep the bar across the opening in the elevator in order to make that particular place a safe place in which to work. That plaintiff did not remove the bar is self-evident. That it was in place when he began to do the work at which he was engaged at the time of the accident is not disputed. The last time he noticed it before he went into the tank the rail was in place. While he was doing the work in the tank some of the other workmen passed up and down with the elevator, and it is reasonable to presume that the other workmen, or some one of them, left the rail down. Now, the "gross negligence" mentioned, and which is charged to the plaintiff, is that he did not come out of the tank and examine the opening into the shaft after his fellow workmen had evidently gone down to the floor below. That is, the plaintiff is charged with gross negligence, forsooth, because he did not assume that his fellow workmen would be guilty of negligence by leaving the bar down when descending in the elevator to the floor below. In my judgment the statement of facts does not warrant any such conclusion, but, on the contrary, shows conclusively, as the jury must have found, that some one of the other workmen besides the plaintiff, without the plaintiff's knowledge and after he had entered the tank for the purpose of doing the work in question, negligently removed the bar and left it down. No claim is made that the workman using the elevator was a fellow servant of the plaintiff. Plaintiff did not, therefore, assume the risk due to the negligence of such fellow workman, and cannot be held responsible for any injury resulting from such negligence. The employer should be held to answer for such negligence.

The judgment of the district court, in my opinion, should be affirmed. I therefore dissent.

(41 Nev. 330)

GAY v. DISTRICT COURT OF TENTH JUDICIAL DISTRICT IN AND FOR CLARK COUNTY et al. (No. 2317.)

(Supreme Court of Nevada. March 4, 1918.)

1. COUNTIES 667—OFFICERS—REMOVAL—JURISDICTION OF DISTRICT COURT.

Whether or not Const. art. 6, § 6, gives the district court jurisdiction of proceedings for removal of county officers, article 7, § 4, gives the Legislature plenary power to provide procedure therefor, and therefore St. 1908-09, c. 200, §§ 21, 22 (Rev. Laws, §§ 2851, 2852), giving such jurisdiction, is constitutional.

2. CONSTITUTIONAL LAW 681—DELEGATION OF POWER TO JUDICIARY.

Const. art. 3, § 1, providing that none of the three departments of government shall exercise functions belonging to the others except where expressly directed, makes it plain that the district court could be delegated powers other than those expressly mentioned by article 6, § 6.

3. CONSTITUTIONAL LAW 6313 — OFFICERS 661—REMOVAL—JURY TRIAL.

St. 1908-09, c. 200, §§ 21, 22 (Rev. Laws, §§ 2851, 2852), providing for summary trial in cases of removal of officers, does not violate the constitutional provision that one charged with crime is entitled to a jury trial, because the Legislature has plenary power in such cases.

4. OFFICERS 674 — REMOVAL—TITLE OF ACTION.

A proceeding for removal of a county officer need not be brought in the name of the state, under St. 1908-09, c. 200, §§ 21, 22 (Rev. Laws, §§ 2851, 2852), giving procedure for removal of officers.

5. CONSTITUTIONAL LAW 643(1)—CONSTITUTIONALITY OF STATUTE—WHO MAY CHALLENGE.

Where the requirement under St. 1908-09, c. 200, §§ 21, 22 (Rev. Laws, §§ 2851, 2852), providing for removal of officers, that officer removed shall pay complainant \$500, is waived, the constitutionality of such requirement cannot be considered.

6. STATUTES 6125(1)—TITLE AND SUBJECT—REMOVAL OF OFFICERS.

The title to St. 1908-09, c. 200, relates to only the one subject of removal of officers, although it provides several independent methods for removing them.

Original proceeding in certiorari by Sam Gay to inquire into the jurisdiction of the District Court of the Tenth Judicial District of the State of Nevada in and for the County of Clark and Charles Lee Horsey, judge of said court. Writ of certiorari dismissed.

W. R. Thomas, of Las Vegas, A. W. Ham, of Los Angeles, Cal., and Richard Busted, of Las Vegas (Chas. E. Barrett, of Las Vegas, of counsel), for petitioner. Geo. B. Thatcher, Atty. Gen., E. T. Patrick, Deputy Atty. Gen., and A. S. Henderson, Dist. Atty., and F. A. Stevens, Asst. Dist. Atty., both of Las Vegas, for respondents. McNamara & Van Fleet, of Elko, amici curiæ.

COLEMAN, J. This is an original proceeding in certiorari to inquire into the jurisdiction of the Tenth judicial district court of the state of Nevada to enter a judgment removing the petitioner, Sam Gay, as sheriff of Clark county, Nev., from office.

A complaint was filed in the district court of said county, wherein it was alleged that the defendant, Sam Gay, as sheriff, was guilty of nonfeasance in office, in that he neglected and refused to arrest one Joe Keate, his deputy, while the latter was making an assault with a pistol upon W. H. Harkins, a justice of the peace, in the presence of the defendant. Upon the filing of the complaint citation was issued and served upon the defendant. Defendant did not demur to the complaint, or in any way question the jurisdiction of the court, but filed an answer denying certain of the allegations of the complaint. The matter was heard upon the issue thus raised, and the court found the allegations of the complaint to be true and entered judgment removing the defendant from office.

The Constitution of Nevada, as do the

Constitutions of the various states, divides the powers of the state into three branches, and provides that the judicial power of the state shall be vested in a Supreme Court, district courts, and in justices of the peace, and authorizes the Legislature to establish municipal courts. Section 6, art. 6, of the Constitution, provides that the district courts shall have jurisdiction in certain cases, but does not say that they shall have jurisdiction in proceedings for the removal of any public officer; hence counsel for petitioner contend that the district court had no jurisdiction to hear and determine the charges filed with said court and to make the order for the removal of the petitioner from office.

[1] Without determining as to the scope and effect of section 6, art. 6, of the Constitution, but conceding for the sake of this matter that the district court acquired no jurisdiction under the section of the Constitution mentioned, we are nevertheless of the opinion that the court had jurisdiction to hear and determine the matter presented in the complaint filed in the district court charging the petitioner with nonfeasance in office. From time immemorial society has found it necessary to make some provision for the removal of venal, corrupt, faithless, and negligent public officers. The importance of this was realized when the Constitution of the United States was drafted, and this policy has been carried into the Constitution of every state in the Union. The impeachment of all of the state and judicial officers of Nevada, except justices of the peace, is provided for in article 7 of the Constitution; and while no procedure is prescribed in the Constitution for the removal of other officials, section 4 of article 7 reads:

"Provision shall be made by law for the removal from office of any civil officer other than those in this article previously specified, for malfeasance, or nonfeasance in the performance of his duty."

It was pursuant to this provision of the Constitution that the Legislature passed "An act providing for the removal from office of public officers for malfeasance or nonfeasance in office, regulating the mode of procedure, and other matters properly connected therewith." Stats. 1909, p. 293; R. L. §§ 2851, 2852. Sections 21 and 22 of the act read:

"Sec. 21. If any person now holding or who shall hereafter hold any office in this state, who shall refuse or neglect to perform any official act in the manner and form as now prescribed by law, or who shall be guilty of any malpractice or malfeasance in office may also be removed therefrom as hereinafter prescribed.

"Sec. 22. Whenever any complaint in writing, duly verified by the oath of any complainant, shall be presented to the district court, alleging that any officer within the jurisdiction of said court has been guilty of charging and collecting any illegal fees for services rendered or to be rendered in his office, or has refused or neglected to perform the official duties pertaining to his office as prescribed by law, or has been guilty of any malpractice or malfeasance in office, it shall be the duty of the court to cite the party charg-

ed to appear before him on a certain day, not more than ten nor less than five days from the time when said complaint shall be presented, and on that day, or some subsequent day not more than twenty days from that on which said complaint is presented, shall proceed to hear, in a summary manner, the complaint and evidence offered by the party complained of, and if, on such hearing it shall appear that the charge or charges of said complaint are sustained, the court shall enter a decree that said party complained of shall be deprived of his office, and shall enter a judgment for five hundred dollars in favor of the complainant and such costs as are allowed in civil cases."

The constitutional convention, in adopting section 4 of article 7 of the Constitution, realized, no doubt, that to confer upon legislative bodies the duty of impeaching, trying, and removing district, county, township, and municipal officers would be to place an undue burden upon the Legislature, and furthermore might, in some instances, unreasonably delay the removal of vicious officials, and in many cases would afford no relief whatever, in view of the fact that a majority of the officers contemplated by section 4, art. 7, of the Constitution, are elected for only two years, and since the Legislature convenes during the month in which the public officers referred to take office, and adjourns at the end of 60 days, not to reconvene until after the term of all county officers shall have expired, and therefore conferred plenary power upon the Legislature to provide a special and summary proceeding for the removal of certain officers. *State v. Borstad*, 27 N. D. 533, 147 N. W. 380, Ann. Cas. 1916B, 1014; *State v. District Court*, 53 Mont. 350, 165 Pac. 294.

Numerous objections are made to the act under which the proceedings in the district court were had, but, as we view the authority conferred by the section of the Constitution mentioned, they may be all brushed aside, save and except such objections only as go to the title of the act. We say this for the reason that the power of the Legislature is plenary so far as providing for the method of procedure is concerned. We do not think there is any authority which questions this view. The Supreme Court of California, in *Re Marks*, 45 Cal. 199, had under consideration a statute substantially the same as ours, and one which was enacted pursuant to a constitutional provision to all intents and purposes the same as ours. The court in that case said:

"The act of 1853 does provide how, in what manner, upon what procedure, in what court, officers, not of the first class, shall be tried for that misdemeanor in office known at common law, and recognized in this statute as neglect of official duty. The power of the Legislature to enact such a statute (under the latter clause of section 18) is plain—as obvious as is the power of the Assembly to prefer and that of the Senate to try articles of impeachment under the first clause of the same section. The power to remove certain officers for misdemeanor in office is exercised only by the Assembly and Senate under the name of impeachment—the like power to remove all other officers under like circumstances and for like causes is to be exer-

cised "in such manner as the Legislature may provide." Section 19. The power to provide the manner in which a delinquent is to be tried in the second case is on a footing with the power to directly remove the delinquent by the judgment of the Senate in the first case."

In a comparatively recent case, in an opinion by Beatty, C. J., and concurred in by the full court, the Supreme Court of California said:

"This is a summary proceeding regulated, as far as it is regulated at all, by a statute (Pen. Code, § 758 et seq.) which the Legislature has plenary power to pass under the authority of section 18 of article 4 of the Constitution, providing for the trial of public officers for misdemeanor in office otherwise than by impeachment. It is exempt from merely technical rules of procedure. *Case of Burleigh*, 145 Cal. 36, 78 Pac. 242." In *re Shepard*, 161 Cal. 171, 118 Pac. 513.

The Supreme Court of Minnesota, in considering the authority of the Legislature under a similar constitutional provision in the case of *State v. Peterson*, 50 Minn. 239, 52 N. W. 655, expressed the following views:

"Article 13 of the Constitution, after providing in section 1 for 'the removal of state officers and judges of the Supreme and district courts by impeachment,' then provides in section 2 that 'the Legislature of the state may provide for the removal of inferior officers from office for malfeasance or nonfeasance in the performance of their duties.' The power thus conferred is plenary, and confers authority upon the Legislature to vest the power of removal, and the determination of the question whether cause for removal exists in any department of the government, or in any officer or official body, it may deem expedient. There is no requirement that this power shall be conferred only on the courts. Indeed, the very purpose of this provision was to provide a more summary and less cumbersome method of removing inferior officers than by impeachment or by indictment, according to the course of the common law, for malfeasance or nonfeasance in office. If, then, the power of removal vested in the Governor by this act be judicial, we have here the constitutional authority for it."

The Supreme Court of Montana, in *State ex rel. Payne v. District Court*, 53 Mont. 350, 165 Pac. 296, in speaking of the authority conferred by a section of the Constitution of that state similar to section 4, art. 7, of our Constitution, used the following language:

"Proceedings for the removal of a public officer do not necessarily partake of the nature of a criminal prosecution. Indeed, the power to remove an unfaithful or negligent public official is not essentially a judicial power. Under our Constitution, its exercise is left to the Legislature itself or to such other authority as the Legislature may designate. This is the plain import of section 18, above, and is the general rule in the absence of any constitutional declaration upon the subject. 29 Cyc. 1370; *State v. Doherty*, 25 La. Ann. 119, 13 Am. Rep. 131; *Territory v. Cox*, 6 Dak. 501. The power may be conferred upon the Governor (*Cameron v. Parker*, 2 Okl. 277, 38 Pac. 14), or upon a board (*Donohue v. Will Co.*, 100 Ill. 94). It may be conferred upon a court of general or limited jurisdiction to be exercised in the mode provided by law, and consequently, if the Legislature sees fit to require a jury trial, a jury trial must be had; but, if it sees fit to provide for a summary hearing without a jury, no constitutional right of the accused is infringed."

In *State v. Grant*, 14 Wyo. 41, 81 Pac. 798, 1 L. R. A. (N. S.) 588, 116 Am. St. Rep. 982, the Supreme Court of Wyoming, in passing upon the power of the Legislature under a similar constitutional provision, said:

"The Legislature, however, under the provisions of section 19, art. 3, of the Constitution, did have express warrant for the passage of an act for the removal of officers not subject to impeachment, and the method of procedure in effecting such removal is not limited by any other constitutional provision. Attorney General v. Jochim, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 690, 41 Am. St. Rep. 606."

In *Skeen v. Paine*, 32 Utah, 295, 90 Pac. 440, it is said:

"Section 21, art. 8, of the Constitution, among other things, provides that such removals may be made 'in such manner as may be provided by law.' Here a plenary power is conferred upon the Legislature. This provision of the Constitution is special, and the mere fact that in another part of the same instrument (section 18, art. 8) it is provided that prosecutions shall be in the name of 'the state of Utah' does not necessarily prevent a proceeding civil in its consequences from being conducted in the name of a private person."

The Supreme Court of Michigan, in *People ex rel. Clay v. Stuart*, 74 Mich. 411, 41 N. W. 1091, 16 Am. St. Rep. 644, in passing upon a similar constitutional provision, observed:

"It will be noticed that the power conferred by this section of the Constitution is plenary. The Legislature is to provide by law for the removal of county officers, etc., in such manner as to them shall seem just and proper. The power conferred is in its nature political, and has reference exclusively to the polity of government, which would be inherently defective if no remedy of a summary nature could be had to remove from office a person who, after his election, had been convicted of crime, or who neglected his duty, or who was guilty of malversation in the administration of his office. Every person elected to a county, township, or school district office holds it subject to removal, in the manner provided by law under this section of the Constitution, which commits to the Legislature the whole subject of removal. They are to prescribe the mode in which it shall be done, and this includes everything necessary for the accomplishment of the object. The causes, the charges, the notice, the investigation, and the determination, and by whom these shall be conducted and the removal adjudged, are all in the discretion of the Legislature."

In *State v. Henderson*, 145 Iowa, 657, 124 N. W. 767, Ann. Cas. 1912A, 1286, in passing upon a case growing out of constitutional and statutory provisions similar to ours, we find the following:

"Section 5 of the act under which this proceeding is prosecuted expressly provides that the 'proceeding shall be summary in its nature and triable as an equitable action.' We think, therefore, that no constitutional right of the defendant was invaded."

See, also, *Moore v. Strickling*, 46 W. Va. 515, 33 S. E. 274, 50 L. R. A. 270; *Woods v. Varnum*, 85 Cal. 639, 24 Pac. 843; *People v. Stuart*, 74 Mich. 411, 41 N. W. 1093, 16 Am. St. Rep. 644; *State v. Seawell*, 64 Ala. 225; *State v. Savage*, 89 Ala. 1, 7 South. 7, 7 L. R. A. 426.

[2] In this connection we incidentally call attention to section 1, art. 3, of our Constitution, which reads:

"The powers of the government of the state of Nevada shall be divided into three separate departments—the legislative, the executive and the judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted."

Thus we see that the constitutional convention made it plain that other powers than those expressly mentioned in section 6, art. 6, of the Constitution, might be delegated to the district court.

The language of *Norcross, J., in Bell v. District Court*, 28 Nev. 280, 81 Pac. 875, 1 L. R. A. (N. S.) 843, 113 Am. St. Rep. 854, 6 Ann. Cas. 982, is not opposed to the view we have expressed. What was said in that case was directed to an entirely different question than the one here presented, as will be readily seen from a reading of the opinion.

[3] But it is urged, and with apparent earnestness, that the complaint in removal proceedings in the district court charged the defendant with a crime, and that he was entitled to a jury trial under that section of the Constitution which provides that the right of trial by jury shall remain inviolate forever. We think we have disposed of this question by showing that the Legislature had plenary power under the terms of the Constitution to pass an act authorizing the removal of officers, and pursuant to that authority had passed a law which provided a summary and special proceeding for such cases. In this connection we wish to say that the case of *Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615, is not in conflict with this view; for, while it is true that the court in that case, as in other cases, held that the proceeding to remove a public officer was criminal in its nature, the court said: "The intent to make it a criminal prosecution is to my mind clear." The opinion then proceeds to give the reasons which induced the court to take that view, and it is apparent that its conclusion was reached because it was the evident intent of the Legislature that the proceeding should be criminal in its nature, and not because the Constitution contemplated a proceeding inherently criminal in its character. In fact, strange as it may seem, the reply brief of the petitioner practically concedes as much; for, in answering the contention of respondent on this point, wherein it was sought to show why different proceedings had existed in California in removal cases, counsel say:

"The case—*In re Marks*, 45 Cal. 190—is relied upon by respondent, but it will be noted that the opinion in that case was prior to the adoption of the Codes and was had under a provision of law which ceased to exist upon the adoption of the Codes."

But the Supreme Court of California has held that though the proceeding is criminal in nature, under certain statutes, the defend-

ant was not entitled to a jury. *People v. McKamy*, 168 Cal. 533, 143 Pac. 752.

[4] The contention that the proceeding should have been instituted in the name of the state of Nevada is entirely without merit. As we have shown, the inquiry was had under a special proceeding, provided pursuant to plenary power conferred by the Constitution. Even in California, after the adoption of the Codes, and under statutes which the Supreme Court of that state held showed a clear intent upon the part of the Legislature to make the proceedings criminal in their nature, it was decided that the accusation did not have to be made in the name of the people. *Woods v. Varnum*, 85 Cal. 639, 24 Pac. 843.

[5] Objection is made to that part of the act which provides that the court in making the order of removal shall enter judgment for \$500 in favor of the complainant. The complainant and the defendant in the removal proceedings expressly agreed that this requirement of the statute might be waived, and accordingly no such judgment was rendered by the court; hence we are of the opinion that it is not necessary that we determine this question, as it is a well-established rule of law that no one can urge that an act or part of an act is unconstitutional if his rights are in no way infringed by it. 6 R. C. L. p. 89; 8 Cyc. 789.

[6] The objection made to the title of the act of 1909 is without merit. The title of the act relates to one subject only, and that is to the removal of public officers. It is true that the act deals with three methods of removal—one by accusation made by the grand jury, one by impeachment by the Assembly, and one by accusation by a private citizen. That part of the act relating to impeachment by the Assembly prescribes the method of procedure to be followed in the trial by the Senate. The act also provides for the summary method by accusation of a private individual, and makes provision for the proceedings after the accusation is filed. And, apparently realizing that individuals are reluctant to file charges against a public official as the basis for his removal, the Legislature also made provision for the initiation of proceedings for the removal of a public officer by accusation on the part of the grand jury. In other words, this act not only supplements the constitutional provisions for the removal of state officials, but creates two separate, distinct, and independent methods of removal of county officers. Just why the Legislature thought it necessary to create two methods of removal of county officials is not clear, but since one method is more drastic than the other, it may be that the Legislature anticipated that there might be occasions when a drastic measure would be needed; but whatever the reason, or lack of reason, the statute, which was enacted pursuant to plenary authority by clear and unmistakable

language, creates the two methods, and beyond that we cannot inquire.

For the reasons given, it is ordered that the writ of certiorari heretofore issued be, and the same is hereby, dismissed.

SANDERS, J., *concura*.

McCARRAN, C. J. (concurring). I concur. Sections 1, 2, and 3 of article 7, of our Constitution lay down the manner and authority by which certain specified state and judicial officers may be removed from office. So far as these officers are concerned, the mode of removal from office is by the Constitution limited and fixed. But in contemplation of the necessity for removal of civil officers other than those designated, section 4 of article 7 of the Constitution provides:

"Provision shall be made by law for the removal from office of any civil officer other than those in this article previously specified, for malfeasance, or nonfeasance in the performance of his duty."

By this provision of the organic law the power was reserved and assigned to the legislative branch of the government to provide a way by which civil officers other than those whose office is within the contemplation of sections 1, 2, and 3 of article 7 might be removed for malfeasance or nonfeasance in office. To meet this and to provide a rule of conduct by which removal from office might be accomplished as to those officers not affected by sections 1, 2, and 3 of article 7 of the Constitution, the Legislature of 1909 passed the act under which petitioner, as sheriff of Clark county, was brought before the district court. It is the right of the designated authority or tribunal of determination, the district court, to entertain such proceeding that is here questioned. Section 6 of article 6 of the Constitution, in prescribing the jurisdiction of the district court, contains no words of limitation as to matters of which that court may take jurisdiction, but rather excludes other courts and tribunals from exercising jurisdiction over those subject-matters specifically named as belonging to that of the district court.

To declare that section 6 of article 6 of the Constitution by its language limited the jurisdiction of the district court to matters specifically named in that section would be to open discussion to any number of matters and proceedings which by reason of this constitutional provision would find no jurisdictional resting place. Such was never the intention of the authors of our Constitution.

By section 4 of article 7 of the Constitution the legislative branch of the government was given full power to enact laws looking to the impeachment and removal of civil officers other than those mentioned in the preceding sections. The power to enact such laws implied power to assign the accomplishment of the law's purpose to a designated functionary. The Legislature of 1909 car-

ried out this power by designating the district court as the tribunal before which matters of this character should be heard and determined. In enacting the statute and designating the tribunal before which its object should be carried out, the Legislature, having full power in the matter, could, as it did, concisely and emphatically outline the steps to be taken and rigidly lay the course to be pursued. In *re Shepard*, 161 Cal. 171, 118 Pac. 513.

In my judgment, the matter contemplated by the statute cannot properly be termed a criminal proceeding, and I say this fully aware of the decision of the Supreme Court of California in the matter of *People v. McKamy*, 168 Cal. 531, 143 Pac. 752, in which is reviewed the former decisions of that court. In *re Curtis*, 108 Cal. 661, 41 Pac. 793; *Wheeler v. Donnell*, 110 Cal. 655, 43 Pac. 1; In *re Burleigh*, 145 Cal. 35, 78 Pac. 242. It is a proceeding for removal from office, rather than a prosecution for malfeasance or nonfeasance in office. Criminal prosecution might follow after removal, in which event a plea of once in jeopardy could not be interposed.

It is contended that this statute is in contravention of constitutional provision because trial by jury is not contemplated in the proceeding before the district judge. In this respect it may be properly said that the proceeding contemplated by the statute is not a trial but rather a proceeding to remove from public office, and as such does not involve either life, liberty or property.

The question here involved has in one form or another been passed upon on several occasions by the Supreme Court of the United States under the contention that by such statute the officer removed was deprived of due process of law under the Fourteenth Amendment.

In the case of *Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 80, 23 L. Ed. 478, statutory proceedings much more summary than those of ours were considered. In that instance a statute of Louisiana, instituted for testing right to office, was under consideration. The statute was upheld as providing due process of law, and the provision which eliminated hearing before a jury was held to be not repugnant to the amendment.

In the case of *Foster v. Kansas ex rel. Johnston*, Attorney General, 112 U. S. 201, 5 Sup. Ct. 8, 97, 28 L. Ed. 693, it appears that the Attorney General of the state of Kansas proceeded in quo warranto in the Supreme Court of the state for the removal of a county attorney, alleging his failure to prosecute certain violations of the law of that state. The case went to the Supreme Court of the United States on rule, and there, after referring to *Kennard v. Louisiana*, supra, the court held that the proceeding was of a civil nature, and inasmuch as the process for removal, though summary, provided for bringing the party into court and notifying him

of the case he had to meet, and gave him an opportunity to be heard in his defense and gave opportunity for deliberation and judgment of the court, it constituted due process of law.

In the case of *Wilson v. North Carolina*, 169 U. S. 586, 18 Sup. Ct. 435, 42 L. Ed. 865, the matter grew out of the suspension of a railroad commissioner by the Governor of North Carolina. On being carried to the Supreme Court of the United States, Mr. Justice Peckham, speaking for that court, said:

"The controversy relates exclusively to the title to a state office, created by a statute of the state, and to the rights of one who was elected to the office so created. Those rights are to be measured by the statute and by the Constitution of the state, excepting in so far as they may be protected by any provision of the federal Constitution."

Continuing, it was said:

"The procedure was in accordance with the Constitution and laws of the state. * * * What kind and how much of a hearing the officer should have before suspension by the Governor was a matter for the state Legislature to determine, having regard to the Constitution of the state."

In my judgment, that portion of the statute here involved which would permit of a judgment against the deposed officer of any sum of money is clearly in violation of the constitutional guaranty prohibiting the deprivation of property without due process of law. Even, however, were this involved here, which is not the case, since no such judgment was entered in this matter against petitioner in the district court, it would not avail in furtherance of petitioner's contention, for, under the established rule in this court, constitutional portions of the statute might be enforced if intact and operative, and unconstitutional portions might be rejected. *Virginia & Truckee R. R. Co. v. Henry*, 8 Nev. 165.

(41 Nev. 349)

GUISTI v. GUISTI. (No. 2290.)

(Supreme Court of Nevada. March 4, 1918.)

1. APPEAL AND ERROR §632 — SERVICE OF TRANSCRIPT.

Where transcript was served in part before docketing of cause in the Supreme Court and the remainder within a reasonable time thereafter, the appeal will not be dismissed under court rule xiii (154 Pac. ix), relating to curing of technical objections, the policy of the court being to give the appellant every reasonable opportunity to be heard.

2. APPEAL AND ERROR §301—MEMORANDUM OF ERRORS ON MOTION FOR NEW TRIAL — WHEN NECESSARY.

Rev. Laws, § 5322, requiring service of memorandum of errors upon adverse party, has reference only to errors committed at the trial under section 5320, subd. 7, and not error committed in arriving at an erroneous conclusion as to the legal effect of all of the evidence in the case, the making of findings, or entering of judgment.

3. MONEY LENT §6 — "CONTRIBUTED" — PLEADING.

A complaint, alleging that plaintiff "contributed" money to the erection of a building, does not allege a loan.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contribute.]

4. FRAUDULENT CONVEYANCES §213 — "CREDITOR."

An unrecorded bill of sale of undelivered personalty, executed by a deceased, is not void as to an order of court setting aside a monthly allowance to wife of deceased, the wife not being a "creditor" within Rev. Laws, § 1078 (Comp. Laws, § 2703), making sales and assignments of personalty without delivery fraudulent as to creditors.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Creditor.]

5. EXECUTORS AND ADMINISTRATORS §172—FRAUDULENT ACTS—EFFECT.

No matter how many fraudulent acts an administrator is guilty of, he is not divested of contractual rights under a valid mortgage which he has purchased.

Appeal from District Court, Nye County; Mark R. Averill, Judge.

Action by Phoebe J. Guisti against John Guisti. Judgment for plaintiff, and defendant appeals. Reversed.

Wm. Forman, of Tonopah, and P. E. Keeler, of Long Beach, Cal., for appellant. Thompson & Thompson, of Goldfield, for respondent.

COLEMAN, J. The complaint alleges that plaintiff, Phoebe J. Guisti, is the widow of Lawrence Guisti, who, at the time of his death in October, 1907, was a resident of Beatty, Nye county, Nev.; that deceased, at the time of his death, was the owner of a dwelling house and the lot upon which it was situated, and certain other real estate and personal property. The complaint also alleges:

"That at the time of the erection of said building and the furnishing said saloon said Lawrence Guisti did not have funds sufficient to pay for the erection of said building and purchasing of said bar and bar fixtures, iron safe, cash register, piano, slot machine, and gambling layouts and liquors and cigars for said saloon, and solicited this plaintiff to contribute toward the erection of said building and the paying for said bar, bar fixtures, furnishings, liquors, and cigars for said saloon. That pursuant to said request this plaintiff did contribute the sum of three thousand dollars (\$3,000) toward the erection of said building and the paying for said bar, bar fixtures, furnishings, iron safe, cash register, piano, slot machine, gambling layouts cigars and liquors for said saloon. That said Lawrence Guisti nor any other person has ever paid or returned said money or any part thereof to this plaintiff."

That plaintiff and the defendant (father of deceased) are the sole heirs at law of the deceased; that the defendant, conspiring to cheat and defraud plaintiff, purchased of the Bull Frog Bank & Trust Company a note of deceased for about \$3,000, which purported to be secured by a mortgage upon certain real and personal property of the deceased,

which note it is alleged was paid by the deceased prior to his death.

It is also alleged that the defendant, designing to cheat and defraud plaintiff, induced plaintiff to waive her right to be appointed administratrix of said estate, and as a consideration for such waiver promised and agreed that plaintiff should have a lien upon the real estate and personal property covered by the mortgage to the bank above mentioned, to secure the payment of the alleged indebtedness to her of \$3,000; and that plaintiff, having great faith and confidence in the defendant, did execute such waiver, and nominate and request that the defendant be appointed to administer upon said estate, and that thereafter he was appointed by the court as administrator thereof and thereafter qualified as such. Other allegations of fraud are contained in the complaint, but, taking the view which we do of the case, it is not necessary to state them.

It is further alleged that upon her petition the court made an order setting aside to plaintiff, as a widow's allowance, the dwelling house mentioned above and the sum of \$130 per month, and that no part of said monthly allowance has been paid; that on February 19, 1910, the court approved the final report of the defendant, as such administrator, and granted him a discharge from his trust as such administrator.

By the prayer of the complaint plaintiff asks that the decree of final distribution in the matter of the estate of Lawrence Guisti, deceased, and the decree settling the final account of the administrator, and such other orders as may interfere with granting full relief to plaintiff, be set aside and annulled; that defendant be declared a trustee for the benefit of plaintiff, and that plaintiff recover judgment against defendant for \$3,000, the amount contributed by her, as alleged in the complaint, and in a further sum to cover the monthly allowance of \$130, and that the same be made a lien upon the real estate bought by defendant from said estate, and for general relief.

Defendant filed a demurrer to the complaint, for the reason, among others, that it did not state a cause of action, which being overruled, an answer was filed. By his answer defendant denies that plaintiff is the widow of the deceased; denies that the deceased contributed any money as alleged in the complaint; denies that he solicited plaintiff to renounce her right to administer upon the estate of the deceased; denies that he told her she did not need an attorney, or that he would see that her family allowance and her claim of \$3,000 would be paid; denies all allegations of fraud on his part, and pleads affirmatively the indebtedness of the Bull Frog Bank & Trust Company, its assignment to him, and all of the various orders in the matter of the estate of Lawrence Guisti, deceased, including the approval of his final

report and the order of his discharge as administrator.

Defendant also alleges that the cause of action pleaded by the plaintiff is barred by section 4967, Revised Laws. It is also alleged that plaintiff's cause of action is barred by section 6018, Revised Laws.

It is also alleged that if the promise sued on was made at all, it was made with reference to the administration of the said estate; that it was a specific promise to answer for the debt of said intestate out of the estate of defendant; that said alleged agreement was not, nor was any note or memorandum thereof, in writing, ever made or signed by defendant, or by his agent.

Plaintiff filed a reply, pleading estoppel on the part of defendant to deny that she was the widow of Lawrence Guisti, deceased.

The case was tried by the court without a jury, and the court made its findings of fact, whereby it found all of the material allegations of the complaint to be true, except the allegation that the note to the bank had been paid, and entered a decree setting aside, annulling, and canceling the decree of final distribution in the matter of the estate; also the order approving the final account of the administrator; also the order confirming the sale of the real estate and personal property under the mortgage. The court rendered judgment in favor of plaintiff and against defendant in the sum of \$3,000, the amount alleged to have been contributed by plaintiff to deceased, as alleged in the complaint, and in the further sum of \$3,010 on account of the monthly allowance of \$130. It was further ordered that said judgment be made a lien upon the property bought by defendant at the administrator's sale, and that the same be sold to pay said judgment and costs.

On motion for a new trial the court modified its judgment, so that, instead of giving judgment for \$3,010 on account of the allowance of the court, it was given for a sum aggregating 12 monthly payments, for the reason that our statute provides that when an estate is insolvent such allowance cannot run for more than 12 months (section 5958, R. L.); and it was further adjudged that the defendant is a trustee and holding the property in question as a trustee for the benefit of plaintiff to the extent of the amount found to be due plaintiff on account of the family allowance.

This appeal is from the original judgment, from the judgment as modified, and from the order denying the motion for a new trial.

Before entering upon a consideration of the merits of the case, it becomes necessary that we dispose of a motion to dismiss the appeal. This motion is based upon two grounds: First, because a transcript of the record was not filed within 30 days after the taking of the appeal had been perfected, as provided in rule 2 (154 Pac. viii); and, sec-

ond, for the reason that "no transcript on appeal has ever been served" upon respondent.

[1] All that we need to say as to the first ground of the motion is that the record shows that the appeal was taken on June 16, 1917, and the transcript was filed on July 5, 1917, less than 30 days from the taking of the appeal. As to the second ground, we might say that we think there are at least two good reasons why it is not well taken, but we will confine ourselves to one only. Paragraph 3 of rule 25 (154 Pac. xi) provides that a copy of the transcript shall be served by appellant upon the opposite party. Rule 8 of this court (154 Pac. ix) reads:

"Exceptions or objections to the transcript, statement, the undertaking on appeal, notice of appeal or to its service or proof of service, or any technical exception or objection to the record affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken at the first term after the transcript is filed, and must be noted in the written or the printed points of the respondent, and filed at least one day before the argument, or they will not be regarded."

From a reading of this rule, it is apparent that it is the policy of this court to give the appellant every reasonable opportunity to be heard upon the merits, and that an appeal should not be dismissed where an error or oversight can be corrected without injury to the opposite party, where appellant desires to make such correction. From the record and affidavit on file in this matter, it appears that a copy of a part of the transcript was served before the case was docketed in this court, and that the balance thereof was served within a reasonable time thereafter. No injury, inconvenience, or delay appears to have been sustained by respondent. The case of *Gardner v. Pacific Power Co.*, 163 Pac. 731, is dissimilar from this, in that no copy of the transcript was ever served and no brief was ever filed, nor did appellant in any way seek to cure the defects pointed out. In fact, it appears that the appeal in that case was entirely abandoned.

[2] Counsel for respondent also moves to strike from appellant's assignment of errors assignment No. 11, for the reason that said assignment was not embraced in and made a part of the memorandum of exceptions required by section 5322, Revised Laws. The section mentioned provides that where the motion for new trial is based upon "error in law occurring at the trial and excepted to by the party making the application" (section 5320, subd. 7), the party moving for a new trial shall within ten days * * * serve upon the adverse party a memorandum of such errors excepted to as he intends to rely upon, and that no other errors under such ground shall be considered, either upon the motion for a new trial or upon appeal than those mentioned in such memorandum of exceptions. It is very evident that by section 5322 reference is had only to errors com-

mitted by the court at the trial, and not to an error committed by the court in arriving at an erroneous conclusion as to the legal effect of all of the evidence in the case. Motion is also made to strike numerous other assignments of error, upon the ground that they were not embodied in the memorandum of exceptions required by section 5322, Revised Laws, above quoted. In our opinion, the assignment of errors just alluded to does not go to errors contemplated by section 5322, Revised Laws, but rather to error committed by the court after the trial had been completed, and in the making of findings and in the entering of judgment and decree. In our opinion, none of the motions are well taken, and they are denied, for the reasons which we have given.

We come now to a consideration of the merits of the case. This action was brought to recover upon two alleged claims, one being based upon the allowance by the court in the matter of the estate of Lawrence Guisti, deceased, of the so-called monthly allowance of \$130, and the other upon the so-called contribution by plaintiff to Lawrence Guisti in his lifetime of the sum of \$3,000. The complaint is replete with allegations of fraud alleged to have been committed by defendant as administrator of the said estate, all of which alleged fraudulent acts, it is claimed, go to aid in the establishment of both causes of action.

[3] We will first dispose of the cause of action based upon the \$3,000 claim; and in this connection, we call attention to the allegations in the complaint, which we have quoted, which are pleaded by plaintiff as the very foundation of her claim. It will be noted from the allegations that it is contended that the plaintiff "contributed" to the erection by Lawrence Guisti, deceased, of a certain building and toward the purchase by him of certain personal property, and upon the strength of this allegation it is claimed that proof of a loan from plaintiff to Lawrence Guisti can be established. There is a marked difference between "contributing" money and "loaning" money. The court did not find that plaintiff loaned the deceased \$3,000, but that she did "contribute" the sum of \$3,000 toward the erection of said building and paying for said bar, bar fixtures, furnishings, cigars, and liquors, etc. In *Parks, Adm'r, v. American Home Mfg. Soc.*, 62 Vt. 19, 20 Atl. 107, it is said:

"A 'contribution,' then, is 'the act of giving to a common stock, or in common with others, that which is given to a common stock or purpose,' etc. *Webst. Dict.*"

New Standard Dictionary defines "contribute" as follows:

"To give or furnish, in common with others, for a common purpose; supply as part of a common stock; give in aid of some object."

See, also, *Century Dict.*; *Black's Law Dict.* (2d Ed.).

From these definitions of the word "contribute," it is clear that the complaint does not allege a loan by plaintiff to Lawrence Guisti.

[4] In disposing of the claim based upon the monthly allowance of \$130 by the court in the estate matter, it becomes necessary that we determine the force and effect of the mortgage given by the deceased to the Bull Frog Bank & Trust Company, and assigned to defendant. The note mentioned was dated September 11, 1907, payable on demand, in the sum of \$2,296.20. The deceased died October 23, 1907, a little over one month after the execution of the note. The uncontradicted evidence of F. L. Warburton, the cashier of the bank, and a disinterested witness, is to the effect that this note was secured by a mortgage upon the real and personal property in question, and that the note being unpaid, the bank sold the same to the defendant in this action for the sum of \$3,000. This evidence being uncontradicted, it is evident that the claim thus held was a prior valid claim, unless there was some inherent defect in the mortgages. The real estate mortgage is not attacked because of any such defect, but the trial court held that the mortgage upon the personalty is void as against creditors, and that plaintiff was a creditor. The mortgage upon the personalty was in the form of a bill of sale. There is no question but that an unrecorded chattel mortgage or bill of sale of personalty, unaccompanied by an immediate change of possession, is void as to creditors, as a general proposition; but plaintiff's claim based upon the monthly allowance does not come in that class. The statute which was in force at the time the bill of sale was given is section 2703, Cutting's Compiled Laws (section 1078, R. L. 1912), which reads as follows:

"Every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of things sold or assigned, shall be conclusive evidence of fraud, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith."

[5] The order of the court setting aside a monthly allowance to plaintiff did not constitute her a creditor in the sense contemplated by the statute. Both the real and personal estate of the deceased, so far as covered by the mortgages, were subject to specific liens, which were, at the time of the death of the deceased, valid as to this plaintiff, and nothing which could be done subsequent to the death of the deceased would operate to deprive him of his lien. No matter how many acts of fraud the defendant may have been guilty of as administrator, if any, or how gross they may have been, such conduct would not divest him of his

contractual rights under his mortgages; hence we do not deem it necessary to consider his alleged fraudulent conduct.

For the reasons given, it is ordered that the judgment and order appealed from be, and the same are hereby, reversed.

MCCARRAN, C. J., concurs. SANDERS, J., did not participate.

(41 Nev. 375)

In re KATTENHORN'S ESTATE.
(No. 2302.)

(Supreme Court of Nevada. March 5, 1918.)

HUSBAND AND WIFE ~~vs~~ 273(1)—COMMUNITY PROPERTY.

St. 1915, c. 130, does not affect or repeal Rev. Laws, §§ 2164, 2165, relating to descent of community property, and where spouse dies intestate all the community property goes to the surviving spouse.

Appeal from District Court, Lander County; Peter Breen, Judge.

In the matter of the estate of Albert Kattenhorn, deceased. From a decree distributing all of the estate to Lulu Kattenhorn, widow of the deceased, Annie F. Kattenhorn appeals. Affirmed.

Frank Curran, of Austin, and Leonard B. Fowler, of Reno, for appellant. Callahan & Brandon, of Winnemucca, for respondent.

MCCARRAN, C. J. To the marriage of Albert Kattenhorn and Lulu Kattenhorn there was no issue. Albert Kattenhorn died intestate; Lulu Kattenhorn survives. The district court in the probate proceedings found that the property of which Albert Kattenhorn died possessed was in its nature community. Lulu Kattenhorn, respondent here, contended in the district court, and that court sustained her contention, that she was entitled to a distribution of the entire estate of her deceased husband. Annie F. Kattenhorn, mother of the deceased, contended that as such she was entitled to have an interest in the estate of her deceased son distributed to her. By decree of the district court the entire estate was ordered distributed to Lulu Kattenhorn, the widow. From this decree the mother of the deceased appeals to this court.

Nothing appears in the record from which we would be required to disturb the finding of the trial court as to the nature and character of the property left by the deceased Kattenhorn.

One question, and one only, comes to this court for determination on appeal. In this is involved the interpretation of the force and effect of an amendatory statute enacted by the Legislature of 1915, entitled:

"An act to amend an act entitled 'An act to amend section 1 of an act entitled "An act to regulate the settlement of estates of deceased persons," approved March 23, 1897, and amended and approved March 16, 1899, approv-

ed March 6, 1901,' and as amended March 11, 1913."

The amendatory act, in so far as its effect in the case at bar is concerned, is as follows:

"Section 1. Section 259 of the above-entitled act is hereby amended so as to read as follows:

"Sec. 259. When any person having title to any estate, not otherwise limited by marriage contract, shall die intestate as to such estate, it shall descend and be distributed, subject to the payment of his or her debts, in the following manner:

"First. If there be a surviving husband or wife, and only one child, or the lawful issue of one child, one-half to the surviving husband or wife, and one-half to such child or issue of such child. If there be a surviving husband or wife and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his or her children, and to the lawful issue of any deceased child by right of representation. If there be no child of the intestate living at his or her death, the remainder shall go to all of his or her lineal descendants, and if all of the said descendants are in the same degree of kindred to the intestate, they shall share equally, otherwise they shall take according to the right of representation.

"Second. If he or she shall leave no issue, the estate shall go, one-half to the surviving husband or wife, one-fourth to the intestate's father and one-fourth to the intestate's mother, if both are living; if not, one-half to either the father or mother then living. *If he or she shall leave no issue, nor father, nor mother, the whole community property of the intestate shall go to the surviving husband or wife, and one-half of the separate property of the intestate shall go to the surviving husband or wife, and the other half thereof shall go in equal shares to the brothers and sisters of the intestate, and to the children of any deceased brother or sister by right of representation.* If he or she shall leave no issue, or husband, or wife, the estate shall go, one-half to the intestate's father and one-half to the intestate's mother, if both are living, if not the whole estate shall go to either the father or mother then living. *If he or she shall leave no issue, father, mother, brother, or sister, or children of any issue, brother or sister, all of the property, both community and separate, of the intestate shall go to the surviving husband or wife.*"

Session Acts 1915, p. 149. (We italicize.)

The original act thus amended by the Legislature of 1915 was a part of an act entitled "An act to regulate the settlement of the estates of deceased persons." The statute from its first enactment (Stat. 1861, p. 238) until the present time has referred to but one class of property. It has been subject to change by way of amendment, and on the several occasions when the language was changed it was either to make it more lucid or to change the interest of the recognized heirs. Stat. 1897, p. 158; Stat. 1899, p. 110; Stat. 1901, p. 44; Stat. 1903, p. 218; Stat. 1915, p. 149. It never referred to other than the separate property of the person deceased. In re Estate of Foley, 24 Nev. 197, 51 Pac. 834, 52 Pac. 649. The language of the amendatory statute of 1915 first appeared in the amendatory statute of 1903. Session Acts 1903, p. 218. In the latter statute we find for the first time the expression:

"If he or she shall leave no issue nor father nor mother, the whole community property of

the intestate shall go to the surviving husband or wife, and one-half of the separate property of the intestate shall go to the surviving husband or wife," etc.

The expression "the whole community property of the intestate shall go to the surviving husband or wife" we read as in the nature of a parenthetical clause, the substance of which the lawmaking body recognized as being a matter of course pursuant to the force and effect of, and taking its authority and existence from, a statute specifically affecting the disposition of community property. Section 2165, R. L. There is nothing about the language of the second subdivision of the amendatory statute of 1915, any more than in the amendatory statute of 1903, which attempts to amend, modify, or repeal the statute dealing with the disposition of community property on the death of one spouse.

By section 11 of the act defining the rights of husband and wife, which section bears specifically on the distribution of community property, it is declared that community property on the death of the husband without will goes one-half to the wife and one-half to the issue. If there be no issue and no will, all community property goes to the surviving wife. Does the second subdivision of the amendatory act of 1915, concerning descent and distribution, designate any part of the community property as going to either the father or mother in the event of no issue? There is not a word in that statute that would convey such an idea with any degree of definiteness whatever. The amendatory statute says no more with reference to the community property than does section 2165, R. L., i. e., if there be no issue and no will, the whole community property goes to the surviving spouse, and more, for, if there be separate property, one-half of that also goes to the survivor if there be no issue and a father or mother living, and if there be no issue and no father or mother and no brothers or sisters and no issue of brothers or sisters, then the whole property of the intestate, separate as well as community, goes to the surviving husband or wife.

Sections 10 and 11 of the statute defining the rights of husband and wife (sections 2164 and 2165, Rev. L.) prescribe:

"Sec. 10. Upon the death of the wife the entire community property belongs without administration to the surviving husband. * * *

"Sec. 11. Upon the death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to the surviving children equally, and in the absence of both such disposition and surviving children, the entire community property belongs without administration to the surviving wife. * * *

In the case of Clark v. Clark, with eminent counsel on both sides, it was conceded that, the property being community in nature, the case did not come within the statutes concerning descents. Clark v. Clark, 17 Nev. 124, 28 Pac. 238.

In *Re Foley's Estate*, this court had before it the consideration of the same statutes as here presented. True, the statutes were somewhat different at that time as to the distributees under the statute governing descent and distribution. The statute then provided:

"Second. If he or she shall leave no issue, the estate shall go in equal shares to the surviving husband or wife and to the intestate's father." Gen. St. 1885, § 2981.

It was there held that the lower court exceeded its jurisdiction in its decree distributing community property to other than the wife. Indeed, the most that was contended for there was the right of the heirs to take a part of the property, both community and separate, by reason of a written agreement to that effect entered into with the surviving wife. The court held in effect that even under such agreement the community property was not subject to distribution to the heirs, but passed to the wife. In our judgment, the amendment of 1915 was intended to effect no different result. The amendatory statute of 1915, in so far as it refers to community property, if anything, serves only to carry out the strict object and intent of the statute dealing with the disposition of community property heretofore quoted. That portion of the second subdivision in the amendatory statute of 1915 which refers to "the whole community property" as going to the surviving husband or wife is but a re-enunciation of the statute directing the disposition of community property. Rev. L. § 2165. The same may properly be said with reference to the latter part of the second subdivision, wherein it prescribes when and under what circumstances all the property, both community and separate, goes to the surviving husband or wife. The amendatory statute of 1915 in no wise conflicts with sections 10 and 11 of the statute defining the rights of husband and wife (Rev. L. §§ 2164 and 2165), bearing specifically on the disposition of community property. In the amendatory statute of 1915, as the same affects the settlement of estates of deceased persons, there is not a word or expression designating any part or fraction of the community property as going to, belonging to, or distributable to other than the husband or wife where there be such survivor. The amendatory statute of 1915 cannot be said to even impliedly repeal or affect sections 10 and 11 of the act pertaining to husband and wife, because as regards the subject of community property they stand and operate coordinately and harmoniously.

Any other interpretation of the amendatory act of 1915 would not only do violence to the cardinal principles of statutory construction, but would serve to destroy the community property law of this state, a law enacted and carried down on the statute books of this state under a policy coexistent with the his-

tory of the state itself. In the absence of specific and positive declaration by the legislative branch of the government, such havoc would not reasonably be contemplated.

The property here in question being found by the court to be common or community in nature, left by the deceased unaffected by testamentary disposition or the rights of living issue, passes, pursuant to the specific language of section 2165 of our Revised Laws, to the surviving wife.

The order and decree of the lower court from which this appeal is taken is affirmed. It is so ordered.

SANDERS, J., concurs. COLEMAN, J., concurs in the order.

(42 Nev. 1)

VINEYARD LAND & STOCK CO. v. DISTRICT COURT OF FOURTH JUDICIAL DIST. OF NEVADA IN AND FOR ELKO COUNTY et al. (No. 2264.)

(Supreme Court of Nevada. March 5, 1918.)

1. CONSTITUTIONAL LAW §48 — PRESUMPTIONS IN FAVOR OF ACT.

When a statute is assailed as being unconstitutional, every presumption is in favor of its validity, all doubts must be resolved in its favor, and, unless it is clearly in derogation of some constitutional provision, it must be sustained.

2. CONSTITUTIONAL LAW §70(3) — CONSIDERATION BY COURTS OF POLICY OF LAW.

The courts, in considering the constitutionality of a statute, have nothing to do with the general policy of the law.

3. CONSTITUTIONAL LAW §278(1)—WATERS AND WATER COURSES §123—DUE PROCESS — NEVADA WATER LAW.

Water Law (St. 1913, c. 140), as amended by St. 1915, c. 253, providing that, subject to existing rights, the water of all sources of supply belongs to the public, providing for the appointment of a state engineer, to whom application may be made to appropriate any unappropriated water in a public stream, etc., and providing that the state engineer, on his own initiative, or on application of one or more users of water of any stream, may make an order for the determination of the relative rights of the water users, there being provision for notice, etc., is not violative of federal Const. Amend. 14, prohibiting the taking of property without due process of law.

4. CONSTITUTIONAL LAW §251—DUE PROCESS — ADHERENCE TO METHODS IN EXISTENCE AT TIME OF ADOPTION OF CONSTITUTION.

It is not the rule in Nevada that there can be no due process of law unless the methods, means, and instrumentalities which were in existence at the time of the adoption of the Nevada Constitution are adhered to.

5. CONSTITUTIONAL LAW §80(1) — WATER LAW—ENCROACHMENT ON JUDICIARY—JURISDICTION OF DISTRICT COURT.

Water Law (St. 1913, c. 140), as amended by St. 1915, c. 253, providing that, subject to existing rights, the water of all sources of supply belongs to the public, providing for the appointment of a state engineer, to whom application may be made to appropriate any unappropriated water in a public stream, etc., and providing that the state engineer, on his own initiative or on application of one or more

users of water of any stream, may make an order for the determination of the relative rights of the water users, there being provision for notice, etc., is not violative of Const. art. 6, § 6, providing that the district courts shall have original jurisdiction in all cases which involve the title or the right of possession to, or the possession of, real property, even though a water right is real estate, since the entire proceedings under the water law amount to nothing until a copy of the order of determination of water rights of the state engineer is filed in the office of the clerk of the district court, thus operating as a complaint, the proceedings before the state engineer being nothing more than the routine of preparing and filing the complaint in the district court, which invests the latter court with jurisdiction to act.

6. CONSTITUTIONAL LAW §55—SEPARATION OF POWERS OF GOVERNMENT—WATER LAW.

Water Law (St. 1913, c. 140), as amended by St. 1915, c. 253, providing that, subject to existing rights, the water of all sources of supply belongs to the public, providing for the appointment of state engineer to whom application may be made to appropriate any unappropriated water in a public stream, etc., and providing that the state engineer, on his own initiative, or on application of one or more users of water of any stream, may make an order for the determination of the relative rights of the water users, there being provision for notice, etc., is not violative of Const. art. 3, § 1, and article 6, § 1, providing that the powers of government shall be divided into three separate departments, the legislative, executive, and judicial, etc., and that the judicial power of the state shall be vested in a supreme court, district courts, and justices of the peace, the act not conferring judicial powers on the state engineer, since the procedure before him merely paves the way for an adjudication by the district court.

7. EMINENT DOMAIN §2(10)—COMPENSATION—PUBLIC USE—WATER LAW.

Water Law (St. 1913, c. 140) as amended by St. 1915, c. 253, providing that, subject to existing rights, the water of all sources of supply belongs to the public, providing for the appointment of a state engineer, to whom application may be made to appropriate any unappropriated water in a public stream, etc., and providing that the state engineer, on his own initiative, or on application of one or more of the users of water of any stream, may make an order for the determination of the relative rights of the water users, there being provision for notice, etc., is not violative of Const. art. 6, § 1, providing that private property shall not be taken for public use without just compensation, since the law does not contemplate or suggest the taking of private property for any public or any other use.

8. WATERS AND WATER COURSES §128 — CONSTITUTIONALITY OF WATER LAW — DISTRIBUTION OF WATER — DETERMINATION OF STATE ENGINEER.

Water Law (St. 1913, c. 140) § 33, as amended by St. 1915, c. 253, § 3, providing that from and after the filing of the state engineer's order of determination with the clerk of the district court, and during the hearing thereon, the waters of the stream in question may be distributed as indicated in the order of determination, unless a stay bond be given, is not unconstitutional.

9. CONSTITUTIONAL LAW §106 — VESTED RIGHTS.

No person has a vested right in any rule of law, nor can any one assert a vested right in any particular mode of procedure.

10. CONSTITUTIONAL LAW §306—DUE PROCESS—WATER LAW.

Water Law (St. 1913, c. 140), as amended by St. 1915, c. 253, is not unconstitutional, as permitting a taking of property without due process of law, in that, should an interested party fail to file objections, to the determination of the state engineer as to water rights, with the clerk of the district court in which the engineer files a copy of his order of determination, and the court enters a decree in accordance with such order, such decree will be tantamount to a taking of property without due process.

McCarran, C. J., dissenting.

Petition for prohibition, on the relation of the Vineyard Land & Stock Company, a corporation, against the District Court of the Fourth Judicial District of the State of Nevada in and for the County of Elko, E. J. L. Taber, District Judge of said District Court, and W. M. Kearney, as State Engineer of the state of Nevada. Alternative writ vacated, and permanent writ denied.

Chas. B. Henderson and Carey Van Fleet, both of Elko, for petitioner and relator. Geo. B. Thatcher, Atty. Gen., for respondents. Cheney, Downer, Price & Hawkins, of Reno, and Hugh H. Brown, of Tonopah, amici curiæ.

COLEMAN, J. This is a proceeding in prohibition. It appears from the petition that the state engineer, upon the application of petitioner, initiated proceedings under the water law (Stats. 1913, p. 192, as amended by Stats. 1915, p. 378) of this state, to determine, for administrative purposes the relative rights of the appropriators of the water of the Salmon river and its tributaries, situated in Elko county, Nev.

After the preliminary steps provided for in the statute had been complied with by the state engineer, and after a copy of the order of determination made by him establishing the relative rights of appropriators of the water of said stream had been filed in the office of the clerk of the district court of Elko county, and after an order had been made by that court fixing a time for hearing upon such order of determination, these proceedings were instituted to prohibit said court from proceeding with such hearing or taking any action whatever in the matter.

The act in question provides that, subject to existing rights, the water of all sources of supply belongs to the public, and makes provision for the appointment of a state engineer, to whom application may be made to appropriate any unappropriated water in a public stream. It is provided also that the state engineer may, on his own initiative, or upon the application of one or more users of water of any stream in the state, make an order for the determination of the relative rights of the water users of such stream; and by section 19 of the act it is made the duty of the state engineer to publish for four

weeks notices of such order and the date when examination of the rights of water users will begin, and notify all claimants of rights in the water of the stream to make proof of their claims. Sections 20 and 21 provide for an independent investigation by the state engineer and the making of surveys and maps. Section 22 provides that after such investigation is made, and maps, etc., are filed, the state engineer shall give notice by publication and by registered mail, of the commencement of the taking of proofs by him and of the date prior to which the same must be filed. Section 33 of the amendatory act provides for the making by the state engineer of an order determining the relative rights to the waters of the stream, a certified copy of which, together with the original evidence, shall be filed with the clerk of the district court, whereupon the court shall make an order, fixing a time for a hearing upon such order of determination, which the state engineer shall cause to be published for four consecutive weeks in one or more newspapers, and a copy of which he shall send, by registered mail, to each party in interest. Interested parties may, pursuant to the act, five days prior to the day set for hearing by the court, file with the clerk of the court exceptions to the order of determination made by the state engineer. Section 35 of the amendatory act also provides:

"The order of determination by the state engineer and the statements or claims of claimants and exceptions made to the order of determination shall constitute the pleadings and there shall be no other pleadings in the cause. If no exceptions shall have been filed with the clerk of the court as aforesaid, then on the day set for the hearing, on motion of the state engineer, or his attorney, the court shall enter a decree affirming said order of determination. On the day set for hearing all parties in interest who have filed notices of exceptions as aforesaid shall appear in person or by counsel, and it shall be the duty of the court to hear the same or set the time for hearing, until such exceptions are disposed of, and all proceedings thereunder shall be as nearly as may be in accordance with the rules governing civil actions."

Section 38 of the amendatory act reads:

"From and after the filing of the order of determination, evidence, and transcript with the county clerk as aforesaid, and during the time the hearing of said order is pending in the district court, the division of water from the stream involved in such determination shall be made by the state engineer in accordance with said order of determination."

The operation of said order of determination may be stayed, in whole or in part, by the giving of a bond in an amount to be fixed by the judge of the district court.

The foregoing statement of the water law, together with such other provisions as we may call attention to in this opinion, are, we think, sufficient for a full understanding of the questions involved in this case.

The questions presented in this matter are not new; in fact, we think it may be said that the law involved is well settled adversely to the contention of the petitioner. The

purposes of the water law were fully set forth by Norcross, J., in *Ormsby County v. Kearney*, 37 Nev. 314, 142 Pac. 803, where the statute of 1913 (before amendments) was considered, and we will not undertake to restate them at length, contenting ourselves by saying generally that the moving cause therefor was to provide a method whereby unappropriated water might be appropriated, and whereby the relative rights of existing appropriators of the waters of the public streams of the state might be determined without great delay and expense to such appropriators, and to enable the state to supervise and administer the distribution of such waters so that the greatest good might be attained therefrom for the development of our agricultural resources.

In approaching the consideration of this case, we wish to say that the main questions upon which this decision must turn were considered and determined in the interpretation of similar laws, from which ours was chiefly taken, in the following cases: In *re Willow Creek*, 74 Or. 592, 144 Pac. 507, 146 Pac. 475; *Pacific Live Stock Co. v. Lewis* (D. C.) 217 Fed. 95; *Id.*, 241 U. S. 440, 36 Sup. Ct. 637, 60 L. Ed. 1084; *Farm. Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; *Enterprise Irr. Dist. v. Tri-State Land Co.*, 92 Neb. 121, 138 N. W. 171. And the statutes now under consideration were ably and exhaustively analyzed in the case of *Bergman v. Kearney* (D. C.) 241 Fed. 884. Just here we may well say, as did the learned judge in *Pacific Live Stock Co. v. Lewis* (D. C.) 217 Fed. 95, but with added force because of the decision of the Supreme Court of the United States in the same case, *supra*, and the decision in the *Bergman Case*, *supra*, "it would be mere reiteration to attempt to add anything to what has already been said on this subject."

[1, 2] Nor would it be out of place at the threshold of this inquiry to call attention to the well-known canons of construction when a statute is being assailed as being unconstitutional, namely, that every presumption is in favor of the validity of the act, that all doubts must be resolved in its favor, and that unless it is clearly in derogation of some constitutional provision, it must be sustained. It is also a well-known rule that the courts have nothing to do with the general policy of the law.

[3] We will first consider the contention that the water law of 1913, as amended in 1915, is unconstitutional in that it is in violation of the Fourteenth Amendment to the federal Constitution, prohibiting the taking of property without due process of law. As stated, Norcross, J., set forth at length, in the case of *Ormsby County v. Kearney*, *supra*, the purpose of the 1913 statute, and held that in so far as the same was administrative it was valid, and in this view Talbot, C. J., concurred; but it was also held in that case that, since that statute sought to make

the determination of the state engineer conclusive, subject to the right of appeal, and since no appeal could be taken because of constitutional limitations, that portion of the act providing for an appeal was unconstitutional; hence the amendment of 1915, which provided for a course of procedure in the district court, by the state engineer, almost identical with the procedure which is provided for by the Oregon statute.

As we understand the contention of counsel, it is that that portion of the act which provides for the procedure by the state engineer from the time of the filing by him of a copy of his order of determination with the clerk of the district court is void as not being due process of law. It certainly cannot be said that this law is in violation of the constitutional provision mentioned because of failure to provide for the giving of ample notice to all interested parties, for we doubt if in the history of legislation an act was ever passed in which so many safeguards were provided that a man might not be deprived of his property in a proceeding without knowledge of such proceeding being brought to his attention. The first notice of the proceedings under the water law is the publication for four weeks of an order granting a petition for the determination of the relative rights of the users to the waters of a public stream, and of a time when the state engineer will begin to make examinations. This is followed by proceedings under section 22 of the act, which provides for the publication of notice of the taking of testimony before the state engineer, and in addition thereto requires him to serve upon each interested party personally a copy of such notice, or else to send it by registered mail; and after the taking of testimony before the state engineer is completed, and an order of determination of the water rights has been made by him, and a copy thereof filed with the clerk of the district court, that court must make an order fixing the time for the hearing upon such order of determination. The order fixing the time of the hearing before the court must be published in one or more newspapers once a week for four consecutive weeks, and a copy thereof must also be sent by registered mail to each of the parties whose interests can be affected by such proceedings.

Thus far it will be seen that before a final decree can be entered by the court in the matter, an interested party, who is known, gets five different notices of the proceedings before a decree is entered, whereas in an ordinary action to quiet title to real estate a defendant receives only one notice of the pendency of the suit. But, so that by no possible chance may a final decree affecting a person's water right to his detriment be entered, it is further provided by section 13 that any person who has not been served, and who has had no actual knowledge of the pendency of the proceedings, may, at

any time within six months from the entry of the decree of the court, petition the court for relief. Thus it would seem that the Legislature took every precaution conceivable to prevent a final decree being entered, affecting detrimentally the rights of an interested party, without first giving him actual notice; for, as provided by the statute, the water is distributed in accordance with the order of determination of the state engineer as soon as a copy thereof is filed in the office of the clerk of the district court, unless a bond is given to stay such distribution, in which event the stay is probably effective as to the party giving the bond only. Surely if the order of determination and the distribution of the water in accordance therewith is a violation of the rights of any person, it will not take him long to learn that he is being deprived of his water, especially if it be during the irrigating season; and, if any contest whatever is made in the district court, it is more than likely that no decree could be entered in less than six months from the time of the filing by the state engineer of his order of determination, in which event, and with six months therefrom in which to petition for relief, it will be seen that at least one irrigating season will have passed before the time will have expired for those who had no actual knowledge of the pendency of such proceeding to petition for relief. If no contest is made, such person will have about seven months from the time when the right of distribution accrued. Hence we see the remote possibility of the passing of the six-month period after the entry of the decree of distribution without actual notice thereof being brought to the knowledge of an interested party.

We have already mentioned certain decisions which we think are controlling upon the questions involved in the case at bar. To our mind, we might well base our conclusion upon the decisions cited growing out of the Oregon statute and the Bergman Case, *supra*, without giving further attention to the points urged. As we understand the contention of the learned counsel who have appeared to assail the constitutionality of the water law of Nevada, it is not claimed that the decisions construing the Oregon statute are not sound, but that they are not controlling because, as urged, the Oregon Constitution empowers the Legislature of that state to create a tribunal to take jurisdiction over just such proceedings as provided for in the Oregon Water Code, and that it is by virtue of such a constitutional provision that the water board in Oregon acquired jurisdiction to act, while in Nevada the Constitution (article 6, § 1) limits the judicial authority to certain designated courts, whereas the water law undertakes to confer judicial authority upon the state engineer. Conceding that there is such a constitutional provision in Oregon as contended, certainly petitioner ought not to be able to

find comfort in that fact, for the reason that no contention was made in the Oregon case that the statute in question was valid because of such provision. On the other hand, the law was assailed upon the identical ground here urged, as pointed out in the opinion of the court, where it was said that it was contended that the Oregon statute "*undertakes to vest judicial power in a tribunal and officers not recognized by the Constitution (italics ours).*" In re Willow Creek, supra. We think this should suffice to show the utter lack of force of the contention. The opinion in that case turned upon the point that the duties imposed upon the water board were not judicial in character, but at most were only quasi judicial; the court saying:

"The statute prescribing the duties to be performed by the water board and its members in their respective official capacities in a determination of water rights does not confer judicial powers or duties upon the board or such officers in any sense as indicated by the Constitution. Their duties are executive or administrative in their nature. In proceedings under the statute the board is not authorized to make determinations which are final in character. Their findings and orders are prima facie final and binding until changed in some proper proceeding. The findings of the board are advisory rather than authoritative. It is only when the courts of the state have obtained jurisdiction of the subject-matter and of the persons interested, and rendered a decree in the matter determining such rights, that, strictly speaking, an adjudication or final determination is made. It might be said that the duties of the water board are quasi judicial in their character. Such duties may be devolved by law on boards whose principal duties are administrative."

Not only the cases growing out of the Oregon law, but all other cases growing out of similar statutes, have held that the powers conferred upon the official designated under the statute to supervise and administer the laws were, at most, quasi judicial. Such was the holding in *Farmers' Inv. Co. v. Carpenter*, supra, where it is said:

"The determination required to be made by the board is, in our opinion, primarily administrative rather than judicial in character. The proceeding is one in which a claimant does not obtain redress for an injury, but secures evidence of title to a valuable right, a right to use a peculiar public commodity. That evidence of title comes properly from an administrative board, which, for the state in its sovereign capacity, represents the public, and is charged with the duty of conserving public as well as private interests. The board, it is true, acts judicially, but the power exercised is quasi judicial only, and such as, under proper circumstances may appropriately be conferred upon executive officers or boards. The jurisdiction bears some resemblance to that of the land department of the government concerning the disposal of the public lands. That department is not regarded as a court, or as a branch of the judicial department; nor is its jurisdiction upheld upon the basis of any authority residing in Congress to establish courts. It is considered as an administrative department, and its powers are held to be quasi judicial only. *Orchard v. Alexander*, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737. There exists the same partial resemblance to the state board of land commissioners of our own state. *State v. State Board of Land Com'rs*, 53 Pac. 292, 7 Wyo. 478. We

are not persuaded that the act is void as conferring judicial power upon the board in violation of the Constitution."

But it is urged that that decision was of no weight in determining the question before the court, for the reason that the Wyoming Constitution authorized the creation of a tribunal with power to adjudicate water rights. The Wyoming Constitution (article 8, § 2) on that point reads:

"There shall be constituted a board of control, to be composed of the state engineer, and superintendents of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state."

So far as we are able to see, there is nothing in that section of the Wyoming Constitution conferring judicial power upon the board of control. To us it seems clear that the power of the board is limited to the determination of questions of a quasi judicial nature, such as may arise in the investigation and granting of permits to appropriate unappropriated water in a public stream, and in the supervision and administration of the distribution of the waters of the public streams. There is a wide difference between having authority to supervise and administer and having authority to determine questions involving vested rights. The former may, we think, with propriety, be left to an administrative officer, while the latter is properly a question for the courts.

Furthermore, from another standpoint we see no way of escaping the conclusion stated that no judicial power was vested by the Wyoming Constitution in the board of control, for the reason that the Constitution itself states just where the judicial power of the state is vested. It reads:

"The judicial power of the state shall be vested in the senate, sitting as a court of impeachment, in a supreme court, district courts, justices of the peace, courts of arbitration, and such courts as the Legislature may, by general law, establish for incorporated cities or incorporated towns." Article 5, § 1, Const. Wyo.

This provision limits the exercise of judicial power to the courts mentioned therein, so we think it must be clear that the distinction sought to be made between the Wyoming statute and our statute because of the fact that we have no provision in our Constitution such as article 8, § 2, of the Wyoming Constitution is without support. See *Bergman v. Kearney*, supra. On this point the Supreme Court of Nebraska, in considering a statute similar to ours prior to the amendment of 1915, says

"In the face of these decisions, it hardly seems necessary to again consider the question, but we have done so, and have examined further authorities. It is a matter of common knowledge that both in the administration of the laws of the United States and of the several states, boards of individuals, for the purpose of exercising executive or administrative functions, are often compelled to inquire into and determine questions requiring the exercise of powers

judicial in their nature. Some of such determinations are often, by virtue of the statutes defining the functions and power of the tribunal, final and decisive, and others are made reviewable by appeal to the courts. * * * Whether reviewable by the courts or not, the exercise of such powers by tribunals of this nature has seldom been held to be a violation of the Constitution in this respect. *McGehee, Due Process of Law*, 162, 368; *Reetz v. Michigan*, 188 U. S. 507, 23 Sup. Ct. 390, 47 L. Ed. 563; *Gardner v. Bonestell*, 180 U. S. 362, 21 Sup. Ct. 390, 45 L. Ed. 574; *Bates & Guild Co. v. Payne*, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894; *People ex rel. Deneen v. Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 62 Am. St. Rep. 175; *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. 253, 50 L. R. A. 747, 87 Am. St. Rep. 918; *State v. Thorne*, 112 Wis. 81, 87 N. W. 797, 55 L. R. A. 956; *Gee Wo v. State*, 36 Neb. 241, 54 N. W. 513; *Lincoln Medical College v. Poynter*, 60 Neb. 228, 82 N. W. 855. We are satisfied with the conclusion reached by this court in the cases cited, which were followed in *Farmers' Canal Co. v. Frank*, 72 Neb. 136, 100 N. W. 286, and see no reason to change our conclusion in this respect." *Enterprise Irr. Dist. v. Tri-State Land Co.*, 92 Neb. 121, 138 N. W. 179.

But it is contended that since nothing is said in the Constitution of Nebraska about irrigation, and since the doctrine of riparian rights existed in Nebraska, the case just quoted from should not be considered as an authority by this court. We fail to see the force of this contention. As we understand the law, unless the state or federal Constitution prohibits legislation upon a subject, the power of the Legislature is plenary; and the Legislature of Nebraska, evidently being of this view, passed an irrigation act. This act was first brought to the attention of the Supreme Court of that state in the case of *Crawford v. Hathaway*, 60 Neb. 754, 84 N. W. 271, where the court gave it scant consideration. On an application for a rehearing, the statute was more fully considered. 61 Neb. 317, 85 N. W. 303. Another rehearing was had in the case, where the full scope of the act was set out. Upon this rehearing the former opinions were reversed, and it was held that the irrigation act was constitutional, but that no vested riparian rights could be violated. 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647. In that opinion it was also held that as to unappropriated water the act in question controlled, and that vested riparian rights might be condemned under the right of eminent domain. Following the case just mentioned was the case of *Enterprise Irr. Dist. v. Tri-State Land Co.*, from which we have quoted supra.

We are unable to see the force of the distinction sought to be made between the Nebraska statute and the Nevada statute. The fact is that the Constitution of neither of these states has a word to say about irrigation, but in Nevada the courts "took the bull by the horns," and in effect repealed the doctrine of riparian rights without awaiting the action of the Legislature (*Reno Smelting Works v. Stevenson*, 20 Nev. 269, 21 Pac. 317, 4 L. R. A. 60 19 Am. St. Rep. 364), while in

Nebraska it was left for the Legislature to pass an irrigation act.

The only difference between the Constitutions of Wyoming and Nebraska and that of Nevada, so far as to warrant a different conclusion as to the Nevada statute of 1913, is that there is nothing in the Constitutions of the first two states prohibiting an appeal from the order of distribution made pursuant to the water laws of those states, while in Nevada the Constitution prohibits such a proceeding; hence, since the amendment of 1915, the reasoning and logic of the Wyoming and Nebraska cases apply with full force to the situation now presented to us.

It is also contended, if we correctly understand counsel, that there can be no due process of law except in a proceeding in court, where summons is regularly issued and served in accordance with the usual practice in actions pending in such tribunals. While we do not deem it necessary to determine this question, for the reason that we think, as will be shown later, that the real proceeding wherein an adjudication is made is after the proceedings are instituted in the district court, however, as pointed out by Norcross, J., in his opinion in the Ormsby County Case, supra, the Supreme Court of the United States, to which we must look for a final interpretation of the federal Constitution, took the contrary view. In that case Mr. Justice Norcross quoted from *Balch v. Glenn*, 85 Kan. 735, 119 Pac. 67, 43 L. R. A. (N. S.) 1080, Ann. Cas. 1913A, 406, as follows:

"It has been held by the Supreme Court of the United States that the phrase 'due process of law' does not necessarily mean a judicial proceeding. *McMillan v. Anderson*, 95 U. S. 37, 24 L. Ed. 335. On the other hand, it does not necessarily mean a special tribunal created for the express purpose of hearing the merits of the particular controversy. Where ample notice is provided which gives to the property owner an opportunity to have a hearing in any court of competent jurisdiction before his property is affected, he is afforded due process of law."

See, also, *Reetz v. Michigan*, 188 U. S. 507, 23 Sup. Ct. 391, 47 L. Ed. 563; 8 Cyc. 1084; 6 R. C. L. p. 459.

[4] Counsel seem to labor under the impression that there can be no due process of law unless the methods, means, and instrumentalities which were in existence at the time of the adoption of our Constitution are adhered to. Such was never the rule in Nevada, as shown by the opinion in the case of *State v. Millain*, 3 Nev. 466, where it is said:

"Counsel further insists that a constitutional right of defendant's is violated, because the indictment does not conform to the requirement at common law, and founds his objections on a part of section 8, article 1, of the state Constitution, which provides that no person shall be deprived of life, liberty, or property, without due process of law. The same rights are preserved in article 5 of Amendments to the Constitution of the United States, which is held to be a restriction of the government of the United States and the proceedings of the federal courts,

and does not apply to the state governments. But this is of no moment, as we observe the same provision obtains in the state Constitution. It has been universally held, under a like constitutional restriction, that it does not mean 'the process,' or otherwise expressed, 'the proceeding' shall be the same as pursued at common law, but that the mode and manner of their procedure may be regulated and prescribed by statute."

A similar rule has also been adopted by the Supreme Court of the United States, as shown in the well-considered case of *Hurtado v. State of California*, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232, where the question is considered at length. In that case the court quotes approvingly from *Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559, as follows:

"But its design was not to confine the states to a particular mode of procedure in judicial proceedings, and prohibit them from prosecuting for felonies by information, instead of by indictment, if they chose to abolish the grand jury system. And the words 'due process of law,' in this amendment, do not mean and have not the effect to limit the powers of state governments to prosecutions for crimes by indictments, but these words do mean law in its regular course of administration according to prescribed forms and in accordance with the general rules for the protection of individual rights. Administration and remedial proceedings must change, from time to time, with the advancement of legal science and the progress of society; and, if the people of the state find it wise and expedient to abolish the grand jury and prosecute all crimes by information, there is nothing in our state Constitution * * * and nothing in the Fourteenth Amendment to the Constitution of the United States which prevents them from doing so."

See, also, 8 Cyc. 1090, and cases cited in note 2.

Without considering the question at greater length, we think the contention of counsel that the statutes mentioned are in violation of the Fourteenth Amendment is fully and completely answered in the opinion in *Bergman v. Kearney*, supra, wherein the court quotes copiously from the Oregon and federal decisions, and we content ourselves with calling attention to that opinion.

[5] But it is said that a water right is real estate, and hence the provisions in the water law of 1913, as amended in 1915, authorizing the proceedings here sought to be prohibited, are in violation of section 6, article 6, of our Constitution, wherein it is provided:

"The district courts in the several judicial districts of this state shall have original jurisdiction in all cases in equity; also in all cases at law which involve the title or the right of possession to, or the possession of, real property. * * *"

Conceding for the purposes of this case that a water right is real property, we are unable to see wherein the law in question is in any way in violation of the provision of the Constitution which we have quoted. The fact of the matter is that the entire proceedings amount to nothing until a copy of the order of determination of the state engineer is filed in the office of the clerk of the district court. When this document is filed in

that office it operates as and has the force and effect of a complaint, and from the time of the filing thereof the water of the public stream concerning which the order is made is divided among claimants according to the terms of such order, unless a bond is given pending a decree of the district court. As said in *Pacific Live Stock Co. v. Lewis*, 241 U. S. 440, 36 Sup. Ct. 637, 60 L. Ed. 1084:

"A serious fault in this contention is that it does not recognize the true relation of the proceeding before the board to that before the court. They are not independent or unrelated, but parts of a single statutory proceeding, the earlier stages of which are before the board and the later stages before the court. In notifying claimants, taking statements of claim, receiving evidence, and making an advisory report the board merely paves the way for an adjudication by the court of all the rights involved. As the Supreme Court of the state has said, the board's duties are much like those of a referee. * * * That the state, consistently with due process of law, may thus commit the preliminary proceedings to the board and the final hearing and adjudication to the court is not debatable." (Italics ours.)

If this language means anything, it means that the adjudication—the determination, the decree—is made by the court; and the proceedings before the water board in Oregon, to which the state engineer in Nevada holds relatively the same position, is nothing more than the routine of preparing and filing the complaint in the court, which invests the court with jurisdiction to act.

Suppose the water law had provided that the Attorney General might proceed exactly as it now provides that the state engineer may proceed, up to the point of the making by the state engineer of an order of determination, and in lieu of the proceeding provided under the law as it now stands, from the time of making the order of determination, had provided that the Attorney General should, from the information to be gathered in the same manner as now provided by law, prepare and file in the district court a complaint setting forth substantially the same facts contained in the state engineer's order of determination, and that from the filing thereof the proceedings thereupon should be identically the same as those now contemplated by the water law, would any one insist that any constitutional right would be violated? We think not. Yet, what is the difference between conferring such power upon the state engineer and the Attorney General? We see no difference.

We do not accept radical changes without protest. If a statute radically different from anything to which we have been accustomed is enacted, the average lawyer becomes alarmed and at once brands it as unconstitutional. Lawyers generally were very much excited and alarmed when the statutes of the various states creating railroad commissions, corporation commissions, industrial insurance commissions, and the like, were enacted. They considered them not only unconstitutional, but revolutionary. Lawyers do

not feel that way about the matter to-day, because they have become used to such statutes. We do not wish to be misunderstood as saying that we can make an unconstitutional act constitutional merely by becoming familiar with its workings. We simply desire to impress forcibly our illustration relative to a statute providing for a proceeding by the Attorney General.

We are too prone to view legislation as unconstitutional, unmindful of the fact that, unless a statute violates the letter or spirit of some portion of the Constitution, it should be upheld. We think every lawyer and judge in the land could profit by a reading of the magnificent address of Geo. B. Rose, which appears in *Case and Comment* for October, 1917, in which he says:

"If we undertake to make the Constitution a dam to stem the tide of human progress, we may be sure that it will be swept away. It should not be an obstruction. It should be the broad channel, with high and well-defined banks, between which the stream of progress may flow on forever in calm and majestic strength. * * * These hidebound constructions are unnecessary, and they imperil the existence of constitutional government. The constitutional guarantees must be maintained; but the only way to maintain them is to mold them to the requirements of modern civilization. They must be reins to guide the chariot of progress in the road of safety, not barriers across its track."

[6] It is also contended that the water law is void because it is in violation of section 1, article 3, and section 1, article 6, of the state Constitution. These sections read:

"The powers of the government of the state of Nevada shall be divided into three separate departments—the legislative, the executive and the judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." Section 1, art. 3.

"The judicial power of the state shall be vested in a supreme court, district courts, and in justices of the peace. The Legislature may also establish courts, for municipal purposes only, in incorporated cities and towns." Section 1, art. 6.

The point which is made is that the Legislature attempted by the terms of the water law to confer judicial powers upon the state engineer, whereas the Constitution limits the exercise of such powers to the courts provided for in the Constitution. This question was considered at length in the *Ormsby County Case*, supra, in the opinion of Norcross, J., where he held that the view now urged was not well taken, though a majority of the court took the contrary view. But, conceding that the conclusion of the majority of the court was correct, the reason which justified such conclusion does not exist under the law as amended in 1915, because, as we have shown, the procedure before the state engineer leading up to the determination by the district court simply "paves the way for an adjudication by the court," and is in no sense a judicial proceeding.

[7] It is also urged that the water law is

unconstitutional, in that it is in violation of section 8, art. 1, of the state Constitution, which provides, *inter alia*, "nor shall private property be taken for public use without just compensation. * * *" We are of the opinion that there is not the least foundation for this contention. Nowhere does the law contemplate or suggest the taking of private property for public or any other use. Section 2 of the water law expressly provides that, subject to *existing* rights, water may be appropriated, while section 84 expressly prohibits the impairing of vested rights. The sole purpose of the law is to make definite, certain, and secure the rights which have already vested, to provide a method of determining if there is any unappropriated water in the public streams of the state, and, if so, to enable persons desirous of so doing to appropriate the same, and to see that the water is distributed in accordance with the rights of appropriators as they actually exist.

[8, 9] It is also suggested by counsel that the act is void because that portion of section 33, as amended, which provides that from and after the filing of the order of determination with the clerk of the district court, and during the hearing thereon, the waters of the stream in question may be distributed as indicated in the order of determination (unless a stay bond be given) is unconstitutional. We are unable to agree with this contention. As said in *Pacific Live Stock Co. v. Lewis*, 241 U. S. 440, 36 Sup. Ct. 637, 60 L. Ed. 1084:

"The proceeding in question is a quasi public proceeding, set in motion by a public agency of the state. All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end: First, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators. Referring to a situation resembling that to which this proceeding is addressed, the Supreme Court of Maine said in *Warren v. Westbrook Manufacturing Co.*, 88 Me. 58, 66 [33 Atl. 665, 35 L. R. A. 388, 51 Am. St. Rep. 372]. 'To make the water power of economic value, the rights to its use, and the division of its use, according to those rights, should be determined in advance. This prior determination is evidently essential to the peaceful and profitable use by the different parties having rights in a common power. To leave them in their uncertainty—to leave one to encroach upon the other, to leave each to use as much as he can, and leave the other to sue at law after the injury—is to leave the whole subject-matter to possible waste and destruction.' In considering the purpose of the state in authorizing the proceeding the Supreme Court of Oregon said in *Re Willow Creek*, 74 Or. 592, 613, 617 [144 Pac. 505, 146 Pac. 475]: 'To accelerate the develop-

ment of the state, to promote peace and good order, to minimize the danger of vexatious controversies wherein the shovel was often used as an instrument of warfare, and to provide a convenient way for the adjustment and recording of the rights of the various claimants to the use of the water of a stream or other source of supply at a reasonable expense, the state enacted the law of 1909, thereby to a limited extent calling into requisition its police power.

* * * Water rights, like all other rights, are subject to such reasonable regulations as are essential to the general welfare, peace, and good order of the citizens of the state, to the end that the use of water by one, however absolute and unqualified his right thereto, shall not be injurious to the equal enjoyment of others entitled to the equal privilege of using water from the same source, nor injurious to the rights of the public."

In view of the character of the proceeding, there is no question but that the Legislature could provide that upon the filing of a certified copy of the order of determination with the clerk of the district court, the waters of the stream system might, from the date of the filing thereof, be distributed according to its terms unless a stay bond be given. But we do not concede that, if the proceeding were not a quasi public one, calling into requisition the police power of the state, a statute providing for such a proceeding would be unconstitutional. In many cases, under our practice, the court may, upon the giving of a bond, issue a temporary injunction before summons is served or notice is given to the defendant. The state and municipal corporations generally are, under our statute, exempted from giving bond in certain proceedings in court. No person has a vested right in any rule of law (*New York C. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629); neither can any one assert a vested right in any particular mode of procedure (*Bolse Irr., etc., Co. v. Stewart*, 10 Idaho, 58, 77 Pac. 25, 321; *Lewis' Sutherland Stat. Const.* [2d Ed.] § 674). What sanctity is there in requiring a bond in a proceeding in court that the sovereign people may not, through the Legislature, dispense with unless inhibited by the Constitution? We know of none, nor do we know of any provision of the Constitution which restricts the right of the Legislature in that regard.

[10] It is contended that, should an interested party fail to file objections with the clerk of the district court in which the state engineer files a copy of his order of determination, and the court enters a decree in accordance with such order of determination, such decree would be tantamount to a taking of property without due process of law. If what we have said of the character of the proceedings up to and including the filing of the copy of the order of determination with the clerk of the district court is sound, we fail to see wherein an interested party who fails to file such exceptions would be in a worse position than the defendant in the ordinary suit in the district court who fails

to plead when duly summoned, and against whom a default judgment is entered. Yet no one would contend that such default judgment, in the ordinary suit, would be equivalent to taking property without due process of law.

It is suggested also that certain other sections of the water law are unconstitutional. The sections mentioned are independent, and, whether constitutional or unconstitutional, can in no way affect the result upon this hearing. When the constitutionality of these sections is presented in an action in which the determination of their validity is essential to a disposition of the case, we will consider and dispose of the question involved.

We are constrained to say that in view of the fact that the state engineer initiated the proceedings now sought to be restrained upon petition of applicant for this writ, the question arises whether we would not be justified in denying the writ without passing upon its merits; but, in view of the statewide importance of the attack upon the constitutionality of the water law, we have decided to dispose of the matter upon its merits.

It is ordered that the alternative writ of prohibition heretofore issued in this matter be vacated, and that the permanent writ asked for be denied.

SANDERS, J., concurs.

McCARRAN, C. J. I dissent. Inasmuch as this case was originally assigned to the writer to prepare the opinion of the court, we have transformed our original draft into this dissenting opinion, adding thereto such observations as we deem proper in view of the attitude of the prevailing opinion.

This is an original proceeding in prohibition. From the petition it appears that the state engineer, proceeding under the water law of this state as enacted in 1913 and as amended in 1915, has made and filed with the clerk of the district court of Elko county a certain order of determination, establishing certain water rights, or rights to the use of water on the Salmon river and its tributaries, among which are the water rights of petitioner.

Petitioner alleges that it and its predecessors in interest, being the owners of large tracts of land along the Salmon river, have acquired and maintained vested rights to the use of water upon these lands, and such acquisition was made prior to the enactment of a statute creating the office of state engineer and defining his powers and duties. As a basis for the petition, the unconstitutionality of the statute of 1913 and 1915 is declared. The statute itself contains some 80-odd sections, many of which are not involved in the proceedings here. I shall limit my consideration in this dissenting opinion to those sections of the statute which by reason of the nature of the proceedings are directly involv-

ed. The reply to the petition for the writ admits the act of the state engineer in filing his orders of determination with the clerk of the district court. Hence that order of determination, the manner in which it was brought about, its force and effect, are the subjects of inquiry. For this purpose we review and set up certain sections of the statute, some of which, although disconnected or having intervening sections, must be considered together inasmuch as they operate jointly. Section 29 provides:

"Should any person claiming any interest in the stream system involved in the determination of relative rights to the use of water, whether claiming under vested title or under permit from the state engineer, desire to contest any of the statements and proof of claims filed with the state engineer by any claimant to the waters of such stream system, as herein provided, he shall, within twenty days after said evidence and proofs, as herein provided, shall have been opened to public inspection, or within such further time as for good cause shown may be allowed by the state engineer upon application made prior to the expiration of said twenty (20) days, in writing notify the state engineer, stating with reasonable certainty the grounds of the proposed contest, which statement shall be verified by the affidavit of the contestant, his agent or attorney. * * *

Section 30, as amended by the act of 1915, is as follows:

"The state engineer shall fix a time and place for the hearing of said contest, which date shall not be less than thirty (30) days nor more than sixty (60) days from the date the notice is served on the persons who are parties to the contest. Said notice may be sent by registered mail to the person, and the receipt thereof shall constitute valid and legal service. Said notice may also be served by the state engineer, or by any person qualified and competent to serve subpoenas as in civil actions, appointed by him, and returns thereof made in the same manner as in civil actions in the district courts of the state. The state engineer shall have power to adjourn hearings from time to time upon reasonable notice to all parties interested, and to issue subpoenas and compel the attendance of witnesses to testify at such hearings, which shall be served in the same manner as subpoenas issued out of the district courts of the state. He shall have the power to administer oaths to witnesses. In the case of neglect or refusal on the part of any person to comply with any order of the state engineer or any subpoena, or on the refusal of any witness to testify to any matter regarding which he may be lawfully interrogated, it shall be the duty of the district court of any county, or any judge thereof, on application of the state engineer, to issue attachment proceedings for contempt, as in the case of disobedience of a subpoena issued from such court, or a refusal to testify therein. Said witnesses shall receive fees as in civil cases, the costs to be taxed in the same manner as in civil actions in this state. The evidence in such proceedings shall be confined to the subjects enumerated in the notice of contest and answer and reply, when the same are permitted to be filed. All testimony taken at such hearings shall be reported and transcribed in its entirety."

Section 33, as amended by the act of 1915, provides:

"As soon as practicable after the hearing of contests, it shall be the duty of the state engineer to make, and cause to be entered of record in his office, an order determining and establishing the several rights to the waters of said

stream; provided, however, that within sixty days after the entry of an order establishing water rights, the state engineer may, for good cause shown, reopen the proceedings and grant a rehearing. Such order of determination shall be certified to by the state engineer, and as many copies as required printed in the state printing office. A copy of said order of determination shall be sent by registered mail, or delivered in person, to each person who has filed proof of claim, and to each person who has become interested through intervention or as a contestant under the provisions of section 26 or section 29 of this act."

Section 34, as amended by the act of 1915, has to do with the filing of the order of determination made by the state engineer. It is as follows:

"As soon as practicable thereafter a certified copy of the order of determination, together with the original evidence and transcript of testimony filed with, or taken before, the state engineer, as aforesaid, duly certified by him, shall be filed with the clerk of the county, as ex officio clerk of the district court, in which said stream system is situated, or if in more than one county but all within one judicial district, then with the said clerk of the county wherein reside the largest number of parties in interest. But if such stream system shall be in two or more judicial districts, then the state engineer shall notify the district judge of each of such judicial districts of his intent to file such order of determination, whereupon, within ten days after receipt of such notice, such judges shall confer and agree where the court proceedings under this act shall be held and upon the judge who shall preside, and on notification thereof the state engineer shall file said order of determination, evidence, and transcripts with the clerk of the court so designated; provided, that if such district judges fail to notify the state engineer of their agreement, as aforesaid, within five days after the expiration of such ten days, then, and in that event, the state engineer may file such order of determination, evidence, and transcript with the clerk of any county he may elect, and the district judge of such county shall have jurisdiction over the proceedings in relation thereto. In all instances a certified copy of the order of determination shall be filed with the county clerk of each county in which such stream system, or any part thereof, is situated. Upon the filing of the certified copy of said order, evidence, and transcript with the clerk of the court in which the proceedings are to be had, the state engineer shall procure an order from said court setting the time for hearing. The clerk of such court shall immediately furnish the state engineer with a certified copy thereof. It shall be the duty of the state engineer immediately thereupon to mail a copy of such certified order of the court, by registered mail, addressed to each such party in interest at his last known place of residence, and to cause the same to be published at least once a week for four consecutive weeks in some newspaper of general circulation published in each county in which such stream system or any part thereof is located, and the state engineer shall file with the clerk of the court proof of such service by registered mail and by publication. And such service by registered mail and by publication shall be deemed full and sufficient notice to all parties in interest of the date and purpose of such hearing."

Section 35, as amended by the act of 1915, provides:

"At least five days prior to the day set for hearing all parties in interest who are aggrieved or dissatisfied with the order of determination of the state engineer shall file with the clerk of said court notice of exceptions to the order of determination of the state engineer, which no-

tice shall state briefly the exceptions taken, and the prayer for relief, and a copy thereof shall be served upon or transmitted to the state engineer by registered mail. The order of determination by the state engineer and the statements or claims of claimants and exceptions made to the order of determination shall constitute the pleadings and there shall be no other pleadings in the cause. If no exceptions shall have been filed with the clerk of the court as aforesaid, then on the day set for the hearing, on motion of the state engineer, or his attorney, the court shall enter a decree affirming said order of determination. On the day set for hearing all parties in interest who have filed notices of exceptions as aforesaid shall appear in person or by counsel, and it shall be the duty of the court to hear the same or set the time for hearing, until such exceptions are disposed of, and all proceedings thereunder shall be as nearly as may be in accordance with the rules governing civil actions."

Section 36, as amended by the act of 1915, provides:

"For further information on any subject in controversy the court may employ one or more qualified persons to investigate and report thereon under oath, subject to examination by any party in interest as to his competency to give expert testimony thereon. The court, may, if necessary, refer the case or any part thereof for such further evidence to be taken by the state engineer as it may direct, and may require a further determination by him, subject to the court's instructions. After the hearing, the court shall enter a decree affirming or modifying the order of the state engineer. Upon the hearing the court may assess and adjudge against any party such costs as it may deem just and equitable, or may assess the costs in proportion to the amount of water right allotted. Appeals from such decree may be taken to the supreme court by the state engineer or any party in interest, in the same manner and with the same effect as in civil cases."

Section 38, as amended by the act of 1915, provides:

"From and after the filing of the order of determination, evidence, and transcript with the county clerk as aforesaid, and during the time the hearing of said order is pending in the district court, the division of water from the stream involved in such determination shall be made by the state engineer in accordance with said order of determination."

Section 39, as amended by the act of 1915, provides:

"At any time after the order of determination, evidence and transcript has been filed with the clerk of the court, as aforesaid, the operation of said order of determination may be stayed in whole or in part by any party upon filing a bond in the court wherein such determination is pending in such amount as the judge thereof may prescribe, conditioned that such party will pay all damage that may accrue by reason of such determination not being enforced, pending decree by said court. Immediately upon the filing and approval of such bond, the clerk of the court shall transmit to the state engineer a certified copy of such bond, which shall be recorded in the records of his office, and he shall act in accordance with such stay."

Section 45 of the act is as follows:

"In any suit which may be brought in any district court in the state for the determination of a right or rights to the use of water of any stream, all persons who claim the right to use the waters of such stream and the stream system of which it is a part shall be made parties. When any such suit has been filed, the court

shall by its order duly entered, direct the state engineer to furnish a complete hydrographic survey of such stream system, which survey shall be made as provided in section 20 of this act, in order to obtain all physical data necessary to the determination of the rights involved. The cost of such suit, including the costs on behalf of the state and of such surveys, shall be charged against each of the private parties thereto in proportion to the amount of water right allotted. In the case of any such suit now pending or hereafter commenced the same may at any time after its inception, in the discretion of the court, be transferred to the state engineer for determination as in this act provided."

Section 84 declares:

"Nothing in this act contained shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this act where appropriations have been initiated in accordance with law prior to the approval of this act. Any and all appropriations based upon applications and permits now on file in the state engineer's office, shall be perfected in accordance with the laws in force at the time of their filing."

Stat. 1913, p. 192; Stat. 1915, p. 378.

Dwelling now on these statutory provisions as we find them, and especially these sections, inasmuch as they are the sections directly involved, we may inquire, With what does this statute deal? It deals with that vested estate which one may acquire by diverting water from a public stream and applying the same to a beneficial use. This is commonly termed a water right.

By reason of the nature of the soil and the climatic conditions attendant in western arid and semiarid states, it has been recognized, and rightfully so, that the waters of the public streams are indispensable to the land, the productiveness of the whole depending entirely, as it does, upon the beneficial application of the former. This being true, the land and the water as beneficially applied thereto must be, and indeed have been by courts and text-writers, regarded as one by reason of their correlation. Property in land acquires its value and importance, its very life in regions such as that encompassed by this state, from the application of water. A vested right to divert the waters from a public stream and apply them to a beneficial use in the way of irrigation applies to and is of the very nature of the realty itself. A deprivation of the land made valuable by the application of water diverted from a public stream would no more affect the property rights of the individual than would the deprivation of the water itself by reason of which the value of the estate was acquired and without which it would be worthless.

In the case of *Conant v. Deep Creek & C. Valley Irrigation Co.*, 23 Utah, 627, 66 Pac. 188, 90 Am. St. Rep. 721, the Supreme Court of that state declared in effect that an action to ascertain, determine, and decree the extent and priority of water rights partakes of the nature of an action to quiet title to real estate. The same court, in the case of *Taylor v. Hulett*, 15 Idaho, 265, 97 Pac. 37, 19 L. R. A.

(N. S.) 535, held that a water right appurtenant to irrigated land was real property.

The right to the flow and use of water, being a right in a natural resource, was held by the Supreme Court of Colorado, in the case of *Travelers' Insurance Co. v. Childs*, 25 Colo. 360, 54 Pac. 1020, to be real estate; and to the same effect will be found *Davis v. Randall*, 44 Colo. 488, 90 Pac. 322, and *Bates v. Hall*, 44 Colo. 360, 98 Pac. 3.

In the case of *Hill v. Newman*, 5 Cal. 445, 63 Am. Dec. 140, the Supreme Court of California held that a justice of the peace, although conferred with jurisdiction to try and determine actions for damages for taking, detaining and injuring personal property, had no jurisdiction over an action for diversion of water because it was an action concerning title to real estate. Holding to the same conclusion, we find the case of *Griseza v. Terwilliger*, 144 Cal. 456, 77 Pac. 1034.

In the case of *Yankee Jim's Union Water Co. v. Crary*, 25 Cal. 504, 85 Am. Dec. 145, the Supreme Court of California held that water rights may be held, granted, abandoned, or lost by the same means as a right of the same character issuing out of lands to which a private title exists, saying that:

"The right of the first appropriator may be lost, in whole or in some limited portions, by the adverse possession of another. And when such person has had the continued, uninterrupted, and adverse enjoyment of the water course, or of some certain portion of it, during the period limited by the statute of limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him."

Supporting this general proposition of law may be found the cases of *Lower Kings River Water Ditch Co. v. Kings River & F. C. Co.*, 60 Cal. 410, and *Last Chance Co. v. Emigrant Ditch Co.*, 129 Cal. 278, 61 Pac. 960. See, also, *Hayes v. Fine*, 91 Cal. 398, 27 Pac. 772; *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 93 Pac. 858, 115 L. R. A. (N. S.) 359.

Mr. Kinney, in his work on *Irrigation and Water Rights*, summing up the subject, puts it thus:

"It is generally conceded by all the authorities that a water right, or an interest in a water right, is real property, and it is so treated under all the rules of law appertaining to such property." Kinney on *Irrigation and Water Rights* (2d Ed.) vol. 2, p. 1328.

The assertion of the author in this respect is supported by a line of authorities wherein the question has been discussed and determined in nearly every phase.

To the same effect will be found the holding of the courts in the cases of *Hough v. Porter*, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; *Town of Sterling et al. v. Pawnee Ditch Extension Co.*, 42 Colo. 421, 94 Pac. 339, 15 L. R. A. (N. S.) 238; *Fisher et al. v. Bountiful City*, 21 Utah, 29, 59 Pac. 520.

Mr. Well, in his work on *Water Rights in the Western States* (vol. 1) asserts the same general principle.

Our Legislature has in but one instance,

so far as we are able to ascertain, attempted to define the term "real property," and in that instance they declared that:

"The term 'real property' shall include every estate, interest and right in lands, tenements and hereditaments, corporeal or incorporeal." Section 6294, sub. 10, Rev. Laws.

In the case of *Rickey Land & Cattle Co. v. Miller & Lux*, 152 Fed. 11, 81 C. C. A. 207, Judge Wolverton, speaking for the Circuit Court of Appeals for the Ninth Circuit, analyzed the question at hand with a finesse which is to our mind unanswerable, and there the court, after a complete analysis in which he referred to numerous cases supporting the position, held that an appropriation of water from a public stream put to a beneficial use "savours of and is a part of the real estate." Speaking of the nature of the suit, which was in that instance one to determine water rights on the Walker river, the court said:

"The suit * * * in its purpose and effect, is one to quiet title to realty."

This court, speaking through Mr. Justice Hawley, has declared to the same effect, holding that a right to the use of water diverted from a public stream should be regarded and protected as property. *Dalton v. Bowker*, 8 Nev. 190.

Hence, it may be asserted as the first and major premise of the position which we here take that the subject-matter dealt with by the sections of the act referred to is real property.

The validity of this act is challenged under the several sections of our Constitution, as well as under the Fourteenth Amendment. Article 1, § 8, of our Constitution provides, *inter alia*:

"No person shall be subject to be twice put in jeopardy for the same offense * * * nor be deprived of life, liberty, or property, without due process of law. * * *

Article 3, § 1, provides:

"The powers of the government of the state of Nevada shall be divided into three separate departments—the legislative, the executive and the judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted."

Article 4, §§ 1 and 6, provide:

"Sec. 1. The judicial power of this state shall be vested in a supreme court, district courts, and in justices of the peace. The Legislature may also establish courts, for municipal purposes only, in incorporated cities and towns."

"Sec. 6. The district courts in the several judicial districts of this state shall have original jurisdiction in all cases in equity; also in all cases at law which involve the title or the right of possession to, or the possession of real property, or mining claims, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand (exclusive of interest) or the value of the property in controversy exceeds three hundred dollars. * * * They shall also have final appellate jurisdiction in cases arising in justices courts, and such other inferior tribunals as may be established by law. The district courts, and the judges thereof shall have power to issue

writs of mandamus, injunction, quo warranto, certiorari, and all other writs proper and necessary to the complete exercise of their jurisdiction. * * *

The framers of our Constitution, judging from the report of debates upon the subject, appear to have been most zealous and careful in the language selected and the terms used in each particular section and article. It was no haphazard selection of provisions thrown together for the purpose of forming the fundamental law for the government of a new state. Words were selected with regard to their true, usual, and ordinary acceptance and meaning; and we, in construing and applying these provisions, now may well give these terms the very broadest meaning of which they are susceptible, but none such as would be inconsistent with the spirit and intent of the framers of that organic law.

Mr. Chief Justice Marshall, in the case of *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, at page 188, expresses the idea when he says that the framers of the Constitution must be understood to have employed words in their natural sense and to have intended what they have said. The application of this rule would forbid forced or unnatural construction to be put upon the language found in the constitutional provisions. "This," says Mr. Cooley, "seems so obvious a truism that one expects to see it universally accepted without question; but the attempt is made so often by interested subtlety and ingenious refinement to induce the courts to force from these instruments a meaning which their framers never held, that it frequently becomes necessary to redeclare this fundamental maxim." Cooley, *Constitutional Limitations*, p. 93.

In so far as the sections of the water law of this state directly involved in the proceedings in the district court are concerned, and in our attempt to test them under the constitutional provisions, we may be mindful of the rule that we are bound to indulge in the presumption of the validity of the statute, and we should so construe unless we find in the Constitution *some specific inhibition which has been disregarded or some express command which has been disobeyed*.

Reluctant as we may be to accept a responsibility wherein by reason of the nature of our duties we may be called upon to nullify the enactment of the legislative branch of the government, the seriousness of that responsibility impresses us all the more with the necessity that we should speak plainly and emphatically, and when we find some specific inhibition of the Constitution which has been disregarded or some express command thereof which has been disobeyed, we should adopt no apologetic language, but declare the condition, that the future may be benefited thereby.

Sections 25, 30, 33, 34, 35, 36, 37, 38, and 39 of the water law as amended seek to deal in a determinative way with the subject of

real property. In this and in the results accomplished pursuant to these statutory provisions, has a specific inhibition of the Constitution been disregarded, has some express command of the Constitution been disobeyed? This is the scope and limit of our inquiry. The identical question here presented was up for consideration before the federal District Court of the District of Nevada but a short time since (*Bergman v. Kearney* [D. C.] 241 Fed. 884), and inasmuch as the views expressed there by the learned judge is the apparent inspiration of the prevailing opinion here, we deem both most eminently worthy of review.

Certain sections of this act—and to these sections we confine ourselves entirely—would confer upon the state engineer the power to determine in the first instance the title to and the right to possession of real property as such is founded in the use and beneficial application of water diverted from the public streams.

The framers of our Constitution, recognizing that some tribunal or arbiter was necessary for the settlement of disputes and controversies having to do with the title to or possession of real property, designated in no uncertain language the district court as created by the Constitution to be the tribunal that should have jurisdiction over such matters. The district court by the express provisions of the Constitution (article 6, § 6) is conferred with original jurisdiction of cases in equity, and cases at law "which involve the title or right of possession to or possession of real property."

Sections 29, 30, 33, and 34 of the act provide for the institution, hearing, and determination of a contest, the subject of which is the right of the contestants to a stated appropriation of water. Under these sections the state engineer assumes functions of equal significance to a constituted court. The pleadings are provided for and the issues of fact and law are thereby made. Witnesses are required to testify before the state engineer. The subject-matter of the action is the independent, usufructuary estate in the use of water. Vested rights are set up and their validity passed upon by the state engineer. An order is made and caused to be entered of record by the engineer "determining and establishing" these rights, vested or otherwise. The order of the state engineer thus made becomes effective against the property of the parties contestant immediately on its being filed with the clerk of the district court. This is the original or initial proceeding involving property of the highest order. Is the function judicial? Is it "the exercise of that portion of judicial authority appertaining to or belonging to the judicial department?" *Bergman v. Kearney*, supra. It is not necessary for this court to answer this query. The organic law (section 6, art. 6) answers far above our power to add or detract. It is the

exercise of that portion of judicial authority belonging originally to the district court.

By section 35 the district court, the constituted court of original jurisdiction, is made a court of review only. The order of determination having already been made and filed by the state engineer pursuant to sections 29, 30, 33, and 34, and the establishment having been already set up and put into effect, the district court reviews the orders and establishments already made by the state engineer, and this review is limited to the orders of determination made, and is circumscribed as to those orders by the scope of the exceptions filed as provided in section 35. We say this because the pleadings as fixed by section 35 being "the order of determination of the state engineer and the statements or claims of claimants and exceptions made to the order of determination" limit and fix the scope of the review that may be conducted by the district court. Finally, the district court may, pursuant to section 36, do but one of two prescribed acts: "Affirm or modify the order of the state engineer." So by these sections it is sought to transfer the court of original jurisdiction into a court of review, where its field of review is limited and its powers or relief are fixed, and where the greatest function that it can perform with reference to a subject-matter over which it was by the organic law given original jurisdiction is to affirm or modify orders made originally by another tribunal. If this statute is to be upheld, the district court ceases to be a court of first instance as to these matters and becomes a court invested with limited powers of review and yet more limited powers as to the making of orders therein. Instead of being a proceeding the initial stages of which are before the engineer and the final stages before the district court, the reverse is the fact, for it is the order of determination as initially and finally made by the state engineer that is dealt with by the district court. Such order by the language of section 36 is final, subject only to modification by the district court. Modification has to do rather with degree of effectiveness than with finality. If that court affirms, it merely reasserts (Standard Dict.) an order in the making of which it had no part. Certainly, it will not be seriously contended that this is the original jurisdiction prescribed by section 6 of article 6 of the Constitution as belonging to the district court.

The Supreme Court of the United States, in *Pacific Live Stock Co. v. Lewis*, referring to the Oregon law under the Oregon Constitution, said:

"That the state, consistently with due process of law, may thus commit the preliminary proceedings to the board and the final hearing and adjudication to the court is not debatable." *Pacific Live Stock Co. v. Lewis*, 241 U. S. 440, 36 Sup. Ct. 637, 60 L. Ed. 1084.

Such observations might, under the peculiar language of the Oregon Constitution,

making no mention of the matter of original jurisdiction over real property, be pertinent. Again, it might apply by reason of the peculiar reviewing powers conferred on the circuit court of Oregon by their Constitution. But under our Constitution, which of itself "commits the preliminary proceedings" in matters involving title to real property specifically to the district court and limits the power of review by such court to certain matters arising in the justice's court only (*Anderson v. Kearney*, 37 Nev. 314, 142 Pac. 803), such an observation as that made in the *Lewis Case* is not to be anticipated.

It is asserted that the proceeding following the acts of the state engineer in making his determination and establishment is a special proceeding; that the transfer from the state engineer's office to the district court is not an appeal.

Taking the first assertion as to special proceeding, it must be admitted that if it is a special proceeding, it is one originating before a ministerial officer; and if it is a special proceeding, it is one involving title to real property, a subject constitutionally assigned to the judicial branch of the government. If it is a special proceeding, its culmination is an order establishing rights to the possession of real property, an order, the finality of which can, by the terms of section 36, be disturbed by the district court to the extent only of modification.

Taking the second assertion, that the proceeding in the district court is not an appeal, the language of the statute (section 36) precludes the idea of a trial de novo. The latter term implies complete power to try and determine as of the first instance. The language of the statute here studiously avoids such, and makes the power of determination of the district court limited to affirmance or modification of an order of establishment already made and entered by a subordinate authority. Can it be seriously contended that this is the original jurisdiction reposed in the district court by the framers of article 6, § 6, of the Constitution? However minutely the district court may review the proceedings under the exceptions taken (section 35), whatever evidence may be produced before the district court within the scope of the exceptions, however erroneous or unfounded the court may find the determination of the state engineer, such determination must stand in that court subject only to modification. The determination of the state engineer when filed in the district court under our statute (section 34) is not there as a matter of evidence (*Pacific Live Stock Co. v. Lewis*, supra; *In re Willow Creek*, 74 Or. 592, 144 Pac. 505, 146 Pac. 475). It has passed beyond the realm of the evidentiary. It cannot be excluded. The rules of materiality, relevancy, competency, and general admissibility are inoperative, because the statute confirms it as a fixity which must be af-

firmed, or at most can be but modified. How in seriousness can it be said that this order of determination, made originally by the state engineer, the finality of which cannot be disturbed, but at most can be but modified, is not of the very essence of that which is the sine qua non of that judicial power vested in the original jurisdiction of the district court? True, the form of the procedure whereby the determination of the state engineer goes to the district court is not such as we are accustomed to recognize as an appeal, but the substance of the whole proceeding in the district court is that of review only, review looking only to affirmance or modification. An appeal or review, except where it is provided for hearing de novo, is not to be regarded as a trial. *People v. McKemy*, 168 Cal. 531, 143 Pac. 752. Hence the trial, if there be one, in which is involved the title or right to possession of real property in so far as the same is involved in a vested water right is, under this statute, originally conducted, and the original order of determination is entered by the state engineer. A review of that trial looking only to affirmance or modification of that order is conducted in the district court; and, whether this review be termed an appeal or a special proceeding, the substance and result are the same. Due process of law as affecting real property under our Constitution (article 6, § 6) placed the power of original trial and final determination in the district court; the whole matter was one for the judicial branch of the government only. This was a constitutional guaranty under section 8, art. 1. The judicial authority of the state "may," says the Supreme Court of the United States, "keep within the letter of the statute prescribing forms of procedure in the courts and giving the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with the amendment (Fourteenth Amendment, United States Constitution). In determining what is due process of law, regard must be had to substance, not to form." *Chicago, Burlington & Quincy R. R. Co. v. City of Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979.

And again in the case of *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616, that court made the pertinent observation:

"Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation."

By this statute and under the sections providing for the trial and determination by the state engineer of property rights in the contest proceeding (sections 29, 30, 33, 34, 35, and 36) that officer is made to assume the powers properly belonging to the judicial branch of the government.

These sections of the water statute were taken largely from a similar statute found in the state of Oregon. In passing upon these sections of the act as they are now amended by our statute of 1915, the federal court, in *Bergman v. Kearney*, adopted the conclusion announced by the Supreme Court of the United States in the case of *Pacific Live Stock Co. v. Lewis*, supra, where like provisions of the Oregon statute were challenged. The Constitution of Oregon (article 7, § 9) provides:

"All judicial power, authority, and jurisdiction not vested by this Constitution, or by laws consistent therewith, exclusively in some other court, shall belong to the circuit courts; and they shall have appellate jurisdiction and supervisory control over the county courts, and all other inferior courts, officers, and tribunals."

In the *Lewis Case* the appellant concluded, as does petitioner here, that the proceeding in the circuit court constituted an appeal and was therefore a proceeding, the nature of which was not properly belonging to the circuit court. The Supreme Court of the United States, reviewing this provision of the water law of Oregon, in response to the argument of appellant said:

"A serious fault in this contention is that it does not recognize the true relation of the proceeding before the board to that before the court. They are not independent or unrelated, but parts of a single statutory proceeding, the earlier stages of which are before the board and the later stages before the court. In notifying claimants, taking statements of claim, receiving evidence, and making an advisory report, the board merely paves the way for an adjudication by the court of all the rights involved. As the Supreme Court of the state has said, the board's duties are much like those of a referee." *Pacific Live Stock Co. v. Lewis*, supra.

Speaking of this phase of our water law, Judge Farrington, in his opinion in the case of *Bergman v. Kearney*, said:

"There is no appeal from the determination of the engineer to the district court, but rather a continuation in that court of proceedings commenced by and before the state engineer."

The decision of the Supreme Court of the United States in the case of *Pacific Live Stock Co. v. Lewis*, while it appears to have afforded the thought which guided the learned judge of the federal court in the assertion just quoted, appears to our mind to afford no assistance in deciding the question as to the nature of the proceedings before the state engineer and as to the validity of sections 30, 33, 34, 35, 36, and 38 of the statute under the sections of our Constitution. In that case the court was, as it expressly declares, guided by the decision of the Supreme Court of Oregon in the case of *In re Willow Creek*, supra. This latter decision of the Supreme Court of Oregon was construing the statute of that state in the light of their Constitution, wherein the jurisdiction of the circuit court is as stated. Under their constitutional provision the way was made clear for matters such as the investigation by the circuit court of the findings and determination of the water board, the latter being the "early

stages" of a statutory proceeding, the "later stages" of which might be before the circuit court under its constitutional grant of "appellate jurisdiction and supervisory control over * * * officers and tribunals."

It is said in the prevailing opinion that neither the Constitution of Nebraska nor Nevada "has a word to say about irrigation." Hence, the decision of the Supreme Court of Nebraska in the cases of *Crawford v. Hathaway*, 60 Neb. 754, 84 N. W. 271, and *Enterprise Irrigation District v. Tri-State Land Co.*, 92 Neb. 121, 138 N. W. 171, should be guiding authorities here. True, neither the Constitution of Nevada nor that of Nebraska mentions irrigation; in both, however, property rights are protected. But, singularly, in Nevada real property is a subject over which a given tribunal, the district court, is vested with original jurisdiction. No such provision is found in the Constitution of Nebraska. This same distinction may be noted in comparing the Constitution of Nevada with those of Wyoming and Oregon, and this distinction differentiates the effect of the water statute of those states from that of ours under our constitutional provisions. This differentiation takes from the force and effect of the decisions rendered in the states named.

The function exercised by the state engineer under sections 29, 30, 33, and 34 being an original "determination and establishment" of the right to possession and enjoyment of property arrived at after a trial conducted with all the formality with which such would be conducted in a court of established jurisdiction, attended with all the seriousness and responsibility that is always attendant where title and right to possession of property is involved, is one which by the express command of the Constitution is placed in the district court, which by the specific inhibition of that organic law is denied to any other authority.

Keeping always in mind the nature of the proceeding contemplated by our water law and the character and nature of the subject-matter, and realizing that our water law was largely drafted from the Oregon statute, we may dwell with more than usual seriousness on a comparison of the constitutional grant of jurisdiction of our district court with that of the circuit court of Oregon. The Constitution of Oregon (article 7, § 1) vests the judicial power of the state in the Supreme Court, circuit court, and county courts. To the circuit court is granted general jurisdiction to be limited, regulated, and defined by law. Section 9 of article 7 makes clear the placing of all judicial power not otherwise vested by the Constitution or by laws in the circuit court. The term "jurisdiction" as applied to courts has been variously defined. It is:

"The power conferred on a court by Constitution or statute to take cognizance of the subject-matter of a litigation and the parties

brought before it, and to legally hear, try, and determine the issues * * * joined by them, either of law or of fact." *Brown on Jurisdiction*, § 2. *Western Union Tel. Co. v. Arnold*, 33 Tex. Civ. App. 306, 77 S. W. 249.

"Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence." *Illinois Central R. Co. v. Adams*, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410; *Venner v. Great Northern Ry.*, 209 U. S. 24, 28 Sup. Ct. 328, 52 L. Ed. 666.

Jurisdiction is not only the power to hear and determine, but also the power to render a particular judgment in a particular case. *Charles v. White*, 214 Mo. 187, 112 S. W. 545, 21 L. R. A. (N. S.) 481, 127 Am. St. Rep. 674.

Turning to our Constitution (article 6, § 6), we find specific conference of jurisdiction placed in the district court with reference to a given and specific subject-matter, to wit, title to real property and the right of possession thereto, so the right to put the wheels of justice in motion and proceed to final determination as to these specific subjects is vested in our district court. Moreover, the section of the organic law referred to gives the district court *original* jurisdiction. The word "original" is defined as:

"Of or belonging to the beginning; the first stage or existence of a thing." *Standard Dictionary*.

"Of or pertaining to the origin or beginning; first in order or existence; belonging to or being the origin or source." *Webster*.

"Pertaining to or characteristic of the first or earliest stages or state of anything. *Century*.

"Proceeding immediately from its source; not arising from or dependent on any other thing; independent; underivative." *Oxford*.

Our Constitution not only specifies the branch of the state government in which that particular subject, to wit, title to and possession of real property, shall be determined, and specifically provides the forum in which such matters may be heard and determined, but with equal emphasis it declares that forum to be the situs of the first stage or existence of a case involving matters of this general character. It is a well-established doctrine that the extent, character, and completeness of jurisdiction of a court is ordinarily to be determined by the provisions of the organic law or by such statutory provisions as may be enacted thereunder. To give sanction to the expression found in the prevailing opinion, and taken from the opinion of the federal district court in the case of *Bergman v. Kearney*, wherein is declared that the proceedings provided for by sections 36, 37, and 38 are but a continuation in the district court of proceedings commenced by and before the state engineer, we must close our eyes not only to the technical but to the ordinary acceptance and meaning of the term "original jurisdiction" as found in section 6 of article 6 of our Constitution applicable to our district court. The term permits of no such interpretation as signifying the continuation of a something commenced before any other authority. This term is applied to a specific forum which is empowered to deal

originally with specific subjects; it limits the place of first existence of actions with reference to the matters named. Actions commenced in a court endowed with original jurisdiction must, by reason of the very terms used, giving the words their very broadest scope and significance, be independent and unrelated to any primary or inferior authorities. Original jurisdiction is a vested power which bears no relation to prior proceedings. It is a power independent and unrelated; hence the view taken by the Supreme Court of the United States in the case of *Pacific Live Stock Co. v. Lewis*, supra, as to the validity of the Oregon law in the light of the Oregon Constitution, cannot be binding or applicable, and we regret that it can be of no assistance, in view of the vested power and emphatic exclusiveness thereof placed specifically in the district court by the Constitution of this state as to the subject of real property, its title and possession.

Addressing himself to this phase of the question and to the same contention as that of petitioner here, the learned judge of the federal court in the case of *Bergman v. Kearney*, says:

"The insistence that the proceedings provided in the statute as amended are tantamount to an appeal to the district court, as authorized in the act of 1913, is not well founded. At no stage does the determination possess any of the characteristics of finality; it cannot be regarded as terminating between the parties litigation on the merits of the case."

We dwell on the words of the learned judge, because they give force to our position both as to section 38 and also as to the effect of sections 34, 35, 36, and 37.

The very thing prescribed against by section 6 of article 6 of the Constitution is here presented, to wit, a proceeding involving title to or possession of real property brought before the district court, the initial stage or existence of which was before another jurisdiction or officer. Moreover, by the operation of these sections in conjunction with section 38, not only are the initial stages and existence of the proceedings brought before an authority other than that prescribed by section 6 of article 6 of the Constitution, but the initial order of determination is before another authority, and more, the initial power of execution of such orders of determination (section 38), which execution lays hold on real property, divests of or confers possession, declares the right of possession to, and would deliver possession thereof; all of which powers are by the constitutional prescription placed originally in the district court.

In reference to this proceeding, the court, in *Bergman v. Kearney*, further comments:

"It [the order of determination] operates, not as a judgment, but as a pleading, or the findings of a referee."

Again we dwell on the words of the learned federal court, for we may emphasize our thoughts thereby.

Section 33 requires the state engineer to "make, and cause to be entered of record in his office, an order *determining and establishing* the several rights to the waters of said stream. * * *" Section 34 provides for the filing of this order of determination and establishment in the office of the clerk of the court. This is made and entered prior to any court action.

A pleading is a statement of causes of action or grounds of defense; allegations of what is affirmed on one side or denied on the other, disclosing to the tribunal of trial the matter in dispute between the parties. It seems to us we are going far afield when we try to apply this definition to an order of determination filed in a court, subject to attack only within the scope of exceptions filed thereto, and which order of determination can only be affected in that court to the extent of modification or affirmance.

Section 38 commands the state engineer, after filing his order of determination with the clerk of the district court, to immediately assume the role of executioner, and without let or hindrance, as though clothed with all the equitable writs, enter upon private property, close and open headgates, confer or divest possession of property. Let us view section 38 under the theory of respondent that the state engineer might exercise the powers there sought to be conferred because his action in this respect was but temporary at most and was not final. If this ministerial officer can confer or divest title to property for the period of an hour, if he can for a day oust of or instate to possession of real property, what is there to limit the time during which his order conferring or divesting title or ousting of or instating to possession may be enforced? If the determination and order and the execution thereof made by the state engineer affecting the title to and right to possession of real property can, under our Constitution, be effective for the shortest period of time, can it not with equal sanction be made to be effective at the pleasure of that officer? When the Constitution declared that where a controversy arose involving the title or right to possession of real property it should originate in the district court, did it infer there that any other power than that tribunal could even temporarily oust of possession or divest of ownership? Was not the jurisdiction conferred on the district court by article 6, § 6, original and exclusively so? If so, then by what other means than the power and process of the district court may title to real property or the right to possession thereof be even temporarily determined? The prevailing opinion in dealing with section 38 waives it aside by alluding to the provision of section 39, wherein it declares that the operation of the order of determination "may be stayed in whole or in part by any party upon filing a bond in the court wherein such

determination is pending." We deem it sufficient observation to say that we are here required to determine whether a law is contrary to constitutional prescription, rather than as to how the effect of the law may be avoided. Section 38 is before us in this proceeding more effectually than any other section of the statute. It is no answer to the question of constitutionality to say that the effect of the law may be stayed by the giving of a bond by the party against whom the operation of the law may be enforced. Such does not operate to make a void law valid, nor does the fact that by this means there is offered a simple way of avoiding the force of the law resolve the question of its constitutionality. This section deals with property of the highest order and of which no man may be deprived without due process of law. Section 8, art. 1, Const. The question is not, may the force of this statute be avoided by some court order such as the issuance of an extraordinary writ, but rather, does the statute when enforced place in the hands of some ministerial officer, power and privilege which by the organic law may only be exercised by the judicial branch of the government? We have declared that where the means for the exercise of a grant of power are given, no other or different means can be employed as being more effectual or convenient. *State v. Hallock*, 14 Nev. 202, 33 Am. Rep. 559; *Fletcher v. Oliver*, 25 Ark. 289.

Let us suppose that a statute was enacted authorizing the state engineer to inquire as to the title and right to possession of all lands contiguous to the natural water courses in this state, and that as to a strip of land for one mile on each side of such water courses he was empowered to inquire as to the ownership or right to possession and to "determine and establish" the same, and, after filing his determination and establishment in the office of the clerk of the district court, he was empowered by the statute to issue his orders, putting his determination and establishment into effect. Let us suppose that pursuant to such statute the state engineer, having determined and established title and right to possession of the lands adjacent and contiguous to the Carson river system, sought to exercise his orders, and in furtherance thereof directed that certain parties vacate a given tract, and that the same be turned over to another; that certain gates be thrown open and others permanently closed; that certain titles were good and sufficient and others were void; would such a statute be constitutional? Under section 6 of article 7 of our organic law, would such acts be recognized? Manifestly not. A writ of injunction would no doubt lie to prevent the acts of the state engineer in this respect, but if the statute be challenged as to its constitutionality, would it be a sufficient answer for this court to say that, inasmuch

as a remedy was available by way of injunction, the question of constitutionality might be overlooked? Would this court be warranted, when called upon to declare as to the constitutionality of the statute, in saying: "Assuming that this statute is unconstitutional, the parties are protected in their property rights, inasmuch as they may seek relief by injunction," or would it suffice to say that, inasmuch as injunction might be sought to prevent the acts of the engineer, therefore the act was not in contravention of the organic law?

But there is another observation that might be made as to the availability of a remedy by injunction against the order determining and establishing water rights under section 33 of the statute under consideration and against the enforcement of such orders as provided for by section 38 of the statute. The learned judge of the federal court in the Bergman Case, like the prevailing opinion in this case, passed lightly over sections 33 and 38 and laid emphasis on the so-called remedy offered by section 39. The prevailing opinion contents itself with the assumptive hypothesis that section 38 is unconstitutional. In order to typify the remedy suggested by section 39, relied upon in the prevailing opinion, let us assume that an appropriator on the upper waters of the North fork of the Humboldt (a tributary of the Humboldt river system) finding his vested rights impaired by the state engineer, seeks the remedy of injunction to prevent his being deprived of his property by the acts of that officer. For immediate relief he must act under section 39 of the statute, which provides:

"At any time after the order of determination, evidence and transcript has been filed with the clerk of the court, as aforesaid, the operation of said order of determination may be stayed in whole or in part by any party upon filing a bond in the court wherein such determination is pending in such amount as the judge thereof may prescribe, *conditioned that such party will pay all damage that may accrue by reason of such determination not being enforced, pending decree by said court.* * * *" (We italicize.)

To whom may damage accrue by reason of such determination not being enforced? All the appropriators on a stream system affected by the order of determination made by the state engineer whose order of determination the appropriator seeks to stay. The injunction proceedings must be and are none other than a proceeding for the determination of a water right and to relieve such water right of an order unjustly and illegally made. That being true, the party seeking injunctive relief, unless he brings in all the appropriators on the stream, will be met with the objection of defect of parties defendant, because by section 45 of the original act of 1913 it is provided that:

"In any suit which may be brought in any district court in the state for the determination of a right or rights to the use of water of any

stream, all persons who claim the right to use the waters of such stream and the *stream system of which it is a part* shall be made parties." etc. Stat. 1913, p. 204.

So our appropriator on the North fork seeking injunctive relief from the order affecting his property must bring in as parties defendant, under the authority of sections 39 and 45, not alone the state engineer, but "all persons who claim the right to use the waters of such stream and the stream system of which it is a part." The stream system of which the North fork is a part is the Humboldt river system, extending from Northern Elko county to Western Humboldt county, affecting a culture watered area of approximately 300,000 acres, with more than 400 water users and appropriators. The court in fixing the bond before the issuance of the injunction must do so with a view to the "damage that may accrue by reason of such determination not being enforced," and the condition must run accordingly. Injunctive relief under such conditions is the adequate protection suggested by the prevailing opinion, afforded by way of staying the order of determination. To him whose property has been taken, whose vested rights have been divested, whose possession has been ousted, whose title may have been set aside, an injunction under such conditions is said to be available. Section 39, taken, as it must be, in connection with section 45 of the act of 1913, makes injunctive relief a useless and impossible thing. However just may be the appropriator's cause, however secure and well founded may be his vested right, immediate relief from the effects of an order, however unjust or unauthorized, is a thing impossible. A more effective plan of making the determination and order of the state engineer entered and put forth under sections 33 and 38 free from interference by court action could scarcely be conceived. By these sections a condition, and not a theory, is presented. The injunctive relief offered by section 39, when sought for, will, in the light of section 45, be found to be a remedy that does not relieve, a function without substance, a *camouflage* which serves the purpose of covering the hidden sting in section 38.

Respondents contend that section 38 is put in force only by the properly constituted authority, and in furtherance of this they argue that not until the final order and decree of the state engineer are filed with the clerk of the district court may such order become operative. In this they say is due process.

The contention of respondents in this respect finds sanction only in the fact that the order of determination, evidence, and transcript are filed with the clerk of that tribunal wherein is vested the original power to determine matters of that nature. If we read the section correctly, it calls for no judicial investigation or sanction to put it in operation. From the time the state engineer

files the orders of determination which he made, affecting certain property rights, he might set about under the sanction of section 38 and from thence exercise all the jurisdiction and powers that by the organic law were reposed in the district court. The judge of the district court, that constituted officer whose judgment and decision is presumed to be exercised and in whom is reposed the powers and duties under the law of determining title, possession, and right to possession of real property, might be in the remote ends of the state, yet by the mere act of filing his determination the state engineer becomes clothed with powers to fix, limit, regulate, establish, and set up the title or the right of possession or the possession of real property within that judicial district. This statute may give evidence of a studied effort to clothe the proceedings with the outward form of due process of law, but with that ingenious refinement of which Mr. Cooley makes mention, it is made devoid of the substance. Chicago, Burlington & Q. R. R. Co. v. City of Chicago, *supra*.

Section 38 ousts the district court of its constitutional function and seeks to repose in a ministerial officer powers which belong exclusively in that court. It is in contravention of the letter and spirit of the Constitution, as expressed in section 6, article 6, as well as in article 3, § 1.

In the case of Bergman v. Kearney, *supra*, plaintiff contended, as does petitioner here, that these sections of the act were void as conferring judicial powers on a nonjudicial officer. In the opinion in that case, the court took occasion to remark:

"Apparently it is not the exercise of all judicial authority, but the exercise of that portion of the judicial authority pertaining or belonging to the judicial department, which is forbidden."

We would search in vain for an expression more cogent to the furtherance of our views. Real property, the title thereof, and questions involving the possession or right of possession thereof, are all matters which the Constitution ordained should be originally dealt with, pertain to, and belong to the judicial department. These matters are exclusively and originally within the jurisdictional authority pertaining and belonging to the district court. The exercise of judicial authority to the extent of ousting from or conferring possession of real property is not only ultimately, but originally, in the district court, and any act which seeks to place this power to any extent in any other tribunal, board, body, or officer must fall by the force of the organic law, and especially under the view thereof as expressed by the learned judge of the federal court.

It is the exception found in section 1 of article 3 of our Constitution that adds emphasis to the application of the expression of the learned judge of the federal court:

"No persons charged with the exercise of powers properly belonging to one of these de-

partments shall exercise any functions appertaining to either of the others, *except in cases herein expressly directed or permitted.*"

There are exceptions expressly directed and permitted by the organic law itself. These exceptions furnished the basis for the assertion in the Bergman-Kearney Case that "a complete and perfect separation of powers is not made by the Constitution itself." The veto power of the Governor is authorized by the Constitution; likewise the Lieutenant Governor is made the presiding officer of the Senate. It is by constitutional provision that the Legislature is made the judge of the qualifications of its own members, and the Senate, the high court of impeachment. By section 6, art. 6, the original jurisdiction over the subject of real property, title thereto, and possession thereof, was specifically vested in the judicial branch, and no exception is expressly directed or permitted, nor can such exception be inferred from the language employed. The power of originally putting in motion the wheels of justice applicable to the title or right to possession of real property is seated in a designated branch of the government, and that without the remotest inference of exception:

"When the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition." Cooley, *Constitutional Limitations*, p. 99.

It is seriously contended here that the powers sought to be conferred on the state engineer by section 29 and those sections following are not such as belong to judicial officers; and in furtherance of this argument it is said that all acts judicial in their nature are not within the exclusive province of the judicial department of the government. We are referred to instances where nonjudicial officers have been required to exercise functions which in a sense are judicial and courts have held statutes imposing such duties or powers to be constitutional. Perhaps the most striking illustration of this is found in the statutes creating our Railroad Commission, the constitutionality of which was passed upon in the case of *Southern Pacific v. Bartine* (O. C.) 170 Fed. 725. But there it was held that the power exercised by this commission, as by other boards similarly created, is, in a constitutional sense, legislative rather than judicial. "Judicial power in the constitutional sense," says the court in the Bergman Case, *supra*, "is something more than authority to hear and determine; it includes the power to decide finally and conclusively." We would add to this expression by saying that when by constitutional mandate the power to hear *originally* and decide finally as to a specific thing, as in this instance the right to possession of real property, is placed in the judicial branch of the government, then a statute which seeks to confer these powers, either in the initial stage of determination or finally, in some

other branch of the government, is void as against the constitutional mandate. If the original jurisdiction to determine reasonable rates to be charged for freights and fares by common carrier was a function which by the constitutional mandate could be exercised originally and finally only by the district court, would not the fixing of freights and fares by a board or officer other than the district court be a usurpation of judicial function?

It is absurd to argue that in the proceeding before the state engineer nothing is involved which belongs to the function of the district court under its constitutional grant of jurisdiction. A mere analysis of the matter dispels such a contention. From the very moment that the state engineer attempts to *establish* (sections 29, 30, and 33), title and right to possession are involved. By reason of the force and effect of section 38, the immediate possession of and right of possession of a usufructuary estate is to be determined. When the proceeding before the state engineer passes out of the realm of investigation into that of *establishment* or *determination*, the nature of the proceedings changes; and the constitutional prescription, establishing the specific functions of the several branches of the state government, as a traffic officer on the avenue of governmental guarantees, calls a halt and points the way. Up to a given point the proceedings are ministerial; when they assume to establish or determine (sections 25 to 38) they take on the nature of an action to quiet title (*Rickey Land & Cattle Co. v. Miller & Lux, supra*), and that function belongs from the very initial step to the district court.

It has been suggested that the statute here under consideration is enacted under the police power of the state and for regulation; hence the observations as to the application of the several sections of the Constitution are not well taken. No authority of which we are aware has ever held that police regulation took the place of or superseded specific constitutional provision. Determination and establishment of individual or relative property rights is one thing; police regulation after determination and establishment is another. Where by the organic law itself the way is made and the machinery furnished for the carrying out of a given policy, that is final and police regulation can only follow.

To those who, believing in organized government, would adhere to a democracy, the Constitution is looked to as the instrument of guaranty, and its specific inhibitions and commands are to be enforced and carried out. We are referred to the learned words coming by way of an excerpt from an address of Mr. George B. Rose, of the Arkansas bar. The language and thought therein expressed, in the midst of the prevailing opinion, is most refreshing and enlightening.

In our humble way we might interpolate the words of the learned author by saying that the Constitution is never a "dam to stem the tide of human progress," when it points the way and paves the avenue by which that progress may be accomplished. It is the avoidance of that "broad channel" furnished by the organic law for human progress, and evasive constructions sanctioning such avoidance, that imperils the existence of constitutional government by making the same a "mere scrap of paper" rather than a guaranty. It is the "Constitution be damned" theory that wrecks the chariot of democratic government and makes the road of constitutional safety a quagmire of uncertainty.

In the proceeding before us it is sought to prohibit the district court from assuming jurisdiction of a matter involving title and right to possession of real property where a determination and establishment of that title has been already made by a ministerial officer and where, notwithstanding the constitutional direction that such was the original function of the district court, the determination and establishment as originally made by the ministerial officer can only be affected to the extent of modification.

The order of determination was originally and finally made by a ministerial officer, and in this he exercised functions belonging to the district court.

The district court assumes to take jurisdiction of this matter after determination by a ministerial officer, and can only review to ultimately affirm or modify that determination. In this it permits itself to be divested of original jurisdiction and assumes an appellate jurisdiction forbidden by the Constitution.

The order of determination which the lower court will act upon and which it will modify or affirm, is a decree by which it is bound, and not of its own making. It is not due process of law.

The writ should have issued.

(87 Or. 476)

ARCHAMBEAU v. EDMUNSON et al.

(Supreme Court of Oregon. Feb. 26, 1918.)

1. TRIAL \S 366—SPECIAL INTERROGATORIES—DEFECTS.

Objections to the form of special interrogatories submitted are waived where, prior to submission, they were not called to the court's attention.

2. TRIAL \S 350(2), 355(3)—SPECIAL INTERROGATORIES—OBJECTIONS.

A special interrogatory should not submit to the jury a question calling for a conclusion of law, and, in order to sanction judgment, a special verdict should contain statements of ultimate facts.

3. DEEDS \S 66—DELIVERY—QUESTION OF FACT.

Where there is any controversy upon the subject the delivery of a deed or instrument of such nature is a question of fact.

4. TRIAL \S 366—SPECIAL INTERROGATORIES—OBJECTIONS—WAIVER.

Where the court's attention was not called to any defect of form, a special interrogatory submitting to the jury the question whether a contract for the sale of land was delivered is not open to objection on the ground that it called for determination of the ultimate fact of delivery instead of the evidentiary facts from which that fact was to be deduced.

5. EVIDENCE \S 246—ADMISSIONS—ADMISSIONS IN OPEN COURT.

In an action for damages for breach of contract to convey land, where plaintiff's counsel in open court stated that if the contract was not delivered plaintiff would only be entitled to recover sums paid, such statement is an admission binding on plaintiff, and a verdict for a greater sum cannot be sustained where the jury found that the contract had not been delivered.

6. TRIAL \S 359(1)—SPECIAL FINDINGS—CONFLICTS.

Under L. O. L. \S 155, special findings by the jury will, where conflicting with the general verdict, control.

7. APPEAL AND ERROR \S 876—REVIEW—QUESTIONS PRESENTED.

While under L. O. L. \S 548, an order setting aside judgment is deemed a final judgment for the purpose of review, yet as there is no determination on the merits, the propriety of a ruling that counterclaims and defenses interposed by certain of the defendants were sufficient cannot be reviewed.

8. TRIAL \S 219—INSTRUCTIONS—"EXECUTION OF WRITING."

In an action for damages for breach of a contract to convey land, an instruction that before the contract could be binding on defendants there must be an execution and delivery, and if there was no delivery or if there was an unauthorized delivery there could be no recovery, is, under L. O. L. \S 777, declaring that the execution of a writing is the subscribing and delivering, erroneous; there being no attempt in the instructions to define or explain what in law constitutes the delivery of a writing.

9. NEW TRIAL \S 40(4)—AUTHORITY OF COURT—ERROR OF LAW.

Under Const. art. 7, \S 3, as amended, declaring that in actions at law where the value in controversy shall exceed \$20 the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court unless the court can affirmatively say there is no evidence to support the verdict, the trial court has authority on its own motion to grant a new trial on account of errors in instructions submitting the cause to the jury, even though no exception was taken.

Department 2. Appeal from Circuit Court, Lane County; G. F. Skipworth, Judge.

Action by F. A. Archambeau against Donna Edmundson and others. On defendants' motion a judgment and verdict for plaintiff was set aside, and thereafter the court on its own motion set aside a second judgment and granted new trial, from which order defendants appeal, and plaintiff cross-appeals from the order setting aside the first judgment. Affirmed.

This was an action to recover damages for the alleged breach of an agreement. The complaint, as far as deemed material herein, substantially charges that on September 1, 1912, a written contract was subscribed by the parties whereby the defendants, in consideration of the payment of \$150 an acre,

stipulated to sell and convey to the plaintiff a sand and gravel bar in the Willamette river on the Blighton farm in Lane county, Or., and within a designated time they would procure a survey of the land and deposit with a specified bank an abstract showing a marketable title to the tract and a deed conveying it to the plaintiff; that pursuant to the terms of the agreement he took possession of the land, made valuable improvements thereon, and paid \$400 on account of the purchase price; that the written contract was subsequently modified so that plaintiff agreed to pay \$175 an acre for the premises; that without his consent the defendants sold and conveyed to a third person a part of the tract which they had stipulated to grant to the plaintiff, to his damage, etc. The answer denies the material averments of the complaint and for a further defense, so far as considered important, alleges in effect that no written agreement had ever been consummated by the parties; that the defendants had fully performed all the terms of an oral agreement to sell and convey the land, causing the premises to be surveyed and tendered a deed therefor to the plaintiff from whom they demanded the remainder of the consideration, but he refused to comply therewith. For another defense and by way of counterclaim the answer charges that the plaintiff hauled away from the bar sand and gravel of a specified value, and upon demand for the payment thereof he refused to adjust the matter to the defendants' damage. A reply put in issue the allegations of new matter in the answer. At the trial of the cause testimony was received on the part of the defendants tending to show that a writing was subscribed by them and left with their attorney from whom, without their consent, an agent of the plaintiff obtained the document for the represented purpose of making a copy, and thereupon delivered the paper to his principal who signed it. When all the testimony had been received, the court addressing plaintiff's counsel inquired:

"If the jury should find that this contract was never delivered to the plaintiff, then do you concede that your case would fail?"

The counsel replied:

"No, sir; I do not.

"The Court: Suppose that the jury should find that this contract was never consummated, never delivered?

"Counsel: Even in that event, we would be entitled to our money back on the ground that the violation of the contract was willful.

"The Court: You would not contend that you would be entitled to any more than your money back?

"Counsel: If they found that no contract was delivered, all we would be entitled to would be upon the basis of a rescission. Our money back.

"The Court: That is one of the special questions that I am going to submit to the jury."

Thereupon written interrogations, without objection or exception, were propounded by the court to the jury, who answered them as follows:

"Question No. 1. Was the written contract Exhibit A delivered by the defendant to the plaintiff? Answer: No.

"Question No. 2. Did the defendants offer to convey to the plaintiff all the land which they agreed to convey? Answer: No.

"Question No. 3. How much, if any, is the plaintiff entitled to as general damages? Answer: \$1,600.

"Question No. 4. How much, if any, are the defendants entitled to recover on account of sand and gravel removed from the premises? Answer: Nothing."

A general verdict was also returned in plaintiff's favor for \$1,600, and a judgment was entered therefor. The defendants' counsel then moved to set aside such determination and for a judgment in favor of their clients on the ground that the general verdict was inconsistent with the special findings, which motion was granted. Thereupon the court, upon its own motion, deeming that its charge to the jury, which was not challenged in any manner, was not sufficiently specific in respect to the alleged delivery of the written contract, set aside the latter judgment and granted a new trial, from which order the defendants appealed. Thereafter the plaintiff also took a cross-appeal from the order setting aside the first judgment.

Chas. A. Hardy and John M. Williams, both of Eugene (Williams & Bean, of Eugene, on the brief), for appellant. Fred E. Smith and C. M. Kissinger, both of Eugene (J. H. Bower, of Florence, and W. G. Martin, of Eugene, on the brief), for respondents.

MOORE, J. (after stating the facts as above). [1] Considering these appeals in reverse order, it is contended by plaintiff's counsel that an error was committed in submitting to the jury the first interrogatory, which it is asserted involved an issue of law that should have been determined by the court, and that though the written contract may not have been actually delivered, the inquiry took from the jury a consideration of the question as to whether or not the alleged agreement was acted upon by the parties and thereby ratified so as to become a binding obligation, and for these reasons the first judgment was improperly set aside. A text-writer, referring to such interrogatories, remarks:

"If the questions asked are defective, the court's attention should be called to the fact before they are submitted, otherwise they will not be closely criticized on appeal. But if questions are omitted which a party thinks should be submitted, he cannot raise the question by objecting to the submission of the draft. His remedy is by submitting an additional draft containing the facts on which he desires findings." Clementson, Special Verdicts, p. 69.

This author further observes:

"Objections to form must be made at the time of submission, otherwise it will be presumed that there was assent to the submission of questions as drawn by the court." Id. 193.

As no objections to the interrogatories submitted were interposed, nor additional drafts

suggested, so as to call to the court's attention the facts now urged in respect to a possible ratification of the terms of the alleged contract, all questions relating to that subject were thereby waived.

[2-4] In support of the assertion that the first interrogatory involved a question of law, reliance is had upon the case of *White v. White*, 34 Or. 141, 158, 50 Pac. 801, 55 Pac. 645, where, over objection, an issue was submitted requiring a special verdict as to the delivery of a deed, and it was held that the investigation demanded properly related to a probative fact upon which the rights of the parties depended and was determinative of the case, and that the interrogatory did not refer to mere evidentiary facts, which might afford only prima facie proof of some other fact. In that case the inquiry submitted, omitting names, was in effect: Did the deceased in his lifetime voluntarily place the deed in question in possession and control of the defendant, the grantee named in the sealed instrument? An objection was interposed to the question on the ground that it was inconclusive, immaterial, and misleading. The jury answered the inquiry in the affirmative.

When there is any controversy upon the subject, the delivery of a deed is always a question of fact. 2 Jones, Real Prop. § 1220. In *Flint v. Phipps*, 18 Or. 437, 439, 19 Pac. 543, 545, Mr. Justice Strahan, in speaking of a deed remarks:

"The question of delivery is purely a question of fact."

In *State v. Leonard*, 73 Or. 451, 483, 144 Pac. 683, Mr. Justice Ramsey in referring to this subject observes:

"The question of delivery is always a question of fact for the jury where there is any conflict in the evidence in relation thereto."

A text-writer, discussing this matter, says:

"Some courts have stated broadly that delivery is a question of fact. Taken literally, however, this declaration is, perhaps, too sweeping, as ignoring the occasional instances in which the undisputed facts establish delivery as a matter of law. And strictly speaking the question is rather one of mixed law and fact, for from the detail of facts established the legal conclusion must be drawn, though, since the jury usually must find a delivery or not, or else the circumstances from which the court may draw its conclusions, the question may properly be denominated, as has been done in a number of cases, largely one of fact, being so much so, indeed, that the decision of the lower court is conclusive unless the specific facts found conclusively establish the contrary." 8 R. C. L. 976.

The rule established sustains the statement that an interrogatory should not be submitted to the jury which calls for a conclusion of law (38 Oyc. 1912, 1917), and in order to sanction a judgment rendered thereon, special verdicts must contain statements of ultimate facts. *Id.* 1921. As no objection was interposed to the form of the inquiry, an answer to which required a consideration and determination on the part of the jury of the ultimate fact relating to the delivery of the

written contract and not the mere evidentiary facts from which the fact, incapable of further analysis, was to be deduced, no error was committed in the respect alleged.

[5] It is insisted by plaintiff's counsel that the second interrogatory assumes that the defendants agreed to convey the land to the plaintiff, and that this inquiry is so inconsistent with the first, that an error was committed in setting aside the original judgment. From the colloquy between the court and plaintiff's counsel, as hereinbefore set forth, the issue seems to have been narrowed to a consideration of the question as to whether or not the defendants delivered to his client the written contract, and if no surrender thereof had been made then the plaintiff's recovery was limited to \$400, the amount paid on account of the alleged purchase, from an acceptance of which sum an oral agreement to sell and convey the land might reasonably be inferred, and this being so, a breach thereof required a return of the money thus received. This is the construction which the trial court seems to have given to the second interrogatory, the language of which is not inconsistent with the first.

It is argued by plaintiff's counsel that the jury unmistakably intended to award his client a recovery of \$1,600, and hence the judgment originally rendered therefor was erroneously set aside. The answers to the first and third interrogatories are inconsistent when viewed in the light of the questions propounded by the court to plaintiff's counsel and his replies thereto. Since he thus solemnly asserted in open court that only \$400 could legally be recovered, in case the jury should find the written contract was never delivered, that declaration should be binding.

[6] When special findings made by the jury are inconsistent with the general verdict, the findings are controlling. L. O. L. § 155; *Rolfes v. Russel*, 5 Or. 400; *Loewenberg v. Rosenthal*, 18 Or. 178, 22 Pac. 601; *Leavitt v. Shook*, 47 Or. 239, 83 Pac. 391; *Palmer v. Portland Ry., L. & P. Co.*, 62 Or. 539, 125 Pac. 840; *Parker v. Smith Lumber Co.*, 70 Or. 41, 138 Pac. 1061; *Herrlin v. Brown & McCabe*, 71 Or. 470, 142 Pac. 772. In consequence of the inconsistency in the answers to the interrogatories mentioned, the judgment based upon the general verdict was properly set aside, instead of disregarding the answer to the first question returned by the jury and rendering judgment on the general verdict.

[7] Exceptions were taken by plaintiff's counsel to the court's ruling that a counterclaim, interposed as a defense to the maintenance of the action, was sufficient, and in sustaining the contention of the defendants *H. L. Edmunson*, *Millie Blighton*, and *R. A. Maltzan* that each signed the writing intended as a contract in order to release an inchoate right of curtesy or of dower in, and to the premises described in the complaint, and that neither of them was liable for a breach of the agreement. It will be remembered

that the cross-appeal was taken from the order setting aside the first judgment. Such direction of a court is deemed to be a judgment or decree for the purpose of being reviewed. L. O. L. § 548. The only question presented by an appeal from an order setting aside a judgment is the action of the court in that respect, and, as no final determination upon the merits of the cause then remains, any other ruling in relation to the issues must necessarily be held in abeyance until a judgment thereon has been regularly rendered. The alleged assignments of error in these particulars will therefore not be considered.

[8, 9] The defendants' counsel contend that since no objections were made or exceptions taken to any part of the charge to the jury, the court erred in setting aside the judgment ultimately rendered in favor of their clients and in granting a new trial. It will be remembered that the trial court, deeming its unchallenged instructions in respect to an alleged delivery of the written contract were insufficient properly to enable the jury to understand the rules of law governing the surrender of the possession of a writing, set aside the second judgment and granted a new trial upon its own initiative. The jury were charged *inter alia* as follows:

"Before this written contract can be binding upon the defendants, there must be an execution and delivery of the contract. If you find there was not a delivery of the contract, or if you find it was an unauthorized delivery of the contract, then I instruct you that the plaintiff would not be entitled to recover, and it would be your duty to return into court a verdict for the defendants."

From the language thus employed it will be seen that a distinction was made between the terms "execution" and "delivery," while our statute declares: "The execution of a writing is the subscribing and delivering it, with or without affixing a seal." L. O. L. § 777. The execution of a document therefore necessarily includes its delivery. The instructions do not attempt to define or explain in any manner what in law constitutes the delivery of a writing, which surrender of possession has been held to mean any act, word, or conduct from which may reasonably be inferred an express or implied assent on the part of one party to the document that it should irrevocably pass beyond his control, and then or subsequently to be ultimately possessed by the other party to the instrument. *Fain v. Smith*, 14 Or. 82, 12 Pac. 365, 58 Am. Rep. 281; *Shirley v. Burch*, 16 Or. 83, 18 Pac. 351, 8 Am. St. Rep. 273; *Allen v. Ayer*, 26 Or. 589, 39 Pac. 1; *Hoffmire v. Martin*, 29 Or. 240, 45 Pac. 754; *Tyler v. Cate*, 29 Or. 515, 45 Pac. 800; *Payne v. Hallgarth*, 33 Or. 430, 54 Pac. 162; *Swank v. Swank*, 37 Or. 439, 61 Pac. 846; *Pierson v. Fisher*, 48 Or. 223, 85 Pac. 621; *Burns v. Kennedy*, 49 Or. 588, 90 Pac. 1102; *Reeder v. Reeder*, 50 Or. 204, 91 Pac. 1075; *Footo v. Lichty*, 60 Or. 542, 120 Pac. 398;

Thrush v. Thrush, 63 Or. 143, 125 Pac. 267, 126 Pac. 994.

The rule formerly obtained in Oregon that the granting or denial of a motion for a new trial was a matter resting within the discretion of the trial court, whose action upon the application would not be disturbed upon appeal, except in case of a manifest abuse of what should have been an exercise of sound judgment. Section 3, art. 7, of the Organic Law of this state, as amended, declares:

"In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." Gen. Laws. Or. 1911, p. 7.

Since that amendment became operative it has been held that the granting of a new trial was not a matter of discretion; that an order for the rehearing of a cause could not be sanctioned except when the court had committed some error, which, if properly excepted to or seasonably called to the attention of the court and the motion denied, would have been sufficient cause for a reversal of the judgment if it had been brought up for review; and that under such circumstances the trial court upon motion or *sua sponte* possessed adequate power and was authorized within the prescribed time to correct the error which it had committed by granting a new trial. *De Vall v. De Vall*, 60 Or. 493, 118 Pac. 843, 120 Pac. 13, Ann. Cas. 1914A, 409, 40 L. R. A. (N. S.) 291; *Taylor v. Taylor*, 61 Or. 257, 121 Pac. 431, 964; *Sullivan v. Wakefield*, 65 Or. 528, 133 Pac. 641; *Smith Typewriter Co. v. McGeorge*, 72 Or. 523, 143 Pac. 905; *Rudolph v. Portland Ry., L. & P. Co.*, 72 Or. 560, 144 Pac. 93; *Frederick & Nelson v. Bard*, 74 Or. 457, 145 Pac. 669; *McGinnis v. Studebaker*, 75 Or. 519, 146 Pac. 825, 147 Pac. 525, L. R. A. 1916B, 868, Ann. Cas. 1917B, 1190; *Delovage v. Old Oregon Creamery Co.*, 76 Or. 430, 147 Pac. 392, 149 Pac. 317; *Pullen v. Eugene*, 77 Or. 320, 146 Pac. 822, 147 Pac. 768, 1191, 151 Pac. 474, Ann. Cas. 1917D, 933; *Brewster v. Springer*, 79 Or. 88, 154 Pac. 418; *Wakefield v. Supple*, 82 Or. 595, 160 Pac. 376; *Speer v. Smith*, 83 Or. 571, 163 Pac. 979.

The rule thus established ought in our opinion to be enlarged so that, when by reason of some misapplication of the principles of law to which no exception has been taken, or in consequence of some inadvertence to which attention has not been called, if the court is satisfied that a party has not had his cause properly presented, justice which should be dispensed in all cases sanctions the setting aside of a judgment rendered upon a verdict and the granting of a new trial, when such action of the lower court does not violate section 3 of article 7 of the Constitution of Oregon, respecting the quantum of evidence.

In this instance, the action of the court in granting a new trial in consequence of its failure properly to instruct the jury in rela-

tion to the delivery of the alleged written contract brings this case within the rule last announced, and, this being so, the orders appealed from are affirmed.

McBRIDE, C. J., and McCAMANT and BENSON, JJ., concur.

(38 Or. 84)

GABEL v. ARMSTRONG.

(Supreme Court of Oregon. Feb. 26, 1918.)

1. PLEADING \S 225(2)—DEMURRER—DISCRETION OF COURT.

Permission to amend after a demurrer is sustained should ordinarily be granted, but the matter rests in the discretion of the court, and denial of permission to amend after demurrer is sustained to affirmative matter in defendant's fourth amended answer cannot be treated as an abuse of discretion.

2. PLEADING \S 330—ISSUES—EVIDENCE ADMISSIBLE.

Evidence in support of affirmative allegations of the answer to which demurrer was sustained, and which were out of the case, was properly excluded.

3. PAYMENT \S 82(4) — RECOVERY — VOLUNTEERS.

Where, after defendant purchased a bakery, giving a chattel mortgage to secure the purchase-money notes, and the seller induced her to pay for personal property on the premises on the ground that it was not included in the sale, defendant cannot, in a suit to foreclose the chattel mortgage, offset the amount of the payment which was not made under duress, on the ground that the property so paid for was included in the sale, for defendant was as to such payment only a volunteer.

4. CHATTEL MORTGAGES \S 274 — RELIEF — LACHES.

Where such payment was made in July, 1913, and suit on the chattel mortgage was begun in October, 1914, but the payment was not set up by defendant until the filing of her fourth amended answer, on March 30, 1916, the lapse of time precluded recovery of the payment; no equity other than that arising on account of the payment appearing.

5. CHATTEL MORTGAGES \S 277—PLEADING—CONSTRUCTION.

While a pleading is to be construed most strongly against the pleader, the language is to be interpreted fairly and in accordance with the intent of the pleader if that intent is to be gathered from a reasonable construction of the language used; hence in a suit to foreclose a chattel mortgage given to secure notes executed for the purchase of a bakery, an answer, alleging that plaintiff, seller, misrepresented to defendant purchaser the profitableness of the bakery business, was a sufficient averment that the sale was induced by material misrepresentations.

6. SET-OFF AND COUNTERCLAIM \S 14—SUIT IN EQUITY—LEGAL DEMAND.

Where plaintiff sold defendant a bakery, misrepresenting the profits of the business, defendant's remedy on account of the misrepresentations is at law, and hence in a suit to foreclose a chattel mortgage on the property given to secure purchase-money notes, defendant cannot as a counterclaim set up the misrepresentations, for L. O. L. \S 401, relating to counterclaims in equity, declares that the counterclaim shall be one on which a suit in equity might be maintained by defendant against plaintiff.

7. PLEADING \S 143—CONSTRUCTION—SUFFICIENCY.

The sufficiency of a pleading is to be tested by its allegations, not by the name which the pleader has given it, and an answer in a suit to foreclose a chattel mortgage, which set up a valid defense by way of recoupment, is not subject to demurrer, though it was denominated a counterclaim.

8. SET-OFF AND COUNTERCLAIM \S 29(2)—RECOUPMENT—PLEADING.

In a suit to foreclose a chattel mortgage on a bakery, given to secure purchase-money notes, defendant, the purchaser, and mortgagor, may by way of recoupment plead the seller's misrepresentations by means of which the sale was induced.

9. PLEADING \S 143—DEFENSES—DEMURRER.

In a suit to foreclose a chattel mortgage given to secure purchase-money notes, defendant's answer, setting up by way of recoupment damages for fraudulent misrepresentations made in effecting the sale, is not subject to demurrer, although the damages alleged to have resulted from the fraud were less than the amount of plaintiff's demand, for such answer was a good defense pro tanto.

10. CHATTEL MORTGAGES \S 272 — FORECLOSURE—DEFENSES.

In a suit to foreclose a chattel mortgage on a bakery given to secure notes for its purchase, defendant's answer setting up that the plaintiff agreed not to conduct a bakery in that section for at least a year, but that shortly after the sale he notified customers he would soon be engaged in the bakery business, and shortly thereafter did engage in such business to defendant's damage, is defective, not showing that plaintiff opened the second establishment within the year period.

Department 1. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Suit by George Gabel against Jennie Armstrong. From a decree for plaintiff, defendant appeals. Reversed and remanded.

This is a suit brought to foreclose a chattel mortgage on a bakery, given to secure promissory notes of the defendant, aggregating \$2,500. Payments had been made on the debt, and at the time the suit was brought, the balance due was alleged to be \$1,100, with interest. The defendant was permitted to file four answers. Plaintiff's demurrer to the affirmative matter in the fourth amended answer was sustained. The court refused to permit defendant to file a fifth answer, and the case was tried on the complaint and the denials contained in the fourth amended answer. The decree was for plaintiff, and the defendant appeals.

Bradley A. Ewers, of Portland (Sears & Ewers, of Portland, on the briefs), for appellant. B. Cole, of Portland (C. A. Bell, of Portland, on the briefs), for respondent.

McCAMANT, J. (after stating the facts as above). [1] Error is assigned on the refusal of the circuit court to permit defendant to file a fifth amended answer. Permission to amend after a demurrer is sustained should ordinarily be granted, but the matter rests in the discretion of the court. *West v. McDonald*, 74 Or. 421, 423, 144 Pac. 655. In the case

at bar we are advised by the briefs of certain matters which should have inclined the circuit court to be liberal in permitting defendant to amend. These matters do not otherwise appear from the record. We cannot say that there was an abuse of the court's discretion when defendant was denied the right to file a fifth answer.

[2] Error is also assigned on the exclusion of testimony offered by the defendant. This testimony tended to sustain the affirmative allegations which went out of the case on demurrer. The issues as they stood at the time of trial did not authorize the admission of this evidence. The only other errors assigned by defendant are based on the order sustaining the demurrers to the three affirmative defenses set up in the fourth amended answer.

[3, 4] The first of these affirmative defenses alleges that defendant purchased the bakery described in the mortgage from plaintiff and his co-owners for \$3,000; that \$500 of this sum was paid in cash, and that the notes for the security of which the mortgage was given represented the remainder of the purchase price. It is then alleged that the vendors falsely represented to defendant that the purchase covered certain personal property of the reasonable value of \$350, located on the premises, but that thereafter the vendors induced defendant to pay them the sum of \$350 for this property. It is alleged that defendant is entitled to have this sum credited on the cause of action asserted in the complaint. The \$350 was paid July 7, 1913, the suit was brought October 23, 1914, and the fourth amended answer was filed March 30, 1916. There is nothing to show that defendant acted under duress in making this payment. The payment was made at a time when the falsity of the representations had been demonstrated and when defendant labored under no misapprehension as to the facts. She therefore paid as a volunteer, and cannot recover the money. *Scott v. Ford*, 45 Or. 531, 535-545, 78 Pac. 742, 80 Pac. 899, 68 L. R. A. 469; *Eugene v. Lane County*, 50 Or. 468, 470, 93 Pac. 255. If she were otherwise entitled to rescind and recover the \$350, lapse of time would bar her right, in the absence of some equity not disclosed by this record. *Cooper v. Hillaboro Garden Tracts*, 78 Or. 74, 85, 152 Pac. 488, Ann. Cas. 1917E, 840. The court did not err in holding this pleading insufficient.

[5] The second affirmative answer repeats the allegations of the first defense as to the circumstances under which the notes and mortgage were executed by defendant. It is then averred:

"That in order to induce the defendant to purchase from the plaintiff, Henry Gabel and Mary Gabel, the personal property hereinabove described, the plaintiff, Henry Gabel and Mary Gabel, falsely and fraudulently represented to the defendant that many months prior to said July 5, 1913, they had been operating the said bakery; * * * that they were drawing between them \$39 per week as part of the running expenses of said business, and after paying all other expenses of conducting the said business were

making a profit of not less than \$300 per month, which they were dividing among them; that said bakery business was being conducted at a large profit of not less than \$300 per month, and would continue in the ordinary course of business to net defendant such profit; * * * that each and all of the said representations were false and untrue, and were known by the plaintiff, Henry Gabel and Mary Gabel, to be false and untrue, and were made by them to the defendant for the purpose of falsely and fraudulently inducing the defendant to purchase said personal property, and that plaintiff and Henry Gabel and Mary Gabel intended that the said defendant should rely upon said representations, and defendant did rely thereon, and, believing the same to be true, made the purchase aforesaid; that in truth and in fact the said bakery business had not been conducted at a profit by the plaintiff and said Henry Gabel and Mary Gabel, but had in fact for some time prior to the said sale been conducted by them at a loss."

There are other allegations not necessary to be quoted. We think that the averments which we have set out sufficiently allege actionable fraud. They contain all of the elements of a valid plea as defined in *Rolfes v. Russel*, 5 Or. 400, 402. While the pleading is to be most strongly construed against the pleader, the language is to be interpreted fairly and in accordance with the intent of the pleader if that intent is to be gathered from a reasonable construction of the language used. Defendant plainly intended to charge that plaintiff and his co-owners represented that they were in possession of the bakery at the time of the sale; that they had been operating the bakery for many months at a profit which was specified in the representations; that in fact the bakery was conducted at a loss; that the representations were made with intent to deceive and were acted on by defendant to her injury. There can be no doubt of the materiality of the misrepresentation. The profitability of a business is vitally related to its value, and is always important from the standpoint of the purchaser.

[6] This portion of defendant's pleading is denominated a counterclaim. It is clear that if defendant had sued in assertion of the rights alleged, her remedy would have been at law. 39 Cyc. 1997. This affirmative answer is therefore not good as a counterclaim in equity within the provisions of section 401, L. O. L.

[7] It is well settled, however, that the sufficiency of a pleading is to be tested by its allegations, not by the name which the pleader has given it. A pleading is not obnoxious to general demurrer if any portion of it by fair construction states a cause of action or defense. *Simpson v. Prather*, 5 Or. 86, 88; *Jackson v. Jackson*, 17 Or. 110, 112, 113, 19 Pac. 847; *Waggy v. Scott*, 29 Or. 386, 388, 45 Pac. 774. It is of no consequence that the pleader has misapprehended the legal effect of his allegations and claims for them conclusions not warranted. *Hanna v. Hope*, 168 Pac. 618, 619; *Robinson v. Phegley*, 84 Or.

124, 128, 130, 163 Pac. 1166. If this portion of the answer states a defense to the suit, the circuit court erred in sustaining the demurrer by which it was attacked.

[8] It is a well-established principle of equity jurisprudence that the mortgagor may defend against the foreclosure of a purchase-money mortgage on the ground of fraudulent representations inducing the purchase, and that this defense is available where the right to rescind is waived and damages are claimed by way of recoupment. *Twitchell v. Bridge*, 42 Vt. 68; *McMichael v. Webster*, 57 N. J. Eq. 295, 41 Atl. 714, 73 Am. St. Rep. 630; *Allen v. Henn*, 197 Ill. 486, 494, 495, 64 N. E. 250; 27 Cyc. 1556; 19 R. C. L. 542, 543; 21 L. R. A. 324, note. Under the old chancery practice, such defense could be set up by answer; a cross-bill was unnecessary to its assertion. *McMichael v. Webster*, 57 N. J. Eq. 295, 297, 298, 41 Atl. 714, 73 Am. St. Rep. 630. This is tantamount to holding these allegations defensive; it is well settled that affirmative relief under the chancery practice is obtainable only by cross-bill. 2 *Daniel's Chancery Pleading and Practice* (6th Ed.) 1550; 10 R. C. L. 262. *Twitchell v. Bridge*, 42 Vt. 68, 74, was a suit to foreclose a purchase-money mortgage. The answer alleged fraudulent representations inducing the purchase by defendant, and prayed that defendant be credited with the damages suffered by reason of this fraud. Plaintiff challenged the right of defendant to set up this defense in equity. The court said:

"The technical objection to adjusting this whole matter in this suit is of no avail in a court of equity. It is in no sense an offset; it is a defense growing out of the same contract on which the note and the mortgage were given, and strikes at the consideration of the note. The proof shows a partial want of consideration. The orator is asking the court in a proceeding instituted by himself to enforce the note for the whole nominal amount, and thus to compel the defendant to pay more than he justly or equitably owes, or else to be barred of his equity of redemption. A party who asks equity must do equity. It is not in accordance with equity law to compel this defendant to pay for land he never had; to pay more than the orator is entitled to hold; and to compel the defendant to resort to a court of law to recover back the excess. The whole matter should be adjusted in this suit, and the defendant decreed to pay only so much as the orator is equitably entitled to receive and ultimately retain."

We are committed by two recent decisions of this court to the doctrine that on the foreclosure of a purchase-money mortgage it is competent for the defendant to allege fraud on the part of plaintiff inducing the purchase and to recoup the damages arising therefrom against plaintiff's cause of suit. *Kreinbring v. Mathews*, 81 Or. 243, 159 Pac. 75; *Hanna v. Hope*, 168 Pac. 618, 619. The defendant was therefore within her rights in alleging the fraud of plaintiff and his co-owners as a defense to this suit.

[9] Defendant claims damages in the sum of \$750 as the result of the fraud alleged.

The answer is plainly insufficient as a bar to the suit, and plaintiff contends that for this reason it is demurrable. In support of this contention we are cited to *Webb v. Nickerson*, 11 Or. 382, 385, 4 Pac. 1126, *Case Co. v. Campbell*, 14 Or. 460, 469, 13 Pac. 324, *Bergman v. Inman*, 43 Or. 456, 464, 72 Pac. 1086, 73 Pac. 341, 99 Am. St. Rep. 771, and *Springer v. Jenkins*, 47 Or. 502, 507, 84 Pac. 479. In none of these opinions was the language relied on by plaintiff essential to the conclusions reached by the court. The authority of these cases is greatly impaired by the later decision of *Swank v. Elwert*, 55 Or. 487, 502, 503, 105 Pac. 901, which overruled *Springer v. Jenkins*. The case of *Bergman v. Inman* cites *Pomeroy on Code Remedies* (3d Ed.) § 608. In this text-book the following principle is announced:

"If a defense is set up as an answer to the whole cause of action, while it is in fact only a partial one * * * it will be bad on demurrer."

This principle is not applicable to the answer under consideration.

In a suit for \$1,100 an answer setting up fraud at the inception of the contract sued on and claiming damages in the sum of \$750 by reason of the fraud cannot be treated as an attempt to answer the whole cause of suit. In a note to the section above cited, Mr. Pomeroy says:

"But this rule does not extend to an answer simply pleading a set-off less than the plaintiff's demand, since a set-off is not strictly a defense."

We think that the circuit court erred in sustaining the demurrer to this portion of the answer.

[10] The third affirmative defense is also alleged as a counterclaim. It repeats the allegations of the first defense as to the circumstances under which the notes and mortgage were executed. It is then averred that plaintiff and his co-owners agreed with defendant that they would not, for at least a year, conduct a bakery in the section of Portland where the bakery sold was located. It is alleged that shortly after the sale plaintiff and his co-owners notified the customers of the bakery that they would soon be engaged in the same business in the same vicinity, and that shortly thereafter they did engage in the bakery business within one block of defendant's location. It is alleged that defendant failed in business as the result of this competition, and damages in the sum of \$250 are claimed on this ground.

This pleading is defective in that it fails to allege a consideration for the agreement relied on, and in that it fails to allege that plaintiff and his associates opened their competing bakery within a year from the date of the sale to defendant. The circuit court did not err in sustaining the demurrer to this portion of the answer.

The judgment is reversed, and the cause remanded.

MOORE and BENSON, JJ., concur.

BURNETT, J. (concurring specially). A mere defense is not as a rule available as ground for an original action. This characteristic distinguishes the second affirmative answer, and puts it in the classification of pure counterclaims, for without reference to whether the chattel mortgage was due or not or already paid, the defendant could have instituted an action at law to recover damages from the plaintiff for the fraud he had practiced upon her immediately upon her discovery thereof. She thus had a plain, speedy, and adequate remedy at law, ousting the equity side of the court of jurisdiction, as taught by section 389, L. O. L., and citations in the appended note. By alleging a return or refused offer to return what she had received in the transaction, she might have used the fraud as an element in the statement of a cause of suit to rescind the contract by which she became the owner of the bakery, to cancel the notes and mortgage, and to restore to her what she had paid. Again, if she had added to her present statement an averment that the plaintiff is insolvent, so that a claim for damages could not be collected from him, she would have had a good answer under section 401, L. O. L. In both cases the matter would have been of equitable cognizance, and in the first an original suit could have been maintained. If the question were *res integra*, the writer would dissent from the conclusion reached by Mr. Justice McCAMANT on the ground that the answer does not state a counterclaim in equity; but as the court has decided it the other way in *Hanna v. Hope*, and *Kreinbring v. Mathews*, which he cites, and as the rule seems to be confined to purchase-money mortgages, I concur on the ground of *stare decisis*.

(87 Or. 493)

GREAT WESTERN LAND CO. v. WAITE.
(Supreme Court of Oregon. Feb. 26, 1918.)

BROKERS § 43(3) — CONTRACT OF EMPLOYMENT—STATUTE OF FRAUDS.

Correspondence held not to show a contract of employment of plaintiff by defendant as his broker to sell land, within L. O. L. § 808, requiring a written memorandum of such contract, expressing the consideration.

Department 1. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

On petition for rehearing. Overruled.

For former opinion, see 168 Pac. 927.

John K. Kollock, of Portland, for appellant. C. L. Reames, and Littlefield & McGuire, all of Portland, for respondent.

BURNETT, J. Protesting against the reversal of the judgment for the plaintiff in this case, with directions for the trial court to enter a judgment of nonsuit therein, the plaintiff has filed a petition for rehearing, contending that it was wrong to grant the

nonsuit; that the decision was erroneous in refusing to consider testimony as to the contents of a missing letter; and that the conclusion reached was contrary to earlier decisions of this court upon the same question under the statute of frauds. For the sake of greater clarity we here set down in full all the papers passing between the parties as disclosed by the record:

1.

"Nov. 25, 1913.

"Mr. Waite, Sutherlin, Oreg.—Dear Sir: We understand that you are the owner of a large tract of land at Round Prairie, and that the same has been submitted on the basis of \$20 an acre. We believe that we are in a position to successfully submit this property and would like to have your authorization to submit the same and giving us the very lowest cash price on the property, also stating what commissions you would pay in the event of sale; also stating whether you would consider good income city trade for part or all of the property. We have some clients interested in a proposition of this kind and your immediate attention to this will be highly appreciated as our parties are waiting for an answer from us. Thanking you for your immediate attention to this, we beg to remain,

"Yours truly,

"Great Western Land Co., Inc.,

"By _____, President."

2.

As shown by the oral testimony to which allusion has been made, all that the missing letter amounted to was a request from the plaintiff to Waite asking for an answer to the letter above quoted, dated November 25, 1913.

3.

"December 18, 1913.

"Great Western Land Co., Eugene, Oregon—Gentlemen: Your favor of December first at hand and, in answer to the same, beg to state that, if you have a purchaser for my Round Prairie tract of land, consisting of thirty-five hundred eight-two (3582) acres, I will make the price fifteen dollars (\$15) per acre net to me. This is a bed rock price and will only be offered at that price for a short time. If, in case you have an interested party. I will give you a reasonable time in which to close the deal, but would not care to give any extended option at this time. This place sold for fifty-four thousand (\$54000) six years ago, and since that time, farm lands have more than doubled in value in our county. My terms would be one-half cash, and balance on three or five years' time, at eight per cent. These terms might be changed a little to suit purchaser, but any amount left standing on the place would have to bear eight per cent. interest.

"Very respectfully yours, F. B. Waite,
"Sutherlin, Oregon."

4.

"December 20, 1913.

"F. B. Waite, Sutherlin, Oregon—Dear Sir: Replying to your favor of the 18th inst. and thanking you for your kind offer, on the basis of which we are now endeavoring to negotiate a deal for your property, we will say that it is possible that our client may not be able to pay one-half cash at this time, but we believe that such a substantial payment will be made that the balances would be amply secured. We are co-operating with some other people in the matter of handling this deal and naturally will endeavor to make as much profit out of the transaction as possible, and will expect you to protect us in the matter of difference between the

net price and the quotations to be made to the purchaser; we understand this is in the neighborhood of \$20.00 an acre, although it may be considerably less before the deal is finally consummated. We feel that you are entitled to know the details of the transaction and shall be pleased to keep you informed as to our progress in the matter. Again thanking you for your favor and trusting that we may be able to be of service to you, we beg to remain,

"Yours truly,

"Great Western Land Co., Inc.,
"By _____, President."

5.

"Marshfield Ore Jan 2 1914

"Great Western Land Co Eugene Ore
"Will be here Chandler Hotel until further
notice F. B. Waite"
(Telegram.)

6.

"Sutherlin, Ore., Jan. 6, 1914.

"I hereby agree to protect you 'The Great Western Land Co.' of Eugene in the sale of 3582 acres Round Prairie to Rev. Doering or associates. The price shall be not less than \$16.50 to the Rev. Doering and \$15.00 net to me. Subject to change only under agreement with you.
F. B. Waite."

7.

"Eugene Ore Jan 6 1914

"F. B. Waite Sutherlin Ore
"Out of our commission of one dollar and fifty cents per acre we will stand as a part payment for getting immediate possession Round Prairie Farm one thousand dollars one half commission payable when first payment of ten thousand dollars is made balance of commission payable out of second payment
"Great Western Land Co."

(Telegram.)

The missing letter is negligible and the omission to consider testimony about it furnishes no ground for rehearing because it adds nothing to terms or conditions of the negotiation. The letter opening the correspondence on behalf of plaintiff properly may be construed as that of a buying broker approaching a landowner in the interest of the former's client. The plaintiff there informs the defendant that "we have some clients interested in a proposition of this kind," and the defendant was well within his rights in considering this as an overture by those clients acting through their own broker to begin negotiations for the purchase of the land in question. We note indeed that the plaintiff asks in that letter that the defendant state what commission he would pay in the event of a sale; but asking the question does not amount to a contract. It is not a case where silence gives consent. On the contrary, in the defendant's letter of December 18th we find him treating this correspondence of the plaintiff as a quest for an option. He gives the lowest price, without any intimation about commission, and after saying that the land will be offered at the price named only for a short time, he says:

"I will give you a reasonable time in which to close the deal, but would not care to give any extended option at this time."

Thus far we have no acceptance by the plaintiff of whatever offer may be framed upon the defendant's letters. In the next

letter of December 20, 1913, the plaintiff fails to accept the condition imposed by the defendant for payment by the purchaser of half cash and balance on three or five years' time at 8 per cent., saying:

"That it is possible that our client may not be able to pay one-half cash at this time, but we believe that such a substantial payment will be made that the balance would be amply secured."

Here also is an utter lack of acceptance of the offer of the defendant so as to correspond precisely therewith. The telegram from the defendant at Marshfield throws no light upon the subject. It merely locates him until further notice. Then come the instrument he signed at Sutherlin, January 6, 1914, and the telegram sent to him by the plaintiff from Eugene on the same day. The testimony does not disclose which one of these papers was first in point of time. However, if the telegram preceded the "protect" paper, the latter instrument does not show any assent to the terms of the former whatever they are. If the "protect" paper was first, then the telegram was an effort to add another condition to which no subsequent assent is shown, thus leaving the negotiation open with the result that there was no contract for want of final acceptance of the additional terms proposed.

Remembering that the statute says, "Evidence, therefore, of the agreement shall not be received other than the writing or secondary evidence of its contents," it becomes our duty to construe the quoted documents and determine whether in effect they amount to a contract of hiring as alleged in the complaint. The rule is as stated by Mr. Justice McBride in *Henry v. Harker*, 61 Or. 276, 290, 122 Pac. 298, 299:

"But when, as in this case, the contract consists wholly of a writing or series of writings all admitted to be genuine, and containing no technical terms, the construction of the writings becomes a matter of pure law for the court. *Hutchison v. Bowler*, 5 M. & W. 535; *Godard v. Foster*, 17 Wall. 123 [21 L. Ed. 589]."

Looking at the whole case made by the correspondence to which the statute restricts us as a matter of evidence, there is no situation disclosed where one party makes a distinct proposition to the other which is unmistakably and precisely accepted by the latter in the exact terms in which it was offered. Moreover, as we have shown, the plaintiff approached the defendant in the character of a buying broker and agent acting and proposing to act for another party not disclosed. There is nothing in the writings on either side showing that the defendant ever assented to any change of front on the part of the plaintiff. The writing of January 6, 1914, signed by the defendant at Sutherlin, is consistent only with the rôle assumed by the plaintiff of representing some one other than the defendant. It may be likened to the telegrams involved in the case of *Beymer Bauman Lead Co. v. Haynes*, 81 Me. 27, 16 Atl. 326. It seems that the plaintiff there was

a wholesale dealer in paint materials, and was represented by traveling salesmen. The defendants were retailers, and telegraphed the plaintiff thus: "Will you protect and guarantee us on lead until your agent gets here? We are offered inducements." The plaintiff answered: "Yes." The court, construing the word "protect," said: "We are satisfied that the meaning of the expression was that the plaintiffs would sell as low as the most favorable market price at the time." In the light of that precedent the writing under immediate consideration is properly construed only as an agreement by Waite not to sell the land for less than \$16.50 per acre, leaving the plaintiff to get as much as it could from its own client, the expected purchaser. The telegrams in the Maine case were not set down as an agreement to pay money, but were held to be a stipulation to maintain minimum prices on lead. That is all Waite did in the present instance, granting that the writing he signed otherwise expresses a valid contract. Under that instrument the plaintiff could have quoted any price it chose to its principal subject to the minimum prescribed by its terms. It does not in any sense constitute an agreement by Waite to pay money nor a hiring of the plaintiff by the defendant, and yet hiring is what the plaintiff relies upon in its complaint.

Again, in all this correspondence there is nothing expressing anything paid or promised or a condition to be performed by the plaintiff which induced the defendant to act or to sign any writing. We might almost take judicial notice that a real estate broker is always on the lookout for a commission from whatever source it may come. On the other hand, it is equally certain that the owner of land usually declines to pay a commission unless he has promised to do so. To that end the statute was framed requiring the agreement to be reduced to writing expressing the consideration and subscribed by the party to be charged. Giving to all these writings their utmost scope as in effect one instrument, there is no language in any of them amounting to an expression of the consideration even by "necessary implication as some of the courts have put it." Even the "commission" mentioned in plaintiff's telegram of January 6, 1914, may be the compensation to be paid by the purchaser who was the client of the plaintiff as stated in its letter beginning the correspondence. Going to the limit of construction favorable to the plaintiff in the direction of implication, it cannot be "necessarily implied" that the commission mentioned was to be paid by the defendant.

In the petition for rehearing the plaintiff has cited *Bowman v. Wade*, 54 Or. 347, 103 Pac. 72, claiming that the decision therein leads to the conclusion that a contract not measuring up to the statute of frauds is not always utterly void. The statute, however, says in direct terms that such an agreement

is void. Moreover, the opinion in the case does not teach the doctrine ascribed to it. It was a case where the plaintiff averred that he had loaned to the defendant a sum of money to be repaid in three years, with interest, and that, as evidence of the loan, the defendant had caused his demented son to execute a promissory note for the land secured by mortgage on land to which he had no title. The defendant himself signed no paper. Under these circumstances, on discovering the true condition of affairs, the plaintiff brought the action as for money had and received seeking to charge the defendant directly for repayment of the money. On behalf of Wade it was urged that the agreement mentioned was void so far as he was concerned because it was within the statute of frauds making void under its provisions "an agreement that by its terms is not to be performed within a year from the making thereof." So far as the statute of frauds is concerned the opinion of Mr. Justice Slater adopted the argument of Mr. Chief Justice Dixon in *McClellan v. Sanford*, 26 Wis. 595, reaching the conclusion that the doctrine of the cases is that the provision of the statute now being considered applies to contracts not to be performed on either side within the year, and that as the plaintiff Bowman had performed his part of the contract completely within the year by advancing the money, the statute did not apply. Even this construction was limited to cases where the stipulation sought to be enforced related solely to the payment of a money consideration.

Beyond all this also the court seems to have placed its decision upon the ground "that if it were held to be within the statute, he [the plaintiff] may recover not upon the contract, but for money had and received, if the complaint be so framed; this is undoubtedly held by many authorities" (citing them). That is to say, the fact that the plaintiff advanced money to the defendant may be shown and for the purpose of negating the idea that it was made to liquidate any obligation which the payor owed the payee, or that it was intended as a gift, evidence of the void agreement may be received. In any event, the *Bowman-Wade* Case is not apropos here because it is confined to cases where there is an effort on the part of the plaintiff to recover an actual payment of money, and the principle is restricted to the recovery of cash considerations already paid. The distinguishing characteristic of that precedent in that respect is wanting here, for it is not pretended that any money passed between the parties to the present case.

In brief, if we view the writings as an instance of contract by offer and acceptance, there is no situation disclosed where one party accepts precisely and exactly the offer of the other without proposing new terms. Further, the plaintiff having assumed the attitude of a buying broker seeking for an option it has shown nothing indicating a change

of front, and this does not prove the allegation that the defendant hired the plaintiff; and, finally, there is no language in any of the writings, taken all together, which expresses anything to be done, promised, or performed by the plaintiff which would serve as an inducement or consideration sufficient to satisfy the statute and charge the defendant.

The petition for rehearing is overruled.

McBRIDE, C. J., and McCAMANT, J., concur.

HARRIS, J. (concurring specially). The writings suggest that the Great Western Land Company might have occupied any one of three possible positions: (1) As a purchasing broker for its "client" H. E. Doering; (2) as an optionee, if such a term is permissible, holding an option with a limitation upon the price to be quoted by him; or (3) as a selling broker for Waite. If Waite did no more than to offer to deal with the plaintiff as a purchasing broker or as an optionee, it would avail the Great Western Land Company nothing if it did not accept such offer. If the plaintiff offered to deal with Waite as his selling broker that offer could not benefit the plaintiff if Waite did not accept it. The complaint alleges that the plaintiff was authorized and employed to act as a selling broker for Waite, and hence by its pleading the plaintiff admits that it did not accept any offer that Waite may have made to deal with the plaintiff as a purchasing broker for its "clients," or as the holder of an option. If the plaintiff recovers at all it can only recover by showing that, as a result of an offer by one and an acceptance of that offer by the other, it was authorized and employed to act as a selling broker for Waite. If the writings signed by Waite disclose nothing but offers to treat with the plaintiff as a purchasing broker for its "clients" or as the holder of an option, the plaintiff cannot prevail, for Waite is "the party to be charged." Looking at the writings signed by Waite it will be seen that every instrument signed by him proceeds upon the theory that he is dealing with or offering to deal with the Great Western Land Company as a purchasing broker for its "clients" or as the holder of an option. Waite never at any time agreed to pay a commission. The first letter written by him speaks of an option, and the "protect" letter of January 6, 1914, makes it clear, especially when construed in connection with the plaintiff's letter of December 20, 1913, that he did not consider that he was dealing with the plaintiff as his selling broker.

It must be remembered that the plaintiff must produce a writing or writings containing the essential terms of the contract expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties. Browne on St. of Frauds (5th Ed.)

§ 371; 20 Cyc. 258. And the writing or writings relied upon by the plaintiff must tend to prove and not disprove the existence of an agreement between the parties authorizing or employing the Great Western Land Company to sell Waite's land for him for a commission. Browne on St. of Frauds (5th Ed.) § 371a; Catterlin v. Bush, 39 Or. 496, 501, 59 Pac. 706, 65 Pac. 1064. Giving the writings signed by the plaintiff a meaning most favorable to the plaintiff, and then examining the writings signed by the defendant, it cannot be said that the parties at any time made an agreement authorizing or employing the plaintiff to sell the land for a commission or compensation to be paid by Waite. The defendant is the party to be charged, and the essential terms of the agreement must be in writing signed by him; and while it is true that the statute is satisfied by letters and telegrams, it is also true that the requirements of the statute are not fulfilled if the letters and telegrams amount to nothing more than offers and unaccepted counter offers.

The promise sued upon is the alleged promise of Waite to pay a commission for finding a purchaser. It is not claimed that the plaintiff paid anything or made any promise to Waite as a consideration for his alleged promise to pay a commission, and therefore the alleged service to be rendered by the plaintiff would be the consideration for the promise sued upon. Laying aside any question concerning the expression of the consideration and viewing the service to be performed by the broker solely as one of the essential elements of the contract, it must, of course, like the other essential elements of the contract, be stated in the writing with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties; and if the service to be performed were so stated it would probably be sufficiently expressed to satisfy the statute when viewed as the consideration for the promise sued upon, for it would be difficult to conceive of a writing which would not either in terms or by necessary implication show the consideration for the promise to pay a commission where the service to be performed by the broker is the consideration for the promise of the owner and the writing contains all the essentials of an agreement authorizing a broker to sell land for a commission. The obstacle confronting the plaintiff in the instant case is that the writings do not disclose an agreement by Waite to pay the plaintiff a commission if the latter found a purchaser. If the writings did reveal such an agreement they would probably contain an expression of the consideration, assuming that the service of the broker constituted the consideration, for it is everywhere held, including jurisdictions having statutes requiring the consideration to be expressed, that the consideration is sufficiently expressed if it is "expressly expressed" or if it appears by necessary inference.

Osborne v. Baker, 34 Minn. 307, 311, 25 N. W. 606, 57 Am. Rep. 55. In no jurisdiction is it held that the consideration is not expressed when it appears by necessary inference.

The petition for a rehearing should be denied.

(87 Or. 547)

WEBSTER et al. v. ROGERS et al.

(Supreme Court of Oregon. Feb. 26, 1918.)

1. EXECUTION \S 213—EXECUTION SALE—AS JUDICIAL SALE.

Under the Oregon practice, a sale on execution partakes of the character of a judicial sale.

2. EXECUTION \S 307—DEED—TIME FOR MAKING.

The right of a purchaser at such a sale to a sheriff's deed is not lost by the expiration of the time within which a second execution could issue on the judgment.

3. EXECUTION \S 228—ACQUIRING LAND AT JUDICIAL SALE.

It was not fraudulent for a mortgagee of land, who on account of a great number of judgment liens did not desire to foreclose at great expense, to induce a judgment creditor to issue an execution and sell the land, and to buy the land at the sale.

4. REFORMATION OF INSTRUMENTS \S 11—MORTGAGES—FORECLOSURE.

A mortgage given as security for an accommodation "note to F. and B.," whereas the note was in favor of W. O., executed at the F. and B. bank, evidencing a loan made through the good offices of the bank, could be reformed in a foreclosure against the accommodated party.

5. TENANCY IN COMMON \S 19(4)—MORTGAGE BY ONE TO ANOTHER—WHO MAY PURCHASE AT FORECLOSURE.

Where a tenant in common mortgages his interest to another tenant in common, the latter can buy at a foreclosure sale.

6. TENANCY IN COMMON \S 19(3)—BUYING INTEREST OF ANOTHER AT JUDICIAL SALE.

A tenant in common can buy the interest of another tenant at a public sale under execution without being charged as a trustee for such tenant, although he would be a trustee if he bought an outstanding hostile title.

7. TENANCY IN COMMON \S 38(8)—JUDICIAL SALES—ADEQUACY OF CONSIDERATION—EVIDENCE.

Evidence held to warrant a finding that a tenant in common did not buy the interest of another tenant at a judicial sale at an inadequate price.

8. EXECUTION \S 256(1)—SALES—ACTION TO SET ASIDE—LACHES.

Where the interest of a tenant in common in real property is incumbered with judgment liens in excess of its value, and where such tenant stands by for 18 years after his cotenant has purchased the former's moiety at execution sale, the purchaser paying all taxes and street improvements and constructing a valuable building on the land, the former will not be heard to attack the execution sale after the expiration of the liens of the judgments with which the property is incumbered. A suit making such an attack on his behalf is barred by laches.

Department 2, Appeal from Circuit Court, Coos County; G. F. Skipworth, Judge.

Suit by Alma Webster and Walter H. Webster against S. C. Rogers and Frank Rogers to set aside a sheriff's deed as a cloud on title. Decree for defendants, and plaintiffs appeal. Affirmed.

In 1890 the defendant S. C. Rogers and W. G. Webster contracted for the purchase of lots 2, 3, 6, and 7 in block 2 of E. B. Dean &

Company's Second addition to Marshfield. A deed in their favor was executed December 1, 1892. They held the property as tenants in common. Webster's interest in the property immediately became subject to a number of liens. The first of these was a mortgage he gave the defendant Rogers May 14, 1891, to secure the latter on an indorsement of a \$500 note which Rogers signed for the accommodation of Webster. The second of them was a judgment in the sum of \$399.50 recovered against Webster by Eichold and Miller October 3, 1892. Sundry other judgments were docketed against Webster in 1892, and still others were recovered later. Webster paid the interest on the note indorsed by Rogers until May 13, 1894. Thereafter he made no payments and on December 18, 1894, Rogers was obliged to meet the note, paying the sum of \$529.25. From the time when the contract of purchase was made in 1890 Rogers had paid all the taxes and other charges incident to carrying the property. By 1896 Webster was in his debt to the amount of \$200 additional on these accounts. In 1895 Webster left Oregon, acquired a residence in Arizona and remained there until his death on October 7, 1904. He was hopelessly insolvent when he left this state. The plaintiff Walter H. Webster is his son, and the plaintiff Alma Webster is his granddaughter. They, with Annie Webster, his widow, are his heirs at law. In the spring of 1896 the defendant Rogers consulted Mr. J. W. Bennett of the Coos county bar with a view to the foreclosure of his mortgage. Mr. Bennett advised him that so many judgments had been docketed against Webster that the foreclosure of the mortgage would be expensive and burdensome. Mr. Bennett suggested a sale of the property under the Eichold and Miller judgment, which Bennett had secured. Rogers acceded to this suggestion. An execution was sued out, the property was regularly advertised in the newspaper, which published notices of all sheriff's sales, and on May 14, 1896, the interest of Webster in these lots was purchased by Frank Rogers in trust for S. C. Rogers for \$40. The sale was reported to the court, and was confirmed October 13, 1896. Thereafter S. C. Rogers exercised dominion over the property. The lots were used for the storage of lumber and stone, permission for such use being given by the defendant S. C. Rogers, who continued to pay the taxes. He also paid a heavy municipal lien for a street improvement. A sheriff's deed in favor of Frank Rogers was executed October 29, 1906, and he conveyed the property to S. C. Rogers. On January 11, 1904, S. C. Rogers acquired title to lots 1 and 8 in the same block, and in June, 1906, he began the construction of a two-story building which was completed the following year at a cost of \$10,000, and which covers the lots purchased in 1904 as well as those in dispute in this case. Since then this defendant has been in the actual and exclusive possession of the property. Annie

Webster conveyed her dower right to S. C. Rogers September 17, 1912, for a consideration of \$25. On May 28, 1915, plaintiffs filed their complaint, alleging that they are the owners of the property, and praying that the sheriff's deed to Frank Rogers be set aside as a cloud upon their title. It will not be necessary to review the pleadings; it is enough to say that they were sufficient to present the questions on which the case turns. The circuit court dismissed the complaint, and plaintiffs appeal.

W. T. Slater, of Portland (Stoll & Hodge, of Marshfield, on the brief), for appellants. A. J. Sherwood, of Coquille (L. A. Liljeqvist and Bennett, Swanton & Bennett, all of Marshfield, on the brief), for respondents.

MCCAMANT, J. (after stating the facts as above). Plaintiffs rely chiefly on the fact that the sheriff's deed was not issued to Frank Rogers until October 29, 1906. The sale was made on an execution based on a judgment recovered October 3, 1892. The execution was issued March 11, 1896. A period of more than 10 years elapsed between the date of this execution and the date of the sheriff's deed; it appears that no further executions were issued in the interim. Section 241, B. & C. Code, then in force and since repealed, was as follows:

"If, at any time after the entry of judgment, a period of ten consecutive years shall have elapsed without an execution being issued on such judgment during such period, no execution shall thereafter issue on such judgment, and such judgment shall thereafter be conclusively presumed to be paid and satisfied unless an execution be issued thereon within one year from the passage of this act."

Plaintiffs contend that a sheriff's deed cannot lawfully issue after the judgment on which it is based has lost its vitality. We are cited to a long line of authority to the effect that a valid sale cannot be made under an execution issued on a dead judgment. Plaintiffs cite the following cases in support of their ultimate contention that when the life of a judgment ends a sheriff's deed cannot thereafter issue to consummate a sale made while the judgment was effective. *Dixon v. Dixon*, 89 App. Div. 603, 85 N. Y. Supp. 609; *Middlesboro Water Co. v. Neal*, 103 Ky. 586, 49 S. W. 428; *McCall v. White*, 73 Ala. 562; *Rucker v. Dooley*, 49 Ill. 377, 95 Am. Dec. 614; *Harmon v. Larned*, 58 Ill. 169; *Cottingham v. Springer*, 88 Ill. 90; *Peterson v. Emmerson*, 135 Ill. 55, 25 N. E. 842; *Rann v. McTiernan*, 187 Ill. 193, 58 N. E. 390; *Bradley v. Lightcap*, 202 Ill. 154, 67 N. E. 45.

The later Illinois cases do not tend to support plaintiffs' contention, because they are based wholly on an Illinois statute which forbids the execution of a sheriff's deed after the lapse of 5 years from the expiration of the period of redemption. The authority of the earlier Illinois cases is destroyed for the purposes of this case by the decision in *Cottingham v. Springer*, 88 Ill. 90, 96, 97. This

case squarely holds that objection to a sheriff's deed on the ground here asserted is available only to an innocent purchaser from the execution defendant; it cannot be urged by his heirs.

The Alabama case holds that, when a sheriff's deed is applied for 10 years after the sale, in the absence of evidence that the purchaser has been in possession, an explanation of the delay should be offered. The doctrine of this case does not help plaintiffs. It abundantly appears that all acts of dominion over the property in dispute were exercised by S. C. Rogers at all times after the sheriff's sale, and that when the sheriff's deed was secured his possession was actual, hostile, and complete.

As we read the Kentucky case it does not hold that a sheriff's deed must be executed during the life of the judgment under which the sale is made. In that case the sale was made in 1853; there was no satisfactory proof that the purchase price had ever been paid; the defendant in the writ continued to live on the land for 7 years after the sale; the plaintiff in the writ lived in the immediate neighborhood, and must have known of the occupancy of the land; it was doubtful if the purchaser had ever been in possession, but, if so, he had given up possession prior to the Civil War; the sheriff's deed was executed in 1894, 41 years after the sale. It was held that a conclusive presumption should be indulged that the debtor had redeemed from the sale.

The case of *Dixon v. Dixon*, 89 App. Div. 603, 607-609, 85 N. Y. Supp. 609, turns largely on the fact that the deed was executed 43 years after the sale. The opinion lays some emphasis on the expiration of the lien of the judgment before the issuance of the deed. Under the laws of New York in force at the time when this sale was made there was no requirement that the sheriff should report his proceedings, nor was any provision made for confirmation. 3 Rev. Stat. N. Y. (5th Ed.) pp. 651-655. The sale which took place was an execution, as distinguished from a judicial sale. If such a sale is made in violation of law, the title of the defendant is not disturbed, and the judgment of plaintiff is not impaired. There is no provision for curing the defects by an order of confirmation passed after the expiration of a period allowed for exceptions to the regularity of the sale.

[1, 2] Under the Oregon statute a sale on execution partakes of the character of a judicial sale. It must be reported to the court; it becomes effective to start the period of redemption only when it is confirmed. The Oregon statute allows a time after the filing of the report of sale within which any party interested may call the attention of the court to irregularities in the sale. The confirmation of the sale is an acceptance by the court of the bid of the purchaser. The judgment debtor is credited with the amount of the

bid; if he redeems the effect of the sale is abrogated, but the judgment stands satisfied in whole or in part in accordance with the price for which the property is sold. In any event the judgment is satisfied to the extent of the purchase price. The rights of the purchaser are based on the price paid for the property and credited on the judgment. In the event of redemption the purchaser receives this sum with interest. He is not concerned with the remainder of the judgment debt, and we cannot see why the expiration of its lien should affect his right to a sheriff's deed. As to the distinction between execution and judicial sales, see 17 Am. & Eng. Enc. Law (2d Ed.) 956; Rorer on Judicial Sales (2d Ed.) 247; Noland v. Barrett, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572.

In Talbot v. Cook, 57 Or. 535, 538, 112 Pac. 709, 710, Mr. Justice Burnett discusses Dixon v. Dixon, supra, and distinguishes the New York law from the Oregon law on another ground which is conclusive of this branch of the controversy. His opinion states:

"No limitation is expressly provided by our Code against the time within which a sheriff may execute a deed to the purchaser at a foreclosure sale."

The statute in force when the sheriff's deed to Frank Rogers was executed, section 1035, B. & C. Code, is as follows:

"The former sheriff shall return all process, whether before or after judgment or decree, which he has fully executed, and shall complete the execution of all final process which he has begun to execute: Provided, that in all cases where real property has been or may be sold under execution by any sheriff, and he shall fail or neglect during his term of office, by virtue of the expiration thereof, or otherwise, to make or execute a proper sheriff's deed conveying said property to the purchaser; or if through mistake in its execution, or otherwise, any sheriff's deed shall be inoperative, the sheriff in office at any time after such purchaser shall be entitled to a deed shall execute such conveyance, and such conveyance so executed shall have the same force and effect as if made by the sheriff who made the sale."

A fair construction of this statute negatives this contention of plaintiffs. The sheriff is required to execute the conveyance "at any time after such purchaser shall be entitled to a deed." To hold that the purchaser's right to a deed expires with the lien of the judgment under which the property is sold would be to read into the statute words which the Legislature has not written there and to disregard the legislative intent manifested by the language above quoted.

[3] Plaintiffs' charges of fraud are not borne out by the evidence. The sale took place at a time when Webster had left the state and abandoned all intention of settling with his creditors. He had executed eight mortgages for sums aggregating \$13,006.13. Six of these mortgages had been foreclosed prior to the time when defendants purchased the property in dispute. S. C. Rogers had been more lenient than most of Webster's

creditors. Webster's interest in the property in dispute was subject to the lien of the Rogers mortgage for \$500, and to the lien of 12 judgments aggregating \$7,038.10. No witness gives the property such a value as to allow Webster any beneficial interest in it over and above these liens. The preponderance of the testimony shows that Webster's half of the property was worth far less than the liens with which it was incumbered. Rogers had paid all taxes levied from 1890 to 1896. He was carrying Webster for \$200 in excess of the mortgage debt. He was entitled to a settlement.

Mr. Bennett is not subject to criticism for suggesting a sale under the Eichold and Miller judgment in lieu of the burdensome and expensive remedy of foreclosure. The result was a credit to Eichold and Miller of \$13.75 in excess of the expenses of sale. The Rogers mortgage was the first lien on the land. The Eichold and Miller judgment was an honest debt. The proceeding was not collusive, but was an effort of a patient creditor to make some salvage on an indebtedness which would have been wholly lost in the absence of affirmative action on his part. The proceedings were strictly in accord with the statute. The case has nothing in common with Conklin v. La Dow, 33 Or. 354, 54 Pac. 218.

[4] It is argued that Webster's mortgage to S. C. Rogers was defective, in that it described the accommodation note signed by Rogers as "a note to Flanagan & Bennett," whereas it was a note in favor of Walter Oldland, executed at the Flanagan & Bennett bank, evidencing a loan made through the good offices of the bank. The mortgage gave the date, amount, and maturity of the note correctly. It recited that Rogers signed the note as "security" for Webster. It is doubtful if this mortgage can be said to be defective under plaintiffs' authorities. See New v. Sailors, 114 Ind. 407, 410, 16 N. E. 609, 5 Am. St. Rep. 632; Bowen v. Ratcliff, 140 Ind. 393, 397, 39 N. E. 860, 49 Am. St. Rep. 203. In any event the mortgage could have been reformed as against Webster in a foreclosure suit. Bramhall v. Flood, 41 Conn. 68.

[5] It is suggested that Rogers as the tenant in common of Webster was disqualified from purchasing. By mortgaging his interest in the property to Rogers, Webster consented that Rogers might buy at a foreclosure sale. Twin Lick Co. v. Marbury, 91 U. S. 587, 590, 23 L. Ed. 328; Rawlings v. New Memphis Co., 105 Tenn. 268, 60 S. W. 206, 214; Preston v. Loughran, 58 Hun, 210, 215, 12 N. Y. Supp. 313.

[6] His right to buy at a sale under an execution to which he was a stranger is even clearer. Fisk v. Sarber, 6 Watts & S. (Pa.) 18; Allen v. Gillette, 127 U. S. 589, 596, 8 Sup. Ct. 1331, 32 L. Ed. 271. While a tenant in common will be charged as a trus-

tee if he purchases an outstanding hostile title, the weight of authority entitles him to buy the moiety of his cotenant at a public sale thereof under legal process running against the property of the cotenant. *Freeman on Cotenancy and Partition* (2d Ed.) 165; *Baird v. Baird's Heirs*, 1 Dev. & Bat. Eq. (21 N. C.) 524, 31 Am. Dec. 399; *McNutt v. Nuevo Land Co.*, 167 Cal. 459, 466-467, 140 Pac. 6; *Starkweather v. Jenner*, 216 U. S. 524, 528, 30 Sup. Ct. 382, 54 L. Ed. 602, 17 Ann. Cas. 1167.

[7] Plaintiffs attack the sale on the ground of inadequacy of price. It appears that Webster paid \$2,400 for his interest in the lots in controversy. They were purchased during a boom, at a time when real estate sold readily. In 1896, when the defendants purchased at sheriff's sale, the boom had flattened out and property was unsalable except at prices which were a small fraction of former values. There is testimony that those who were not obliged to sell continued to value their property at the same prices as before the depression, but the adequacy of the price obtained at a judicial sale is to be tested by comparison with prices paid for like property at sales made at or about the same time. The property sold by the sheriff was subject to the lien of the Rogers mortgage. On the day of sale the mortgage debt amounted to \$603.58. The lots sold subject to this incumbrance for \$40. A previous execution against Webster had been returned nulla bona. Counsel who controlled this execution testified that he did not think the lots were worth the amount of the mortgage, and for this reason refrained from levying upon them. S. C. Rogers testified that he was willing to bid a larger sum than that for which the property was struck off and sold. This circumstance cannot be permitted to defeat the sale. If the rule were otherwise, sales at public auction would be a precarious source of title. Plaintiffs have produced a number of witnesses who appraise the property at the time of sale at sums largely in excess of the price paid, and defendant offers evidence to show that Webster's equity of redemption had no value. The lower court found in accordance with this latter testimony that Webster's half interest in the property did not exceed \$400 in value. It is sufficient for present purposes to say that the inadequacy of price, if any, was not gross. Plaintiffs are not entitled to relief on this ground. *Farmers' Co. v. Oregon Pacific Railroad Co.*, 28 Or. 44, 69, 70, 40 Pac. 1089; *Nodine v. Richmond*, 48 Or. 527, 544, 87 Pac. 775. We do not intend to decide that after the confirmation of a sale it is competent for the defendant in the writ or his successor in interest to attack the sale on

the ground of inadequacy of price. That the order of confirmation concludes this question is intimated in *Lelinenweber v. Brown*, 24 Or. 548, 552.

[8] The defense of laches asserted by the defendants is clearly made out. Plaintiffs and their predecessor in interest have paid no part of the taxes since the land was purchased in 1890. A street assessment of \$1,008 was paid by S. C. Rogers. The plaintiff Walter H. Webster resided in Marshfield until 1898. He knew the condition of the real estate market, and must have known that at the time of the sale his father had no beneficial interest in the property. No one could think that at that time his father's interest in the property was worth the amount of the liens with which it was incumbered. He stood by until these liens were outlawed, and until 9 years after S. C. Rogers had constructed a valuable building on the property. The front of this building is situate on lots in which plaintiffs assert no interest. If they were to prevail in this suit they would be entitled to a half interest in the lots on which the rear portion of the building is constructed. The complaint was filed 19 years after the sale. In the meantime the business section of Marshfield had shifted, the population had increased, and the property had acquired a value it did not possess in 1896. In the 10 years intervening between the sheriff's sale and the construction of the building, the possession of S. C. Rogers fell short of the requirements of the law of adverse possession, but he exercised dominion over the property from time to time. There were open and visible marks of this dominion, notice of which is chargeable to these plaintiffs and their ancestor. Within the principles of the law of laches as expounded by Mr. Justice Wolverton in *Raymond v. Flavel*, 27 Or. 219, 238, 40 Pac. 158, by Mr. Justice Moore in *Loomis v. Rosenthal*, 34 Or. 585, 600-603, 57 Pac. 55, and as applied by Mr. Justice Bean in *Crowley v. Grant*, 63 Or. 212, 221, 127 Pac. 28, plaintiffs' claim is stale, and it would be most inequitable to adjudge them the owners of a half interest in this property. If the defense of equitable confirmation had been pleaded, the case would fall within the doctrine of *Mascall v. Murray*, 76 Or. 637, 651, 149 Pac. 517. Plaintiffs' right to litigate this controversy in a court of equity has not been challenged, and this opinion must not be construed as adjudging that such right exists.

The decree of the lower court is affirmed.

McBRIDE, C. J., and MOORE and BEAN, JJ., concur.

(87 Or. 507)

WILSON v. CITY OF PORTLAND et al.
(Supreme Court of Oregon. Feb. 26, 1918.)

1. MUNICIPAL CORPORATIONS §514(1) — STREET IMPROVEMENTS — REASSESSMENT — AMENDMENT OF JURISDICTIONAL DEFECTS IN ORDINANCES.

Under Portland City Charter, § 400, all manner of errors and irregularities in ordinances for assessment of street improvements may be corrected whether jurisdictional or otherwise, and a reassessment made for pavement already laid.

2. MUNICIPAL CORPORATIONS §490—STREET ASSESSMENTS—FREEHOLDER'S RIGHT TO BE HEARD.

Under such charter provision, a freeholder of Portland should make his objection to street improvements in the beginning, since it is never too late for the city to amend a defect in ordinance for assessment therefor, provided only that somewhere the freeholder has had opportunity to be heard before his property is taken for payment of the tax.

Department 1. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

On rehearing. Rehearing denied.

For former opinion, see 169 Pac. 90.

W. P. La Roche and L. E. Latourette, both of Portland, for appellant. W. M. Gregory, of Portland, for respondent.

BURNETT, J. In his petition for rehearing the plaintiff lays much stress upon the case of *Murray v. La Grande*, 76 Or. 598, 149 Pac. 1019, as being in direct conflict with the former opinion in the instant case. In prescribing the formula for street improvements the La Grande charter under which the Murray proceedings were had states in substance that when an improvement is proposed a committee of the council shall examine the property and make a report as to its valuation and extent and of the benefits to be derived thereby on account of the proposed improvement. After receiving the report and before making any levy of taxes to plaintiff for the improvement the council must cause notice to be given in terms prescribed by the charter, giving sundry details not necessary here to mention, after which follows this language:

"After a compliance with this subdivision the council shall be deemed to have acquired jurisdiction to order the making of such improvements."

This is the only manner and time prescribed by the La Grande charter in which jurisdiction may be acquired. It is also said in the same section:

"If any assessment is set aside by order of any court the council may cause a new one to be made in like manner for the same purpose for the collection of the amount so assessed."

It will be noted that in the La Grande charter there is but one time and place in the process where the city may obtain jurisdiction; and the power of correction vested in the council does not include an amendment to cure the defect in the proceedings by

which the acquisition of jurisdiction was attempted. It seems, therefore, that one effort to acquire jurisdiction would exhaust the prerogative of the council in that particular proceeding. It was conceded in that case that the city of La Grande had not done the things prescribed by its charter as the necessary foundation of jurisdiction.

[1] The authority of the city of Portland under its charter is much more extensive and far-reaching. As pointed out in the former opinion, section 400 of the Portland Charter empowers the municipality to correct all manner of errors and irregularities whether they be "jurisdictional or otherwise." The distinction between the two charters is found in the fact that in that of La Grande there is provided but one point in the procedure where the city can acquire jurisdiction for any purpose and beyond which it cannot retrace its steps in its effort to amend its errors; while that of Portland enables the municipality to go back and begin again even to rectify any lack of authority not excepting the absence of jurisdiction itself. In brief the Portland charter permits correction of jurisdictional defects, while that of La Grande under consideration in the *Murray* Case did not.

So it is a possible event that acting either directly or through the agency of contractors the city may have laid down a pavement as stated in the complaint herein before discovering its mistake in supposing it had acquired authority to do so. Yet it is not powerless to escape the consequences of such a blunder, although the effort to extricate itself may involve the exercise of the taxing power. The complaint does not differentiate the plaintiff's grievance from such circumstances. He argues that a mere volunteer might pave a street and the city could pay for it, but his complaint does not state such a case. That question is not presented on the record before us, and we make no intimation what the decision should be if the city, as an act of its sovereignty, should adopt some completed but unauthorized work of the kind which it deemed of real public benefit, and as an exercise of its taxing prerogative should essay to lay a special impost with which to raise funds to pay for it.

[2] Under the present Portland charter it behooves the freeholder to be vigilant in respect to street improvements in his vicinity and resist them in their incipency if he has cause for doing so. He cannot safely wait until a pavement is installed and then for the first time begin to object, for that is one of the things the city can put in the street and make him pay for. It may err in its effort to acquire authority over the adjacent property in the beginning, but it seems to be a case of "never too late to mend," and the municipality may return again and again

to the task until it reaches the desired result, always provided that somewhere in the process the freeholder has an opportunity to be heard before his property is taken for payment of the tax.

The petition for rehearing is overruled.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

(88 Or. 554)

SERVICE et al. v. SUMPTER VALLEY RY. CO.*

(Supreme Court of Oregon. Feb. 26, 1918.)

1. CARRIERS \S 202—BILL OF LADING—INTERSTATE OR INTRASTATE.

A bill of lading is not conclusive of the character of the shipment as interstate or intrastate commerce, but it may be considered as a circumstance with other incidents of the transaction on the question; the issue being one of fact for the jury, unless the evidence is conclusive.

2. TRIAL \S 244(2) — INSTRUCTIONS — SINGLE OUT EVIDENCE.

Requested instructions, selecting particular pieces of testimony and charging the jury wholly thereon, when there are other circumstances proper for its consideration, is an invasion of the province of the jury.

3. COMMERCE \S 27(4) — INTERSTATE COMMERCE—COMMON CONTROL.

Shipments over defendant's road wholly within the state were not necessarily interstate commerce, depending on whether the acts were done under a common control, management, or arrangement for a continuous shipment from one state to another, merely because the lumber was destined for points outside of the state, as shown by notations on the bills of lading, and was at the terminus of defendant delivered to a connecting line and by it carried out of the state and delivered; and it paid defendant its charges for its haul.

4. CARRIERS \S 202 — OVERCHARGES FOR FREIGHT—INTEREST.

Interest should not be allowed on a claim for overcharge in freight rates.

5. ABATEMENT AND REVIVAL \S 75(1) — SUBSTITUTION OF PARTIES—EFFECT AFTER REVERSAL.

The substitution in the appellate court of parties for the plaintiff corporation, because of the expiration of the five years after its dissolution within which it could wind up its affairs, is only for the purpose of appeal, and so after reversal there must be a substitution in the trial court.

6. ABATEMENT AND REVIVAL \S 75(1) — SUBSTITUTION OF PARTIES—NEW PLEADING.

Substitution in the trial court for a plaintiff corporation which has become defunct, of its stockholders, for which leave must be obtained, must be not merely by insertion of their names in the complaint, but by allegations therein showing their right to recover, on which defendant may take issue.

7. APPEAL AND ERROR \S 193(9)—OBJECTIONS BELOW—WANT OF CAUSE OF ACTION.

Objection that the complaint does not state facts sufficient to constitute a cause of action, excepted by L. O. L. \S 72, from the grounds of objection that shall be deemed waived if not taken by demurrer or answer, may be made for the first time on appeal.

8. APPEAL AND ERROR \S 193(9) — OBJECTIONS BELOW—WANT OF CAUSE OF ACTION.

Where names of parties are written into a complaint as substituted for plaintiff, without any allegations showing right in them to recover, the ground of objection, relative to right to raise it for the first time on appeal, is that the complaint does not state a cause of action, and not that the substituted parties have not legal capacity to sue, which applies to minority, insanity, or the like.

9. ABATEMENT AND REVIVAL \S 77—SUBSTITUTION OF PARTIES—ORDER—EFFECT.

An order of the trial court that certain persons are substituted as plaintiffs amounts to no more than permission to them to proceed in their own right, and does not dispense with necessity of their stating a cause of action in themselves.

10. APPEAL AND ERROR \S 112—VOID JUDGMENT.

Appeal may be taken from a void judgment.

11. ABATEMENT AND REVIVAL \S 74(6) — REMAND ON APPEAL—CONTINUANCE OF ACTION BY SUBSTITUTED PARTIES.

The greatest effect that a remand for new trial, after it appears that plaintiff corporation has become defunct, can have, relative to right to continue the action by substitution of the corporation's successors in interest as plaintiffs, is to extend to such time the commencement of the year limited by L. O. L. \S 38, for allowing the same.

In Banc. Appeal from Circuit Court, Baker County; Dalton Biggs, Judge.

Action by Robert Service and others, substituted for the Service & Wright Lumber Company, against the Sumpter Valley Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

The Service & Wright Lumber Company, a corporation, commenced an action against the defendant railway company on September 11, 1909, to recover what the former claimed was an excess over what was reasonable which was charged to and paid by it on lumber transported by the defendant for the plaintiff between Deer Creek siding and Baker, in Baker county, Or. From an adverse judgment the defendant appealed, and secured a reversal in an opinion reported in 67 Or. 63, 135 Pac. 539. A second trial in the circuit court again resulted in a judgment for the plaintiff, and on appeal the action was dismissed on the ground that as the record disclosed the plaintiff corporation had been dissolved more than five years prior to filing the amended answer stating that fact. 81 Or. 32, 149 Pac. 531, 152 Pac. 262, 158 Pac. 175. At this juncture Robert Service and others, urging substitution for the first time, applied to this court to be substituted for the original plaintiff corporation which had been dissolved as hereinafter stated, and by an ex parte affidavit gave as grounds therefor that all the debts of the concern had been paid, and that they were its only stockholders. On this showing they were substituted, and their motion for a rehearing in this court was granted. The judgment of the circuit court was again reversed for the reasons stated in the first opinion.

We here set down the chronology of this litigation as follows: The alleged cause of action in favor of the original plaintiff corporation accrued May 27, 1906; the resolution of its stockholders to dissolve it was adopted May 3, 1907; the secretary of state issued his dissolution certificate May 7, 1907; the original action was commenced September 11, 1909; the first judgment of the circuit court was rendered November 3, 1911; the defendant's first appeal was perfected April 29, 1912; the period of five years from the dissolution of the corporation ended May 7, 1912; the original reversal of the cause on appeal to this court was rendered September 30, 1913; the second circuit court judgment was entered January 9, 1914; the action was dismissed in this court June 15, 1915; the petition of Robert Service and others to this court to be substituted was allowed October 22, 1915, and the cause was set for rehearing; the original opinion of September 30, 1913, was adopted and the judgment was reversed June 20, 1916; the judgment from which the present appeals were taken was rendered in the circuit court December 22, 1916, and both parties appealed.

Join L. Rand, of Baker, and W. Lair Thompson, of Portland (Snow, Bronaugh & Thompson, of Portland, on the briefs), for appellant. Samuel White, of Portland, and Robert Service, of Baker, for respondents.

BURNETT, J. (after stating the facts as above). On the appeal of the defendant there are three questions to be treated: (1) Whether and to what extent the question of interstate commerce is involved in this case; (2) the correctness of the circuit court's instruction to the jury, to the effect that, if they found for the plaintiff, they should allow interest from May 27, 1906, to the date of the verdict; and (3) whether the stockholders of the original plaintiff corporation have been properly substituted therefor so as to maintain this action.

So far as the first question is concerned it is embodied in the defendant's assignments of error numbered 3, 4, and 5. Under the third assignment it contends that the court erred in refusing to give this instruction:

"The jury is instructed that, eliminating the four local shipments to which your attention has been directed, the bills of lading issued by the defendant for all shipments prior to the 5th of May, 1906, were contracts for interstate transportation, and that under the provisions of the act of Congress approved February 4, 1887, and the acts amendatory thereof, and the decisions of the federal courts defining the meaning of these acts, plaintiffs cannot recover for any freight paid to the defendant for the transportation called for in said bills of lading."

The fourth and fifth assignments predicate error upon the court's refusal to give instructions 21 and 22 requested by the defendant and here set down as follows:

"(21) The plaintiff Robert Service has testified that the bulk of the contents of 800 of the cars which came down over the line of the defendant

from Deer Creek spur to Baker was transferred on arrival at Baker to broad gauge cars in which the lumber left the state of Oregon for shipment to consignees from whom the Service & Wright Lumber Company had received orders. I instruct you that the carriage of the shipments of lumber referred to in the foregoing testimony was interstate commerce, and that under the provisions of the act of Congress approved February 4, 1887, and the acts amendatory thereof and the decisions of the federal courts defining the meaning of the said acts of Congress, plaintiffs cannot recover for any freight which may have been paid on any of the said 800 cars.

"(22) The plaintiff Robert Service has testified that the bulk of the contents of 800 of the cars which came down over the line of the defendant from Deer Creek spur to Baker was transferred on arrival at Baker to broad gauge cars in which the lumber left the state of Oregon for shipment to consignees from whom the Service & Wright Lumber Company had received orders. I instruct you that under this evidence the bulk of the contents of the 800 Sumpter Valley cars referred to which were transferred to the broad gauge cars and went out of the state of Oregon were carried in interstate commerce, and that plaintiffs cannot recover in this case for any freight which the Service & Wright Lumber Company may have paid for the carriage from Deer Creek spur to Baker of the bulk of the said 800 cars so transferred. I instruct you that the provisions of the act of Congress of date February 4, 1887, regulating interstate commerce, and the acts amendatory thereof and the decisions of the federal courts, defining the meaning of these statutes preclude the recovery by plaintiff of any freight so paid by the Service & Wright Lumber Company."

At all the times mentioned in this litigation the defendant owned and operated a railway from Baker, in Baker county, Or., to a terminus west of that town, all within the state of Oregon. The shipments in question were made from what is known as Deer Creek spur to Baker. It is conceded that four carloads of lumber never went beyond the latter point, but were disposed of to the local trade there. Some evidence is in the record also to the effect that at least the bulk of the contents of 800 of the defendant's cars was immediately shipped out of the state by another railroad passing through Baker, and that when the cars of the defendant arrived there laden with the lumber of the Service & Wright Lumber Company the agents of that corporation took charge of the lumber and loaded it upon cars procured by it from the other railroad company upon which it was shipped out of the state. Mr. Robert Service, the principal witness for the plaintiff, testified to the effect that in every instance when any of the lumber in question arrived at Baker in the defendant's cars it was set or spotted on the track where it was unloaded or where portions of it could be transferred, and, as soon as it was spotted, the plaintiff corporation by its agents took charge of it, had complete control of it, sold it in Baker if it wished, or shipped it wherever it pleased, and did with it as it wanted to. There is in evidence, as shown by the bill of exceptions, a letter of the defendant company written by its general passenger and freight agent addressed to the original plaintiff corporation as follows:

"Baker City, Oregon, April 24, 1905.

"Service & Wright Lumber Co., Baker City, Oregon—Gentlemen: Replying to yours of the 20th inst.: The transfer of lumber from our cars to standard gauge cars, and the selection of those standard gauge cars for such transfer purposes, has been entirely with yourselves for a long time past. You have made your shipments from mill on Deer creek to Baker on our cars. At Baker you have made requisition upon O. R. & N. Co. for such standard gauge cars as you saw fit, and when such cars were designated to us by O. R. & N. Co. yardmaster, we have spotted them convenient to your lumber, on our cars, for transfer. When the transfer was made by you, we were notified and the standard gauge car loaded was and has been set over on O. R. & N. Co. tracks by our switch crew. We have assumed no responsibility whatever for the lumber in any manner, except to move it over to O. R. & N. tracks when notified by you to do so, after its arrival at Baker.

"We are under no obligations to transfer lumber, or any other shipment, as a matter of fact, from our tracks to O. R. & N. Co. or vice versa. We agree to responsibility for its arrival at Baker station, but our responsibility then ceases. We have no contract with the O. R. & N. Co. by which we can demand any certain kind or number of cars, or at any particular time or day. We cannot, and will not, agree to assume any responsibility for lumber shipments transferred from our cars to standard gauge cars, or for losses or damages arising from overweight, underweights, less than minimum charge shipments, or from any cause whatever, from the time such shipments are received by us at Baker and expense bills or freight charges made out. If you make a shipment of lumber of such lengths, sizes and quantities that it is next to impossible to transfer to a standard gauge car, unless such car is of a size that calls for a minimum weight over and above the actual weight of lumber—that will be your loss—if any such there be, and not ours.

"We will not agree to, or be responsible for, securing from O. R. & N. Co. any particular kind or class of car, small or large, box, flat or stock, for transfer purposes for any particular lumber shipment, to go forward at any particular time or date, or to contain any certain quantity in weight or measurement of lumber; but will use, handle and place in position for transfer purposes such cars, and only such cars as may be designated and set off on joint tracks for our use by O. R. & N. Co. yardmaster. In short, we do not propose to assume any risk or liability for matters which we cannot control or direct. The securing or providing of standard gauge cars of any particular kind for transfer purposes is one of the matters we cannot control or direct.

"It is my understanding that for some time past you have made direct demand of O. R. & N. Co. for such cars you have needed from time to time, it being agreed and understood that you should do so, in order that we could not properly be accused of not assigning to you an equitable number and kind of cars, that were turned over to us by O. R. & N. Co. I supposed that matters were working along smoothly, and that all causes—supposed or real—for dissatisfaction removed.

"We positively refuse to make any change to present arrangements that will, or may, bring a liability to us, for loss or damage resulting from any act done or performed by any person, our employé or otherwise, during the act of transfer from our cars to standard gauge and delivery of same to O. R. & N. Co.

"Yours truly,

"Sumpter Valley Railway Co.,

"Per Joseph Barton, G. P. & F. A."

Another letter from general counsel for the defendant to a member of the Interstate

Commerce Commission was also put in evidence over defendant's objection. This letter appears at large in 67 Or. p. 80, 135 Pac. 539, reporting the first opinion in this case, and need not be here repeated. It is sufficient to say of it that it constitutes a strict disclaimer on the part of the defendant that it was engaged in or concerned with interstate commerce so as to be subject to the jurisdiction of the Interstate Commerce Commission.

Of the bills of lading alluded to in the first-quoted instruction requested by the defendant it is enough to say that they all required lumber to be transported from Deer Creek spur, Or., to Baker City, Or. They were all signed by the defendant as the carrier and by the plaintiff as the shipper. The printed conditions in all of them were substantially identical. On one form, under the head of "Consignee, Marks and Destination," was inserted the name and address of a consignee outside of the state of Oregon. On a second, under the same head, was put in the name of the original plaintiff corporation, with its address at Baker City, Or., and under the description of the article shipped was a notation, "Adams-Pelgerrin Co. Ship to Shoshone, Ida., Destination, Twin Falls, Ida." On the third no name appeared under the head noted, but with the description of the article were these words, "Chicago Lumber & Coal Co., Oakley, Kansas."

[1] The substance of the defendant's contention is that on such bills of lading and the testimony alluded to in the requested, instructions the circuit court ought as a matter of law to have decided conclusively that the transaction was interstate commerce which would oust the state court of jurisdiction. It is conceded by both parties that if in very truth the shipments in question were part of commerce between the states, any dispute or any question in relation thereto must be determined by the Interstate Commerce Commission in the first instance and not by the state court. The question with which we are concerned at present is whether on the record before us the question of interstate commerce is purely one of law to be declared by the court peremptorily. It is indeed true that the construction of contracts and the declaration of their legal effect is the exclusive province of the court; but it is equally true that on federal questions where the United States courts have construed congressional enactments the state courts are bound to follow the same. As to the first instruction the question is whether the court should say as a matter of law that the bills of lading as described above were conclusive on the nature of the transaction making it interstate commerce beyond cavil. We might content ourselves with the decision on this point when the case was before us in *Service & Wright Lumber Co. v. Sumpter Valley Ry. Co.*, 67 Or. 63, 84, 135 Pac. 539; but counsel have again presented the matter with an array of authorities

which we have studiously examined and here review:

The decision in *Atchison, T. & S. F. Ry. v. Harold*, 241 U. S. 371, 38 Sup. Ct. 665, 60 L. Ed. 1050, was rendered June 5, 1916. The case involved a carload shipment of corn from Yanka, Neb., to Topeka, Kan., in care of the plaintiff. An interstate bill of lading was issued. While the corn was in transit over the Union Pacific Railway, the holder surrendered the bill of lading to an agent of the Santa Fé in Kansas City, Mo., and took another bill treating the car as being at the latter place, though, in fact, it was yet in transit to Topeka. The Supreme Court of the United States looked past the terms of both bills, and classed the shipment as interstate because: (1) The firm to be notified of the shipment was at Kansas City, Mo.; (2) there was no person at Topeka to whom the same was consigned; and (3) the first bill having the direction "C/o S. F. for shipment," it was apparent that the movement was not intended to stop at Topeka, but that it should go farther as directed by the indorsee of the first bill of lading while in transit. There was no intrastate bill of lading in the case. The same court on June 10, 1913, decided the case of the *R. R. Com. of La. v. Tex. & Pac. Ry.*, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215. That was a suit in the United States courts to enjoin the enforcement of penal orders of the state Railway Commission of Louisiana. Certain logs and staves were delivered to railways at various points in Louisiana consigned to parties in New Orleans, who were engaged in exporting such stuff to Europe. The railway transportation was wholly within the state, and the bills of lading were all intrastate. The shipments passed through the hands of two railway companies, and by the order of the consignees were delivered at New Orleans directly to steamers plying to European ports. The property was all the time in the physical custody of the transportation companies, and not within that of the consignees. No demurrage was charged for delay beyond the four days' free time allowed by the state Railway Commission for intrastate shipments, and they all paid the usual charges for handling in transshipment of foreign exports. The merchandise was intended by the shippers for foreign export. The pith of the decision was in these words:

"The principle enunciated in the cases was that it is the essential character of the commerce, not the accident of local or through bills of lading, which determines federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country. The facts of the case at bar bring it within the ruling."

The court sitting in equity assumed, as it had the right, to decide the fact, and held that it was not concluded as a matter of law by the terms of the bills of lading in determining whether it was interstate or intra-

state commerce. In 1913 *Tex. & N. O. R. R. Co. v. Sabine Tram. Co.*, 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442, was decided. That also was a trial by the court. The lumber was shipped from Ruliff to Beaumont by one railroad, and thence by another to Sabine on intrastate bills of lading. On arrival at Sabine, by direction of the firm that had bought the lumber en route by paying draft with bills of lading attached, the loaded cars were at once run on about one quarter of a mile beyond the railroad station to a dock where the lumber was unloaded within reach of ship's tackle by which it was taken aboard as cargo for foreign export. The court considered the usual course of business connected with such shipment, and the fact that the parties took advantage of the longer free time allowed for moving foreign exports from cars to ships over that for handling domestic freight. It was held that the facts that the bills of lading were wholly intrastate and the railroad transportation entirely within the state of Texas were not controlling in the matter. In other words, a construction of the bills of lading was not decisive of the character of the shipment, whether interstate or intrastate. The *Denver & R. G. Ry. Co. v. Interstate Com. Commission (Com. C.)* 195 Fed. 968, was decided April 9, 1912. The Missouri Pacific Railway carried a carload of beer from St. Louis, Mo., to Pueblo, Colo., on its local waybill charging its own local rate. The waybill showed Baer Bros. Merc. Co. as consignee, and Leadville, Colo., as the destination of the shipment. At Pueblo the car was put on an interchange track, where the Missouri Pacific and Denver & Rio Grande delivered carload traffic to each other. The former road then delivered to the latter a transfer sheet, showing consignor, point of shipment's origin, weight and contents of the car, together with the name of consignee and destination. The latter road then took the car and moved it to Leadville on a local waybill of its own, charging its own freight rate separately, and also noting consignor, consignee, and destination, together with the back charges of the Missouri Pacific. The usual course of business was for each road to collect for the other all the latter's unpaid charges or, if charges were prepaid, for the collector to account to the other, all being subject to daily settlement. Notwithstanding the *Denver & Rio Grande* operated only within Colorado on its own local waybill and had no joint rate with eastern connections for Colorado points, yet the Commerce Court disregarded the local waybill under which the *Denver & Rio Grande* operated, and held that the facts showed interstate commerce. The proceeding was a suit in which all the issues were determined by the court, and turned upon a question of fact, not upon a legal construction of the waybill. It is said in *Penn. Ry. Co. v. Clark Bros. Coal Mining Co.*, 238 U.

S. 456, 35 Sup. Ct. 896, 59 L. Ed. 1406, decided in June, 1915:

"In determining whether commerce is interstate or intrastate, regard must be had to its essential character. Mere billing, or the place at which the title passes, is not determinative."

What is known as the "lake cargo" coal case (*R. R. Com. v. Worthington*, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004), decided in 1912, was where the Railroad Commission of Ohio undertook to fix railroad rates for transportation of coal from interior points in that state to coal bunkers at Huron, Ohio, to be transported by steamers to other states as required. The court said:

"The question is, then, one of fact. * * * It is true that the shipper transports the coal ordinarily upon bills of lading to himself, or to another for himself, at Huron on Lake Erie. The so-called 'lake cargo coal' is necessarily shipped beyond Huron. If it stops there, another and higher rate applies."

The court then considered the circumstances of a lower rate applied to the transportation, including the loading on the steamers and trimming the cargo, whenever the coal went out of the state. The court disregarded as not conclusive the fact that the coal was billed only to Huron and distinguished *Gulf, etc., Ry. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540, involving a shipment of corn between two points in Texas where the court held that the interstate transportation from another state had been completed under a contract to deliver the corn at Texarkana, Tex., and that when sold there the buyer's shipment of it to Goldthwaite, Tex., constituted a new, independent intrastate shipment. *Tex. & Pac. Ry. Co. v. Langbehn* (Tex. Civ. App.) 158 S. W. 244, decided in 1913, also ignores local bills of lading as nonconclusive. *Galveston, etc., Ry. v. Carmack* (Tex. Civ. App.) 176 S. W. 153, decided in 1915, involved a shipment of horses from Alpine, Tex., destined to Little Rock, Ark. The court there said:

"There is no merit in the contention that it was an intrastate shipment. The fact that appellant [common carrier] only obligated itself to transport the animals to San Antonio does not affect the interstate character of the shipment. It was clearly interstate in its nature."

In 1911 was decided *S. P. Terminal Co. v. Interstate Commerce Com.*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310. The terminal company had some docks at Galveston forming a connecting link in transportation of freight from interior Texas points to the seaboard, and thence by ship to other states and countries. It did not charge defendant Young the same dockage rates as it did others in handling oil cake and meal, but leased to him one of the piers at such an annual rental that he was enabled to make a profit of 30 or 40 cents per ton of such produce over the average gain of his competitors in such transaction. In a suit by the Interstate Commerce Commission to enjoin operations under the lease as discriminative on the part of the terminal company, it was

urged that the transportation was not interstate commerce, and that the commission therefore had no authority in the matter because, among other reasons, the oil cake was hauled to the Galveston docks on intrastate waybills only, there unloaded, ground into meal, and sacked for water carriage. The court considered all the circumstances affecting the business, including the fact that the premises on which the docks were located had been dedicated substantially for the establishment of terminal facilities for certain railroad and steamship systems. The court refused to be bound by the construction of the local bills of lading under which the products were brought to Galveston, and found from all the evidence as a fact that the transactions constituted interstate commerce. *Lusk v. Atkinson*, 268 Mo. 109, 186 S. W. 703, decided in 1916, was a proceeding to review the action of the Missouri Public Service Commission fixing the rates to be charged on shipments of ties gathered at various points in that state, carried by railroad to a station called Commerce, and afterwards sent into other states to fill contracts for delivery there. Disposing of the contention that the business was not interstate commerce, after reviewing the precedents, the Supreme Court of Missouri in that case said:

"In order to determine this question, it is important and necessary to ascertain: (1) What was the motive or intention of the shipper? (2) And what was the object and purpose to which the shipment was devoted? These two tests necessarily determine the nature of the shipment as being interstate or intrastate, and they were had in mind in each of the foregoing cases, wherein the court passed upon that question."

It is hornbook law that intent and purpose are always questions of fact. In 1916 was decided *Alabama Great So. Ry. v. McFadden* (D. C.) 232 Fed. 1000. The case was decided on a rule for judgment for want of sufficient affidavit of defense. The facts were admitted, in substance, that loose cotton was bought by the defendants at various points in Alabama and shipped on local bills of lading to Birmingham, Ala., for compression, when it was shipped on new bills of lading to New Orleans. The through rate allowed from Albertville, the origin of the shipment, to New Orleans was 57 cents per hundred. The local rate from Albertville to Birmingham was 11 cents, and from Birmingham to New Orleans 32 cents, a total of 43 cents, which defendants were told by plaintiff's agent was the correct one, and which they paid. The railroad company brought action to recover the difference between 57 cents, the rate established by the Interstate Commerce Commission, and 43 cents, actually paid. The court disregarded the local waybills, and considered all the circumstances as questions of fact. On appeal to the Third Circuit Court of Appeals, the affirmance of the decision of the District Court was made largely to de-

pend upon the fact that the cotton remained all the time in the custody of the carrier who unloaded and compressed it, under a provision of the bill of lading giving it that privilege, after which it continued the transportation. The decision attaches a great deal of importance to the fact that the shippers did not, as they might, take the cotton into their possession at Birmingham, the terminal named in the intrastate bill of lading. *McFadden v. Ala. Grt. So. Ry. Co.*, 242 Fed. 562, 154 C. C. A. 338.

We recall the testimony in the case at bar to the effect that when the lumber arrived at Baker the original plaintiff corporation took physical custody of it and had complete control of it. The clear effect of the opinion in the case last cited is to make such evidence sufficient to take to the jury the question of fact involved in determining whether the transaction was one of interstate commerce. In 1891 was decided *Cutting v. Fla. Ry. & Nav. Co.* (C. C.) 46 Fed. 641. This was a suit in equity where the interveners besought the court to direct its receiver of an insolvent railroad company to return the excess of what he had charged over the rate fixed by the state Railroad Commission on shipments of oranges from points within the state to another intrastate point and thence to other states. The court laid aside as negligible the local bills of lading, and held that, where the fruit was shipped to plaintiff's agent at a point within the state, and he, without taking custody of it, merely had it rebilled to consignees in other states, the business was interstate commerce, notwithstanding the local bills of lading. *Swift & Co. v. U. S.*, 196 U. S. 375, 35 Sup. Ct. 276, 49 L. Ed. 518, decided January 30, 1905, was a suit to restrain repeated violations of the law against unlawful combinations in restraint of trade. The bills of lading were not considered. The court there held that when, as in that case, cattle are shipped from one state to another without change or delay except enough to secure a buyer at some stockyard en route, and when this is a typical, constantly recurring course of trade it constitutes interstate commerce, at least where a resident of one state purchases from an inhabitant of another. In April, 1887, the case of *Ex parte Koehler* (C. C.) 30 Fed. 867, was decided by the late Judge Deady. It involved a petition to instruct the receiver of the Oregon & California Railroad Company in respect to his duty. The Oregon Railway & Navigation Company's steamers carried freight from San Francisco, Cal., to Portland, Or., where the receiver took it and carried it over the railroad wholly within the state to its ultimate destination on its own bills of lading. Each carrier fixed and collected its own charges independent of the other, and they were not under a common control or management. The learned judge decided that:

"So long as the railway and steamer are each operated under a separate and distinct control,

making its own rates, and only liable for the carriage and safe delivery of the goods at the end of its own route, the act does not apply to the transaction. To make these carriers subject to the act, the railway and vessel must, as therein provided, be operated or used under a 'common control,' a control to which each alike is subject, and by which rates are prescribed and bills of lading given for the carriage of goods over both routes as one."

About ten years later was handed down an opinion in *United States v. Colorado & N. W. Ry. Co.*, 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, 18 Ann. Cas. 893. It was a case to recover a penalty for violation of the federal Safety Appliance Act (U. S. Comp. St. 1916, § 8605 et seq.). Judge Sanborn points out that the construction of the Interstate Commerce Act (section 8563 et seq.) does not affect the construction to be given to the safety appliance law. He indicates two classes of carriers operating within a single state and engaged in transporting articles of interstate commerce:

"(a) Those who conducted that transportation with another or other carriers under a common control, management, or arrangement for a continuous carriage, or shipment; and (b) those who conducted such transportation alone, or with other carriers without any common control, management, or arrangement for such a carriage or shipment."

He then shows that the interstate commerce law applies only to the first class, while the other act includes both; that the two enactments are not in pari materia because the first relates to contracts and rates of transportation, while the second has reference to the construction of the cars and engines employed to carry interstate commerce in any form. The evils attacked in the former were favoritism and discrimination in contracts for carriage, while those in the latter were injuries to employes on account of defective car equipment. The case is not an authority on matters involved in the one at bar. In *U. S. v. Ill. Terminal Co.* (D. C.) 168 Fed. 546, decided in 1909, there was an indictment for transporting interstate commerce without filing its schedule of rates with the Interstate Commerce Commission. The defendant's road was wholly within the state of Illinois, but by its plea of guilty it admitted that it was hauling shipments of merchandise moving entirely by rail on a continuous passage from one state to another. *Louisville & Nashville R. Co. v. Behlmer*, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. Ed. 309, was decided in 1900. On shipments of hay from Memphis, Tenn., by various roads through Summerville, S. C., to Charleston, S. C., the participating roads shared in a rate common to Summerville and Charleston, but for the shorter route to Summerville there was added to this and exclusively appropriated by the local road the rate from Charleston back to Summerville. It was held to be interstate commerce subjecting the charges to revision by the Interstate

Commerce Commission because the entire transportation was continuous by railways operating under a common arrangement for through traffic. A similar case is that of the Cincinnati, N. O. & Tex. Pac. Ry. v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935, decided in 1896. In the latter case the plaintiff in error operated a railway from Cincinnati, Ohio, to Chattanooga, Tenn. The Western & Atlantic Ry. Company owned a road extending southerly from Chattanooga, to Atlanta, Ga., and from there the Georgia Railroad Company operated a third line easterly through Social Circle, to Augusta, Ga., the latter road being entirely within the limits of that state. The three roads made a common joint rate of \$1.07 per hundred from Cincinnati to either Atlanta or Augusta, which they divided among themselves in certain proportions. For shipments from Cincinnati, Ohio, to Social Circle, \$1.37 was charged, being the \$1.07 to Atlanta which it divided between the first two roads to the exclusion of the last one, which collected an additional 30 cents for its own use, which was its state established rate on shipments originating at Atlanta and sent to Social Circle. The court held that whether the Georgia company was engaged in interstate commerce depended upon whether what it did was done "under a common control, management, or arrangement for continuous carriage or shipment." Under the interstate commerce law as it then stood, it was held in that case to be competent for a local road situated entirely within a state to haul freight coming from another state, and that, too, independent of any control, except that of its home state, provided its transportation was undertaken in good faith as a new and independent enterprise. On the other hand, if the local road had elected to become a party to a contract or arrangement with roads in other states to carry foreign freight by agreeing to receive the goods on foreign through bills of lading and to participate in through rates, it thereby made its trackage part of a continuous line for the carriage of a through shipment, and so became amenable to federal control under the interstate commerce law. In 1908 appeared the opinion of the Interstate Commerce Commission in *Lanning-Harris Coal & Grain Co. v. Mo. Pac. Ry.*, 13 Interst. Com. R. 154. The plaintiff shipped two cars of coal from Springfield, Ill., to Kansas City, Mo., via the Wabash Railway, and after arrival at the latter place forwarded both of them by the Missouri Pacific Railway to points in Kansas. The through joint rate from Springfield to the Kansas points was \$3.73, while the sum of the local rate from Springfield to Kansas City, plus that from Kansas City to Kansas points, was \$3.50. The two roads charged the higher through rate. The commission considered the intent of the shipper in deter-

mining the rate applicable, and, awarding reparation for excessive charges, said:

"From the facts, it is clear that the complainant intended these as strictly local shipments, and no evidence was offered by defendant to controvert this contention. It is true that complainant was unable to say positively whether or not these particular cars of coal had been sold by it prior to the time they reached Kansas City, but it is a fact that no orders were given to the defendant to carry the coal to any other points until after it had actually reached Kansas City. * * * The billing of both shipments here concerned was to Kansas City. * * * They might have been held there, the cars unloaded, and the coal sold at Kansas City."

As a question of fact the commission found that the transportation was composed of two local shipments, and applied the local rates instead of the established joint one. In *Re Through Routes & Through Rates*, 12 Interst. Com. R. 163, a section of the syllabus reads thus:

"Existence of a through route is to be determined by the incidents and circumstances of the shipment, such as the billing, the transfer from one carrier to another, the collection and division of transportation charges, or the use of a proportional rate to or from junction points or basing points. These incidents named are not to be regarded as exclusive of others which may tend to establish a carrier's course of business with respect to through shipments."

Morgan v. Mo., K. & T. Ry. Co., 12 Interst. Com. R. 525, was decided in 1907. Owing to local competition the company made a special low rate on shipments of live stock from Crowder City, Ind. T., to Kansas City, Mo. At the same time it had joint rates with other roads from points west of Crowder City to Kansas City, which were greater than the sum of local rates to Crowder City, plus the special low rate from thence to Kansas City. The commission sustained the right to charge the joint rate on shipments originating west of Crowder City without reduction on account of the special low rate named. Answering the contention that this would allow shippers from the west to take their cattle out of the cars at Crowder City, immediately run them back into the same cars, and forward them to their destination at Kansas City on the special rate, the commission said:

"There seems to be no doubt as to the right of the shipper to consign a shipment to a given point, pay charges upon it, assume custody, and take possession of the property, and later reship it to another point under rates lawfully applicable to such reshipment. A carrier or carrier's agent may not, however, act as forwarding or reconsigning agent for a shipper for the purpose of evading or defeating the terms or purposes of the law or in such manner as to defeat or evade the intent of the law. To do that would be to resort to one of the devices prohibited in the act."

The doctrine to be drawn from all these decisions is that a bill of lading is not conclusive of the character of the shipment, yet the instruction requested and specified in the third assignment of error would require the trial judge to say as a matter of law, based alone upon the bill of lading in question, that

the transaction was one of interstate commerce so as to oust the state court of jurisdiction. If such a document is inconclusive in one case it is inconclusive in others. The clear reason of the cases cited is to the effect that the bill of lading may be considered as a circumstance with other incidents of the transaction throwing light on the question of fact whether it be interstate or intrastate commerce. Notwithstanding the declaration of defendant's general counsel and its freight and passenger agent disclaiming all authority over or in connection with the shipment beyond its own lines and the testimony of Service to the effect that his company, the original plaintiff, took actual charge and custody of all the lumber at Baker, we are asked to disregard all this and direct the court below to say as a matter of law that the transaction was interstate commerce. At the least these items of testimony to which allusion has just been made were sufficient to carry this disputed question of fact to the jury. That the issue of whether the transaction is interstate commerce or not is one of fact to be determined by the jury under proper instructions is taught also by *State v. Taber Lumber Co.*, 101 Minn. 186, 112 N. W. 214, 13 L. R. A. (N. S.) 800; *Tredway v. Riley*, 32 Neb. 495, 49 N. W. 268, 29 Am. St. Rep. 447, note; *Commonwealth v. People's Express Co.*, 201 Mass. 564, 88 N. E. 420, 131 Am. St. Rep. 416. In our judgment there is at least some testimony to be considered on both sides of the question about interstate commerce; and, however great the preponderance in its favor as estimated by the defendant, we cannot say that its showing is so conclusive as rightly to call from the trial court a peremptory direction to the jury to find against the plaintiff on that point.

[2] Moreover, all the instructions referred to in assignments 3, 4, and 5 are subject to the criticism that they sought to advise the jury of the effect of certain acts which, because of the nature of the controversy, were prominent when there was other evidence in the case which properly could be considered in the same relation. The court cannot select any particular piece of testimony, and charge the jury wholly upon that, when there are other circumstances proper for its consideration. *Stanley v. Smith*, 15 Or. 505, 16 Pac. 174; *Patterson v. Hayden*, 17 Or. 238, 21 Pac. 129, 3 L. R. A. 529, 11 Am. St. Rep. 822; *Crossen v. Oliver*, 41 Or. 505, 69 Pac. 308; *State v. Deal*, 43 Or. 17, 70 Pac. 534; *Kellogg v. Ford*, 70 Or. 213, 139 Pac. 757; *Saratoga Inv. Co. v. Kern*, 76 Or. 243, 148 Pac. 1125. The principle is thus aptly stated in the syllabus to *Church v. Melville*, 17 Or. 413, 21 Pac. 387:

"Unless evidence is by law conclusive upon the parties, it would be error for the trial court to select a single fact or part of the evidence where there was a conflict, and instruct the jury that they must find their verdict on that fact alone, and in a particular way. Such an

instruction would be an invasion of the rights of the jury."

In cases like the present it is permissible for the court to state to the jury a hypothetical case covering the entire contention of each party, and to declare to the jury that if they find such to be the fact, the law will be as directed by the court. If the testimony is indisputably all one way, the court can direct a verdict according to the admitted facts; but where there is any material dispute about the facts, or where reasonable men legitimately may draw different conclusions from a given state of facts, the decision of the ultimate question in dispute in a jury case must be left to the jurors. There was no error in refusing the instructions alluded to in the third, fourth, and fifth assignments of error because they each invaded the province of the jury.

[3] Besides all this, it is not directly alleged in the answer that the acts therein described were done under a common control, management, or arrangement for a continuous shipment from one state or territory of the United States to any other state or territory. It is said that the lumber "was consigned and destined for points outside of the state of Oregon," as shown by the bills of lading made out by the plaintiff and signed by the defendant's representative; that the lumber was delivered to a connecting line of railroad at Baker for the purpose of being transported by that carrier, by whom it was carried to points outside of the state and delivered; and that the connecting carrier paid to the defendant its charges for the haul from Deer Creek spur to Baker. As the statute then stood, all these things might have been done without there being any common control, management, or arrangement for a continuous carriage. The pleading is silent on the point of the transaction being the result of common control. The statements in the answer narrate matters which would no doubt be receivable in evidence as circumstances tending to prove common control, but this ultimate fact is not stated. That the things alleged in the answer in that behalf do not necessarily constitute interstate commerce is shown by *Heiserman v. Burlington R. Co.*, 63 Iowa, 732, 18 N. W. 903; *United States v. Geddes*, 131 Fed. 452, 65 C. C. A. 320; *Interstate Com. Com. v. Bellaire*, etc., R. Co. (C. C.) 77 Fed. 942; *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 23 Sup. Ct. 266, 47 L. Ed. 349.

[4] It was error to allow interest on the sort of claim described in the complaint. The question was considered and decided in *Sargent v. Am. Bank & Trust Co.*, 80 Or. 16, 38, 154 Pac. 759, 156 Pac. 431.

[5, 6] It remains to consider whether substitution was effected in the circuit court so as to allow the stockholders of the original corporate plaintiff to prosecute this action.

So far as the allegations thereof are concerned the cause was tried the third time in the circuit court on the same complaint used in the first trial. The only indication of actual substitution there is that in some places afterwards the names of Robert Service, Mrs. Robert Service, and Peter Service were put into the title of the cause. There is an utter absence of averment connecting any of these individuals with the original plaintiff corporation, or with the matters alleged in the complaint. It becomes necessary to inquire: (1) As to the effect and extent of the order of this court allowing a substitution of parties plaintiff; and (2) whether substitution was actually accomplished in the circuit court. This is an action at law, the final determination of which is embodied in a judgment. This court has no original jurisdiction in such cases. The cause is not tried here *de novo* as in suits in equity. In actions at law of this sort the Supreme Court exists only to review the decisions of the circuit court on the questions of law appearing in the transcript. L. O. L. § 556. This, of course, is subject to the terms of section 3, art. 7, of our Constitution, authorizing this court on appeal to direct judgment in certain cases in like manner, and with like effect as decrees are entered in equity cases; but hitherto the court has not exercised that prerogative herein.

Remembering that the cause was originally prosecuted to final judgment in the circuit court and the appeal perfected eight days before the expiration of five years from the dissolution of the former plaintiff corporation, it is apparent that prior to the first appeal the question of substitution of parties had not arisen in the circuit court, nor could it have arisen because the plaintiff corporation was yet in existence as an active participant in the litigation. Up to the time of the first appeal, therefore, the circuit court had not committed any error about change of parties, and there was nothing in that respect either to affirm or to reverse. Meanwhile, the plaintiff corporation had lapsed. Section 38, L. O. L., reads thus:

"No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, marriage, or other disability of a party, the court may, at any time within one year thereafter, on motion, allow the action to be continued by or against his personal representatives or successors in interest."

This statutory rule is applicable in the following manner to the transactions already had in this court as to a change of parties. An appeal is a proceeding distinct and separate from the original judgment. *Shirley v. Burch*, 16 Or. 1, 18 Pac. 344. It can be determined only in the appellate court. The cause of action on appeal is the right to have the determination of the circuit court reversed or modified. *Jameson v. Bartlett*, 63 Neb.

638, 88 N. W. 860. The proceeding to enforce this cause of action, as distinguished from the one in the complaint, was ripe for the consideration and determination of this court when the appeal was perfected on April 29, 1912, eight days before the lapse of the original corporate plaintiff. Having thus acquired jurisdiction over the parties and the subject-matter of the new action, conventionally denominated an appeal, which was instituted to overturn the judgment of the circuit court, this court, in a case where substitution is permissible, has power to retain the proceeding and preserve it by the requisite change of parties for the purposes of the appeal and the adjudication thereof, but no further. It is much like *Pendleton v. Russell*, 144 U. S. 640, 12 Sup. Ct. 743, 36 L. Ed. 574, where an insurance corporation was dissolved pending its appeal to the United States Supreme Court. Its receiver in the state court which dissolved it obtained permission there to employ counsel in the United States Supreme Court to argue the case. He did so, and the original decision was reversed. No substitution was made anywhere. In a new trial a judgment was again rendered against the corporation, and it was held on final appeal to the United States Supreme Court that the receiver was right in rejecting the last judgment as a claim against property in his hands, because, being against a defunct corporation, it was a nullity. To allow substitution here for the purposes of litigation over which this court has obtained jurisdiction by perfection of appeal is a necessary incident to the exercise of the only authority vested in this tribunal; but it cannot assume or exercise control in matters referable alone to the original jurisdiction of the circuit court. The only function of substitution in this court was to enable us to decide the question before us on appeal, and, the purpose of its exercise having been accomplished, its effect is ended. Whatever may be said as to the regularity of the substitution in this court for the first time, the order allowing it is the law of the case. The question is, What was the extent and effect of the order? The reversal left the litigation where it was at the beginning of the first trial in the circuit court, and if any one was entitled to prolong it as the successor in interest of the original plaintiff, it was his duty to apply to that court for leave to be substituted for his predecessor in title. It is taught in *Reay v. Heazleton*, 128 Cal. 335, 60 Pac. 977, that change of parties in the Supreme Court should be followed by substitution in the court below on proper averments. Again, in *Fay v. Steubenrauch*, 138 Cal. 656, 72 Pac. 156, it is laid down that substitution should be made first in the nisi prius court; but, when made first in the Supreme Court, it should be renewed in the trial court. It is said in *Planters' Bank v. Bass*, 2 La. Ann. 430, that if substitution in the Supreme Court involves only a question of law, it will be made for the purpose of exercising appellate

jurisdiction; but if a matter of fact is drawn in question, the cause will be remanded to the lower court to work out the substitution. The doctrine to be derived from *Pendleton v. Russell*, supra, is that, in the absence of substitution before the court having original jurisdiction, the resulting judgment is a nullity. In *Prior v. Kiso*, 96 Mo. 303, 9 S. W. 898, it is taught that on the death of a sole defendant in error it is competent to make his representative a party on return of the cause to the lower court. In *MacRae v. Kansas City*, 69 Kan. 457, 77 Pac. 94, the statute made the directors in office at the time of the dissolution of a corporation trustees for the purpose of winding up the business; but even then it was held that a judgment in favor of the corporation, afterwards dissolved could not be enforced without the substitution of these trustees, and the Supreme Court remanded the cause to the circuit court for further proceedings.

It is clear that the order of this court, allowing substitution, was applicable only to the proceedings before it, and could have no further effect. To hold otherwise would be to say that a stranger to the cause may, for the first time, appear in the Supreme Court, mend his hold by withdrawing the demurrer of the former plaintiff to the plea of the defendant made below that the corporate plaintiff has been dissolved, and confess and avoid the same by a reply that the newcomer is its successor. This would amount to a pure departure from the original cause of action as stated in the complaint, and the allowance of it would be an infringement upon the original jurisdiction of the circuit court. Again, whether the interveners are really stockholders and all of such share owners interested in the original plaintiff and whether all its debts were paid so that the shareholders became tenants in common of the residuum of its assets and might have instituted appropriate litigation to recover the same are facts necessary to be alleged in issuable form to constitute a good complaint in their behalf, if they would bring themselves within the doctrine of such cases as *Baldwin v. Johnson*, 95 Tex. 85, 65 S. W. 171; *Stearns Coal & Lumber Co. v. Van Winkle*, 221 Fed. 590, 137 C. C. A. 314; *Stark Elec. R. Co. v. McGinty Contracting Co.*, 238 Fed. 657, 151 C. C. A. 507, and *Gasque v. Ball*, 65 Fla. 383, 62 South. 215. The precedents just noted are not authority for change of parties in an appellate court exercising jurisdiction over a new and distinct proceeding. Neither are they instances where stockholders were substituted for their corporation at nisi prius. In none of them did the corporation commence the original litigation. Those decisions merely enunciate the principle that when the corporation is in very truth wound up and all claims against it are satisfied, a situation is presented where the stockholders have become the legal as well as the equitable own-

ers of what remains of the property of the concern, and may recover it by suitable procedure. On the necessary allegations authorizing such a recovery the defendant is entitled to its day in court, and, issue being tendered and joined upon them in this action at law, it has the right to a jury trial, which cannot be forestalled or violated by the order of substitution, which this court made only for the purposes of the appeal, of which alone it had jurisdiction. Or. Const. art. 1, § 17. The ipse dixit of an ex parte affidavit, presented only to the appellate court in connection with litigation there, cannot supersede the right of trial by jury in the circuit court.

That section 38, L. O. L., relates to corporations is at least the law of this case; but even then this court will apply its provisions only to the extent of its own jurisdiction for the preservation of the cause of action before it, which is none other than the right to review the decision of the circuit court, and will not invade the original jurisdiction of that court on a question which has never been presented to it. Even in *Long v. Thompson*, 34 Or. 359, 56 Pac. 978, this court did not pretend to change parties except for the purposes of the appeal, nor to impose its order upon the circuit court so as to bar that tribunal from deciding by jury trial the facts upon which substitution must be granted if allowed. If substitution is made regularly in the circuit court, where original jurisdiction exists, it is binding upon this court; but the reverse is not true. The reason is that under our system the Supreme Court is one of special and limited authority. This power to admit new parties to an action is confined to and is exercised only for the purpose of the proceeding before it of which it has gained jurisdiction by the perfection of an appeal. We have no right to reverse, affirm, or modify the decision of the circuit court on matters not presented by its record.

As stated, no change whatever was made in the averments of the complaint upon which first trial was had. It is taught in *White v. Johnson*, 27 Or. 282, 292, 40 Pac. 511, 514 (50 Am. St. Rep. 726) that:

"The procedure for bringing in new parties after the court has made the order to that effect appears to be to amend the complaint by inserting therein such allegations as are necessary to make the persons omitted parties to the action, and to insert their names in the summons; and, if they do not enter an appearance, to serve them with the amended summons and complaint, giving them the usual time allowed by statute to original parties in which to answer. *Fitnam's Trial Procedure*, § 351; *Penfield v. Wheeler*, 27 Minn. 358 (7 N. W. 364)."

[7] It is true the *White-Johnson* Case was decided with reference to bringing in a defendant; but the analogy supports the doctrine that if a new plaintiff intervenes, he must put upon the record proper averments showing his right to sue, so that the defendant, if it chooses, may challenge the same

and have a jury to inquire concerning the truth of the issue. The complaint upon which the action was tried the third time, being identical in allegations with the one used in the first trial, did not state facts sufficient to constitute a cause of action in favor of the individuals substituted in this court for the purposes of the appeal. The defendant filed a general demurrer to this complaint, and the same was overruled. The matter was again raised by a motion on the part of the defendant to direct a verdict in its favor after all the testimony was produced. This motion was also denied. If these are not sufficient to raise the question, recourse may be had to section 72, L. O. L., where it is stated:

"If no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

It has been held many times that these excepted grounds of demurrer may be urged the first time in the Supreme Court, and that failure to count upon them in the assignments of error does not conclude the appealing party. Moreover, it is an error apparent upon the face of the record, and involves a decision upon a point of law made wholly upon matters in writing and on file in the court. Hence the question is before us despite the criticism made of the motion for a nonsuit, which did not specify the grounds upon which it was urged.

[8] Neither is the objection properly classified as one going to the legal capacity of the plaintiffs to sue. It is true that if it is manifest upon the face of the complaint that the plaintiff has not legal capacity to sue, it is ground of demurrer under section 68, L. O. L., and one which is waived if it so appear and the defendant answers without raising that objection. That rule applies to cases where it appears by the first pleading that the moving party himself would have a cause of action except for some disability apparent in his initiatory statement, such as minority, insanity, or the like. To be a good complaint, immune from the effects of a general demurrer, the plaintiff must show in himself legal connection with the matter involved in litigation and a right in himself to recover the amount demanded. Falling in this, his pleading does not state a cause of action, and the objection may be raised for the first time in the Supreme Court.

In brief, on this branch of the case, the effect of the substitution of parties in this court ended with the reversal of the judgment of the circuit court. If any one claiming under the original plaintiff would have continued the litigation, it was his duty to apply to the circuit court to be substituted. Having obtained the necessary permission there, it could be enjoyed and made available only by appropriate averments amending the complaint, in default of which no

judgment could be rendered against the defendant in favor of the plaintiffs any more than A. could recover upon a promissory note given to B. by C. without alleging indorsement to himself.

[9] It is true, that, as appears by the abstract, the circuit court on December 9, 1916, entered an ex parte order "that Robert Service, Mrs. Robert Service, and Peter Service be, and they hereby are, substituted in this court as parties plaintiff in said cause." The language of section 38, L. O. L., is that: "The court may * * * allow the action to be continued by or against his personal representatives or successors in interest."

The order of the circuit court, therefore, amounted to no more than permission to the applicants to proceed in their own right, which might have been denied; but it did not, nor could it, dispense with the necessity of their stating a cause of action in themselves. In other words, although allowed to make substitution, they did not accept the permission in the only way it could be made available. We have thus a situation where substitution has not been effected in the circuit court which alone has original jurisdiction to determine the case on its merits. To all intents and purposes the prosecution of the action was continued as if the proceedings were conducted in the name of the corporation. The allegations of the complaint cannot be controlled nor enlarged by the mere names used in the title. The result is in legal effect as though a judgment had been rendered in favor of a defunct corporation.

"Where the charter of a corporation expires during the pendency of a suit, the suit must abate, whether the company be plaintiff or defendant." *Rider v. Nelson*, 7 Leigh (34 Va.) 154, 30 Am. Dec. 495.

In *Greenbrier v. Livesay*, 6 W. Va. 44, *Livesay* and others sued to compel the board of supervisors of Greenbrier county to admit them to seats in that body. Pending an appeal by the supervisors the board was abolished by constitutional provision, and the Supreme Court abated the suit. In *La Pointe v. O'Malley*, 47 Wis. 332, 2 N. W. 632, the plaintiff town was abolished by the county authorities before it appealed. The Supreme Court held that the appeal by it must be dismissed, as its action had abated. In *Venable Bros. v. So. Granite Co.*, 135 Ga. 508, 69 S. E. 822, 32 L. R. A. (N. S.) 446, after the expiration of the charter the litigation was carried on by two men who owned all the stock. On hearing in the lower court of the report of the referee, counsel for the corporation suggested its lapse, and the court abated the action. In *May v. State Bank*, 2 Rob. (Va.) 56, 40 Am. Dec. 726, the charter of the defendant expired pending an action prosecuted by it, but judgment was rendered in its favor after appeal, although the decision was the other way in the trial court before the charter lapsed. An execution was issued on the judgment rendered in

that court in obedience to the reversal, but after the expiration of the charter. The writ was quashed on showing the dissolution of the corporation. *Rankin v. Sherwood*, 33 Me. 509, decides that an action brought against a corporation whose charter has been repealed results in a void judgment. *Merrill v. Suffolk Bank*, 31 Me. 57, 50 Am. Dec. 649, teaches that no legal judgment can be rendered against a defunct corporation, and that stockholders in such a concern, whose property has been levied upon to satisfy a judgment rendered against it after dissolution, have sufficient privity to sue out a writ of error to annul it. It is decided in *Thornton v. Marginal Freight Ry. Co.*, 123 Mass. 32, that a judgment against a corporation after expiration of the statutory three-year period in which it may wind up its business on dissolution is void. The owner of such a judgment has no standing in equity to reach its assets in the absence of the appointment of a receiver. So, also, in *Eagle Chair Co. v. Kelsey*, 23 Kan. 632, it is said that the court will not render a judgment on the verdict for a defunct corporation, nor for its assignee without amendment of the pleadings to show his right to the judgment. In *Kelly v. Rochelle* (Tex. Civ. App.) 93 S. W. 164, the court distinguishes between actions and suits to which a dissolved corporation is a party, and demonstrates that the dissolution abates an action beyond revival while the suit is in a state of suspension subject to review by bill of revivor. In *Life Association v. Goode*, 71 Tex. 90, 8 S. W. 639, after holding that no action can be prosecuted by or against a corporation after its dissolution, and that judgment cannot be rendered thereon, the court says:

"At law an action abated by the death of a sole defendant ceases for all purposes, is entirely dead, and cannot be revived."

See, also, *Dundee Mortgage & Trust Inv. Co. v. Hughes* (C. C.) 77 Fed. 855, 856. Authorities might be multiplied showing that, unless the statute allowing substitution is complied with, the action at law abates irrevocably. In this instance, as we have seen, there were no attempts by appropriate averment to charge the defendant on behalf of the individuals who have attempted to continue the litigation. Under the precedents cited the result was a void judgment.

[10] The rule has been laid down in this state that an appeal may be taken by an aggrieved party from such a judgment. *Smith v. Ellendale Mill Co.*, 4 Or. 70; *Trullenger v. Todd*, 5 Or. 36; *Askren v. Squire*, 29 Or. 228, 45 Pac. 779; *Oregon R. & N. Co. v. Eastlack*, 54 Or. 196, 102 Pac. 1011, 20 Ann. Cas. 692; *Sturgis v. Sturgis*, 51 Or. 10, 93 Pac. 696, 15 L. R. A. (N. S.) 1034, 131 Am. St. Rep. 724; *Holton v. Holton*, 64 Or. 290, 129 Pac. 532, 48 L. R. A. (N. S.) 779. The disposition to be made of the latest decision of

the circuit court is therefore properly before us.

[11] In the judgment of the writer, the power of this court in the matter of substitution was functus officio when the case was reversed June 20, 1916, and could have no further effect. It was exercised only as a means of determining the case then before us, the decision of which set the matter at large so far as the circuit court was concerned. This court had no right, and did not attempt, on the record before it at that time, to foreclose the defendant from resisting an attempt by new parties to intrude upon the litigation in the circuit court. Neither had we the power nor did we pretend to suspend or prolong the one-year period mentioned in section 38, L. O. L., in the interest of the stockholders who brought about the lapse of their corporation by their own act and made no move to avail themselves of the benefit of the statute until eight years thereafter. Still less had we authority to control in advance the exercise of its original jurisdiction by the circuit court acting under that section. None of the opinions heretofore rendered sanctions the idea that we could do so.

Passing all this, however, the utmost effect to be given to the former remand for a new trial, the result reached in the opinion of Mr. Justice Bean rendered June 20, 1916, was thereby to allow the stockholders to make a case in the circuit court if they could. As we have shown, this involved their application there for leave to be substituted, coupled with an amended complaint stating a cause of action on their behalf. Granting that the reversal set forward the demise of the original corporate plaintiff to that date and made section 38, L. O. L., again applicable, it also again put into operation the one-year limit of that section within which the would-be plaintiffs should have had themselves substituted below. Though warned of this element of the litigation by the law and the constant attitude of the defendant, yet to this day, so far as the record shows, they have taken no measure to avail themselves of the opportunity afforded them to present to the trial court their own case in lieu of that of the corporation under which they claim. Persistently the contest has been waged on the old complaint which states nothing to the direct advantage of the individual stockholders. By failing to put in an amended pleading showing in themselves a right to recover, they have utterly neglected to prepare for the new trial awarded by the opinion of Mr. Justice Bean. Meanwhile, under the construction most favorable for them, the year since then in which they might have amended the complaint has passed, and they are yet without a statement of their cause of action as distinguished from that of the original corporation. Time has thus foreclosed their opportunity to substitute the one for the other in this action. It would

be useless to remand this case for a new trial, for the obstacle preventing substitution is insuperable. We can only give the defendant a judgment here reversing that of the circuit court without the condition awarding a new trial.

In dismissing this branch of the case it will be noted that consideration has been given only to the right to continue the prosecution of this particular action, and not to the question of whether a cause of action or suit exists in favor of the stockholders or is barred by lapse of time. As to those possible features, we make no intimation.

On the appeal of the plaintiffs they rely upon certain questions about admission of testimony affecting the basis upon which reasonableness of rates is to be determined and instructions on the same questions. For the purposes of this opinion it is sufficient to say that those matters are sufficiently considered in the original opinion. 67 Or. 63, 135 Pac. 539. The conclusion of the whole matter is that the judgment of the circuit court is reversed without the usual privilege of a remand for further proceedings.

MOORE and McCAMANT, JJ., not sitting.

(37 Or. 517)

OREGON HOME BUILDERS v. CROWLEY.

(Supreme Court of Oregon. Feb. 26, 1918.)

1. BROKERS § 7 — CONSIDERATION — BROKER'S CONTRACT.

An owner's promise in his written offer to pay a commission for the sale or exchange of realty was designed to procure a broker's services, such services to be rendered are taken as the consideration for the promise.

2. BROKERS § 43(3) — CONTRACT — STATUTE OF FRAUDS — CONSIDERATION.

Under L. O. L. § 808, subd. 8, requiring broker's contract to buy or sell to state the consideration, while the consideration must be expressed, it need not be formally and precisely expressed, and it is sufficiently expressed if it appears by necessary inference.

3. BROKERS § 43(3) — STATUTE OF FRAUDS — WRITTEN OFFER — PAROL ACCEPTANCE.

A written offer may constitute a sufficient memorandum of the broker's written contract required by L. O. L. § 808, subd. 8, to charge the party making it, if it is later accepted by parol.

Department 1. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

On rehearing. Denied.

For former opinion, see 170 Pac. 718.

W. B. Shively, of Portland, for appellant. H. D. Angell, of Portland (Angell & Fisher, of Portland, on the brief), for respondent.

HARRIS, J. The original opinion states that the contention that the consideration is not expressed involves a determination of two questions: "(1) What is the consideration that must be expressed? and (2) When can it be said that the consideration is expressed?"

Before attempting to ascertain whether the consideration is expressed in the writing, the original opinion suggests three possible considerations for the promise sued upon: (1) A promise by the broker; (2) payment of money by the broker; and (3) the service to be rendered by the broker. The opinion proceeds to eliminate the first two things suggested, determines that the service rendered by the broker is the consideration, and then undertakes to ascertain whether the consideration is expressed in the writing. The petitioner now insists that the conclusion that the service of the broker is the consideration "cannot be drawn from the facts," and that it is a mere assumption. The plaintiff does not claim that the consideration for the promise of the defendant is to be found in a promise made by the plaintiff or in money paid by it. In his printed brief the respondent persistently and consistently contended that the writing was a nudum pactum because without consideration. For example, on page 11 of respondent's brief we find the following:

"The consideration, therefore, in the instant case is that which induced the respondent Crowley to sign the offer upon which the appellant relies. If there was a monetary consideration, what was it, and from whom and to whom did it move? The complaint is silent as to this. If there was a mutual covenant or promise on the part of the Oregon Home Builders as an inducement to the respondent Crowley for making this offer, where is the promise expressed in the writing or in the complaint? The only answer is, there was no such promise, neither is there any expressed in the writing nor any allegation in the complaint that one was made. The conclusion is, as hereinbefore stated, that this written offer was a voluntary one for which no consideration was given, and in which no consideration is expressed."

Again, for the purpose of supporting his argument that the complaint is insufficient the respondent says:

"There was no financial consideration given, neither was there a covenant on behalf of the Oregon Home Builders to do or refrain from doing anything."

[1] When we concluded that the consideration was not to be found in a promise made by the plaintiff or in money paid by it, we merely determined the nonexistence of what the plaintiff admitted and defendant himself contended did not exist. If it be conceded that the consideration could have been any one of the three things suggested as a possible consideration, and if it is afterwards ascertained that the writing does not express two of those possible considerations, but does express the third one, then it is at least fair to conclude that the thing expressed is the consideration; and, moreover, it would be illogical to say that the thing expressed was not the consideration merely because the other two unexpressed things could have been the consideration, and when we find a consideration expressed in the writing the instrument cannot be said to be insufficient merely because some other possible consideration is

not expressed. There must be some measure by which to test the sufficiency of a writing, and the test is found in the rule found in *Browne on St. of Frauds* (5th Ed.) § 405, and quoted in the original opinion. Applying this rule to the writing, it is obvious that Crowley's promise to pay a commission was designed to procure the rendition of the service which the plaintiff did render, and hence the service "so stipulated for by the defendant is taken to be the inducement to his promise."

[2] The petitioner insists that "there is no specific statement anywhere in the writing stating what the consideration is for Crowley's promise." Although the consideration must be expressed, it need not be formally and precisely expressed. In every jurisdiction, it is held that the consideration is expressed if it appears by necessary inference. In every one of the states having a statute requiring the expression of the consideration it is the established rule that the statute is satisfied if the consideration appears by necessary inference; and so, too, where an expression of the consideration is required by force of judicial decision the requirement is fulfilled if the consideration appears by necessary inference. The courts have differed upon many questions arising out of the statute of frauds, but upon this question all jurisdictions are agreed. The rule that the consideration is sufficiently expressed if it appears by necessary inference was employed by this court when trying to find a consideration for the writing involved in *Corbitt v. Salem Gaslight Company*, 6 Or. 405, 408, 25 Am. Rep. 541; it was recognized again in *Johnston v. Wadsworth*, 24 Or. 494, 503, 34 Pac. 13; it was indubitably adopted and squarely applied in *Henderson v. Lemke*, 60 Or. 363, 365, 119 Pac. 482; and it was again applied in the original opinion in the instant case. This rule has been applied for more than a century, is accepted everywhere without protest or dissent, and is thoroughly established in our jurisprudence. Indeed, if there is any departure anywhere from the rule applied in the original opinion it is one of relaxation rather than restriction, for the language of many cases is more liberal than the language employed in the instant case.

[3] The defendant takes the position that the oral acceptance by the plaintiff "was void under the statute of frauds and no proof could be offered thereon." The law is stated in 20 Cyc. 254, thus:

"A written offer may constitute a sufficient memorandum of the contract to charge the party making it if later accepted by parol."

See, also, *Browne on St. of Frauds* (5th Ed.) § 345a.

The original opinion is not out of joint with *Lueddemann v. Rudolf*, 79 Or. 249, 154 Pac. 116, 155 Pac. 172; nor is it in conflict with *Great Western Land Co. v. Waite*, 168 Pac. 927. In the former case the writings disclosed nothing "but fruitless negotiation;"

and in the latter the plaintiff was without any writing, signed by the party to be charged, showing a hiring. In neither of these cases did the minds of the parties meet upon an offer made by one and accepted by the other. In the instant case the minds of the parties did meet. The written offer was accepted and after being accepted the condition of the promise was performed. The writing signed by the party to be charged names both parties, describes the subject-matter, states the promise, and prescribes the condition upon which the promise is made. Having accepted the written offer and performed the condition, the plaintiff is in a position to compel payment because the writing contains every element necessary to satisfy the statute.

The petition for a rehearing is denied.

McBRIDE, C. J., and BENSON, J., concur.

BURNETT, J. (concurring specially). In the petition for rehearing in this case counsel for defendant indulge in some criticism of the language used in the opinion by Mr. Justice HARRIS here quoted:

"The consideration for the promise upon which this action is brought cannot be said to be a promise made by the plaintiff or money paid by it, because the writing does not state nor is it claimed that the plaintiff gave a promise or paid money for the promise of the defendant."

The critique is aimed at and can apply only to the method of the argument by the process of exclusion centering finally upon the construction of the only writing adduced in evidence.

We must all agree that in this case the crucial question is whether the writing of October 26, 1915, quoted at large in the former opinion, is sufficient within the statute of frauds to charge the defendant who signed the same. All other questions aside, the controversy narrows down to whether there is an expression in that instrument of the consideration necessary to support the same. Explicitly declaring to the plaintiff to whom the writing was addressed that it is employed and authorized to offer the realty described in the mortgage for sale and to accept a deposit to be applied to the purchase price, the defendant states in so many words:

"In the event that you find a buyer ready and willing to consummate a deal for said price and terms or, on such further terms and price as may be agreed to by me or place me in touch with a buyer to whom I at any subsequent time sell or convey said property I will agree to pay you in cash as a commission for your services the following sums," describing the percentage to be paid.

"To express" in the sense used by the statute is "to set forth or manifest to the observation or understanding especially by written or spoken language." *Standard Dictionary*, title "Express." Webster gives the following definition: "To represent in words; to state; utter; hence to make known or manifest; to give or convey a true impression of." *The Century Dictionary* defines it thus: "To

make known in any way, but especially by spoken or written words." In the excerpt quoted, from the instrument which the defendant signed he conveys to the understanding by his written language the thing which induced him to sign the document to consummate a deal for the stated price and terms. In effect, he says to the plaintiff:

"Your finding a buyer, etc., induces me to sign this writing by which I bind myself to pay you money for your services to be rendered in the respect I have described."

The fault in the argument of the defendant seems to be that he thinks the consideration required must be a present consideration; either the concurrent payment of money or a promise coincident in time with the making of the agreement signed by the defendant. It is true that a past consideration is not, while on the other hand present consideration is, competent to sustain an agreement; and it is likewise true that a condition to be performed in the future is a consideration efficient in the support of a present contract. If the future condition is not performed the contract lapses, not because it was void ab initio, but because the consideration fails, thus releasing the promisor.

It is plain here what moved the defendant to sign the writing upon which he is charged, and this moving cause is delineated by the very language of the instrument itself constituting an expression of the consideration within the meaning of the statute. *Lueddemann v. Rudolf*, 79 Or. 249, 154 Pac. 116, 155 Pac. 172, was decided chiefly, on the principle that the correspondence did not amount to a contract by offer and acceptance; that "throughout the whole correspondence there is never a point where one party says 'I offer this,' and the other party replies 'I accept it.'" It is not an authority controlling the present issue. Neither is *Great Western Land Co. v. Waite*, 168 Pac. 927, a parallel case with the one in hand, for in that instance there was no expression of anything which could be counted upon either presently or in the future as an inducement to the defendant to sign the writing upon which the plaintiff sought to charge him.

(87 Or. 590)

MELHASE v. MELHASE et al.

(Supreme Court of Oregon. March 5, 1918.)

1. WILLS ~~§~~286—SETTING ASIDE PROBATE—ISSUES AND PROOF.

In a proceeding to set aside the probate of a will, a petition, alleging that the instrument admitted to probate was not the last will and testament of the decedent, was sufficient to permit the admission of evidence of the existence of a later will revoking the one admitted to probate.

2. WILLS ~~§~~296—LOST WILLS—PAROL EVIDENCE.

In a proceeding to set aside the probate of a will, evidence of the execution and contents of a later lost will, so far as they could be re-

produced from the memory of witnesses cognizant of the circumstances, was admissible to show that it superseded and revoked the will admitted to probate; there being no attempt to probate the lost will.

3. WILLS ~~§~~306 — REVOCATION BY SUBSEQUENT LOST WILL—SUFFICIENCY OF EVIDENCE.

In a proceeding to set aside the probate of a will, evidence held sufficient to show that the testator made a later will revoking the one probated, which was lost or suppressed.

4. WILLS ~~§~~306 — REVOCATION BY SUBSEQUENT LOST WILL — SUFFICIENCY OF EVIDENCE.

In a proceeding to set aside the probate of a will, it was not necessary for the petitioner to prove the whole substance of a later lost will, and it was sufficient that she clearly established the fact that a later will was made, and that it revoked prior wills.

Department 2. Appeal from Circuit Court, Klamath County; D. V. Kuykendall, Judge.

Proceeding by Henrietta F. Melhase against Gustav Melhase, executor of Frederick Melhase, deceased, and others. From a decree in favor of the petitioner, defendants appeal. Affirmed.

This is a proceeding to set aside the probate of a will. The petition alleges, in substance, that Frederick Melhase died December 8, 1915, being at the time a resident of Klamath county, Or.; that on December 16, 1915, Gustav Melhase presented to the county court an instrument purporting to be the last will and testament of said decedent, and filed a petition for its admission to probate, and the appointment of himself as executor, which petition was granted. Then succeed the following allegations:

"That the said Frederick Melhase never signed the said purported and alleged instrument in the presence of the witnesses whose signatures appear upon same; that the said witnesses never signed the said instrument at the request of the said Frederick Melhase, and that the said Frederick Melhase never, at any time, published the said instrument and declared the same to be his last will and testament, and therefore, plaintiff alleges that the said purported and alleged instrument never was the will and testament of the said Frederick Melhase. That the defendants, and all of them, well knew at the time of the offering of said instrument as the last will and testament of the said Frederick Melhase that the said instrument was not the last will and testament of Frederick Melhase, deceased. That the said instrument offered and admitted to probate is not the last will and testament of the said Frederick Melhase, deceased. That the said defendants, acting together, have conspired to suppress, and have suppressed, the true will and testament of the said Frederick Melhase, deceased, to the damage of this plaintiff."

The defendants answered, admitting generally the probating of the alleged will of 1908 and denying the paragraphs above quoted. A trial was had before the county court sitting in probate, which found in favor of the respondent and dismissed the petition. Thereupon petitioner appealed to the circuit court, which found for the petitioner, and reversed the decree of the county court and re-

voked and annulled the letters testamentary issued to defendant Gustav Melhase. From this decree defendants appeal.

C. F. Stone, of Klamath Falls, and W. Lair Thompson, of Portland (Snow, Bronaugh & Thompson, of Portland, on the brief), for appellants. Charles J. Ferguson, of Klamath Falls, and L. R. Webster, of Portland (Thomas Drake, of Klamath Falls, and Emmons & Webster, of Portland, on the brief), for respondent.

McBRIDE, C. J. (after stating the facts as above). A preliminary question is raised by respondent as to the validity of the execution of the will presented to the county court by defendant Gustav Melhase, but it is sufficient to say that we are of the opinion that it was properly attested and entitled to probate unless it had been revoked by a subsequent will. We take it therefore as established that on the 28th day of July, 1908, deceased duly executed a valid will by which he devised certain property and bestowed legacies upon plaintiff and the defendants, and unless there was a later will, revoking that of July 28, 1908, petitioner's contest must fail. Having established the will of 1908 as a will valid in form and substance, the proponent was not obliged to negative by testimony the existence of a possible subsequent will, and it devolved upon the petitioner to show, by testimony of the same character as that required of the proponent in the first instance, that deceased executed a later will which, by its actual language or by necessary implication, revoked the will presented by proponent.

[1, 2] It is claimed by appellants that the petition does not state facts sufficient to permit the admission of evidence of the existence of a later will, but we think the allegation that the instrument propounded is "not the last will and testament" of deceased, is broad enough to justify the admission of any testimony which might tend to show a state of facts inconsistent with the continued validity of the instrument. The contention of the petitioner is that in 1911 the deceased made a valid will, revoking the will of 1908, which will has been lost, suppressed, and destroyed, and all of the contents of which cannot be reproduced by oral testimony. There is no attempt here to probate this alleged lost will. Evidence of its execution is only admitted for the purpose of showing that it superseded and revoked the will of 1908, for which purpose we think evidence of its execution and contents, so far as they could be reproduced from the memory of witnesses cognizant of the circumstances, was admissible.

[3] We will now consider the testimony regarding the execution of the alleged will of 1911. It was not produced. If it actually existed it was lost or suppressed. The evidence that it was suppressed by the proponent is not conclusive. Shortly after the death of his brother, he procured from the pe-

tioner the keys to the safety deposit box of deceased, which he claims to have been a partnership box of himself and deceased, but to which he had no key and no access during his brother's absence, and in company with his near relatives made a search for a will and produced the will of 1908. It is a suspicious circumstance that this search was made without notice to the wife of deceased, who was certainly the person most interested in the result, and only in the presence of the immediate relatives of proponent. It also appears that proponent is claiming an oral partnership with deceased, and that his interests in that respect would be antagonistic to petitioner. His conduct in instituting this secret examination is at least open to suspicion, which his testimony does not dispel. The opportunity to examine and suppress a later will existed, there was a possible motive, and the secret method adopted does not commend itself. The evidence of Mr. Stone, who is one of the attorneys for proponent, is significant. He testified, in substance, that when the 1908 will was brought to his office he told proponent to go back and take another look, and further testified as follows:

"Q. I think you have stated that you told the witness Gustav Melhase, when he brought that will and this envelope together, as you say this paper here, this purported will and another envelope—you told him to go back and take another look? A. Yes; I did. Q. You had a reason for telling him that? A. Yes. Q. What was the reason? Can you tell us now, Mr. Stone? A. Well, I had an impression we had made Fred Melhase's will. Q. Well, now— A. That recalled the impression to my mind. Q. You didn't make this (referring to Exhibit A)? A. No, I didn't make that; that is not my work on the typewriter, or the work of anybody that ever worked for me on the typewriter. No; I never made that will. * * * Q. In your opinion, when did you make a will for Fred Melhase, about when? A. Well, according to the impression that is in my mind, I think I made a will for Fred Melhase some time in the early part of 1911. Q. That would be some three years later? A. Yes; in 1911. Q. The will was executed, I suppose? If you made a will for him, it was executed? A. Well, I don't remember its execution as an independent fact. I don't believe I remember the execution of any instrument that was ever made in my office unless it was made a few days ago, as an independent fact; that is, each person signing. Now, to illustrate, I think I made a will for Mrs. Melhase. Q. About when? A. About the early part of 1911. Q. Right at the same time you made the will for Fred Melhase? A. About the same time, but I don't remember. I don't remember seeing her sign that will. There are some people probably who remember those things. I can't unless I try to store my memory with them, and that would be useless; if one did that, they would be so confused, they could not testify to anything. * * * Q. Now in the will that you made, have you any recollection what it purported to give, devise, and who the legatees and devisees were? Do you remember any of them? A. Well, now there is something in my mind in a rather indistinct way; it is no stronger than what I said with reference to my memory of having made his will. Q. You have noticed the contents of this, have you not, this Exhibit A here? A. Yes; I am familiar with the contents of that. Q. You have noticed a devise in here to Mrs. Henrietta F. Melhase,

the widow? A. Yes. Q. Do you remember whether she was mentioned in the will that you made for Fred Melhase? A. My recollection is that she was. Q. Do you remember of a person mentioned in the will that you made, getting a legacy, a little child, a little girl of Fred Shallock, of this city? A. Yes, I—that, in fact, is the thing that fixes the making of the will on my mind, or that fixes in my memory there was a legacy, or I am of the opinion, to the best of my— Q. Has it come back to you? A. There was a legacy left to the little girl of Fred Shallock. Q. Little Constance Shallock? A. I don't know what her name is; her mother is sitting here, Mrs. Fred Shallock. Q. Mrs. Fred Shallock's little daughter? A. Yes. Q. I will ask you to state whether or not you were legal adviser for the deceased, Frederick Melhase, for some time prior to his death? A. I was for a number of years. Q. I will ask you to state with reference to that little girl whether or not you have heard the deceased, when addressing himself with reference to her use any pet name? Did you ever hear him call her "That little devil" for instance, meaning it in an endearing way? A. Yes, I have heard Fred Melhase talk about the little girl frequently. I have heard him talk in my office. I have heard him speak of her. He thought a great deal of the little girl. I have; yes. I have often seen him on the street with her. Q. She called him granddad? A. I think he thought quite a lot of the little girl, and she seemed to think a great deal of him. Q. Now, do you have any recollection of about the amount of legacy to that little girl? A. Somehow or another I have it in my mind that it was \$1,500; that is the way I recollect it. Q. I will ask you to state whether or not you are acquainted with Mrs. Fredericka Melhase, the mother of Frederick Melhase, deceased. Were you acquainted with her in her lifetime? A. No."

The witness further testified:

"A. Let me tell you the frame of my mind. If you were to present me with a will witnessed by myself and J. J. Barrett, and signed by Frederick Melhase, I would not hesitate a minute, if it was made about that time, to state that I made that will, and to say that was my signature; if it was my signature; but as I told you, I don't remember seeing Fred Melhase sign that will, and I don't remember seeing J. J. Barrett sign as a witness. I don't remember signing myself. I told you what I do remember according to the way I recollect it. I remember drawing a will for Fred Melhase, member of Barrett sitting at the typewriter in the other office and writing on that will. Now, that is just about all I recollect, so far as the making of the will is concerned. I have got that fixed in my memory as something, some way or another, that got into my memory, and it is there, and I recalled it at the time this will was brought into my office, when we took it out of these envelopes. I recollected that, and I thought that probably there might be another will. I was under that impression. Of course, after a man dies and you made his will, it comes into your mind some way or other. Q. Certainly. A. I was under the impression when the will was brought in, it would be the one I made. Q. Naturally. A. That is about the way the thing was fixed in my mind. As I told you, I don't understand the memory of a man who can go on the stand and say he can remember signing, or anything like that, so many years afterwards. I cannot do it."

Mr. Stone was not volunteering any testimony against his client, but nobody can read the record of it as a whole without being satisfied that his memory convinces him that in 1911 he made a will for the deceased, and that the details of the transaction only are

uncertain, as they well might be after a lapse of so many years. Mr. Stone's partner, at the time the alleged will was executed, was J. J. Barrett, a young man just entering upon the practice of law, who testified that in the first half of January, 1911, the deceased came to the law office of Stone and Barrett and had a talk with Mr. Stone; that as a result of that interview, Mr. Stone drew up in pencil the draft of a will for deceased, and handed it to him to copy upon the typewriter, which he did; that it was the first will he ever had anything to do with drafting; that he was not very familiar with the form of wills at that time, and kept a copy which he used thereafter as a form in drafting other wills; that the will was in the ordinary form used here in Oregon; that he remembered the names of the persons mentioned as legatees and devisees; that Gus Melhase and Fred Shallock were named as executors; that he could not recollect the amounts of the various bequests and legacies, but was positive that Fred Shallock's daughter was to receive \$1,500. He remembered that the wife of deceased was mentioned in the will and also his mother, three brothers, and two sisters; that witness and Mr. C. F. Stone subscribed their names as witnesses. In answer to leading questions Mr. Barrett testified that the will contained the usual clause revoking all prior wills and codicils.

Unless this witness has committed downright perjury, the deceased in January, 1911, executed a will revoking all other wills. It is easy to forget an actual occurrence, but it is not within the bounds of ordinary experience that one honestly thinks he remembers the details of an occurrence which happened only in his imagination. This testimony is either fabricated out of whole cloth or it is true. We believe it to be true, because it is corroborated by the imperfect recollection of Mr. Stone and the additional circumstances hereafter referred to. Mr. Stone testifies that the one thing that recalls indistinctly to his memory the fact that he made a will for deceased was the fact of a legacy given by it to little Constance Shallock, the daughter of Fred Shallock. It is in evidence that he was greatly attached to the child, and referred in a rough, yet endearing way, to her as his "little devil" and his little partner. The child is not mentioned in the will of 1908.

F. C. Stitser, a friend of deceased, visited him in San Francisco during his last illness, and in the course of a conversation with him not necessary to detail here, said, referring to Constance Shallock, "I suppose your little partner is remembered in your will," to which he says that deceased replied, "Yes, that little devil will be remembered," or "has been," or words to that effect. Barrett testifies that the fact that this little girl (who was seven years old and no relation to deceased) was remembered in the will made a distinct impression on his mind, and, as already remarked, this circumstance seems to

have created a distinct impression on the mind of Judge Stone. Mrs. Melhase (wife of deceased) testified that in 1915, deceased had his bank boxes at home, examining his papers, and she said to him, referring to one of the boxes, "Does that amount to all your worldly affairs?" and he answered, "It probably does," and said, motioning to one of the boxes, "My will is in there." She then asked, "Who made your will?" and he answered, "Stone made my will." Stone testifies that he never drew the 1908 will. An old friend of deceased, Mr. W. T. Lee, visited him at San Francisco during his last illness, and in the course of a discussion about his health and in relation to a contemplated operation, he remarked that he "had things fixed." The testimony of this witness continues as follows:

"Q. Did he explain to you what he meant by having things fixed? A. Well, he said he had his will made. I said that it made no difference about a will, that what I was trying to get from him was a promise that he wouldn't let them cut him up; that the will proposition would be after he was gone. He says, 'Yes; that is true, but I have made up my mind to go and have this done and I am going to do it.' Q. Did he refer to the will again? A. He said his will, and I asked him 'Who does your work for you, Fred, along that line?' 'Why,' he says, 'Stone.' I don't know whether he said Stone and Gale or just Charley Stone. He said, 'Charley Stone has been my attorney for a long time.' Q. Do you mean to be understood that he told you that C. F. Stone, lawyer, made his will? A. Well, I mean to be understood that he left the impression with me that Stone was the man that was connected with that proposition. I wouldn't say that he told me that Charley Stone made his will, but I will say that he gave me to understand that Charley Stone had attended to his business, and that he had fixed the proposition all up. Q. Did he tell you where his will was at that time? A. He said it was in Seimen's Bank."

From all these circumstances we are irresistibly drawn to the conclusion that Mr. Stone's impression and Mr. Barrett's absolute statement that Mr. Stone drew up a will for deceased in January, 1911, are correct. We have Mr. Barrett's direct testimony that it was in the usual form of wills, and that he kept a copy as a guide in making other wills. It is objected that this was in answer to leading questions, but no objections were made to the questions upon this or any other ground, and when a lawyer says that a will was in the usual form every other lawyer and every judge knows what he means, and the same may be said of Barrett's testimony, that the will of 1911 contained the usual clause revoking all other wills and codicils. If we assume that a will was made—and we think that fact was clearly established—it would seem natural that a lawyer of Judge Stone's wide experience and knowledge would have attached to it a revocation clause. A mere tyro at the law might omit it, but Judge Stone never would, and from his very familiarity with that kind of business he would not remember such a detail, while a

beginner like Mr. Barrett copying his first will would be more likely to remember every little thing connected with its proper execution.

A plausible argument is drawn by defendant from the fact that no charge for drawing the will of Fred Melhase is found upon the books of the firm of Stone & Barrett, although they disclose the fact that charges for less important services were frequently made. The circumstance is not without weight, but in the face of the other circumstances above mentioned and the direct testimony as to the occurrence, it is not compelling. Nine years have passed since the alleged will was written, and there may have been a reason existing at the time, but now forgotten, why no charge was ever made, or if made not entered.

[4] It was not necessary in this case that the petitioner should reproduce the whole substance of the second will. It is sufficient that she should clearly establish the fact that a second will was made, and that it contained a clause revoking prior wills. In re Cunningham's Will, 38 Minn. 169, 36 N. W. 269, 8 Am. St. Rep. 650. We are of the opinion that this has been done in the case at bar, and the decree of the circuit court is therefore affirmed.

MOORE, HARRIS, and BEAN, JJ., concur.

(87 Or. 602)

ADAMS v. PORTLAND RY., LIGHT & POWER CO.

(Supreme Court of Oregon. March 5, 1918.)

1. CARRIERS \S 292(2)—CARRIAGE OF PASSENGERS—INJURIES TO PASSENGERS—NEGLIGENCE.

Where a door leading from the main compartment of the street car to the front platform and designed to swing either way for the ingress or egress of passengers worked so hard that a passenger who was directed by the motorman to push on the door was, when she finally forced the door open, carried by the force of her push and the sudden opening out into the platform and down into the highway where she fell, the street railroad company cannot defeat recovery on the ground that there was no actionable negligence, for the door, in the very nature of things, was defective.

2. TRIAL \S 251(8)—CARRIAGE OF PASSENGERS—INSTRUCTIONS.

In a personal injury action by passenger on street car, the refusal of instruction on contributory negligence which was not pleaded was not error, the jury being plainly charged so that they must have understood that there could be no recovery unless street railroad company was negligent and its negligence was the proximate cause of the injury.

3. CARRIERS \S 303(8)—CARRIAGE OF PASSENGERS—DUTY TO ASSIST PASSENGER IN ALIGHTING.

While a carrier is ordinarily under no duty to assist a passenger in alighting, it is the duty of the carrier's servants to assist a passenger where there is some unusual danger or difficulty arising from the means afforded for alighting.

4. CARRIERS \Rightarrow 320(4)—CARRIAGE OF PASSENGERS—ACTIONS—JURY QUESTION.

In an action for injury received by plaintiff when she fell as the result of the sudden opening of a door on street car furnished for egress against which she was told to push, question whether carrier's servants in charge of the car were negligent in failing to open the door, *held*, under the evidence, for the jury.

Department 1. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by Ruby Adams against the Portland Railway, Light & Power Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

The defendant appealed from a judgment which was awarded to the plaintiff on account of personal injuries sustained by her. The plaintiff was a passenger on one of the street cars operated by the defendant in the city of Portland. The main room or body of the car was separated from the vestibule in the front end by a partition wall extending across the car. Built in this partition wall was a door hung on hinges. This door was made to swing either way and when closed was kept in place by friction with a spring set in the top of the casing of the door. The motorman described the spring as follows:

"There is a little spring there with a little opening in the center of it. * * * The door can slip either way, and when it comes into the little opening it holds it, so that you can pull it either way through the friction."

There was also an "exit door" leading from the vestibule so that a passenger who desired to leave the car would pass from the main room or body of the car through the door in the partition wall into the vestibule and then through the exit door to the street. When the car stopped at the plaintiff's destination she attempted to open the partition door and finding that it "worked hard and stiff" she "pushed hard" on the door with the result that it opened suddenly, causing her to follow the door, as it swung on its hinges, into the vestibule and thence through the exit door into the street. The plaintiff alleges in her complaint:

"That defendant was then and there careless and negligent in the following particulars, to wit: (1) That the front door, through which defendant left said car, worked hard and stiff, and would not open excepting when great exertion was applied thereto, and that when plaintiff was leaving said car, in opening the door, she pushed the same, and, by reason of the same being stiff and hard and difficult to move, it opened abruptly and suddenly, causing plaintiff to fall onto the street; (2) that said defendant, through its crew in charge of said car, carelessly and negligently failed to open the front door of said car so that plaintiff could alight from the same."

Aside from admission of the corporate character of the defendant and that the corporation was engaged in operating a street car system, the answer consisted of a general denial.

The plaintiff was called as a witness and testified as follows:

"Q. Well, I wish you would tell the jury when you got there, what was done, on your part. A. When the car stopped for the passengers to get off, and I always go out the front end of the car at that place, and the other passengers did the same, I went to open the door, but I couldn't open it, and I knocked on the glass and told the motorman— I said to the motorman, 'I can't open this door;' and he says, 'Push it; it binds;' and I pushed it— Q. (interrupting). He said what? A. 'Push it; it binds;' and I pushed it, and he said 'Push it harder; it binds;' and I first pushed it with one hand, but when he told me that, I pushed it with both hands, and I pushed and pushed hard, and it opened very suddenly, and the door swung out, and, my hands being on the door, I followed it right along, and I landed on the pavement. I don't know hardly how I did get there, but, as the door swung back, I followed it right around through the other door. Q. Now, you say you landed on the pavement? A. Yes, sir. Q. Just tell the jury in what position. A. Well, I never touched the steps. In following the door around, with my hands on it, I had no way of catching hold of anything to gain my balance, and I went right over the steps and never touched them, and I fell sitting up—and I couldn't help myself up at all. I couldn't move, when I tried to get up."

We here set down portions of the plaintiff's testimony given on cross-examination:

"Q. So that when you tried to open it by pushing it, you called then to the motorman, did you? What did you say to the motorman? A. I says, 'I can't open this door.' Q. And he said 'Push on it?' A. He said, 'Push on it; it binds;' and told me that several times; to 'push it harder.' Q. And then you started to push it. Well, you knew that the door was going to open that way, didn't you? A. I knew it afterward. Q. Well, didn't you know it at the time? A. I didn't expect it to go so suddenly. When I gave that harder push it just went suddenly, and I had my hands on the door, and I couldn't let go and catch hold of anything to save myself; I just followed it right around with my hands on the door, and going down that little drop there was what made me fall. Q. You thought it would open, didn't you? A. I thought it would open, yes; but I didn't know it was going to go so suddenly. Q. Well, you were pushing on it? A. Yes; I pushed on it to open the door, because I was told to, but I didn't know it was just going to just drop away in a minute so suddenly as that."

R. A. Leiter, of Portland (Griffith, Leiter & Allen and F. J. Lonergan, all of Portland, on the brief), for appellant. W. E. Farrell, of Portland (Davis & Farrell, of Portland on the brief), for respondent.

HARRIS, J. (after stating the facts as above). [1] The defendant takes the position that the facts pleaded in the complaint and testified to by the plaintiff do not constitute actionable negligence and that the instant case is controlled by *Goss v. Northern Pacific Railway Co.*, 48 Or. 439, 87 Pac. 149. The decision in that case was rested upon the ground that there was no proof of any fact or circumstance attending the accident from which an inference of negligence could be drawn, and that therefore the negligence

complained of was left wholly and entirely to inference and presumption from the mere happening of the accident. In *Christensen v. O. S. L. R. Co.*, 35 Utah, 137, 99 Pac. 676, 20 L. R. A. (N. S.) 255, 18 Ann. Cas. 1159, also relied upon by the defendant, the conclusion reached by the court was predicated on the theory that there was no evidence of any defect in any appliance or instrumentality used by the company unless such defect could be inferred from the fact that the door closed while the passenger was in the act of alighting from the train after passing through the open door. If, in the instant case, the mere happening of an accident constituted the only evidence of negligence then the plaintiff could not prevail. However, the plaintiff offered evidence of more than the mere happening of the accident; she testified to the attendant circumstances, which, if true, constitute actionable negligence. The door was designed to swing either way so that passengers could pass through it upon entering or when leaving the car. The door was installed for the use of the plaintiff and all other passengers, and she had the right to use it for the purpose for which it was installed. Moreover, she pushed on the door in response to an express invitation of the defendant. If the door worked hard as the plaintiff says it did, and if she could not open the door except by pushing it as she claims she did, then it is obvious that the door was an improper one and that the defendant failed to perform the duty required of it by the law. The defendant made no attempt to show that the spring was examined after the accident and found to work properly. If the testimony of the plaintiff is to be believed, then in the very nature of things either the spring or the door itself was defective. *McCarty v. St. Louis S. Ry. Co.*, 105 Mo. App. 596, 80 S. W. 7. It was not error for the court to refuse to grant the motions for a nonsuit or to decline to direct a verdict for the defendant.

[2] The court did not commit prejudicial error in refusing to instruct the jury upon contributory negligence. The defendant did not plead contributory negligence as a defense. The pleadings made no issue upon that question. Nor was the evidence such as to entitle the defendant successfully to claim that it was injured by the refusal of the court to charge the jury upon contributory negligence, even though it be assumed, without deciding, that an instruction upon contributory negligence might sometimes be proper even in the absence of an answer pleading it as a defense. *Dunn v. Orchard Land Co.*, 68 Or. 97, 103, 136 Pac. 872. When the verdict is examined in the light of the instructions actually given, it will plainly appear that the jury must have understood that the plaintiff could not recover unless

she showed that the defendant was negligent and that such negligence was the proximate cause of the injury.

[3, 4] The complaint accuses the defendant of negligence because the crew in charge of the car failed to open the door so that the plaintiff could alight from the car. It is true that, stated generally, the carrier is under no duty to assist a passenger in alighting. But there are exceptions to this general rule (1 *Nellis on Street Railways* [2d Ed.] § 304), as where there is some unusual danger or difficulty arising from the means afforded for alighting (6 *Cyc.* 611; 10 *C. J.* 932.) Strictly speaking the plaintiff was not injured while alighting from the car. She was attempting to go from the main room to the vestibule so that she could then alight from the car. According to the testimony of the plaintiff the motorman had knowledge of the condition of the door; he was made aware of the difficulty which she was experiencing in attempting to open the door, and instead of assisting her to open the door the motorman instructed her what to do and she followed his instruction. Assuming the facts to be as testified to by the plaintiff, it was not error to permit the jury to consider the second specification of negligence.

On the whole record we think the defendant had a fair trial, and that it was not prejudiced by anything occurring at the trial.

The judgment is therefore affirmed.

McBRIDE, C. J., and BENSON and BURNETT, JJ., concur.

(87 Or. 612)

PATTEE v. HARBAUGH.

(Supreme Court of Oregon. March 5, 1918.)

1. CHATTEL MORTGAGES — 152 — EXECUTION — PRIORITY — STATUTES.

L. O. L. § 7407, having been enacted after section 799, prevails in case of any repugnancy as regards priority between unrecorded chattel mortgage, without delivery and change of possession, and subsequently levied executions.

2. CHATTEL MORTGAGES — 152 — PRIORITY — EXECUTION — STATUTES.

Execution creditors being classified by L. O. L. §§ 233, 301, as purchasers in good faith, as against third persons, are protected by section 7407, subsequently enacted, declaring unrecorded chattel mortgages, without delivery and change of possession of property, void as against subsequent purchasers in good faith.

Department 1. Appeal from Circuit Court, Lane County; G. F. Skipworth, Judge.

Action by David Pattee against Jasper J. Harbaugh. Judgment for defendant, and plaintiff appeals. Affirmed.

Plaintiff held an unrecorded chattel mortgage on some grain consisting of wheat and oats, to secure a valid subsisting debt. The property remained in the possession of the debtor. Two executions based upon regular

and valid judgments were placed in the hands of the defendant as constable. Without any knowledge of the mortgage he levied both executions upon the grain and sold it in satisfaction of the judgments. Plaintiff then began this action to recover the property or its value. Issues having been joined and a trial had, there was a judgment for defendant, and plaintiff appeals.

H. E. Slattery, of Eugene, for appellant.
L. M. Travis, of Eugene, for respondent.

BENSON, J. [1, 2] There is no controversy as to the facts. We are simply called upon to say which party upon the agreed facts is entitled to prevail. The problem is one of statutory construction. The earliest legislation in Oregon upon the subject is found in the Code of 1855, at page 528, which makes unrecorded chattel mortgages "void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith," unless there is an immediate delivery and actual continued change of possession of the property. This statute was expressly repealed in 1862, and at the same session the Legislature enacted what is section 799, L. O. L. of which subsection 40 provides that such an unrecorded mortgage creates a presumption of fraud as against the creditors of the seller or assignor or as against subsequent purchasers in good faith. At the same session section 301, L. O. L., became a law, declaring that attaching creditors as against third persons are to be deemed purchasers in good faith, and likewise section 233, L. O. L., providing, *inter alia*, that in execution proceedings "property shall be levied on in like manner and with like effect as similar property is attached."

In 1893, the law of 1855, above referred to, was in substance re-enacted, omitting, however, the words "as against the creditors of the mortgagor," and so the law now stands as section 7407, L. O. L. Plaintiff contends that by virtue of the provisions of section 799, L. O. L., he is entitled to prevail upon showing the good faith of the transactions resulting in the mortgage, and that section 7407 is not available to defendant for the reason that creditors are not protected thereby. It will be observed that section 799 refers, not only to mortgages, but to absolute sales as well where as the latter statute (7407) applies exclusively to mortgages, and if they be repugnant in any of their parts the later legislation must prevail as to such conflicting portions. Referring to the failure to mention creditors of the mortgagor in section 7407, L. O. L., it is sufficiently answered by calling attention to the fact that when the law of 1855 was passed attachment and execution creditors were not classified as purchasers in good faith, but were so des-

ignated by statute in 1862, and when the act of 1893 (section 7407, L. O. L.) was framed it would have been a needless iteration expressly to have named creditors of the mortgagor, since they were elsewhere declared to be purchasers.

We conclude that there was no error in the determination reached by the trial court, and the judgment is therefore affirmed.

MCBRIDE, C. J., and BURNETT and BEAN, JJ., concur.

(87 Or. 576)

LEARNED et al. v. HOLBROOK et al.

(Supreme Court of Oregon. March 5, 1918.)

DAMAGES ~~85~~—LIQUIDATED DAMAGES—EFFECT—AGREEMENT.

Where the parties by contract stated a reasonable sum as liquidated damages, neither could urge that the damages were greater or less than the amount agreed upon.

Department 2. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

On petition for rehearing. Rehearing denied.

For former opinion, see 170 Pac. 530.

Miller Murdock and V. A. Crum, both of Portland, for appellants. Wood, Montague, Hunt & Cookingham, of Portland, for respondents.

McCAMANT, J. Defendants petition us to modify our conclusions in so far as they direct the lower court to enter judgment in favor of plaintiffs in the sum nominated in the bond. They ask that the cause be remanded to the lower court with leave to defendants to offer evidence to show that plaintiffs have sustained no damage by the default complained of.

For reasons with which we are still satisfied, we have ruled that it was competent for these parties to liquidate the damages arising from a default by the defendants in the agreement alleged in the complaint. We have decided that the sum at which these damages were liquidated was not unreasonable in view of the conditions obtaining when the bond was executed.

It follows that the parties are bound by their agreement. Plaintiffs could not be heard to say that their damages are greater than \$2,000, and defendants are not entitled to urge that there are no damages. *Salem v. Anson*, 40 Or. 339, 345, 67 Pac. 190, 56 L. R. A. 169, 91 Am. St. Rep. 485; *Webster v. Bosanquet* [1912] A. C. 394, Ann. Cas. 1912C, 1019.

The former opinion is adhered to.

MCBRIDE, C. J., and BEAN and HARRIS, JJ., concur.

(87 Or. 609)

PRATT v. GIBSON.

(Supreme Court of Oregon. March 5, 1918.)

1. APPEAL AND ERROR §544(1, 3)—ABSENCE OF BILL OF EXCEPTION—EXTENT OF REVIEW.

No bill of exceptions accompanying transcript and defendant's assignments being that court erred in overruling demurrer to complaint and in refusing and in giving instructions, the only matter which will be considered on appeal is the ruling upon demurrer; the objection that a complaint does not state facts sufficient to constitute a cause of action never being waived under L. O. L. § 72.

2. ANIMALS §44—INJURIES—COMPLAINT—SUFFICIENCY.

A complaint alleging that plaintiff was the owner of and entitled to possession of one Jersey bull calf of the age of five months worth \$100, and that defendants caught said calf and castrated him, to the damage of plaintiff in the sum of \$100, was sufficient.

In Banc. Appeal from Circuit Court, Crook County; T. E. J. Duffy, Judge.

Action in justice court by Alice D. Pratt against Joe Gibson and others. There was judgment for plaintiff against defendant named, which judgment was amended on defendant's appeal to the circuit court, and defendant named appeals. Affirmed.

This action was commenced by Alice D. Pratt in a justice's court of Crook county, Or. The complaint reads:

"Comes now the above-named plaintiff, and for cause of action against the above-named defendants complains and alleges as follows, to wit: (1) The plaintiff complains and alleges that on or about the 25th day of March, 1916, in Crook county, Or., the plaintiff was the owner of and entitled to the possession of one Jersey bull calf of the age of about five months; that said calf was sired by pure-bred Jersey bull out of an extra good high-grade Jersey milk cow; that said calf was of the value of \$100. (2) The plaintiff alleges that the above-named defendants, Joe Gibson, Grover Gibson, Ralph Gibson, and Earnest Gibson, acting together, caught the above-mentioned calf and castrated him, on the 25th day of March, 1916, at their ranch in Crook county, Or., to the damage of the plaintiff in the sum of \$100."

Judgment was demanded for that amount and for the costs and disbursements of the action. The answer is as follows:

"Comes now the defendants in the above-entitled action and admit, deny, and allege as follows, to wit: We admit all of section 1 of the plaintiff's complaint, except the alleged value of the calf. We deny each and every allegation of section 2 of plaintiff's complaint, and allege that we neither acting together nor single handed did castrate nor in any way harm any calf belonging to the above-named plaintiff."

Judgment was demanded for the costs and disbursements. The cause was tried in that court and a verdict was returned in plaintiff's favor and against Joe Gibson alone for \$75, as damages, and a judgment therefor and for the costs and disbursements having been rendered, he appealed to the circuit court for that county. He interposed in that court a demurrer to the complaint on the ground that it did not state facts sufficient to

constitute a cause of action against him. The demurrer was overruled, and the cause, being retried, resulted in a like verdict and judgment. Upon motion, however, it was ordered that unless the plaintiff remitted \$37.50 of the sum so recovered, the judgment should be set aside and a new trial granted. This condition was complied with, and from the amended judgment the defendant against whom the judgment was given appeals to this court.

N. G. Wallace, of Prineville, for appellant. Jay H. Upton, of Prineville, for respondent.

MOORE, J. (after stating the facts as above). The transcript filed herein contains a copy of the demurrer, duplicates of the orders made by the circuit court, copies of the verdict, the judgment, the notice of appeal, the undertaking therefor, the exception to the sufficiency of the sureties thereon, and the ruling of the court in relation thereto, to which the certificate of the clerk is appended. There have also been sent up the original papers filed in the justice's court and copies of orders made therein to which the clerk also attaches his certificate. No bill of exceptions, however, accompanies the transcript.

[1, 2] The appellant's counsel assigns as errors alleged to have been committed by the trial court its action in overruling the demurrer, its refusal to instruct the jury as requested, and its giving of instructions to which exceptions were taken. None of these matters are properly before us for consideration, except the ruling upon the demurrer; for the objection that the complaint does not state facts sufficient to constitute a cause of action is never waived. L. O. L. § 72. An examination of the averments of the complaint, as hereinbefore set forth, will show that the initiatory pleading is sufficient in all particulars. The judgment should therefore be affirmed; and it is so ordered.

(87 Or. 560)

DEPOT REALTY SYNDICATE v. ENTERPRISE BREWING CO.

(Supreme Court of Oregon. March 5, 1918.)

1. ESTOPPEL §95—EQUITABLE ESTOPPEL—SILENCE.

One is usually required to hastily refute oral declarations, made in his presence, affecting him injuriously, but this does not generally apply to letters, except where acted upon or invited.

2. PRINCIPAL AND AGENT §170(3)—UNAUTHORIZED ACTS OF AGENT—SILENCE OF PRINCIPAL—RATIFICATION.

Where unauthorized contract of agent is brought to the knowledge of the principal, either orally or by letter, the principal must hastily disavow it or he will be held to have ratified it, and particularly so if the failure to do so might impose loss or injury upon the other party.

3. PRINCIPAL AND AGENT \Leftrightarrow 163(1)—"RATIFICATION" OF CONTRACT — "ESTOPPEL IN PAIS."

A clear distinction exists between ratification of contract by a principal and estoppel in pais; ratification following the unauthorized act, and estoppel being based on principal's inducement to another to act to his prejudice.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estoppel in Pais; Ratification.]

Department 2. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

On rehearing. Former opinion affirmed. For former opinion, see 170 Pac. 294.

Joseph Simon, of Portland (Dolph, Mallory, Simon & Gearin, of Portland, on the brief), for appellant. R. W. Montague, of Portland (Wood, Montague & Hunt and Donald M. Graham, all of Portland, on the brief), for respondent.

MOORE, J. In a petition for rehearing it is insisted that the defendant was under no legal obligation to reply to the plaintiff's letter of January 11, 1915, containing the information that the term of the lease had been extended two months, from November 1st of that year, and the monthly rent of \$200 reduced to \$125 to May 1, 1915, and to \$150 for the remainder of the term, which modification was made pursuant to an agreement with C. B. Williams, the agent of the defendant, with the understanding that its guaranty would continue until December 31, 1915, and that, when this court concluded the defendant's failure to answer such communication constituted on acceptance of the condition stated therein, the plaintiff was thus permitted to introduce evidence which had been manufactured for the occasion, whereby an error was committed.

[1] When oral declarations are made by a party in the presence and hearing of his adversary, who is under no restraint and conscious of the charge thus imputed, asserting against him an obligation which might be enforceable, or his commission of an offense, or limiting his title to property, or affecting him injuriously, it is reasonable to suppose he would promptly deny such positive declarations, if he desired to escape unfavorable inferences which might be deduced from his silence, and hence he is usually required hastily to refute such charges. 16 Cyc. 958. This rule, however, does not generally apply to written communications containing statements of facts, a failure to deny which is not construed as a tacit admission of the truth of the writing, and no unfavorable inference arises from such silence, except in cases when the party receiving the letter has invited it, or where there is reason to believe he has acted upon the information thus received, or when there has been sent

with the letter bills showing a shipment of goods, which invoices have been retained without objection, or where money has been sent upon a condition stated in the letter and the sum has not been returned. Id. 960. As sustaining the legal principle thus stated, see *State v. MacFarland*, 83 N. J. Law, 474, 83 Atl. 993, Ann. Cas. 1914B, 782; *Seever v. Cleveland Coal Co.*, 158 Iowa, 574, 138 N. W. 793, Ann. Cas. 1915D, 188.

[2] These rules, however, have no application to the law governing the relation of agency. If a principal, when fully notified thereof, neglects promptly to disavow an act or contract of his agent in excess of his authority, such silence will usually be interpreted as an implied ratification, and particularly so if the failure speedily to repudiate such conduct or agreement might impose upon the other party loss or injury. 31 Cyc. 1276; 2 C. J. 505; *Curtze v. Iron Dyke Mining Co.*, 46 Or. 601, 606, 81 Pac. 815:

"The rule," says Mr. Justice Bean in *Reid v. Alaska Packing Co.*, 47 Or. 215, 220, 83 Pac. 139, 141 "is elementary that when an agent, in contracting for his principal, exceeds his authority, the principal, upon being fully informed of the facts, must, within a reasonable time, disavow or disaffirm the act of his agent, especially in cases where his silence might operate to the prejudice of innocent parties, or he will be held to have ratified and affirmed such unauthorized act, and such ratification will be equivalent to a precedent authority."

To the same effect see, also, 2 C. J. 504, § 124, and exhaustive notes on this subject.

[3] Ratification by a principal of an unauthorized act of his agent has occasionally been grounded upon the doctrine of an equitable estoppel. A clear distinction, however, exists between an estoppel in pais and ratification.

"The substance of ratification is confirmation of the unauthorized act or contract after it has been done or made, whereas the substance of estoppel is the principal's inducement to another to act to his prejudice. Acts and conduct amounting to an estoppel in pais may in some instances amount to a ratification; but on the other hand ratification may be complete without any elements of estoppel." 2 C. J. 469; 31 Cyc. 1247.

In the case at bar, it is possible the extension of the term of the lease and the reduction of the monthly rent might be regarded as creating an equitable estoppel, but, however that may be, we rest our decision upon an implied ratification by the defendant of its agent's unauthorized assumption of authority, by failing, when fully notified thereof, promptly to deny his power to consummate the agreement.

We therefore adhere to the former opinion, and the petition for a rehearing is denied.

MCBRIDE, C. J., and McCAMANT and BEAN, JJ., concur.

(100 Wash. 498)

STATE v. ROBERTS. (No. 14613.)

(Supreme Court of Washington. March 6, 1918.)

1. INDICTMENT AND INFORMATION \S 125(19) — DUPLICITY — "GRAFTING."

Rem. Code 1915, \S 2333, denounces the crime of "grafting" and specifies three methods in which the crime may be committed, the first of which is by receiving compensation on a promise to influence any public officer to refuse, neglect, or defer the performance of any official duty, and the third of which is by asking or receiving any compensation on a promise to influence any public officer in respect to any act, decision, vote, opinion or other proceeding. *Held* that, while the method described in the third clause may in general terms cover that specifically described in the first clause, an information charging the commission of the crime substantially in the terms used in the statute in defining the first method does not charge two crimes, and, moreover, the statute merely denounces different methods of committing the same crime and not different crimes.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Graft.]

2. CRIMINAL LAW \S 678(1) — ELECTION — NECESSITY — ALTERNATIVE PROMISE.

Where an information charged defendant with obtaining money on the representation that he could and would influence a judge to dismiss a case or delay the proceedings therein, the court properly refused to require the state to elect between the charge of an agreement to influence the judge to dismiss the action and the charge of an agreement to influence a delay of the proceedings, as the charge was not in the alternative but was a positive charge that defendant represented that he could and would do one or the other.

3. OBSTRUCTING JUSTICE \S 15 — EVIDENCE — ADMISSIBILITY.

Where the prosecuting witness testified that defendant promised to get him out of his trouble, and later made a similar promise and told him that he had gone to the back door of the judge's office and talked to him, and that the judge had called in the prosecuting attorney and his assistant and talked to them, the testimony of a witness that defendant said he had ways of getting into the judge's office and that he could do more with the judge than people thought, or than other people could, was admissible, even though this statement was made on the evening following the payment of the money, as it bore upon the nature of the transaction as understood by the parties, and corroborated the prosecuting witness' version of the conversation the evening before.

4. OBSTRUCTING JUSTICE \S 17½, New, vol. 14 Key-No. Series — GRAFTING — QUESTIONS FOR JURY.

On a trial for obtaining money on the representation that defendant could and would influence a judge to dismiss a case or delay proceedings, evidence *held* sufficient to justify the denial of a directed verdict of acquittal.

5. CRIMINAL LAW \S 713 — ARGUMENT OF COUNSEL — PERTINENCY TO EVIDENCE.

On such trial, the argument of the assistant prosecuting attorney that defendant had rendered the prosecuting witness no service for the money paid him *held* a legitimate comment in view of the evidence.

6. CRIMINAL LAW \S 1165(3) — APPEAL — HARMLESS ERROR — ERRORS FAVORABLE TO APPELLANT.

If, under Rem. Code 1915, \S 2333, denouncing the offense of obtaining money on a promise to influence official action, the exception applica-

ble where the parties understand in good faith that no means shall be employed except explanation and argument does not apply to the commission of the offense in the first method specified in the statute, the incorporation of such exception in an instruction defining the offense with which defendant was charged was not prejudicial, but was in his favor.

7. OBSTRUCTING JUSTICE \S 1 — GRAFTING — ELEMENTS OF OFFENSE.

Under Rem. Code 1915, \S 2333, denouncing the offense of obtaining money on a promise to influence official action, the intention to corrupt the officer by the payment to him of money is not the gravamen of the offense.

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

J. L. Roberts was convicted of grafting, and he appeals. Affirmed.

H. W. Lueders, of Tacoma, for appellant. Fred G. Remann and J. W. Selden, both of Tacoma, for the State.

ELLIS, C. J. Defendant was prosecuted for the crime of grafting under an information charging, in substance, that in Pierce county, Wash., on or about March 12, 1917, he received from Frank Barron \$210 upon the representation that he could and would influence Judge E. M. Card to neglect and defer the performance of his duty as a judge of the superior court in the case of State v. Barron then pending in the department of that court in that county and state presided over by Judge Card, in that he would influence Judge Card to dismiss that case or delay proceedings therein so that Frank Barron would receive no punishment in that cause, and that it was not clearly understood in good faith between Barron and defendant that no means or influence should be employed except explanation and argument upon the merits of the case. Defendant demurred to the information on the grounds: (1) That it "is not direct and certain as regards the crime charged," and that (2) it "does not state facts sufficient to constitute a public offense." The demurrer was overruled. When the case was called for trial, defendant requested that the state be required to elect whether it would stand upon the charge that defendant agreed to influence the court to dismiss the case, or the charge that he agreed to influence the court to delay proceedings therein. The request was denied. Before the jury was impaneled, the state, over defendant's objection, was permitted to indorse the names of three witnesses upon the information. No continuance was asked nor any claim of prejudice made.

It developed in evidence that the prosecuting witness, Barron, had been charged in Pierce county, Wash., with the crime of seduction. He had fled to Montana and had been brought back to Pierce county about March 1, 1917, through extradition proceedings. He had employed an attorney, and under his advice had entered a plea of not guilty. Through a Mrs. Waters, he met de-

defendant at her house on Friday, March 9, 1917. As to what transpired at this and two subsequent meetings the evidence is in sharp conflict.

Barron, who evidently spoke English with difficulty, testified: That at this first meeting he told defendant, "I got a little trouble." That defendant answered: "That is all right. I am going to pull you out." That defendant asked and was told the name of the girl, and offered his services for \$550, \$300 down and \$250 afterwards. That he then took the name of Barron's attorney and said he would see him and the deputy prosecuting attorney. That Barron then paid \$90 to defendant, promising to pay the other \$210 on the next Monday. Barron further testified that on the evening of Monday, March 12th, he and a friend, one Sledzlewski, went to defendant's room in the Pierce Hotel. That defendant then asked him to pay the money, and said, "I have your case and will handle it and get you out," further stating that he had seen the prosecuting attorney who would not listen, but defendant had gone to the back door of Judge Card's office and talked to him, and Judge Card called in the prosecuting attorney and his assistant and talked to them, after which the assistant prosecutor told defendant he would let him know what they would do. That at one of these meetings defendant told Barron not to tell any one of the arrangement because if found out defendant would get a fine of \$1,000, and that if a lawyer was needed defendant would furnish one as he did not like Barron's then attorney. That at this meeting of March 12th, defendant told Barron the cheapest way was to marry the girl, otherwise they would send him to the penitentiary; that if he married the girl he would not have to live with her. That Barron then said he would think it over and let him know the next day, but paid defendant the \$210 at that time. That next day (he did not state the hour) he went to defendant's room and told him he would marry the girl. That defendant arranged for a meeting with the assistant prosecuting attorney on March 14th, when he (defendant), the assistant prosecutor, and a justice of the peace went to the White Shield Home, where the girl was staying, and he there married her. The case was then dismissed.

As to what happened at the second meeting when the \$210 was paid, Sledzlewski fully corroborated Barron, adding that defendant said:

"That he had certain ways of getting into Judge Card's office, and he could do more with Judge Card than people thought, or that (than) other people could; that he could not do anything with the prosecuting attorney's office, but that he could do more with Judge Card's office."

He could not remember whether this was on the evening of March 12, or March 13, 1917.

Defendant denied that he promised to influence Judge Card, or that he claimed that he could do so, or claimed to have access to

his office. He testified that there was no agreement as to how the money was to be used, except an understanding that he would endeavor to get two men, who, as Barron told him, had been keeping company with the girl, to testify to that fact and to swear that Barron had not had any relations with her, but that he told Barron he would not allow them to perjure themselves and would not "frame-up on the girl." Yet he testified that at this same interview of March 12th, when Barron paid him the \$210 to get this evidence, Barron had admitted in substance that he had seduced the girl under a promise of marriage, and that he at once advised Barron to marry her.

One Jacobson, a friend of defendant, testified that he was present at a meeting in defendant's room on the evening of March 12th or March 13th, and that some compromise with the prosecuting attorney's office was talked of, but defendant said nothing about seeing Judge Card. He stated, however, that he understood that the money had been paid the evening before, so that his testimony hardly contradicts that of Barron and Sledzlewski.

It is hardly necessary to say that both Judge Card and the prosecuting attorney denied that defendant ever approached them in any surreptitious manner, and it is admitted that he never even spoke to Judge Card or approached him in any way. There was other evidence, but it casts little or no light upon the vital conflict here presented.

The jury returned a verdict of guilty. Motions for a new trial and in arrest of judgment were overruled. From the judgment of conviction and sentence, defendant appeals.

[1] It is first contended that the information charges more than one crime. We confess to much difficulty in following appellant's argument on this point. It seems to amount to the following: The statute defining the crime of grafting (Rem. Code, § 2333) specifies three methods in which it may be committed. The terms employed in defining the first and the third methods are in some respects similar. It is urged therefore that the information here charging the commission of the crime substantially in the terms used in the statute in defining the first method in effect charges its commission by the third method also, and therefore charges two crimes. The statute itself furnishes a sufficient answer to this argument. While the terms employed in the first and third clauses are in some respects similar, they are far from identical. The specific official acts or conduct, the taking of money under a promise to exert a sinister influence upon which is declared to constitute the crime, are not the same. In the first clause the influence promised to be exerted upon the officer is to cause him "to refuse, neglect, or defer the performance of any official duty." In the third clause it is to influence the officer "in respect to any act, decision, vote, opinion or other proceed-

ing." Though the method thus described in the third clause may in general terms cover that specifically described in the first clause, it is obvious that the first clause does not cover all that is denounced in the third, but is specifically segregated from it. A charge therefore couched in the more specific language of the first clause charges a commission of the crime in the method denounced by that clause alone. Moreover, the statute does not, as counsel assumes, define three crimes. It merely denounces three methods of committing the same crime, and the information in this case clearly charges its commission in the first of these methods only. It charges the commission of but one crime and in language plainly indicating the manner of its commission. The demurrer was properly overruled.

[2] We find no merit in the further claim that the court erred in refusing to require the state to elect whether it would stand upon a charge that appellant agreed to influence the judge to dismiss the action of *State v. Barron*, or upon a charge that he agreed to influence a delay of proceedings therein. The information does not charge that he either represented that he could and would do one or the other of these things, leaving what he promised a matter of doubt, but that he represented that he could and would do the one or the other, which left no doubt as to the character of the representation. The charge was not in the alternative. It was a positive charge that he represented that he could and would do one of two things in the alternative, both of which are denounced by the statute. The difference is plain. The motion was properly denied.

[3] It is next contended that the court erred in refusing to strike the testimony of Sledziewski as to what occurred at the meeting of March 13th, in appellant's room, on the ground that the \$210 had been paid before that time. While this witness apparently could not segregate in his own mind just what was said at the meeting of March 12th, from what was said at the meeting of March 13th, it is clear from his reference to the payment of the \$210, which was admittedly made on the 12th, that the conversation touching Judge Card, if it ever took place, took place at the meeting of March 12th and was made as an inducement to the payment of the money. This is further borne out by the testimony of Jacobson that Judge Card's name was not mentioned at the meeting when he was present and that he then understood that the money had been paid the night before. Be that as it may, we agree with the trial court that what transpired at all of these meetings was admissible as bearing upon the nature of the transaction as understood by the parties throughout. 1 Wharton, Crim. Ev. (10th Ed.) pp. 501, 502. Even if Sledziewski's testimony as to appellant's representation that he had a means of secret access

to the judge's chambers were capable only of the construction that it took place on the evening after that on which money was paid, it would still be admissible as showing that appellant's then attitude was the same as that testified to by Barron of the evening before when, as Barron said, appellant told him he had already approached the judge by a back door. It was admissible as, in a measure, corroborating Barron's version of that conversation. The motion to strike was properly denied.

[4] Appellant's third contention is that his motion for a directed verdict of acquittal, made at the close of the state's case, should have been granted. As we view it, Barron's testimony alone was sufficient to take the case to the jury. But, as we have just noticed, Barron was corroborated by Sledziewski. True, appellant's representations, as testified to by these men, were made after the first meeting of March 9th, but they were made before the payment of the \$210 on the evening of March 12th, and if then made, which was a question for the jury, their only possible purpose was to induce that payment. It is true also appellant testified that this money was paid on his agreement to secure certain evidence, but he admitted that at the same time Barron confessed that he had in fact seduced the girl under a promise of marriage, so that appellant and Barron both then knew that the desired evidence could not be secured. This is certain if, as appellant further testified, he then told Barron that he would not consent to perjury nor a "frame-up on the girl." The motion for a directed verdict was properly denied.

[5] It is strenuously urged that the court erred in permitting the assistant prosecuting attorney to argue, in substance, that appellant rendered Barron no service for the money. We have read the little of the argument which is set out in the record. In view of the above-noticed evidence, we agree with the trial court that the argument was a legitimate comment.

[6] Appellant criticizes the court's instructions defining grafting, in that it told the jury, in substance, that an agreement to influence a judicial officer to neglect or defer the performance of his judicial duty would constitute the offense, unless it was understood in good faith that no means should be employed "except explanation and argument upon the merits." It is urged that under the statute (Rem. Code, § 2333) this exception applies only to a commission of the crime in the method denounced in the third clause of that section, and not to that denounced in the first clause. Assuming, without deciding, that this criticism is well taken, the addition of the exception was obviously not prejudicial. If error, it was distinctly error in appellant's favor. Other claims of error in the instructions are suggested, but we cannot discuss them in detail. We have ex-

amined the instructions with care. We are convinced that they clearly and correctly stated the law as applied to the evidence.

[7] A further claim of error is predicated upon the court's refusal to instruct upon the theory that the gravamen of the offense charged was the intention of appellant to corrupt the judicial officer by the payment to him of money. It seems to us too plain for argument that the statute is capable of no such construction.

We have discussed every assignment of error that appellant has seen fit to discuss in his brief or in the oral argument. We have also examined the assignments which he has not discussed. We can find no ground warranting a reversal.

The judgment is affirmed.

MOUNT, HOLCOMB, and CHADWICK,
JJ., concur.

(100 Wash. 466)

BRADFORD-KENNEDY CO. v. BUCHANAN. (No. 14618.)

(Supreme Court of Washington. March 2, 1918.)

1. BAILMENT §12 — GRATUITOUS BAILLEE — INSTRUCTIONS—CONSENT.

A gratuitous bailee, who is sent money for a certain purpose with written instructions, must be presumed to have acquiesced and consented to the written instructions, where he did not disavow the terms under which sent.

2. BAILMENT §31(3)—GRATUITOUS BAILLEE— NEGLIGENCE—EVIDENCE.

Evidence held to show that one to whom money was sent for a certain purpose was a gratuitous bailee, and that he was not grossly negligent in handling the money nor in misconstruing his instructions.

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by the Bradford-Kennedy Company against James Buchanan. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

John E. Gallagher, of Tacoma, for appellant. J. H. Gordon and A. O. Burmeister, both of Tacoma, for respondent.

HOLCOMB, J. This case was formerly before this court and reported in 91 Wash. 539, 158 Pac. 76. Upon appeal the court remanded the cause for further proof to be added to that already taken, and further proceedings not inconsistent with the opinion. Among other things it was determined on the former appeal that the cause had not been heard and decided below upon the proper principles; that the evidence clearly disclosed that appellant was a mandatary under a gratuitous bailment to buy logs with his principal's money and as such is liable only for gross negligence; and that, while he must not disregard plain instructions, he is not punished when he honestly mistakes instructions.

Upon the retrial below no additional evi-

dence was produced to show any other status on the part of appellant than that of gratuitous mandatary. He reiterated that his instructions were different from those asserted by respondent. In the former opinion is set forth a letter of instructions from respondent accompanying the money intrusted to appellant. Appellant insisted in the latter trial as well as in the former that he was to use the money as a sort of revolving log fund; that the respondent would demand free shingles only as the shingle company could afford to ship them without immediate payment, and would continue to pay for the shingles if necessary to keep the concern going, and be satisfied if shingles not shipped to it were sold and the proceeds used by Buchanan for the purchase of further logs as respondent's property.

In the former opinion it was also stated that:

"It should be proved beyond doubt that Buchanan had no right except to buy, cause to be manufactured, ship to Bradford, or resell and remit."

There was no further testimony upon this point. Buchanan reasserted his understanding of an oral agreement which he said he had with Bradford, president of respondent, prior to the sending of the letter set forth in the former opinion, in which it was understood that the Tacoma Lumber & Shingle Company was to be kept on its feet and kept going.

[1] However that may be, when the remittance came, accompanied by the letter of instructions, it was the duty of Buchanan to disavow the terms under which it was sent, and if he did not he must be presumed to have acquiesced in and tacitly consented thereto. He would not, however, be held under a mandatary's liability to a strict accountability, as would a paid bailee. Having again shown, doubtless honestly, that he misconceived his instructions, he could, as said in the former appeal, be held only for such damage as actually occurred and only for his own gross negligence. The trial court again held that the net value of the shingles purchased with the \$2,000, had the logs been delivered to the Tacoma Lumber & Shingle Company to be sold for the account of respondent and 25 cents per thousand deducted for the sawing, drying, loading, etc., was \$2,000, and that respondent was entitled to that sum with interest from April 1, 1913, together with costs and costs on the former appeal.

At the last trial respondent introduced the evidence of one wholly disinterested witness, one Hagburg, whose testimony is convincing that the minimum net market price of the ordinary brand of shingles after February 24th, when the money was advanced to appellant, and before April 1st, when the Tacoma Lumber & Shingle Company became

insolvent and went into the hands of a receiver for liquidation, was \$1.60 per thousand on board car, and that the minimum net market value of clears or the higher grade of shingles was \$1.90 per thousand at the mill during that time. The minimum must be taken as the definitely established price rather than the maximum. It is also shown by this witness that the average price of logs during that time was \$12 per thousand; that \$2,000 would have bought during that time 166,600 feet; that therefore the logs could be manufactured into 10,000 shingles per thousand feet of logs, or 1,666,000 shingles; that the logs averaged one-fourth clears or the higher grade and three-fourths stars or the ordinary grade. According to these figures the net value of the shingles which during that time could have been produced at the mill in Tacoma would have been approximately \$2,800. This includes the price of 75 cents per thousand for sawing, drying, loading, etc., and also includes an average of 12 cents per thousand, amounting to \$200, for underweights on shipments of shingles to which the manufacturer is entitled. As respondent concedes, it was required to pay 75 cents per thousand for sawing, drying, and loading the shingles which would have been its own; that of course should be deducted; and on 1,666,000 shingles that amounts to approximately \$1,250. The most therefore the respondent could be entitled to under the new evidence, if appellant is liable at all, is the sum of \$1,750, with interest from April 1, 1913, at the legal rate.

[2] But we are not satisfied that respondent was entitled to recover anything. The evidence is no different from that before upon the question of the gratuitous bailment. Respondent's president admitted in the former hearing that appellant was to receive nothing for his services. Appellant was no more, but rather much less, concerned in the affairs of the Tacoma Lumber & Shingle Company than was respondent itself. Respondent had advanced to that company about \$2,500 for which it held a mortgage, and had a contract with it whereby it was to manufacture and deliver shingles to respondent at 10 cents per thousand less than the market price at any time, and certain other deductions were to be applied to the shingle company's account. After February 24, 1913, 23 cars, containing 5,803,000 shingles were shipped to respondent under this prior arrangement, to respondent's total gain of \$2,448.07. At the time of the advancement by respondent to appellant of the \$2,000, the president of respondent was in Tacoma and was familiar with the condition and affairs of the Tacoma Lumber & Shingle Company. He was in fact well acquainted with one Crandall who was the president and general manager of the shingle company and was a former employé of respondent. Appellant was the friend of

another of the stockholders, one La Vergne. It seems that both respondent's president and appellant had become interested in the affairs of the shingle company; the one for its own security and the other gratuitously. The shingle company was in a precarious financial condition and could not obtain logs sufficient for its operations. Appellant was never at any time interested financially in the shingle company, and never had any interest in its operations except to see it succeed. He profited not a cent from the money intrusted to him nor from his other activities in behalf of the shingle company. The money intrusted to him, as was shown in the former opinion, was not converted by him, but was at once devoted to the purchase of logs, together with much more of appellant's own money. Several pressing debts of the shingle company were also paid by appellant, either out of the funds of respondent and his own, or funds derived from the shipment of shingles to respondent. The payment of most of the claims paid was necessary in order to continue operations and protect the business of the shingle company, and even the logs of respondent, as was stated in the former opinion, would become involved in laborers' claims in the event of failure, and probably receivership expenses, which afterwards proved to be true. The instructions given by respondent when transmitting the money to appellant required that shipments should be made as rapidly as possible and the amount returned as soon as it could be done without inconvenience to the operation. From the evidence in both the former and the last trial it is evident that the money could not have been returned prior to April 1st, when the company went into liquidation, "without inconvenience to its operation." Under this provision appellant could easily err honestly in his duty, even had he been a paid bailee.

The record is also convincing that Crandall, president and general manager of the shingle company and long-time friend of the president of respondent, persisted in shipping to respondent shingles manufactured out of the logs bought by appellant as if under the old contract the shingle company had with respondent, ignoring the new arrangement made by respondent with appellant. Notwithstanding repeated protests on the part of respondent to Crandall, and at least once to appellant, that method was pursued till the last. Indeed, it seems almost impossible, considering the capacity of the shingle company, physically and financially, to have complied with both arrangements with respondent during that period. It seems clear from the evidence, if there was any gross negligence in dealing with respondent's affairs, it must be attributed to Crandall. Appellant had no power in the management of the shingle company's business, and Crandall had sole power therein. It is to be remembered that the \$2,000 was ad-

vanced to appellant for the sole benefit of the shingle company and respondent itself. Appellant profited nothing, either directly or indirectly, through the bailment intrusted to him. Respondent obtained from the logs purchased for the shingle company, upon its former debt and in profits, \$2,448.

Unfortunate as it may be that respondent must lose the amount intrusted to appellant as a gratuitous bailment, there is no convincing evidence shown on either hearing in the case that the money was lost through the gross negligence of appellant.

The judgment is reversed and the action dismissed.

ELLIS, C. J., and CHADWICK and MORRIS, JJ., concur.

(100 Wash. 459)

GRIGGS v. WAYNE. (No. 14299.)

(Supreme Court of Washington. March 2, 1918.)

1. APPEAL AND ERROR §1004(1)—REASONABLENESS OF FEE—VERDICT—CONCLUSIVENESS.

On issue of reasonableness of the fee retained by defendant attorney for services rendered plaintiff, the verdict supported by testimony, whether large or small, is conclusive, unless the court committed error in the course of the trial.

2. EVIDENCE §553(3)—HYPOTHETICAL QUESTIONS—BASING UPON EVIDENCE OF ONE PARTY ONLY.

A hypothetical question may be based upon any assumption of facts which the testimony tends to prove according to the theory of the examining counsel, although such testimony is meager and not at all in line with the theory of the adversary's case.

3. EVIDENCE §543(2)—EXPERT WITNESSES—COMPETENCY.

In case involving reasonableness of attorney's fee charged for services in another case, lawyers of some years experience in the general practice of law were competent to express an opinion based on testimony of the party proposing them.

4. TRIAL §140(1)—WEIGHT OF TESTIMONY—QUESTIONS FOR JURY.

The witness being competent, the weight to be given his opinion is for the jury.

5. EVIDENCE §553(4)—OPINION EVIDENCE—GROUNDS FOR REJECTING.

Meagerness of testimony is not a ground for rejecting expert opinion.

6. EVIDENCE §558(2)—CROSS-EXAMINATION OF EXPERT—DISCRETION.

The trial judge has a large discretion in allowing cross-examination of witnesses called to give expert opinion.

7. APPEAL AND ERROR §1003—REVIEW—GROUNDS—WEIGHT OF TESTIMONY.

Objections going to weight of testimony afford no ground for interference with verdict.

8. APPEAL AND ERROR §1050(3)—ADMISSION OF TESTIMONY—HARMLESS ERROR.

In suit to recover part of fee retained by defendant attorney for services in procuring plaintiff's interest in her husband's estate, a copy of the administrator's final account, though unnecessary, was competent at least to prove the amount of the estate, so that its admission was not prejudicial to defendant.

Department 2. Appeal from Superior Court, Spokane County; Hugo Oswald, Judge.

Action by Sadle Griggs against James A. Wayne. Judgment for plaintiff, and defendant appeals. Affirmed.

James A. Wayne and Post, Russell, Carey & Higgins, of Spokane, for appellant. John L. Dirks and J. M. Simpson, both of Spokane, for respondent.

CHADWICK, J. Appellant was employed by respondent to procure her inheritable interest in the estate of her husband then being administered in the courts of Idaho. Out of the whole sum collected, appellant retained \$1,000 for his services. Respondent brought this action to recover \$850, admitting \$150 to be a reasonable charge for the work appellant had done. The case went to a jury, which returned a verdict for \$750.

[1] The general issue was the reasonableness of the fee, and the verdict is final unless the court committed error in the course of the trial.

[2, 3] The first assignment is that the court permitted certain witnesses to testify answering hypothetical questions which failed to embody all of the facts relating to the subject upon which their opinions were asked, and without a showing of sufficient experience or knowledge of the law, the practice, and the usual charges for such services as were rendered by appellant in the state of Idaho.

The rule as formulated in 8 Encyc. of Pleading & Practice, 756, is quoted:

"The hypothetical question should, however, embody substantially all of the facts relating to the subject upon which the opinion of the witness is asked, since the opinion of the witness is worthless and may be misleading if given on a state of facts which does not exist. A discrepancy between the facts proven, or admitted, and the facts upon which the opinion is given, may be very material."

This rule does not prevail in all its strictness in this state. Our courts are forbidden to comment upon the evidence, or its sufficiency, if competent and relevant. In deference to this limitation upon our powers no doubt, and for other equally sound reasons, we have declared a more liberal rule. It is noted following the text just quoted:

"A hypothetical question may be based upon any assumption of facts which the testimony tends to prove, according to the theory of the examining counsel." 8 Encyc. of Plead. & Prac. 757.

Of course, we do not want to be understood as holding that the court is bound to hear, or submit to the jury, the testimony of one who has no qualifications whatever, or who does not show a sufficient knowledge of the subject-matter to warrant his drawing a conclusion. *Pierson v. Northern Pacific R. Co.*, 52 Wash. 595, 100 Pac. 999. Nor do we want to be understood as holding that the trial judge had no discretion in such matters. But where, as in this case, the witnesses offered as experts were lawyers of some years experience in the general practice of the law, they are competent to express an opinion based up-

on the testimony of the party proposing them, although such testimony may be meager and not at all in line with the theory of the adversaries' case.

[4] The witness being competent, the weight to be given his opinion in the light of all the evidence is for the jury. A careful reading of the record falls to convince us that the questions complained of were not based on the testimony of respondent's witnesses and the theory of her case. *Hanstad v. Canadian Pacific R. Co.*, 44 Wash. 505, 87 Pac. 832.

[5] Meagerness of testimony is not a ground for rejecting expert opinion. *State v. Peacock*, 58 Wash. 41, 107 Pac. 1022, 27 L. R. A. (N. S.) 702.

[6] Appellant was free to, and no doubt did, bring to the attention of the jury by cross-examination the experience of the witnesses, their knowledge, or lack of knowledge, of the practice in the state of Idaho; the facts upon which they based their testimony as to a reasonable charge, and the facts upon which appellant was resisting the claim. The trial judge has a large discretion in allowing cross-examination of witnesses called to give expert opinion. *Seattle & Montana Ry. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864.

[7] Summed up, the objections of counsel go to the weight of the testimony rather than its competency. This affords no legal ground for interference with the verdict. In *Re Mercer Street, Seattle*, 55 Wash. 116, 104 Pac. 133.

[8] It is next contended that the court erred in admitting a copy of the final account of the administrator in the matter of the estate of respondent's husband. While the admission of this document was perhaps immaterial, or at least unnecessary, it was not prejudicial. It was competent at least to prove the amount of the estate.

Appellant finally urges that the case should be reversed because "the damages are excessive." There is no question in this case of damages. The sole question is the reasonableness of the charge, and whether the verdict be great or small, if there is testimony to sustain it, it concludes the controversy.

Affirmed.

MOUNT, MORRIS, and HOLCOMB, JJ., concur.

(100 Wash. 453)

LANDRY v. SEATTLE, P. A. & W. RY. CO.
(No. 14290.)

(Supreme Court of Washington. March 2, 1918.)

1. JUDGMENT \S 199(5)—MOTIONS—DECISION—POWERS OF COURT.

A trial court, after informally indicating to counsel that a motion for judgment notwithstanding the verdict would be overruled, may thereafter grant such motion.

2. JUDGMENT \S 289—WHAT CONSTITUTES.

The formal judgment entered is controlling, irrespective of memorandum opinions or minute entries, except where the clerk, pursuant to statute, enters judgment after a jury trial.

3. MASTER AND SERVANT \S 288(5)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Evidence that plaintiff lineman ascended a telephone pole, which was set an insufficient distance in the ground, without digging around the base to determine the depth to which it was set, made plaintiff's assumption of risk a jury question.

Department 2. Appeal from Superior Court, Clallam County; John M. Ralston, Judge.

Action by Ambrose A. Landry against the Seattle, Port Angeles & Western Railway Company. Judgment for defendant, and plaintiff appeals. Remanded, with instructions.

Griffin & Griffin, of Seattle, for appellant. Geo. W. Korte, Corwin S. Shank, and H. C. Belt, all of Seattle, for respondent.

CHADWICK, J. This case is presented from many angles, but, as we view it, there is but one question for present decision. Action was brought by appellant to recover damages for personal injuries suffered while in the employ of the respondent. It seems that appellant with another was employed in repairing telephone lines along the right of way of respondent's road, which had been demoralized by severe storms. One Borgon had contracted with respondent to make the repairs, and had immediate charge of the work. Borgon and appellant worked together. Appellant was told to climb a pole and put an insulator on it. The pole was standing on a rather steep bank on the down side of the hill, and in earth that had been thrown out when the roadbed had been cut along the hillside. The pole stood upright and seemed to be sound and solid. Borgon says he applied the usual test, as did appellant, by putting his hand against the pole and pushing it to see if it was set firmly in the earth. Appellant went to the top of the pole, and as he was in the act of lowering a line for the purpose of hauling up a guy wire to be attached to a "dead man," which they had previously set in the ground, the pole gave way. Appellant fell with it, sustaining the injuries of which he now complains. It was then discovered that the pole had not been set in the ground a sufficient distance to sustain the superadded weight of the lineman. It is the practice to set poles in the ground a distance equal to about one-fifth of the height. The pole was about 25 feet high, and was set in the ground between 19 and 25 inches. Appellant is a lineman of many years' experience, and upon this showing of fact, respondent moved for a nonsuit. This motion was overruled. When the testimony was all in, respondent reasserted its legal position by motion for a directed verdict.

This was also overruled, and the case sent to the jury. Upon the return of an adverse verdict, respondent made a motion for a judgment non obstante veredicto and a motion for a new trial. The court took the several motions under advisement, and after due consideration wrote to counsel on either side at Seattle that the motion for judgment non obstante would be overruled, and directed that an order be prepared. This order was prepared, "O. K.'d" by counsel for respondent, and returned to the trial judge. Whereupon the judge, after more mature consideration, came to the conclusion that his first impression of the case was wrong, and directed that a judgment non obstante veredicto be entered.

[1, 2] Counsel first contends that the court had no power after deciding that the motion non obstante veredicto should be overruled to thereafter entertain it, and enter a judgment in favor of the respondent. We think it has been fairly settled by the decisions of this court that the formal judgment as entered is the judgment of the court irrespective of memorandum opinions or minute entries (*State ex rel. Jensen v. Bell*, 34 Wash. 185, 75 Pac. 641; *Gould v. Austin*, 52 Wash. 457, 100 Pac. 1029; *McGuire v. Bryant Lumber & Shingle Co.*, 53 Wash. 425, 102 Pac. 237; *Michel v. White*, 64 Wash. 343, 116 Pac. 680), excepting, of course, a judgment entry made by the clerk under the statute directing that such judgment should be entered by the clerk in cases tried by a jury.

[3] It is the contention of counsel that appellant, being an experienced lineman, was bound to inspect the pole before climbing, and, having inspected it, he is bound by such inspection and cannot recover. In other words, that he is bound to an assumption of risk. Appellant contends that no means of inspecting poles was provided. It seems that the distance a pole may be set in the ground can be determined by the use of an iron rod, and it is said that this should have been furnished if respondent would hold appellant to the rule of self-insurance. This is met by respondent with a suggestion that the duty of inspection, by whatever means, was on appellant, and that an inspection which would have shown the distance the pole was set in the ground could have been made by appellant with a shovel, which had been furnished by respondent, and which appellant was using in the work in which he was then engaged. This court has held that when a person, being experienced in his line of work, undertakes to do a certain thing calling for the exercise of skill and judgment, he is bound to inspect and reject all unfit tools and appliances that are put in his hands, and that he assumes at his own risk all work depending upon the strength and security of the means and methods employed by him, the theory of the law being that the experienced or expert workman is quite as competent to appreciate danger and avoid it as

is his principle. But, after all, the various principles that are laid down by the courts in negligence cases where contributory negligence, or assumption of risk, are urged as a defense are but means to the same end, to find out the degree of care required of the one so charged, and to inquire whether, under the facts of the particular case, he met the legal tests of prudence, whether he acted as a man of ordinary prudence would have acted under the same or similar circumstances. In the case at bar, the pole seemed to be firmly set in the ground. There was nothing about it to challenge the attention of the two men who were engaged in the work. Appellant tried it by putting his weight against it. It seemed secure. We cannot hold as a matter of law that appellant had no right to act upon appearances, or that he was bound to the extraordinary care of digging around or at the side of a seemingly solid pole with a shovel to see how far it was set in the ground. The defect was not discoverable by ordinary tests. There was nothing to indicate that the pole was not set to a sufficient depth in the ground to support it. We think under such a state of facts the question of the assumption of risk was for the jury, and it has decided that question in favor of appellant. There are many cases in our reports which affirm these principles. Cases from other courts in point in fact as well as law are *Bland v. Shreveport Belt Ry. Co.*, 48 La. Ann. 1057, 20 South. 284, 36 L. R. A. 114; *Arnold v. Northeastern Pennsylvania Telephone Co.*, 253 Pa. 23, 97 Atl. 1038; *Holden v. Gary Telephone Co.*, 109 Minn. 59, 122 N. W. 1020; *Western Union Telegraph Co. v. Holthby*, 139 Ky. 458, 93 S. W. 652.

Counsel have, no doubt, cited other cases in point. If so, they are scattered through their rather lengthy brief under the alias "supra," a method of identification tolerable in a short brief or opinion, but truly distracting in one of any length. Our time will not permit further search of the briefs for true marks and brands. Authorities are not necessary to support our holding, for if our premises be correct, the case is controlled by fundamental principles. *Anderson v. Inland Telephone & Telegraph Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410; *Goddard v. Interstate Telephone Co.*, 56 Wash. 536, 106 Pac. 188; and *Hord v. Pacific Telephone & Telegraph Co.*, 68 Wash. 119, 122 Pac. 598, are relied upon by respondent as decisive. In the *Anderson Case*, the injured party was an experienced lineman and under a duty to take care of his own safety. His work was hazardous. The danger was obvious to an experienced man. He had been supplied with all means of testing wires and insulators. He assumed an ordinary risk, which, on account of the nature of his work, he was bound to anticipate, and which he took no means to avoid, having everything in his own hands to avoid the danger. In the case at

bar appellant assumed the duty of ordinary care and performed it. The character of the risk, and his relation thereto, did not demand that he seek out hidden or latent dangers. The facts distinguish both the Goddard Case and the Hord Case. In the one case Goddard rested his weight upon a bent iron step set in the pole. In legal contemplation he just stepped out in the air. Being an experienced lineman doing the special work of a trouble man, he was charged with the duty of avoiding an obvious danger. So in the Hord Case, an experienced lineman was content to set his spurs or climbers in a rotten spot in the pole. A duty of inspection to the extent of avoiding obvious defects was upon him. Under the admitted facts the court held that he did not take ordinary precautions for his own safety and to avoid defects which would have been apparent had he done so. The court held that a "casual glance" did not meet the full measure of his duty.

We take it that the motion for judgment non obstante veredicto was a renewal of the motion for nonsuit upon the grounds of insufficient testimony to take the case to the jury under the doctrine of the assumption of risk. Having found that the case was for the jury, it is necessary to remand, with instructions to pass upon the motion for a new trial; all other questions of law being reserved pending the action of the lower court.

ELLIS, C. J., and MOUNT, MORRIS, and HOLCOMB, JJ., concur.

(100 Wash. 429)

HIBBARD et ux. v. OREGON-WASHINGTON R. & NAV. CO. et al.
(No. 14183.)

(Supreme Court of Washington. Feb. 28, 1918.)

1. RAILROADS — 297(4) — COLLISIONS — ACTIONS FOR INJURIES — SUFFICIENCY OF EVIDENCE.

In an action for injuries sustained in a collision occurring after dark between a street car and a train which was backing from a direction in which there were no street lights or other fixed lights, if there was evidence that there was no light on the rear of the train, the jury were warranted in concluding that the failure to have a light there was negligence and the proximate cause of the collision and the injuries.

2. RAILROADS — 297(3) — COLLISIONS — ACTIONS FOR INJURIES — QUESTIONS FOR JURY.

The testimony of two passengers, who were looking and had an opportunity to see, that they saw no lights in the direction from which the train was backing, and the testimony of another passenger that, immediately following the accident, and when the conditions were such that one looking for a light would probably have found one or some evidence thereof, he looked carefully for a light and for evidence of any light having been on the rear of the train and failed to find any light or any evidence thereof, made a question for the jury as to whether there was a light on the rear of the train, in the absence of any positive evidence that there

was a light, conceding that all of such evidence was negative in character.

3. RAILROADS — 297(1) — COLLISIONS — ACTIONS FOR INJURIES — COMPLAINT.

A complaint, alleging that defendants were negligent, in that they operated the train in a negligent manner, in that they were backing it after dark without having or displaying any lights or sufficient lights to warn persons approaching the crossing of its approach, sufficiently charged negligence in so far as the want of a light on the rear of the train was concerned.

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by Russell Hibbard and wife against the Oregon-Washington Railroad & Navigation Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

The complaint alleged that defendants were guilty of carelessness and negligence towards plaintiffs, in that they carelessly and negligently operated the freight train at the time and place of the accident in a careless and negligent manner, in that they were backing the train after dark without having or displaying any lights, or sufficient lights to warn persons approaching the crossing of its approach.

Bogle, Graves, Merritt & Bogle, of Seattle, for appellants. Bradford, Allison & Egan, of Seattle, for respondents.

PARKER, J. The plaintiffs, Hibbard and wife, seek recovery of damages for personal injuries to both of them which they claim were caused by the negligence of the defendant railroad company and its employees. Trial in the superior court for King county, sitting with a jury, resulted in verdict and judgment awarding the plaintiffs damages in the sum of \$2,054, from which the defendants have appealed to this court.

About 9 o'clock in the evening of April 11, 1916, respondents, Hibbard and wife, were passengers on a street car in Seattle, which was proceeding west on Spokane avenue, approaching Whatcom avenue, which runs north and south. It was then dark. There were street lights at the intersection of these avenues, and at other places along Spokane avenue. There were no street lights or other fixed lights to the south of Spokane avenue in this neighborhood, so that one looking to the south would be looking into the dark where train or other moving lights would be readily recognized. There were no obstructions to the view to the south. Appellant railroad company maintains one of its tracks on Whatcom avenue, which track crosses the street car track at right angles in the intersection of these avenues. As the street car upon which respondents were passengers was approaching this crossing from the east, employees of appellant railroad company were slowly backing a long freight train north to

wards the crossing, along its track on Whatcom avenue. This train had no caboose upon its rear end and it is claimed by respondent that it had no light upon its rear end. As the street car passed over the crossing, the rear car of the train came into collision with the street car, striking it near the middle of the south side, resulting in the injuries to respondents for which they seek recovery.

The principal contention here made by counsel for appellants is that the trial court erred in denying their motion for a directed verdict, made at the close of respondents' evidence, upon the ground that the evidence was not sufficient to support any recovery against appellants, counsel for appellants at the same time announcing to the court that they rested. They did not offer any evidence in their own behalf, and participated no further in the trial, not even to the extent of arguing the case to the jury.

[1, 2] It seems clear to us that if the jury were warranted in believing from the evidence that there was no light upon the rear of the train, they would also be fully warranted in concluding that the failure to have a light on the rear of the train was negligence on the part of appellants, and the proximate cause of the collision and respondents' injuries. Indeed we do not understand counsel for appellants to seriously contend to the contrary; that is, we do not understand them to seriously contend that the court should so decide as a matter of law. The real contention here made is that there was not sufficient evidence to warrant the jury concluding that there was no light upon the rear of the train, and this seems to us is little else than a contention that the evidence fails in that respect because it was wholly negative in character. Downs, who was a passenger on the street car and a witness for respondents upon the trial, testified, in substance, that immediately following the accident he looked carefully for a light upon the rear end of the train and also for evidence of any light having been there, but failed to find any light there or evidence of any light having been there. The conditions were then such that the jury could well conclude that one looking for such a light would probably have found one or some evidence of one having been there had it been there while the train was backing onto the crossing. Two other witnesses for respondents, passengers on the street car, looking and having an opportunity for seeing to the south from the car just before reaching the crossing, said that they did not see any lights in the direction from which the train was backing. We may concede that all this evidence was negative in character, even that of Downs, yet we cannot say as a matter of law that it was not sufficient to carry the question of whether or not a light was upon the rear of the train, to the jury, especially in

view of the fact that no positive evidence was offered by appellants to show that there was a light upon the rear of the train. *Schon v. Modern Woodmen of America*, 51 Wash. 482, 99 Pac. 25; *McKinney v. Port Townsend & P. S. R. R. Co.*, 91 Wash. 387, 158 Pac. 107; *Riley v. Northern Pacific Ry. Co.*, 36 Mont. 545, 93 Pac. 948.

[3] Some contention is made in appellant's behalf touching the sufficiency of the complaint. It is clearly sufficient in charging negligence in so far as the want of a light on the rear of the train is concerned; and, since we are of the opinion that the evidence introduced was sufficient to carry the case to the jury upon the question of negligence in that particular, and a new trial is not asked for, we think there is no occasion to notice the sufficiency of the complaint in so far as it charges negligence in other particulars is concerned, with reference to which some evidence was introduced.

The judgment is affirmed.

ELLIS, C. J., and FULLERTON, WEBSTER, and MAIN, JJ., concur.

(100 Wash. 472)

WISHKAH BOOM CO. v. GREENWOOD
TIMBER CO. (No. 14390.)

(Supreme Court of Washington. March 2,
1918.)

1. APPEAL AND ERROR \S 639(1)—GROUNDS FOR DISMISSAL — INSUFFICIENCY OF ABSTRACT.

Under the express provisions of Laws 1915, p. 302, § 6, insufficiency of the abstract is not ground for dismissing the appeal, but only for a motion to amend the abstract upon terms, especially where the evidence and the exhibits were voluminous, and it was doubtful whether a satisfactory abstract could have been made unless prepared in almost the same volume as the statement of facts and exhibits.

2. TRIAL \S 38(2)—FINDINGS AND CONCLUSIONS—CASES IN WHICH REQUIRED.

A suit to enforce liens for driving and booming logs being one in equity, it was a matter of discretion with the trial court whether he would make findings of fact, and conclusions of law.

3. APPEAL AND ERROR \S 205(1)—RESERVATION OF GROUNDS OF REVIEW—NECESSITY OF EXCEPTIONS.

Where the court made no findings of fact and conclusions of law, his memorandum decision that 75 cents a thousand feet would be a reasonable charge for driving and booming timber, and that plaintiff might have a lien in that amount, was not such a finding of fact as was required to be excepted to.

4. LOGS AND LOGGING \S 14—DRIVING AND BOOMING LOGS—RATES—JUDICIAL SUPERVISION.

The courts cannot make rates for driving and booming logs, but can only determine whether or not the rates attempted to be exacted by a boom company are reasonable.

5. LOGS AND LOGGING \S 33(11) — DRIVING AND BOOMING LOGS—LIENS—DECREE.

In a suit to enforce liens for driving and booming logs, a decree allowing a foreclosure of the liens and judgment for a specified amount to

include all services in driving, booming, handling, and delivering the logs referred only to a delivery at plaintiff's boom, and not to a delivery to some other point to be designated by defendant.

6. LOGS AND LOGGING — 33(10) — DRIVING AND BOOMING LOGS—LIENS—FINDINGS.

In a suit to enforce liens for driving and booming logs, where plaintiff's complaint as well as its liens aggregated the total charges for both driving and booming, the court was not required to separately find and state the rates allowed for booming and for driving.

7. LOGS AND LOGGING — 14—DRIVING AND BOOMING LOGS—RATES—REASONABLENESS.

In the absence of any statute adopting a basis of valuation, the present fair cash value of the property of a boom company devoted to its booming and driving operations, which is its reproduction cost minus its depreciation, if any, is a proper basis for determining the reasonableness of rates attempted to be exacted.

Department 2. Appeal from Superior Court, Grays Harbor County; Walter M. French, Judge.

Action by the Wishkah Boom Company against the Greenwood Timber Company. From a judgment for plaintiff for an insufficient amount, it appeals. Affirmed.

Harry E. Wilson, of Seattle, and John O. Hogan, of Aberdeen, for appellant. W. H. Abel, of Montesano, and Donworth & Todd, of Seattle, for respondent.

HOLCOMB, J. This case was before the court on a former appeal to determine the question of whether or not the courts could pass upon the reasonableness of the rates of booming and driving companies. *Wishkah Boom Co. v. Greenwood Timber Co.*, 88 Wash. 568, 153 Pac. 367. This is a consolidation of two actions brought to enforce two liens for driving and booming logs on the Wishkah river for respondent. The cause of action arose in 1913, and the logs were both driven and boomed by appellant on the west branch of the Wishkah river.

Appellant alleged that the rate and charge of 65 cents per thousand feet board measure for driving logs from the place on the Wishkah river from which respondent's logs were driven, and 40 cents per thousand feet board measure for catching, holding, sorting, and rafting the logs in the boom of appellant on tide water in the Wishkah river, making a total charge on the logs of \$1.05 per thousand feet board measure for driving, catching, sorting, rafting and booming, were reasonable and proper rates and charges. Appellant answered and denied that the rates charged and demanded were reasonable, and affirmatively alleged that 35 cents per thousand feet board measure is a reasonable charging rate for all driving services performed by appellant for respondent, and that 30 cents per thousand feet board measure is a reasonable charging rate for all booming services so performed; at which rates respondent tendered sums aggregating the total charge affirmatively alleged to be due, and later by permission of

the court deposited the money in the registry of the court to take the place of the lien. Upon the remanding of the case, issue was joined by appellant's replying to the affirmative allegations of respondent, and the case proceeded to trial. At the trial appellant conceded that 30 cents was a reasonable sum to be allowed it for its booming charges, thus disposing of that issue in favor of the contention of respondent. Later during the progress of the trial respondent asked leave to amend its answer by alleging that 20 cents per thousand feet for booming would be a reasonable rate. The court denied this application, and no exception to the ruling of the court was taken by respondent.

The trial was had largely upon the testimony of expert witnesses and documentary evidence. One Johnson, an expert accountant, and one Burroughs, an expert engineer and rate expert, testified in behalf of appellant, and one Torrey, an expert accountant, and Gray, an engineer and expert on rate matters, on behalf of respondent. These witnesses apparently went deeply into the business and operations of appellant in order to enable them to intelligently testify. Other witnesses also testified to other matters involved. The court by memorandum decision held that:

"Considering the value of plaintiff's property, what would be a fair return on the investment, the costs and expenses, and maintenance and operation, and considering also the vast amount of timber which must necessarily be marketed by means of driving it down the Wishkah river, the court is of the opinion that 75 cents per thousand feet board measure would be a reasonable charge for timber which the plaintiff may drive and boom, and therefore finds that plaintiff may have a lien in the amount of 75 cents per thousand."

It will be seen that the court lumped the driving and booming charges together in the sum of 75 cents per thousand feet board measure. Appellant made a written request to the court to make and enter findings of fact and conclusions of law, and particularly to make separate findings as to the rate allowed for booming and as to the rate allowed for driving. This request was denied by the court and an exception allowed. The boom company submitted to the court requested findings of fact and conclusions of law, which the court denied.

[1] At the outset we are met by a motion on the part of respondent to dismiss the appeal because appellant has failed to file an abstract in accordance with the statutes and rules of court. The statement of facts in the case covers 595 pages. Appellant introduced in evidence 14 exhibits, many of them very voluminous. Respondent introduced in evidence 16 exhibits, many of which are voluminous. The abstract of the evidence covers only 14 pages, of which half are devoted to abstracting the testimony on direct examination of the two experts of appellant. The

cross-examination of these two experts requires nearly 100 pages in the statement of facts, and is abstracted in about three lines. The testimony of respondent's experts is abstracted in about 45 lines of typewriting, and their reports are not abstracted at all. This, however, is a very important case, and the writer of the opinion felt it necessary to examine with care the written summaries in full of the experts on both sides, and much of the testimony of the parties as reported. It is doubtful whether an abstract could have been made which would have been satisfactory unless it had been prepared in almost the same volume as the statement of facts and exhibits. After the passage of the statute amending the law regarding abstracts of record in 1915 (Laws 1915, p. 302, § 6), this court held, in *Kranzusch v. Trustee Co.*, 93 Wash. 629, 161 Pac. 492, that insufficiency of the abstract of the evidence or of its index is ground not for the dismissal of the appeal, but only for a motion to amend the abstract upon terms. The motion is therefore denied.

[2, 3] Respondent moves also to strike the statement of facts and affirm the judgment, for the reason that no exceptions were taken to the findings of the court upon which the judgment was based, and the question presented by assignments of error relates only to questions of fact. This being an equity case, no findings of fact and conclusions of law were necessary, and it was a matter of discretion with the trial court whether he made any. He made none, and the memorandum decision cannot be considered as a finding of fact. This motion is also denied.

[4] While this is a rate case, it must be understood that the courts cannot make rates. Their power is limited to the determination of whether or not rates attempted to be exacted in a given case are reasonable rates. The case is analogous to an inquiry before the Interstate Commerce Commission, under the original act creating that body, whereby it was given no power to fix rates. Upon specific complaint it could determine whether a particular rate or schedule of rates was reasonable, and the courts could only pass upon the validity of the methods used by the Interstate Commerce Commission and the results reached.

[5] 1. The first complaint is that the court erred in making its judgment include delivery of the logs. Under the terms of the decree allowing a foreclosure of the liens and judgment for 75 cents per thousand feet board measure, to include "all services performed by the plaintiff in driving, booming, handling, and delivering said logs," it is obvious that the word "delivering" was meant only as delivering at appellant's boom, not delivering to some other point to be designated by respondent. At any rate such error, if error it was, may be obviated by modifying the decree to include the words "at its boom" after the word "delivering."

[6] 2. The second claim is that the court erred in refusing plaintiff's request to make and enter findings of fact and conclusions of law in the case, and in refusing to separately find or state the rates allowed by the court for booming and for driving. It was not error to refuse to make findings of fact and conclusions of law. It is well settled in this state that, in an equity case, this is a matter of discretion with the trial court. Nor was there any necessity for the court to separately find and state the rates allowed by the court for booming and for driving. While this is a rate case, and may be used as a precedent in the future by either party, it is not a case where the rates can be firmly established for the future. The appellant in its complaint aggregated its total charges and aggregated them in its liens, alleging in the complaint that the total reasonable charges were \$1.05 for both the driving and the booming operations. The court may have aggregated them merely for brevity, and it may have considered that the 30-cent rate was admitted by the affirmative pleadings of respondent and conceded by appellant for booming, and that the 45-cent rate was a reasonable rate for the driving. That not to exceed 30 cents for the booming was admitted by respondent and conceded by appellant, and therefore uncontrovertibly established as the maximum which could be charged for booming, is seen from preceding statements herein. But all of the evidence in the case was before the court, and whether or not the court permitted respondent to amend its pleading so as to allege that not to exceed 20 cents per thousand feet board measure was a reasonable rate for booming, since there is evidence in the case tending to justify that contention, the court may have found that 20 or 25 cents per thousand feet board measure was a reasonable rate for booming and the remainder for driving, considering the pleading amended to conform to the evidence. Its uncertainty however is not open to attack, because the combined rate or total, if segregated into portions, is in any event within the evidence and within the pleadings.

3. The third assignment of error is the one on which appellant mainly relies. The question discussed is whether the rate of 65 cents alleged and claimed for driving and 30 cents conceded and claimed for booming should have been sustained. It is evident that the court relied principally upon the evidence of the experts for respondent, and while the reports of appellant's experts are elaborate and go very largely into minutest details, there is considerable indication that appellant's experts carry inflated values into their methods of valuation, and exorbitant expenses and charges in their maintenance, reproducing, and operating charges. Some, in fact, are apparently duplicated. The very admirable report of Mr. Gray, showing his methods of arriving at his conclusions, is so precise, con-

cise, and simple in its premises, methods, and conclusions that any one, whether an expert or not, can quickly understand and appreciate them. He also displayed the utmost fairness toward the appellant and gave it considerable advantage in his premises and deductions, such as, that it was operating an expensive plant for a limited term of activities until the sources of business would be exhausted, and was not such a permanent plant as a railroad or a street railway. His estimates and his testimony throughout show the fairness of this consideration toward the appellant, and yet his conclusions would justify a finding of a materially lower rate at the present time than was apparently at least made by the court, for booming, and a slightly lower rate for driving. A complete analysis of the methods and figures of the experts would be interesting or important to no one but the parties. We have examined them and the trial court heard and saw the witnesses and found a total rate which seems from the evidence to be a very reasonable rate. We may say in passing that, under the evidence, a driving rate of 45 cents per thousand feet board measure and 30 cents per thousand feet board measure for booming and rafting the logs, if desirable to separate the rates, seem to be amply sufficient and reasonable rates. The appellant, however, never separated its driving and booming operations. It did, as shown by the manner of paying its superintendent, charge one-fourth of the salary of its superintendent per month to driving operations and three-fourths to booming. This was substantially the method adopted as approximately proper by expert Gray. It is shown also that from 1902 to 1908 a joint rate of 60 cents for driving, booming, and towing was in effect as fixed by appellant, and from February, 1909, to May, 1910, a driving rate of 35 cents and a booming rate of 40 cents. It is also shown incidentally that much business on the stream in question was lost the preceding year because of the rates charged by appellant; loggers operating on the stream not being willing to meet the rates. On other similar streams in that vicinity, where the conditions are much the same or even more difficult and the driving longer, lower rates are charged than were here allowed by the court.

[7] Much is said by counsel for appellant, and was said by their expert, as to the proper rating base. Appellant contends that the fair value of the depreciated value of the property devoted by the boom company to its booming and driving operations as adopted by respondent's expert was not a proper basis upon which to figure its rates, and contends that the cost of reproduction now was to be taken as the rating base, and that it was entitled to charge rates that would produce a fair return upon all its property at the cost if purchased new now. There is no

statute adopting the basis of valuation of such public utility. We are of the opinion that the proper rating base of any such public utility is the present fair cash value, which is its reproduction cost minus its depreciation, if any. *Knoxville v. Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371; *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; *Pioneer Tel. & Tel. Co. v. Westenhaver*, 29 Okl. 429, 118 Pac. 354, 38 L. R. A. (N. S.) 209.

Finding nothing in the record which would justify reversal, the decrees are affirmed.

ELLIS, C. J., and CHADWICK, MOUNT, and MORRIS, JJ., concur.

(100 Wash. 413)

LANHAM v. LONGMIRE et al. (No. 14529.)
(Supreme Court of Washington. Feb. 26, 1918.)

1. EXECUTION \Leftrightarrow 194(3) — LEVY — CLAIMS BY THIRD PERSONS.

While a bill of sale from a third person in the hands of one claiming property levied on under execution is prima facie evidence of title, it does not conclude the execution creditor from showing that the title was in fact in the execution debtor at the time of the levy.

2. EXECUTION \Leftrightarrow 181 — LEVY — CLAIMS BY THIRD PERSONS—TITLE.

A third person showing title to property at the time of a levy would not be defeated by reason of having sold the property under warranty between the date of levy and trial of his claim.

3. SALES \Leftrightarrow 199—TRANSFER OF TITLE—INTENTION.

When title passes in a sale of personalty is a question of intention, even though where quality, quantity, or price is to be determined a presumption exists that title does not pass until its determination.

4. SALES \Leftrightarrow 218½—DELIVERY—TITLE.

Where an automobile was delivered, evidence held to show that title passed although the price had not been agreed on.

Department 2. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Claim and delivery by J. D. Lanham against Robert Longmire and others to obtain property levied on while in the hands of a judgment debtor. Judgment for defendants, and plaintiff appeals. Affirmed.

Thomas J. Wayne, of Tacoma, for appellant. Ryan & Desmond, of Seattle, for respondents.

CHADWICK, J. On the 20th day of May, 1914, respondent Louisa C. Pletsch, as administratrix, recovered a judgment against one P. W. Smyley. In March, 1917, Smyley was engaged in the automobile business at Tacoma, Wash. Appellant owned an Overland automobile, which was turned over to Smyley on the 25th day of March. On the 28th day of March, the car was seized by the sheriff on an execution as the property of Smyley. On March 31st appellant began this action, and made affidavit (Rem. Code, § 573)

that he was the owner of the car and entitled to its immediate possession. A redelivery bond was filed, and the car returned to appellant. On the 31st day of March appellant and Smyley consummated a trade, Smyley allowing a credit of \$500 on a new Chandler car, which he turned over to appellant on that day. He thereafter used the Overland car as his own until it was sold to third parties. The court sitting without a jury held in favor of respondents, and appellant has appealed.

It is assigned as error that the court held that it was incumbent upon appellant to prove title at the time of trial, whereas the law is that he may recover if he proves title at the time of the levy.

[1] Appellant offered a bill of sale showing final payment by him to a third party for the Overland car, and this he contends makes proof of ownership that cannot be overcome by subsequent events. It may be granted that a derangement of title from a third party makes a prima facie case, but it does not conclude an execution creditor from showing that the title was in fact in the execution debtor at the time of the levy.

"However conclusive the terms of a written instrument may be between the parties thereto, they are not so conclusive between either of those parties and a third person in litigation where the terms of the written contract are only collaterally in issue." *Ransom v. Wickstrom & Co.*, 84 Wash. 419, 146 Pac. 1041, L. R. A. 1916A, 588.

Counsel differ as to the meaning of our statute (Rem. Code, § 573). The one insists that it means that the title, or right of possession, shall be proved as of the time of the levy; and the other, that it means that such proofs shall be as of the time of the trial. Respondents' reasoning is that, whereas under our claim and delivery statute the sheriff does not try the title, or right of possession, as at common law or under some statutes, the engagement to make good his title means to make it good in a court of competent jurisdiction, and at a time when the bond may be exonerated or enforced by a proper judgment.

[2] It may be granted that a claimant in an ordinary case may sustain himself by showing title, or a right of possession, at the time of the levy, for we can readily conceive that he may have sold his property to a third person, pending a trial, under a warranty of title. If this were made to appear, a defendant in claim and delivery could not set up the sale to defeat the right of the claimant.

[3, 4] But whatever the rule may be as to the time when the title, or right of possession, is to be established, we are satisfied that in so far as appellant is concerned Smyley had title at the time of levy. The books contain no hard and fast rule as to the time when title will pass as between vendor and

vendee. It is a question of intention; and, although the fact that something remains to be done, as to determine quality, quantity, or price, affords a presumption that title is not intended to pass until its performance, the presumption is not conclusive. 35 Cyc. 282. A delivery to the buyer is strong evidence of an intention to pass the title at once. *Id.* 286.

"This question as to the passing of title is fraught with difficulties, and not always easy of solution. An examination of the multitude of cases bearing upon this subject, with their infinite variety of facts, and at least apparent conflict of law, oftentimes tends to confuse rather than to enlighten the mind of the inquirer. It is best, therefore, to consider always, in cases of this kind, the general principles of the law, and then apply them as best we may to the facts of the case in hand." *Sherwood v. Walker*, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531.

Now in the case at bar, the property had been voluntarily delivered to Smyley. It was in his possession at the time the levy was made. This possession was not interrupted by the redelivery, but continued until the price, or an allowance for the old car, had been agreed upon. Appellant never had possession of the car, nor has he ever had any control over it, since he delivered it to Smyley. He admits he filed the affidavit in claim and delivery at the instance and request of Smyley, who is paying the costs of this action.

Taking the whole record with all its legitimate inferences, we are convinced that as between appellant and Smyley title passed on or before the 28th day of March, and that appellant has failed to make good his title even as of the day of the levy. This case rests more in fact than in law, and we are convinced that no jury would ever return a verdict contrary to the findings of the trial judge.

Affirmed.

ELLIS, C. J., and MOUNT and HOLCOMB, JJ., concur.

(100 Wash. 485)

STATE ex rel. GRAYS HARBOR LOGGING CO. et al. v. SUPERIOR COURT FOR GRAYS HARBOR 'COUNTY et al.
(No. 14356.)

(Supreme Court of Washington. March 2, 1918.)

1. EMINENT DOMAIN §264 — METHOD TO REVIEW RIGHT TO TAKE PROPERTY—CERTIORARI OR WRIT OF REVIEW.

The only method to review the question of the right to take property under the power of eminent domain—that is, the question of use and necessity—is by certiorari or writ of review.

2. EMINENT DOMAIN §264—DECREE OF APPROPRIATION—METHOD TO REVIEW—CERTIORARI OR WRIT OF REVIEW.

The only method to review a decree of appropriation of private property under power of eminent domain, if any, is by certiorari or

review, but the court cannot again review the adjudication of necessity of appropriation, which is also reviewable by certiorari or review, nor review that question at all if it was allowed to become final without review.

3. EMINENT DOMAIN \Leftrightarrow 262(1) — **ERROR FROM JUDGMENT AWARDING DAMAGES IN CONDEMNATION PROCEEDING—SCOPE OF REVIEW.**

On error from a judgment awarding damages in a condemnation proceeding, no question can be raised as to the right to condemnation, and the review will be confined solely to the propriety and justness of the amount of damages.

4. EMINENT DOMAIN \Leftrightarrow 264—**WRIT OF REVIEW AS TO ORDER OF NECESSITY—TIME FOR APPLICATION.**

Writ of review to review the judgment or order of necessity entered in an eminent domain case must be applied for within 30 days from date of entry of judgment.

5. EMINENT DOMAIN \Leftrightarrow 198(1)—**JUDGMENT OF NECESSITY TO CONDEMN—FINALITY.**

Without adjudication and judgment of necessity to condemn, no subsequent proceedings can be had in the condemnation proceedings, and judgment of necessity is final, subject only to review as provided by law.

6. EMINENT DOMAIN \Leftrightarrow 246(2)—**CONDEMNATION PROCEEDINGS—NATURE OF DECREE OF APPROPRIATION — BINDING FORCE ON APPROPRIATOR.**

A decree of appropriation in condemnation proceedings is merely a collective judgment, incorporating in it the decree or order of necessity and judgment on the award of the jury, and vests title in an appropriator on condition that he pay the owner or into court for his benefit the money awarded, and under it the appropriator can waive his right to appropriate and take the land, abandon it, and refuse to pay the money, in which case the owner of the land retains it and the previous orders and judgments are null.

Department 2. Application for writ of review and stay of proceedings by the State of Washington, on the relation of Grays Harbor Logging Company and W. R. Boeing, against the Superior Court for Grays Harbor County and W. A. Reynolds, Presiding Judge thereof, and Coats-Fordney Logging Company. Writ and stay denied.

Donworth & Todd, of Seattle, W. H. Abel, of Montesano, A. M. Abel, of Aberdeen, and R. E. Campbell, of Seattle, for relators. Bridges & Bruener, of Aberdeen, for respondents.

HOLCOMB, J. This is an original application for a writ of review and a stay of proceedings pending the final disposition of a condemnation action instituted under the provisions of the private way of necessity act (Laws 1913, p. 412, c. 133; Rem. Code, § 5857—1 et seq.) in the superior court of Grays Harbor county, wherein the Coats-Fordney Logging Company is the petitioner and the Grays Harbor Logging Company and W. E. Boeing are the respondents. The writ is argued for and the relief demanded on the ground that relators have no adequate remedy by appeal.

In the original cause proceedings were had

which resulted in an order of condemnation being entered in the cause on October 15, 1914. On October 22, 1914, a petition for a writ of review to review the order of condemnation was presented to this court by the respondents Grays Harbor Logging Company and Boeing, which came on regularly to be heard upon October 19, 1914. This court made and entered its decision which is reported in 82 Wash. 503, 144 Pac. 722. The decision there affirmed the decision of the superior court and upheld the order of condemnation or adjudication of the use and necessity for taking the property. A petition for rehearing being filed and denied, the judgment of this court was entered in accordance with its decision on March 1, 1915. On April 8, 1915, a petition in that cause for a writ of error to the Supreme Court of the United States was filed in this court, and on that date an order directing the issuance of a writ of error was entered. The cause proceeded to hearing before the Supreme Court of the United States, and upon March 6, 1917, that court made and entered its decision dismissing the cause for want of jurisdiction upon the ground that the order of necessity and public use to review which the writ of error had been issued was not a final judgment, but should be construed as being subject to the conditions that the proper compensation to be paid for the taking of the property described in the petition must be first ascertained and paid. In the opinion it was said:

"When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the Supreme Court (82 Wash. 503), as laying down the law of the case, this court will not be thus bound." Grays Harbor Logging Co. v. Coats-Fordney Logging Co., 243 U. S. 251, 37 Sup. Ct. 295, 61 L. Ed. 702.

Thereafter upon July 2, 1917, the cause having been remitted to the superior court of Grays Harbor county, a trial was had before the court and jury upon the question of the damages to be awarded and paid the respondents, the relators here, for the taking and damaging of their lands as described in the petition for condemnation. The jury awarded damages, and judgment was entered thereon in favor of relators in the sum of \$2,500 as the value of the lands taken and damages to the remainder. On August 21, 1917, the court made and entered its decree of appropriation in the cause. The relators here have appealed from the judgment of award of the lower court, and have also brought this proceeding for a writ of review, frankly stating that they are seeking, and believe they are entitled to, a review of all three of the judgments heretofore entered in the cause, in order to obtain a final determination so that they can have the question of

the constitutionality of the private way of necessity act passed upon by the Supreme Court of the United States upon a final judgment.

The act under which the condemnation proceeding was instituted provides that the procedure shall be the same as that provided for the condemnation of private property by railroad companies. Rem. Code, § 5857—2. The method of procedure in condemnation actions by railroad companies is found in section 921 et seq., Rem. Code. In considering the provisions of the last act this court, in the case of Chicago, M. & P. S. R. Co. v. Slosser, 82 Wash. 467, 144 Pac. 706, said:

"The statute referred to seemingly contemplates the entry, during the course of the proceedings, of three separate and distinct judgments: First (by Rem. & Bal. Code, § 925; P. C. 171, § 176), a judgment finding that the contemplated use for which the property sought to be appropriated is really a public use, and the necessity for its taking for that use; second (by Id. § 926; P. C. 171, § 177), a judgment fixing the amount of the award that is made to the owner of the property appropriated because of the appropriation, both for the property actually taken and for other property damaged thereby; and, third (by Id. § 927; P. C. 171, § 178), * * * a judgment or decree of appropriation of the land, real estate, premises, right of way, or other property sought to be appropriated, thereby vesting the legal title to the same in the corporation seeking to appropriate such land, real estate, premises, right of way, or other property for corporate purposes."

An appeal is granted by the statute only from the second of the judgments above referred to, namely, that awarding the damages. Rem. Code, § 931; Chicago, M. & P. S. R. Co. v. Slosser, supra; North Coast R. Co. v. Gentry, 58 Wash. 80, 107 Pac. 1059.

[1] The only method of reviewing the question of the right to take property under the power of eminent domain—that is, the question of use and necessity—is by certiorari or writ of review. Seattle M. R. Co. v. B. B. & E. R. Co., 29 Wash. 491, 69 Pac. 1107, 92 Am. St. Rep. 907; Whatcom County v. Yellowkanim, 48 Wash. 90, 92 Pac. 892; State ex rel. Pagett v. Superior Court, 46 Wash. 35, 89 Pac. 178; State ex rel. Alexander v. Superior Court, 42 Wash. 684, 85 Pac. 673; State ex rel. Smith v. Superior Court, 30 Wash. 219, 70 Pac. 484.

[2] The only method of reviewing the decree of appropriation, the last of the three judgments above mentioned, if at all, is by certiorari or review. Chicago, M. & P. S. R. Co. v. Slosser, supra; Olympia L. & P. Co. v. Tumwater P. Co., 55 Wash. 392, 104 Pac. 778; State ex rel. Davis v. Superior Court, 82 Wash. 31, 143 Pac. 168. Even then we cannot again review the adjudication of necessity, nor review that question at all if it was allowed to become final without review thereof.

[3] We have held that, upon an error from a judgment awarding damages in a condemnation proceeding, no question can be raised as to the right to condemn, but that the re-

view will be confined solely to the propriety and justness of the amount of damages. Fruitland Irrigation Co. v. Smith, 54 Wash. 185, 102 Pac. 1031; North Coast R. R. Co. v. Gentry, supra; Callapel Diking Dist. v. McLeish, 63 Wash. 331, 115 Pac. 508; Seattle P. A. & L. C. R. v. Land, 81 Wash. 206, 142 Pac. 680; State ex rel. Davis v. Superior Court, supra.

The only question then which relators may present to this court upon appeal from the second judgment is that of the adequacy of the damages awarded, and for this reason they contend that, having no appeal from the last judgment, the decree of appropriation vesting the title in the appropriator, they have the right to a writ of review therefrom which would review the original order or judgment of necessity.

[4] We have uniformly held that the writ of review for the purpose of reviewing the judgment or order of necessity entered in an eminent domain case must be applied for within 30 days from the date of the entry of the judgment. State ex rel. Lowary v. Superior Court, 41 Wash. 450, 83 Pac. 726; State ex rel. Alexander v. Superior Court, 42 Wash. 684, 85 Pac. 673; State ex rel. Tumwater P., etc., Co. v. Superior Court, 56 Wash. 287, 105 Pac. 815.

[5] The judgment of necessity was entered herein October 15, 1914, and within 30 days thereafter these same relators petitioned this court for a writ of review to review the identical judgment of necessity which it now seeks to have the court again review. At that time this court fully reviewed every question involved in the present application, including the constitutional question, and upheld the judgment of the lower court and the constitutionality of the private way of necessity statute. To issue a writ now would reverse all previous decisions of this court and establish a precedent which would require this court to issue the writ in all subsequent condemnation cases after the decree of appropriation had been made, and again review the judgment of necessity. Without the adjudication and judgment of necessity no subsequent proceedings can be had. As to that, under our system, it is final subject only to review as provided by law.

[6] It seems to us that the Supreme Court of the United States overlooked our decisions holding that the judgment or order of necessity under our statutes is a final judgment. And it has always been held by that court that constructions of local statutes and of judicial procedure by the court of last resort of a state will be followed by that court. The decree of appropriation is nothing more than a collective judgment, incorporating in it the decree or order of necessity and judgment on the award of the jury. The decree of appropriation vests title in an appropriator upon the condition that the appropriator pays to the owner or into court for his benefit the money awarded, and there is nothing to

bind or compel the appropriator so to do. He can even then waive his right to appropriate and take the land, abandon it, and refuse to pay the money; in which case the owner of the land would retain his land and the previous judgments and orders would be null.

For these reasons the writ of review and stay of proceedings are denied.

ELLIS, C. J., and CHADWICK, MOUNT, and MORRIS, JJ., concur.

(100 Wash. 491)

**COATS-FORDNEY LOGGING CO. v.
GRAYS HARBOR LOGGING CO.**
et al. (No. 14565.)

(Supreme Court of Washington. March 2, 1918.)

1. EMINENT DOMAIN §262(1) — PROCEEDINGS—APPEAL FROM AWARD—QUESTION PRESENTED.

An appeal from an award of damages in a condemnation case presents to the Supreme Court for consideration only the propriety and justice of the award.

2. APPEAL AND ERROR §816—CONSOLIDATION OF PROCEEDINGS FOR REVIEW—PRESENTATION OF DIFFERENT QUESTIONS.

Where an appeal and an application for writ of review present entirely different questions, motion to consolidate them will be denied.

Department 2. Appeal from Superior Court, Grays Harbor County; W. A. Reynolds, Judge.

Proceedings to condemn a private way by the Coats-Fordney Logging Company against the Grays Harbor Logging Company and W. E. Boeing. From judgment of damages, defendants appeal. Affirmed.

Donworth & Todd, of Seattle, W. H. Abel, of Montesano, and A. M. Abel, of Aberdeen, for appellants. Bridges & Bruener, of Aberdeen, for respondent.

MOUNT, J. This appeal is from a judgment of \$2,500 damages for the taking of an alleged private way of necessity through the lands of the appellants.

[1] The only error assigned is that the statute upon which the proceeding is based is in violation of the Fourteenth Amendment to the federal Constitution. That question was determined adversely to the contention of the appellants in State ex rel. Grays Harbor Logging Co. v. Superior Court, 82 Wash. 503, 144 Pac. 722. No new argument is presented upon this appeal. This court has uniformly held that an appeal from an award of damages in a condemnation case presents to this court for consideration only the propriety and justice of the award. State ex rel. McCormick v. Superior Court, 43 Wash. 91, 86 Pac. 205; State ex rel. Pagett v. Superior Court, 46 Wash. 35, 89 Pac. 178; Whatcom County v. Yellowkanim, 48 Wash. 90, 92 Pac. 892; Calispel Diking District v.

McLeish, 63 Wash. 331, 115 Pac. 508. No claim is made upon this appeal that the damages awarded were not sufficient, or that the trial court committed error upon the trial of that question. There is therefore nothing for us to consider, unless we review our decision in State ex rel. Grays Harbor Logging Co. v. Superior Court, supra. Since the question there considered cannot be raised upon this appeal, it follows that the judgment must be affirmed.

[2] We are asked by the appellants to consolidate this appeal with the application for a writ of review in State ex rel. Grays Harbor Co. v. Superior Court, 171 Pac. 238. These cases present entirely different questions. For that reason the motion is denied.

ELLIS, C. J., and HOLCOMB and CHADWICK, JJ., concur.

(100 Wash. 417)

STATE v. CLAY. (No. 14603.)

(Supreme Court of Washington. Feb. 26, 1918.)

1. CRIMINAL LAW §576(2) — TRIAL — DISMISSAL FOR DELAY.

Under Rem. Code 1915, § 2312, providing that, if a defendant whose trial has not been postponed upon his own application be not brought to trial within 60 days after the indictment is found or the information filed, the court shall order it dismissed unless good cause to the contrary is shown, good cause may be shown for the refusal to dismiss a prosecution other than the postponement of the trial on defendant's application.

2. CRIMINAL LAW §1144(7)—APPEAL—PRESUMPTIONS.

Where the record contains no statement of facts indicating what showing was made by either party on a motion to dismiss for failure to bring defendant to trial within 60 days, and the order denying the motion does not show upon what facts it rests, it must be assumed that good cause was shown justifying the refusal to dismiss.

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Lawrence Clay was convicted of keeping intoxicating liquor with intent to sell it, and he appeals. Affirmed.

Howard O. Durk, of Seattle, for appellant. Alfred H. Lundin, Everett C. Ellis, and Joseph A. Barto, all of Seattle, for the State.

PARKER, J. The defendant, Clay, was charged by information filed in the superior court for King county with the offense of keeping intoxicating liquor with intent to sell the same. He has appealed from a judgment of conviction rendered against him in that court following his trial before the court, a jury trial being waived.

It is first contended in appellant's behalf that the trial court erred in denying his motion to dismiss the case because it was not brought to trial within 60 days following the filing of the information. The information

was filed on May 29, 1917, the motion to dismiss was filed on August 3, 1917, the motion was heard and denied the same day, and the trial was had on September 5, 1917. Counsel for appellant rely upon the provisions of section 2312, Rem. Code, which reads:

"If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty days after the indictment is found or the information filed, the court shall order it to be dismissed, unless good cause to the contrary is shown."

[1, 2] It is plain from the concluding words of this section that there may be good cause shown for the court's refusal to dismiss a prosecution after the expiration of the prescribed 60-day period, aside from the postponement of the trial on application of the defendant. It would seem to follow as a matter of course that we must presume good cause was shown to the court for its refusal to dismiss this case, unless there are facts properly appearing in the record brought here affirmatively showing that the court erred in refusing to dismiss the case. We do not have in this record any statement of facts telling us what showing of facts was made to the trial court in behalf of appellant or the state upon which the court rested its order denying this motion to dismiss, nor does the order refusing dismissal tell us upon what facts it was by the court rested. It is true there are among the papers in the clerk's transcript some copies of affidavits pro and con stating facts bearing upon the question of appellant's right to a dismissal, but we cannot know that they were presented to or considered by the court with reference to that question, nor can we know but that other evidence of relevant facts was presented to the court touching the question of dismissal. Counsel for the state insists that for this reason we cannot consider the alleged error of the court in refusing to dismiss the case, and that therefore we must proceed upon the presumption that there was good cause shown, and that the court did not err in denying the motion to dismiss. We are quite clear that this is the only course we can pursue in the light of this record. *International Dev. Co. v. Sanger*, 75 Wash. 546, 135 Pac. 28; *Beall & Co. v. O'Connor*, 78 Wash. 651, 139 Pac. 605; *Mattson v. Eureka Lbr. Co.*, 79 Wash. 266, 140 Pac. 377; *Thurman v. Kildall*, 80 Wash. 283, 141 Pac. 691.

It is further contended that the evidence fails to support the judgment of conviction. We have read all the evidence with care, and are quite convinced that it fully warrants the conclusion reached by the trial court upon the merits.

The judgment is affirmed.

ELLIS, C. J., and FULLERTON, MAIN, and WEBSTER, JJ., concur.

(100 Wash. 432)

LOCKE v. PUGET SOUND INTERNATIONAL RY. & POWER CO. et al.
(No. 14055.)

(Supreme Court of Washington. March 2, 1918.)

STREET RAILROADS & 103(2) — COLLISION WITH TRICYCLE—LAST CLEAR CHANCE.

As soon as defendant's motorman saw that plaintiff on a tricycle was continuing his course to cross the track in front of the car, he was under duty to care for his safety, and seeing that he was not heeding the warning by sounding of the car gong, he was put on notice that plaintiff was not in full possession of his faculties, and, if having time, was under duty to protect him by other means; failing in observance of which the doctrine of the last clear chance applies, though plaintiff's negligence in not looking continued up to the time of the accident.

Department 2. Appeal from Superior Court, Snohomish County; Everett Smith, Judge.

Action by D. W. Locke against the Puget Sound International Railway & Power Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Cooley, Horan & Mulvihill, of Everett, for appellants. Black & Black and E. C. Dailey, all of Everett, for respondent.

CHADWICK, J. At about 4 o'clock on the afternoon of the 27th day of March, 1915, respondent was struck by a car operated by appellant on the streets of Everett. The accident occurred on Colby avenue, a principal thoroughfare running north and south. Colby avenue intersects Hewitt avenue, the principal business street in the city. The Colby avenue cars have their southern terminus at Hewitt avenue. The first street north of Hewitt avenue is California street. From California street north to the place of the accident the grade is practically level. On the day mentioned, respondent, who is lame and quite hard of hearing, had gone to the office of Doctor Hathaway on the west side of Colby avenue. He left his vehicle, a tricycle, in front of the doctor's residence. After his errand had been performed, he mounted his tricycle, and, after looking to the south and seeing no car approaching and no vehicles other than some automobiles, he started diagonally across Colby avenue, intending to put himself on the east side of the car tracks, or on the right-hand side of the street.

The jury could have found that the car started from Hewitt avenue north on Colby street at about the time respondent left the curb in front of the doctor's office. The motorman testified that he saw respondent leave the curb in front of the doctor's office when he started the car at California street. The street car was stopped at California street to take on a passenger. The motorman sounded his gong as he started the car. As the car moved north he appreciated the

fact that respondent was intent upon crossing the track. He sounded his gong almost continuously up to the time respondent was struck. The accident occurred approximately 165 feet north of California street. Respondent's tricycle was struck by the left-hand corner of the car. The car was stopped by setting the brakes hard in a distance probably equal to, or little more than, its length, although the jury would have been justified in finding a greater distance.

The assignments of error all go to the legal sufficiency of the evidence to sustain the verdict, it being appellant's contention that respondent was so regardless of his own safety that he is to be charged with contributory negligence as a matter of law, and although appellant may have been negligent, the negligence of respondent was concurring and continuing up to the time of the accident. Appellant admits that respondent suffered from a certain degree of deafness, but contends that there is no evidence that the motorman knew of his infirmity. The position of appellant is that there was no duty on the part of the motorman to take care of respondent's safety until respondent actually came into the zone of danger, which is fixed as the car track, or so near the car track that the car would strike any object in its way. This contention is based upon the assumption that there was a primary duty on the part of the respondent, knowing of the existence of the car track and the possibility of cars approaching at any time, to take account of his own safety to the extent of looking before putting himself in a position where he might be injured.

The facts in this case are such that appellant cannot avail himself of the principles relied on. The duty of the motorman began at the very moment that he saw respondent moving into a situation of peril; that moment is fixed by his own testimony when he was starting the car at California street; or, in other words, the duty of the motorman began at the time he began to perform it. He sounded his gong from the time he saw respondent until the car struck him. Whether the mere ringing of the gong, which it is conceded did not attract respondent's attention, was a sufficient performance of duty under all the facts was a question for the jury.

In *Beeman v. Puget Sound Traction, L. & P. Co.*, 79 Wash. 137, 139 Pac. 1087, speaking of the duty of a motorman on a street car—and it will be borne in mind that the duties of the traveler and the motorman are reciprocal—we quoted from *Johnson v. Washington Water Power Co.*, 73 Wash. 616, 132 Pac. 392:

"A motorman has the right to assume that a person on the street will exercise such care to avoid injury, and he may lawfully act on that assumption, until the conduct of the person warns him to the contrary."

But the continued movement of a person toward a place of danger after a warning sound is notice that he is unaware of his peril, and is enough to break the reciprocal balance of duty, and, if it can be said that he had the time to do so, puts upon the motorman the positive duty of avoiding an accident.

In *Budman v. Seattle Elec. Co.*, 61 Wash. 281, 112 Pac. 356, the motorman saw the plaintiff approaching the train when distant about two car lengths. He let the car drift and rang his gong in time to warn plaintiff. He supposed plaintiff knew the car was coming. The evidence did not show that the plaintiff actually knew of the existence of the car. A verdict of the jury that this did not meet the measure of the company's duty was sustained. So in *Tecker v. Seattle, Renton & Southern R. Co.*, 60 Wash. 570, 111 Pac. 791, Ann. Cas. 1912B, 842:

"The motorman testified that, when he first observed the boy, he was about 15 feet from the track, and in a place of safety, 'if he had stopped'; that he kept ringing the gong, but that the boy 'kept going right along,' and that the boy 'was about 15 feet of the car, running across through the street over the crossing.'"

We said:

"If, by the exercise of proper vigilance, the motorman could have seen the child in time to stop the car and avoid striking him, it was his duty to do so; and if, when he saw the boy, his conduct indicated that he was intending to cross the track, and that he had not seen the car or heard the signals, if any were given, it was the duty of the motorman to use every effort to stop the car."

In each of these cases, the court noticed that the collateral facts of age and mental alertness were proper items to be considered by the jury. In the case at bar, respondent's infirmity was a probative fact when considered in the light of all the evidence. We think the case falls naturally within the doctrine of the last clear chance, notwithstanding counsel's contention "that if the negligence of the appellant was merely concurrent with that of respondent, and that respondent's negligence continued up to the time of the accident and was concurrent with that of the appellant, the doctrine of last clear chance has no application."

Much of the confusion attending the doctrine of the last clear chance has come from a seeming belief on the part of many judges and text-writers that it is in itself a principle of law and subject to arbitrary definition, whereas it is no more than a judicial exception to established principles, resting in fact and not in law. The chance to avoid an injury is a relative question to be resolved solely by reference to the facts of each particular case. If the one party knows of the peril of the other, although brought about by that other's negligence, in time to avoid injuring him, he is at once put to a degree of care commensurate with the present situation of the parties.

The doctrine of last clear chance does not abrogate any of the rules of proximate cause; it rather affirms them. It is a rule of convenience as well as necessity, to which the courts have resorted in all proper cases where contributory negligence is pleaded as a defense, and a jury is called upon to find the proximate cause. The rule as we understand it to be is laid down in *Nellis on Street Railways*.

"Contributory negligence of a party injured will not defeat his action, if the defendant or its servants might by reasonable care and prudence have discovered his peril in time to save him, and thus have avoided the consequences of the injured party's negligence. In such a case the plaintiff's alleged contributory negligence could not be said to be the direct and proximate cause of the accident, but the defendant's negligence would be the proximate cause and would thus render it liable." *Nellis on Street Railways* (2d Ed.) § 462.

The argument of counsel is not unlike that made in the case of *Mosso v. Stanton Company*, 75 Wash. 220, 134 Pac. 941, L. R. A. 1916A, 943, where it is said:

"The appellant cites certain authorities, most of them railroad or street car cases, and some of them cases arising on injuries to trespassers on railroad tracks, to sustain the contention that in no case can a plaintiff recover where his negligence continues up to the time of the injury. The authorities cited hardly bear that construction. * * * At any rate, this court has held, in accordance with many courts and with what we conceive to be the more logical as well as the more humane rule, that where the peril of a traveler on the highway is actually discovered and should be appreciated by the operator of a street car, or other agency of danger, there arises a new duty to exercise all reasonable care to avoid injury, and the failure to exercise such care, if it results in injury, will render a defendant liable, notwithstanding the continuance of the plaintiff's negligence up to the instant of the injury. *O'Brien v. Washington Water Power Co.*, 71 Wash. 688, 129 Pac. 391; *Dyerson v. Union Pac. R. Co.*, 74 Kan. 523, 87 Pac. 680, 7 L. R. A. (N. S.) 132 [11 Ann. Cas. 207]; *Bruggeman v. Illinois Cent. R. Co.*, 147 Iowa, 187, 123 N. W. 1007 [Ann. Cas. 1912B, 876]."

A fair statement of the law is to be found in *Gallagher v. Manchester Street Railway*, 70 N. H. 212, 47 Atl. 610:

"If due care on the part of either at the time of the injury would prevent it, the antecedent negligence of one or both parties is immaterial, except it may be as one of the circumstances by which the requisite measure of care is to be determined."

In that case the motorman "might have stopped the car sooner than he did."

Bedell v. Detroit, etc., Railway, 131 Mich. 668, 92 N. W. 349, is a case somewhat similar to the case at bar. The plaintiff was afflicted with deafness as is respondent. The court said:

"The only question which can fairly be made upon this record is whether the facts justified the submission of the question to the jury in the form adopted by the circuit judge. It is contended by the defendant that the evidence shows that the decedent was signaled by his companions, and warned of the danger. This is doubtless true, but it is also apparent that the decedent did not understand the signals

given; and there was testimony from which the jury might have inferred that the motorman observed that these signals were not being understood or observed by decedent. The defendant also contends that the case is one like *Fritz v. Railway Company*, 105 Mich. 50 (62 N. W. 1007), namely, an attempt to cross the track, unexpected and sudden. But the present case differs from that in this: That for a considerable distance the decedent, while pursuing his way on his bicycle, ahead of and in the same direction in which the electric car was going, was near enough to the track to be in a place of danger; and this within the observation of the motorman. There was testimony, therefore, bringing the case within the rule of the cases first above cited, and, as the only error relied upon is the refusal of the circuit judge to direct a verdict for the defendant, the judgment will be affirmed."

In *McAndrews v. St. Louis & Sub. R. Co.*, 83 Mo. App. 233, the court held:

"The only negligence attributable to plaintiff is that he endeavored to pass wagons on a public street which obstructed his way, and that in the necessary use of the part of the street covered by the tracks of defendant, he went upon the same without looking or listening for the approach of trains, and that he continued to use this part of the street without looking for the approach of a train from his rear up to the time of the accident. Conceding that this was negligence on the part of the plaintiff, yet the testimony fairly supports the inference that he went upon the track of defendant at such a distance ahead of the car in his rear that the motorman in charge of the car, by ordinary care, could have stopped the car, after he had discovered the plaintiff in a position of peril. This evidence presented an issue as to the proximate cause of the injury to plaintiff and the damage to his property, which he was entitled to have the jury pass upon."

Fluhart v. Seattle Electric Co., 65 Wash. 291, 118 Pac. 51, *Heilesen v. Seattle Electric Company*, 56 Wash. 278, 105 Pac. 458, and *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, 22 L. R. A. (N. S.) 471, are readily distinguished upon the facts. In none of these cases was the peril of the pedestrian apparent for an appreciable time before the accident, nor did it continue long enough after discovery to put the driver upon either actual or implied notice of the danger in time to have avoided the injury. Under a somewhat similar state of facts, we held that these cases would not control. *Ludwigs v. Dumas*, 72 Wash. 68, 129 Pac. 903:

"He was in plain view of the defendant, and apparently crossing the course which defendant desired to take at that time. Whether he should have seen the defendant and avoided the automobile, or whether the defendant should have seen the plaintiff and avoided him, were, we think, questions for the jury."

Scharf v. Spokane & Inland Empire R. Co., 92 Wash. 561, 159 Pac. 797, is also relied upon. That case was properly decided upon the theory that the one injured was a mere licensee, or trespasser, to whom the defendant company owed no duty other than to avoid a wanton or willful injury. It will be observed that the opinion of the court does not rest entirely upon the continuing negligence of the decedent, but the knowledge

of the respondent is considered as of equal weight.

Our attention is called to the case of *Bullis v. Ball*, 98 Wash. 342, 167 Pac. 942. That case has no bearing upon the case at bar. The court there held that the doctrine of the last clear chance was not applicable to the facts; but, if it were so, the court had instructed upon the only phase of the doctrine that could have even a remote bearing, and inasmuch as appellant had not excepted to the instruction of the court, he was in no position to urge it as error. In the last analysis the case of *Bullis v. Ball* was little more than a race for the crossing, a condition out of which no right of action would possibly arise.

In the instant case respondent was in the rightful use of the street. His persistence in crossing after timely warning had been given was enough to put the motorman on notice that he was not in full possession of his faculties of seeing and hearing. When the motorman saw respondent and rang the gong, he had the right to assume that respondent would look out for his own safety to the extent of stopping, or clearing the track if upon it. But when respondent did not heed the warning, the motorman, having time, was in duty bound to protect him.

In *Johnson v. Washington Water Power Co.*, 73 Wash. 616, 132 Pac. 392, the injured party was aware of the approaching car. His duty was equal, if not greater, than that of the motorman, for knowing the situation, he could have kept his way or turned off the track and avoided the accident. His negligence was clearly the proximate cause.

It is charged that the affirmance of this case will indorse the doctrine of comparative negligence—a doctrine which this court has persistently rejected. There are cases somewhat similar where a recovery has been denied under the doctrine of comparative negligence, but this court, whether for sound or unsound reasons, has rejected these and like cases. In the *Mosso Case* the court assumed to divide the doctrine of the last clear chance, the first element being—

“* * * assuming that a traveler has negligently placed himself in a dangerous situation upon the highway, then, as we have seen, whenever the person in control of such agency actually sees the traveler's situation and should appreciate his danger, the last chance rule applies, without regard to the continuing negligence of the traveler concurring with that of the operator up to the very instant of the injury.”

If this be an adoption of the doctrine of comparative negligence, and it be vicious, the court has erred in declaring what it has conceived to be “the more logical as well as the more humane rule,” and a majority of the judges have sustained it against repeated assaults.

Whether appellants had notice of the peril of respondent, and had time to avoid injur-

ing him notwithstanding his contributory negligence, was a question for the jury.

The judgment is affirmed.

ELLIS, C. J., and MOUNT, MORRIS, and HOLCOMB, JJ., concur.

(100 Wash. 397)

LOCKE v. GREENE et ux.

(Supreme Court of Washington. Feb. 26, 1918.)

1. MUNICIPAL CORPORATIONS — CROSSING ACCIDENTS—INSTRUCTIONS.

In action for death of minor when struck by automobile on street crossing, where plaintiff relied on negligent driving after discovery or the duty to discover the minor's ignorance of the approaching automobile, and defendant relied on the theory that the minor carelessly stepped in front of the automobile when there was no time to avoid injury, an instruction on the last clear chance doctrine was not erroneous.

2. MUNICIPAL CORPORATIONS — STREETS—RIGHT TO USE.

A pedestrian has the same right to use the street as a vehicle, especially at or near crossings, though he cannot obstruct traffic.

3. TRIAL — INSTRUCTIONS — DEFINITION OF “CONTRIBUTORY NEGLIGENCE.”

In action for death of minor when struck by automobile at street crossing, instruction that there could be no recovery if deceased was not using his faculties or powers of observation in a reasonable way, having in consideration his age and experience, and that if he had been using them in such manner the accident would not have happened, or that his failure to use them contributed in any material degree to the accident, and that he did not look for the automobile when by so looking he could have observed its approach and avoided collision by the exercise of reason, sufficiently defined contributory negligence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contributory Negligence.]

4. MUNICIPAL CORPORATIONS — CROSSING ACCIDENTS — QUESTIONS FOR JURY.

Evidence held to present a question for the jury whether the deceased boy ran in front of defendant's automobile.

Department 2. Appeal from Superior Court, Spokane County; Hugo E. Oswald, Judge.

Action by W. J. Locke against Ronald A. Greene and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

McCarthy & Edge, of Spokane, for appellants. Glen E. Cunningham and R. J. Danson, both of Spokane, for respondent.

MOUNT, J. This action was brought by the respondent to recover damages for the death of his son, who was run over and killed by an automobile driven by defendant R. A. Greene.

In the complaint plaintiff alleged that the defendant Greene approached the deceased boy on a public street at an unlawful rate of speed, and, without warning, sounding his horn, or bringing his automobile under con-

trol, attempted to drive between the deceased and another boy, when his automobile struck plaintiff's son Tyree Locke, and killed him. For answer to the complaint the defendants denied any negligence, and alleged that the boy who met his death was guilty of contributory negligence because he stepped in front of defendants' car when there was no time for the defendants to avoid the collision. Upon these issues the case was tried to a jury, and resulted in a verdict and judgment in favor of the plaintiff. The defendants have appealed.

The facts are, in substance, as follows: On the morning of the 4th day of July, 1916, the respondent's son, Tyree Locke, and another boy were shooting firecrackers in the city of Spokane. They were upon Monroe street, a street which runs in a northerly and southerly direction. Eleventh avenue intersects this street from the west. A little south of the intersection of Eleventh avenue, Norman avenue enters from the east upon Monroe street. The two boys, on that morning, came from Eleventh avenue onto Monroe street, and proceeded a short distance to the north. One of the boys was standing about the middle of Monroe street, and near the rails of a street car line which was upon that street. Tyree Locke was on the east side of Monroe street, a little to the east of the other boy. He was somewhere near the curb. The boys were looking to the westward. A street car, going south, passed them while they were in this position. The appellant Greene was driving his automobile from the south to the north on Monroe street. He saw these boys for a distance of 300 feet before he came to them. He met the street car a short distance south of where the boys were. He testifies that he was traveling 12 or 15 miles per hour on a slight down grade; that there was room enough to pass between the boys, and he undertook to do so; and that Tyree Locke stepped in front of his automobile, and was struck by the front right-hand fender, and the automobile ran over him and killed him.

The theory of the respondent at the trial was that the boys were standing near together, that they did not see the automobile, and that it came down upon them without warning, and ran over Tyree Locke and killed him. The theory of the defense was, as above indicated, that the appellant was driving his car at a moderate rate of speed, that he undertook to go between the two boys, where there appeared to be plenty of room, and that the deceased boy stepped in front of appellants' car and was, for that reason, killed.

The court instructed the jury, among other things, as follows:

"You are instructed that if you find that Tyree Locke was not using his faculties or powers of observation in a reasonable way, having in consideration his age and experience, and that if he had been using the same in such manner the accident would not have happened, or

that his failure to use the same contributed in any material degree to the happening of the accident, and these things you believe by a fair preponderance of the evidence, then his father cannot recover from either of the defendants, *unless you further believe from the evidence that, at the same time, said Tyree Locke was unconscious of the approach of the defendant's automobile, and the defendant driver thereof saw said Tyree Locke and observed his state of mind and discovered his peril in time to have avoided the collision with him and failed in this duty.*"

The court further gave the following instruction:

"If you believe from the evidence that Tyree Locke collided with the automobile of the defendants, that when he came into collision with it he was in that part of the east side of Monroe street in which automobiles are required to travel, and that he did not, either before entering upon or when in that portion of the street, look for the approach of automobiles from the south, and that by so looking he could by the exercise of reasonable care have observed the approach of the automobile, and could, by the exercise of reasonable care have avoided coming in collision therewith, then he would be guilty of contributory negligence, and your verdict should be for the defendant, *unless you further believe from the evidence that at said time said Tyree Locke was unconscious of the approach of the defendant's automobile; that the defendant driver thereof saw said Tyree Locke and observed his state of mind and discovered his peril in time to have avoided the collision with him and failed in his duty.*"

[1] It is strenuously argued by the appellant that the italicized portions of these two instructions are erroneous, because they seek to apply the doctrine of last clear chance to the facts in the case. As we have indicated above, the respondent tried the case upon the theory that the appellants saw the boys upon the street and should have known, from the manner of the boys, that they did not see the approach of the appellants' car; that the appellants, driving at an unreasonable rate of speed, carelessly ran the boy down and killed him; while the appellants' theory was that the boy carelessly stepped in front of the approaching automobile when there was no time to avoid the injury, and met his death thereby. These instructions, we think, present both theories of the case, and under the rule which this court has followed in a number of cases the italicized portions of these instructions was not error. In the case of *Mosso v. Stanton Co.*, 75 Wash. 220, at page 228, 134 Pac. 941, at page 945 [L. R. A. 1916A, 943], we said:

"The courts are wide of an agreement as to the extent of the last chance doctrine as applied to the operation of trains, street cars, automobiles, and the like. But what we conceive to be the sounder view is this: Assuming that a traveler has negligently placed himself in a dangerous situation upon the highway, then, as we have seen, whenever the person in control of such agency actually sees the traveler's situation and should appreciate his danger, the last chance rule applies, without regard to the continuing negligence of the traveler concurring with that of the operator up to the very instant of the injury." *Herrick v. Washington Water Power Co.*, 75 Wash. 149, 134 Pac. 934, 48 L. R. A. (N. S.) 640; *Underhill v. Stevenson*, 170 Pac. 354.

It follows that the italicized portions of these instructions were not erroneous.

[2] At the beginning of one of the instructions the court said to the jury:

"You are instructed that Tyree Locke had the same right to use the public street of the city that the defendant had."

It is argued that this was error. We think there can be no doubt that a pedestrian has the same right to the use of a public street as a vehicle, especially at or near crossings. These boys, at the time of the accident, came upon Monroe street at a street crossing. They were a little to the north of that crossing, and, while it was their privilege to be upon the street, they, of course, would not be authorized to obstruct traffic any more than a vehicle; but certainly it cannot be said that a pedestrian has less right to be upon a public street than a vehicle. We think there is no error in this sentence, and, when used with reference to the other instructions, the court meant that a pedestrian, when upon a street, had the same right as a vehicle.

Appellants next argue that the court erred in refusing to give requested instructions numbered 2, 3, 6, 7, and 8; but we are satisfied that the gist of these instructions was given in the part not italicized of those above considered.

[3] It is argued that the court nowhere defined contributory negligence; but it is apparent that the two instructions above quoted contained a definition of contributory negligence, and told the jury, in substance, that, if there was failure on the part of the deceased to look for the approach of automobiles from the south, or failure to use reasonable care, and thereby have avoided the accident, there could be no recovery. Of course this meant that there could be no recovery if the appellant was not guilty of negligence which primarily caused the collision. The instructions given by the court in this case appear to have been carefully prepared. They state the law of the case clearly and concisely, and we are satisfied that there was no error in the instructions.

[4] It is lastly argued by the appellants that the court erred in refusing to grant a nonsuit; but it is apparent from the statement of the case which we have hereinbefore made that the question of the negligence of the appellants was one for the jury. If the appellant, as evidence offered by the respondent tends to show, was driving his automobile at an unreasonable rate of speed past the street car, and upon the boys who were standing in the street, unconscious of his approach, there can be no doubt of liability. If the deceased boy stepped immediately in front of the automobile of the appellants when there was no time to avoid the accident, of course there could be no recovery; but a question was submitted to the jury by the appellants, as follows: "Did Tyree Locke

run in front of Dr. Greene's automobile?" The jury answered this question in the negative. So that the remaining question in the case was whether the appellant driver of the automobile saw the boys in time to avoid striking them and was negligent in not having his car under control at that time. That was a question for the jury, and, we think, was properly submitted.

The judgment must therefore be affirmed.

ELLIS, C. J., and HOLCOMB and CHADWICK, JJ., concur.

(100 Wash. 442)

TAR v. MODEL BAKERY CO. (No. 14160.)

(Supreme Court of Washington. March 2, 1918.)

1. APPEAL AND ERROR \S 544(1)—STATEMENT OF FACTS—EFFECT OF STRIKING.

Where statement of facts was stricken on motion prior to hearing, all inquiry into assignments of error going to the rejection of offered testimony and into all assignments upon instructions of the court is cut off.

2. APPEAL AND ERROR \S 544(1)—STATEMENT OF FACTS—EFFECT OF STRIKING.

Where the statement of facts has been stricken, the merit of the instructions cannot be determined on appeal unless they would be wrong under any conceivable state of facts.

3. APPEAL AND ERROR \S 907(3)—STATEMENT OF FACTS.

Where the errors relied on cannot be reviewed without reference to a statement of facts, and there is none, a presumption of regularity calling for an affirmance attends the judgment.

4. APPEAL AND ERROR \S 544(1)—STATEMENT OF FACTS—EFFECT OF STRIKING.

Where the statement of facts has been stricken, the translation of a technical term by the court cannot be held to be a comment upon the weight of evidence which calls for a new trial, since to work such result the comment must be prejudicial.

Department 2. Appeal from Superior Court, Spokane County.

Action by William Tar against the Model Bakery Company. Judgment for defendant, and plaintiff appeals. Affirmed.

W. B. Mitchell, of Spokane, for appellant. Danson, Williams & Danson and George D. Lantz, all of Spokane, for respondent.

CHADWICK, J. [1] Prior to the time set for the hearing of this case the statement of facts was stricken on the motion of respondent. This precludes all inquiry into assignments of error going to the rejection of offered testimony and also to all assignments upon the instructions of the court. *Weld v. Wheeler*, 90 Wash. 178, 155 Pac. 748; *Morgan v. Bankers' Trust Company*, 63 Wash. 476, 115 Pac. 1047.

[2, 3] We have often held that it is error to instruct the jury by submitting the law in the way of abstract propositions. It follows as a matter of course, if instructions must have some reasonable relation to the facts, that the merit of the instructions can

only be determined by reference to the facts, unless, indeed, the instructions complained of would be wrong under any conceivable state of facts, which is not urged by counsel. The rule is well established that, where the errors relied on cannot be reviewed without reference to the statement of facts, a presumption of regularity calling for an affirmation attends the judgment. *Stedman v. Keener*, 71 Wash. 462, 128 Pac. 1047; *McDonald v. Van Houten*, 59 Wash. 593, 110 Pac. 428; *Yakima Grocery Co. v. Benoit*, 56 Wash. 208, 105 Pac. 476.

[4] It is also contended that the court made comment on the evidence to the prejudice of appellant. In one of its instructions the court said:

"The evidence of the physician in the case shows that plaintiff was suffering from occupational dermatitis, which simply means an inflammation due to dishwashing."

Reference to the testimony of witnesses may, or may not, be a comment within the meaning of the Constitution, depending entirely upon a view of the whole testimony, which can only be had by a reference to the statement of facts. Such comments must be prejudicial. *Earles v. Bigelow*, 7 Wash. 581, 35 Pac. 390; *Johnson v. Northport Smelting & Refining Co.*, 50 Wash. 569, 97 Pac. 746; *Sheffield v. Union Oil Co.*, 82 Wash. 386, 144 Pac. 529.

We think it would do violence to the spirit of the law to hold, in the absence of a record, that the translation of a technical term by the court was a comment calling for a new trial. The fact may not have been controverted. *Conover v. Carpenter*, 57 Wash. 147, 106 Pac. 620; *Carlisle Packing Co. v. Deming*, 62 Wash. 455, 114 Pac. 172; *White v. Jansen*, 81 Wash. 435, 142 Pac. 1140.

Affirmed.

ELLIS, C. J., and MOUNT, MORRIS, and HOLCOMB, JJ., concur.

(100 Wash. 481)

STATE ex rel. MOORE et ux. v. SUPERIOR COURT OF SPOKANE COUNTY.
(No. 14539.)

(Supreme Court of Washington. March 2, 1918.)

1. EMINENT DOMAIN §246(3)—CONDEMNATION PROCEEDINGS—ABANDONMENT.

Condemnation proceedings by a railroad are abandoned when it files its motion to dismiss, within a reasonable time after the return of verdict awarding damages.

2. EMINENT DOMAIN §246(3)—CONDEMNATION PROCEEDINGS—ABANDONMENT—EVIDENCE.

It is evidence of abandonment of condemnation proceedings for right of way that the railroad on building into the city abandons the part of its route over the lands in question, and proceeds by a different route under a trackage agreement with another company.

3. EMINENT DOMAIN §246(2)—CONDEMNATION PROCEEDINGS—RIGHT TO ABANDON.

A railroad may abandon condemnation proceedings after an award of damages; the rights of the parties not changing till the damages have been ascertained and paid.

4. CONSTITUTIONAL LAW §93(1)—CONDEMNATION PROCEEDINGS—AWARD—VESTED RIGHT OF PROPERTY OWNER.

The owner of land for which condemnation proceedings have been instituted can obtain no vested right to the award till by its payment the condemning party has obtained the right to appropriate the land to its use.

Department 2. Original proceeding by the State, on the relation of James Z. Moore and wife, against the Superior Court of Spokane County, and Hon. Bruce Blake, Judge. Writ denied.

Robertson & Miller, E. H. Sullivan, and S. R. Green, all of Spokane, for relators. Cullen, Lee & Matthews, of Spokane, for respondent.

MORRIS, J. Relators by this writ seek a review of the order of the lower court dismissing condemnation proceedings as to lands of the relators. The condemnation proceedings were commenced in the lower court on September 7, 1909, by the Chicago, Milwaukee & Puget Sound Railway Company seeking to condemn, among other lands, eight lots belonging to relators in East Side Syndicate addition to Spokane; the railway company at the same time filing in the county auditor's office a notice of lis pendens. In due time an order of necessity was made, and on April 18, 1910, a hearing was had for the purpose of ascertaining the amount to be awarded relators for the taking of their land, and a verdict returned fixing the damages at \$30,000. Within two days the railway company, being dissatisfied with the amount of the verdict, filed a motion for a new trial. Nothing seems to have been done by either party relative to this motion until August 27th, when a stipulation was made for its hearing on September 3d. In the meantime on June 21st the railway company obtained a franchise from the city of Spokane to construct a railway line into the city over a route covering the lands of relators, and on August 8th filed its formal acceptance of such franchise with the city clerk. On September 2d the railway company filed its motion to dismiss the condemnation proceedings and noted the motion for hearing September 10th. Neither the motion for a new trial nor the motion to dismiss was heard at the time noted. On March 8, 1911, relators filed a motion for judgment on the verdict. All of these pending motions seem to have been heard together by the lower court on April 8, 1911, when the lower court granted the railway company's motion to dismiss conditioned on the entry of judgment on the verdict and the payment of costs to relators. The railway company

failed to comply with these conditions for the reasons now stated that it feared its act might be construed as a waiver of its motion to dismiss. The matter rested in this condition until January 25, 1917, when the railway company filed a second motion to dismiss. On May 31st relators filed a second motion for judgment on the verdict. These two motions were heard together and on November 1, 1917, the lower court denied relators' motion for judgment and granted the railway company's motion to dismiss conditioned as in the order of April 8, 1911, that judgment be first entered on the verdict whereupon the proceedings would be dismissed at the cost of the railway company. This is the order up for review.

[1-4] These facts present the question whether or not the railway company abandoned the condemnation proceedings. We think it clear that it has done so, and that such abandonment took place when it filed its motion to dismiss on September 2, 1910, which was within a reasonable time after the return of the verdict awarding damages. Further evidence of abandonment is shown by the fact that the railway company upon building its line into Spokane from the east abandoned that part of the route crossing relators' lands and proceeded by a different route under a trackage agreement with an established railway line. That a railroad may abandon condemnation proceedings after the award of damages is well settled in this state. *Pt. Angeles R. R. Co. v. Cook*, 38 Wash. 184, 80 Pac. 305; *Pt. Townsend So. R. R. Co. v. Barbare*, 46 Wash. 275, 89 Pac. 710. Such is also the general rule in the absence of statutory provisions. *Nixon v. Marr*, 190 Fed. 913, 111 C. C. A. 503, 36 L. R. A. (N. S.) 1067; *Cunningham v. Memphis R. R. Terminal*, 126 Tenn. 343, 149 S. W. 103, Ann. Cas. 1913E, 1062; *Lewis on Eminent Domain*, § 656.

The reason for this rule in states with constitutional and statutory provisions such as ours is that the land cannot be taken until the damages have been first ascertained and paid. Until that time the rights of the parties have not changed. The condemning party has acquired nothing, and the landowner has lost nothing. By the same reasoning that prevents the condemning party from obtaining any vested right to the land to be taken until the damages have been ascertained and paid it follows that the owner of the land can obtain no vested right to the award until by its payment the condemning party has obtained the right to appropriate his land to its use. *State ex rel. Struntz v. Spokane County*, 85 Wash. 187, 147 Pac. 879.

The reason for the long delay in this case is apparent. The railway company regarded the condemnation award as excessive and did not desire to appropriate the lands of

the relators at that price. Relators obtained an award which they desired to enforce as a money judgment, and not subject themselves to the chances of a second condemnation or the return of a smaller award. If relators' desire had been only to clear their lands of the condemnation proceedings, they could at any time after the railway company had filed its motion to dismiss have obtained an order from the lower court dismissing the proceedings on the ground of abandonment; they cannot, therefore, throw the whole burden of this delay upon the railway company, since the opportunity to proceed was as much within their power as within that of the railway company.

We find no error in the order complained of, and the writ is denied.

ELLIS, C. J., and MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

(100 Wash. 409)

TAYLOR et al. v. CITY OF SPOKANE.

(No. 14263.)

(Supreme Court of Washington. Feb. 26, 1918.)

1. MUNICIPAL CORPORATIONS — § 822(4)—INJURIES ON STREETS—INSTRUCTIONS.

In an action for injuries sustained on an icy sidewalk, the court charged that, if plaintiff knew of the dangerous condition of the sidewalk, the law required more care than if she knew nothing about it; that the degree of care would still be ordinary care, but that she would be required to use the ordinary care which reasonable prudence and caution would dictate to the ordinary traveler as being proper; that if she exercised this care, and injury resulted, she was without fault, but if not, and the failure so to do proximately contributed to the injury, she was negligent, and could not recover; that the question of whether on all the facts she was guilty of negligence was for the jury, and that, while any previous knowledge of the condition of the sidewalk, and the wearing of high-heeled shoes, were not conclusive that she was guilty of contributory negligence, yet the jury, if they found that such acts or omissions on her part were acts of negligence contributing proximately to her injury, might find for defendant. *Held*, that this instruction was not erroneous, as making the character of the shoes worn an independent act of negligence, but merely told the jury that if plaintiff had knowledge of the condition of the sidewalk, and was wearing high-heeled shoes, and if such acts were acts of negligence, she could not recover.

2. MUNICIPAL CORPORATIONS — § 821(20)—INJURIES ON STREETS—QUESTIONS FOR JURY.

In an action for injuries sustained on an icy sidewalk, where the shoes worn by plaintiff were in evidence, it was a question for the jury whether it was negligence to wear such shoes on an icy sidewalk.

3. APPEAL AND ERROR — § 1033(5)—TRIAL — § 186, 194(16)—INSTRUCTIONS—COMMENTS ON EVIDENCE — ERROR IN APPELLANT'S FAVOR.

In an action for injuries sustained on an icy sidewalk, an instruction that the fact, if true, that plaintiff was wearing high-heeled shoes was not conclusive that she was guilty of contributory negligence was neither a comment on a fact nor on the weight to be attributed to the fact that she was wearing high-heeled shoes, and, if error, was error in plaintiff's favor.

4. MUNICIPAL CORPORATIONS \S 821(19, 20)—
INJURIES ON STREETS—QUESTIONS FOR JURY.

In an action for injuries sustained on an icy sidewalk, evidence *held* to make a question for the jury as to whether plaintiff's shoes were the kind usually worn, and whether they were the primary cause of the accident.

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Ruth K. Taylor and husband against the City of Spokane. From a judgment for defendant, plaintiffs appeal. Affirmed.

Danson, Williams & Danson, of Spokane, for appellants. J. M. Geraghty and Alex. M. Winston, both of Spokane, for respondent.

MOUNT, J. Mrs. Ruth K. Taylor, one of the plaintiffs in this action, was injured as the result of a fall upon an ice-covered sidewalk in the city of Spokane. She and her husband sued the city to recover damages, alleging negligence in permitting the sidewalk to be covered with ice upon which ashes had been thrown. The city, for answer, denied negligence on its part, and alleged contributory negligence on the part of the plaintiff Ruth K. Taylor by reason of the fact that she knew the condition of the walk, and was negligent in going thereon wearing high-heeled shoes. The cause was tried to the court and a jury; a verdict was returned in favor of the defendant; a judgment of dismissal was entered; and the plaintiffs have appealed, alleging error in an instruction of the court to the jury as follows:

"I instruct you that if Mrs. Taylor knew of the alleged dangerous condition of the sidewalk prior to the time of the accident, then the law would require more care on her part to avoid injury than if she knew nothing about it. The degree of care in each case required to be used by Mrs. Taylor would still be ordinary care, and she would not be under obligation to use a greater degree of care than ordinary care, but would be required to use that degree of care, to wit, ordinary care, which reasonable prudence and caution would dictate to the ordinary traveler as being proper to be used. When a person knows of a dangerous sidewalk, the law requires of her to exercise such reasonable care as an ordinarily prudent and cautious person would use under like circumstances. If this is done, and injury results, the person is without fault, and if you find this to be the case, Mrs. Taylor was not guilty of contributory negligence. If this was not done, and the failure so to do proximately contributed to the injury, then Mrs. Taylor was guilty of contributory negligence, and cannot recover. The question of whether, upon all the facts in the case as disclosed from all the evidence, Mrs. Taylor was or was not guilty of contributory negligence is one for your determination, and while previous knowledge, if you find she had such knowledge, of the condition of the sidewalk, on the part of Mrs. Taylor, and the fact that she was, if you find that she was, wearing high-heeled shoes, is not conclusive that she was guilty of contributory negligence, yet you have a right to, and may, if you find that such acts or omissions on her part were acts of negligence contributing proximately to her injury, find for the defendant."

[1, 2] It is argued by counsel for the appellants that this instruction is erroneous because it makes the character of the shoes worn an independent act of negligence. We think there is no merit in this contention. The instruction tells the jury that, if they found that Mrs. Taylor had knowledge of the condition of the sidewalk, and was wearing high-heeled shoes, and if they found that such acts were acts of negligence, then she could not recover. But even if we were to conclude that the instruction is susceptible of the construction which appellants seek to place upon it, we think it would not in that event be erroneous, since it was a question for the jury to determine from the character of the shoe which was placed in evidence by the appellants whether it was negligence for Mrs. Taylor to wear such shoes upon an icy sidewalk.

In the case of *Armstrong v. Yakima Hotel Co.*, 75 Wash. 477, 135 Pac. 233, where it was contended that the shoes worn by the respondent in that case had high heels, which caused the accident, and where the defense was one of contributory negligence, because the respondent wore a narrow skirt and high-heeled shoes, we said:

"Both the skirt and the shoes were in evidence. On such a conflict, it is elementary that the questions of negligence and contributory negligence were both for the jury."

So it was in this case. If either the knowledge of the condition of the sidewalk or the fact that Mrs. Taylor was wearing improper shoes with which to go upon a walk, the condition of which she knew, was the primary cause of the accident, she, of course, was guilty of contributory negligence, and could not recover.

[3] Appellants further contend that the statement in the instruction that:

"The fact that she was, if you find that she was, wearing high-heeled shoes, is not conclusive that she was guilty of contributory negligence"

—is equivalent to instructing the jury that, if Mrs. Taylor was wearing high-heeled shoes, that was evidence of negligence, and entitled to any weight short of conclusiveness; and it is argued that this was a comment upon the evidence. We think it was neither a comment upon a fact nor upon the weight to be attributed to the fact that she was wearing high-heeled shoes. The court simply told the jury that if they found it was a fact that she was wearing high-heeled shoes, that fact was not conclusive that she was guilty of negligence. If this statement were held to be error, it would be error in favor of appellants.

[4] Appellants also argue that there was no evidence that the heels of these shoes were higher than those ordinarily worn upon the street. One of the shoes admittedly worn by Mrs. Taylor was introduced in evidence. Mrs. Taylor, when a witness upon the stand, testified that, at the time of her fall, she made a statement that she was afraid her

husband would attribute the fall to her high-heeled shoes. A witness for the respondent testified that her statement was that the accident was caused by "those foolish high-heeled shoes." The jury was at liberty to decide from this evidence whether the shoes were the kind usually worn, and whether the shoes worn were the primary cause of the accident.

The instructions, as a whole, were fair and clear, and, we think, stated the law properly to the jury.

We find no error in the record, and the judgment is therefore affirmed.

ELLIS, C. J., and HOLCOMB, CHADWICK, and MORRIS, JJ., concur.

(100 Wash. 419)

LARSON v. HODGE, Sheriff of King County, et al. (No. 14350.)

(Supreme Court of Washington. Feb. 27, 1918.)

1. PRINCIPAL AND AGENT §103(8), 113(2)—POWER OF ATTORNEY—CONSTRUCTION.

One having power of attorney from mortgagee, giving right to act generally in settlement of all claims against a transportation company and more particularly as to the payment of certain mortgage notes secured by a mortgage on a named launch, could foreclose the mortgage and take possession of the launch, but had no power, after having purchased the launch at foreclosure sale, to sell it.

2. SHERIFFS AND CONSTABLES §120 —WRONGFUL WRIT OF SALE—LIABILITY.

Where mortgagee's agent had power to foreclose a mortgage and take possession, but had no power to sell property after bidding it in at foreclosure sale, defendant sheriff, who made return in the name of and executed a bill of sale to one to whom the agent sold the property, was liable for damages suffered by estate of mortgagee.

3. JUDGMENT §630—JOINT TORT-FEASORS—JUDGMENT AGAINST ONE AS BAR.

Where mortgagee's agent had no power to sell property after bidding it in on foreclosure, defendant sheriff, who made return in the name of and executed a bill of sale to A., to whom the agent had sold the property, and A., who accepted the bill of sale and retained possession, were joint tort-feasors, so that neither could set up anything less than a satisfaction of a judgment against the other as a bar to an action.

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by Gladie M. Larson, administratrix of the estate of B. F. Richardson, deceased, against Robert T. Hodge, Sheriff of King County, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Alfred H. Lundin, Edwin C. Ewing, and C. B. White, all of Seattle, for appellants. P. W. Willett and O. L. Willett, both of Seattle, for respondent.

CHADWICK, J. This is an action brought by Gladie M. Larson, administratrix of the

estate of B. F. Richardson, deceased, to recover damages from the defendants, Robert T. Hodge, as sheriff of King county, and the National Surety Company, surety on his official bond, for a wrongful return of sale. Prior to March, 1915, B. F. Richardson was the holder of a chattel mortgage on the "City of Bothel," a small boat plying on the waters of Lake Washington. The mortgage being overdue, foreclosure proceedings were instituted through the sheriff's office under title 8, c. 1, Rem. Code. On March 1, 1915, the boat was bid in by one E. J. Pettys, attorney in fact for the mortgagee, in the name of the mortgagee for \$2,300. On March 17, 1915, B. F. Richardson died. On March 22, 1915, the sheriff made a return in the name of, and executed a bill of sale to, J. L. Anderson, to whom Pettys had sold the boat. The consideration for the sale of the boat to Anderson was \$1,620, evidenced by three notes for \$500 each, and \$120 in cash. The notes were made payable to Pettys. He cashed one note and absconded. Anderson took and retained possession of the boat. The plaintiff brought an action against Anderson for the value of the boat. On a second trial, the jury brought in a verdict for \$2,300, in favor of the plaintiff. This was set aside by the trial judge. On appeal to this court, Larson v. Anderson, 97 Wash. 484, 166 Pac. 774, 55 Wash. Dec. 284, we directed that judgment be entered in favor of plaintiff on the verdict of the jury. At the time of the trial of this action in the court below, the final decision had not been handed down in the case of Larson v. Anderson. The result of the trial was a verdict and judgment in plaintiff's favor for \$1,800.

Appellants contend that the sheriff is not liable, for the reason that the return and bill of sale were made out under the direction of Pettys, who had a power of attorney from Richardson. Respondent denies that Pettys had any authority to direct the return. She insists that in any event Richardson's death revoked the power of attorney, and therefore the sheriff can claim no protection under any instructions which may have been given by Pettys. Appellants attempted to prove that Pettys authorized the transfer of the boat to Anderson, and directed the sheriff to make out the bill of sale prior to Richardson's death. Whether Pettys attempted to transfer the boat to Anderson, and directed the sheriff to make out the bill of sale before Richardson's death, rests in a decided conflict of testimony. We think, however, that the jury was justified in finding that these transactions did not take place until after Richardson's death.

[1] But in view of the form of the power of attorney on which appellants are relying, we think it unnecessary to review this question. The power of attorney under which Pettys acted was as follows:

"Know all men by these presents that I, Benjamin F. Richardson, of Elkhart county, state of Indiana, do hereby appoint Edward Pettys, city of Elkhart, Elkhart county, Indiana, my attorney for me and in my stead to act generally as my attorney and representative at Bothel, state of Washington, in the settlement of any and all claims that I now have against the Bothel Transportation Company of King county, state of Washington, and more particularly to the payment of three certain mortgage notes, which said notes are secured by mortgage on steamer, City of Bothel, launch W. E. Harrington, to attend to and carry out all matters in reference thereto, in which I may be interested and on my behalf to execute instruments and to do all such other matters and things, as fully and as completely, as if I were personally present and to authorize him to receive and receipt from the Bothel Transportation Company, for any and all money or moneys that may be due and owing me by said company, and to further authorize him to execute an assignment of all stock held by me in the Bothel Transportation Company and to execute the transfer and assign any or all claims that I may have against the Bothel Transportation Company, to any person to whom he shall sell or dispose for valuable consideration, my claims against said company."

It is apparent that Pettys had authority to deal with Richardson's claims against the Bothel Transportation Company and the stock he owned in that company. But the power gave him no authority to do anything other than what was necessary to be done to carry out the express authority delegated to him. Pettys was authorized to receive money from the Bothel Transportation Company, and to receipt for it. He had the right to foreclose the mortgage and take the boat. He was permitted to sell or transfer the claim (mortgage) to some one else. To accomplish these ends he could execute whatever instruments were necessary.

When Pettys bid in the boat in the name of his principal, Richardson's claim against the company was satisfied. Pettys had no authority to deal generally with Richardson's property. His powers were limited to dealing with claims against and to the disposition of the stock of the Bothel Transportation Company. To say that he had the right to sell the boat would be equivalent to saying that if he had sold the mortgage for cash, or if it had been paid by the company, that he would have had the right to invest the proceeds as he saw fit. No such broad powers were given in the power of attorney. While the language is general in places, it is clearly apparent that the authority given is general only so far as it directs the doing of anything which may be necessary in carrying out the express powers given.

[2] This being true, the sheriff had no right or authority to make out the return and issue the bill of sale that he did. As these acts resulted in the estate of plaintiff's tes-

tator being deprived of the boat, it follows that the sheriff is liable for the damage that was suffered by the estate.

Appellants assign as error the giving and rejection of different instructions. As the objections which appellants make to the giving or refusing of instructions all rest on the theory that there was a power of attorney which would have authorized Pettys during Richardson's life to sell or transfer the boat to Anderson, it necessarily follows that there is no merit in any of the assignments of error going to the instructions.

[3] Appellants contend that the judgment obtained in the suit against Anderson is a bar to the present action against the sheriff. The only injury complained of in either action is that plaintiff was deprived of the steamboat. It is immaterial whether we call the action against Anderson trover, conversion, or assumpsit, or say that the action against the sheriff is a survival of the old common-law action of amercement, or hold that it is maintained by virtue of Rem. Code, § 4000. The wrong done to the plaintiff is the same. It was not the wrongful execution of the bill of sale that gave plaintiff a right of action in either case. Both actions grow out of the illegal retention of the steamboat.

When the sheriff executed the bill of sale, he initiated the wrong, and when Anderson accepted the bill of sale and retained possession of the boat, he consummated it. It was their joint acts that deprived plaintiff of the boat, and they thus became joint tort-feasors. It is immaterial that the act of the one was a violation of a statutory duty, while the other was an interference with a common-law right. In *Dowell v. Chicago, Rock Island & Pacific Railway Co.*, 83 Kan. 562, 112 P. 136, affirmed 229 U. S. 102, 33 Sup. Ct. 684, 57 L. Ed. 1090, the Kansas Supreme Court said:

"The fact that the liability of one of the joint tort-feasors was statutory and that of the other arose under the common law does not preclude the joinder of both as defendants or make the controversy separable, nor does the fact that different lines of proof may be necessary to establish the negligence of each have that effect."

It is too well settled to need citation of authority that joint tort-feasors may be sued either jointly, or severally, and that a judgment against one is not a bar to suit against another. While plaintiff can have but one satisfaction for her wrong, yet as between Anderson and the sheriff, neither can set up anything less than a satisfaction of a judgment against the other as a bar to an action.

ELLIS, C. J., and HOLCOMB and MOUNT, JJ., concur.

(100 Wash. 403)

STATE v. MONEYMAKER.

(Supreme Court of Washington. March 2, 1918.)

1. CRIMINAL LAW §=656(2) — TRIAL — RE-MARKS OF JUDGE—REBUKING COUNSEL.

After counsel had stated that he did not want to disclose the purpose of a question asked on cross-examination, as this would defeat the cross-examination, it was error for the court to remark that, if counsel was trying to hide something from the jury, the court was not going to help him, as this tended to put counsel in an unfavorable light before the jury, and to some extent deprived accused of his right to be represented by counsel.

2. WITNESSES §=347—IMPEACHMENT—RAPE—ABSENCE OF COMPLAINT.

On a trial for rape on a girl of 13, where the state unnecessarily proved both force and lack of consent, accused had a right to show the absence of any complaint by the prosecuting witness as touching her credibility, though it was not material to the act charged.

Department 2. Appeal from Superior Court, Lewis County; W. A. Reynolds, Judge.

Charles Moneymaker was convicted of rape, and he appeals. Reversed, and new trial ordered.

Murray & Gruber, of Chehalis, for appellant. W. H. Cameron, of Centralia, for the State.

MORRIS, J. Appeal from a conviction of rape upon a female child of the age of 13 years. Among the errors assigned we find two to be well taken. The prosecuting witness had testified that the act complained of was without her consent and accomplished by force. During her cross-examination the record discloses the following:

"Q. Did you have any conversation with your mother when you got back?

"Mr. Hancock: We object to that as immaterial and irrelevant. Can see no purpose for which that could be permissible.

"The Court: I can see no purpose of that. What is your purpose, Mr. Murray?

"Mr. Murray: If the court please, I do not want to disclose my purpose. By disclosing your purpose you defeat the very idea of cross-examination.

"The Court: Well, Mr. Murray, if you are trying to hide something from this jury the court is not going to help you. Sustained. Do not see its competency.

"Q. Did you make any complaint to her at that time?

"Mr. Hancock: We object to that on the same ground.

"The Court: Not germane, and the court adheres to his ruling.

"Mr. Murray: Exception.

"The Court: Exception allowed."

[1] Persons accused of crime have the right to be represented by counsel whose usefulness shall not be impaired by any unfavorable remark or critical attitude on the part of the trial judge in the presence of the jurors, who are quick to observe and apt to receive hostile impressions, which deprive them of that fair and unbiased mental attitude which

every juror should at all times possess in order to do justice between the state and the defendant at the bar. When a trial judge discredits counsel for the defense in a criminal case, he, to a certain extent, discredits the defense, and thus deprives a defendant of a constitutional right. As was said in *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047:

"The aid of counsel is guaranteed by the Constitution to every person accused of crime, and this is universally recognized as one of the surest safeguards against injustice and oppression. Any conduct or statement on the part of the court which tends to impair the influence or destroy the usefulness of counsel is palpable and manifest error."

The language of the court here complained of was a rebuke to counsel, and would clearly tend to put counsel in an unfavorable light before the jury, entitling the accused to a new trial before a jury not subject to such unfavorable influence or comment. *State v. White*, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442.

[2] While, because of the age of the prosecuting witness, it was not necessary for the state to prove the act complained of was accomplished with or without consent or force, the state did undertake to prove both force and lack of consent. The circumstances under which the act was committed and those attendant circumstances that have always been regarded as material in cases of this character, such as seasonable complaint or the lack of it, while not material to the act charged, are most material as affecting the credibility of the prosecuting witness. That seasonable complaint was made is a corroborative incident tending to support the story of the prosecuting witness. That seasonable complaint was not made is a circumstance entitled to such weight as under all the circumstances it merits. It is the inference to be drawn from the fact that complaint was or was not made that makes the testimony admissible, irrespective of the fact that the act was accomplished with or without consent; the evidence being admissible not so much to prove or disprove the act as to add credit or discredit to the testimony of the prosecuting witness. It is as much the natural instinct of a girl under the age of consent to complain of an outrage to her person as it is of a girl over the age. The law establishing the age of consent does not work a corresponding change in human nature in this respect. The accused had the right, therefore, to show the absence of complaint as touching the credibility of the prosecuting witness. *State v. Griffin*, 43 Wash. 591, 86 Pac. 951, 11 Ann. Cas. 95; *People v. Baldwin*, 117 Cal. 244, 49 Pac. 186; *People v. Willmot*, 139 Cal. 103, 72 Pac. 838.

For these two errors, the judgment is reversed, and a new trial ordered.

ELLIS, C. J., and CHADWICK, MOUNT, and HOLCOMB, JJ., concur.

(100 Wash. 449)

**STATE v. METROPOLITAN PARK DIST.
OF TACOMA.**(Supreme Court of Washington. March
2, 1918.)**1. MUNICIPAL CORPORATIONS ¶1042 —
CRIMINAL LIABILITY—EMPLOYEES.**

Neither metropolitan park districts, created municipal corporations by Rem. Code 1915, § 5835 et seq., nor any municipal corporation, can be guilty of violating Rem. Code 1915, § 6580a, prohibiting the employment of females more than eight hours in any mechanical or mercantile establishment, laundry, hotel or restaurant, but those acting for them can be guilty thereof.

**2. CRIMINAL LAW ¶13 — VIOLATION OF
PENAL STATUTES.**

Penal statutes cannot be violated without some one being guilty of a crime.

**3. MUNICIPAL CORPORATIONS ¶276—PARK
DISTRICTS—POWERS.**

Metropolitan park districts, created special municipal corporations by Rem. Code 1915, § 5835 et seq., have no power to operate a public restaurant.

**4. MUNICIPAL CORPORATIONS ¶1041 —
PARKS—"GOVERNMENTAL FUNCTION."**

The regulation and maintenance of public parks is a governmental function of municipal corporations, and not a private or proprietary act.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Governmental Function.]

En Banc. Appeal from Superior Court, Pierce County; E. M. Card, Judge.

The Metropolitan Park District of Tacoma was convicted of employing females more than eight hours in a restaurant, and it appeals. Reversed.

Stiles & Latcham, of Tacoma, for appellant. Fred G. Remann and J. W. Selden, both of Tacoma, for the State.

MORRIS, J. The appellant was informed against, and convicted of a violation of the statute forbidding the employment of females more than eight hours a day in any mechanical or mercantile establishment, laundry, hotel, or restaurant. Rem. Code, § 6580a.

[1] The only question presented by this appeal is the criminal liability of a municipal corporation, such as appellant, for any violation of this act. Metropolitan park districts are created special municipal corporations under section 5835 et seq. of the Code, empowering cities of the first class to create such districts for the management, control, improvement, maintenance, and acquisition of parks and boulevards. Section 5833 provides that when a metropolitan park district shall be created it shall at once become a separate and distinct corporation, the officers of which shall be a board of park commissioners consisting of five members. The corporation is given the right of eminent domain, to purchase and acquire lands for park purposes, to regulate, manage, and control parks and boulevards; the intent of the act being expressed to place the sole man-

agement, control, and improvement of parks and boulevards within cities of the first class exclusively within the control of a metropolitan park district and its board of commissioners. The information charges that the Metropolitan Park District of Tacoma employed a female in a restaurant more than eight hours in one day. The liability of municipal corporations to criminal indictment upon the authorities seems to be determined by the question as to whether or not the act complained of constitutes a nuisance; the rule, as we gather it, being that a municipal corporation may be indicted or informed against only for misfeasance or nonfeasance in cases where a positive duty is imposed upon it and where the mental element is negligence, and that it is incapable of committing any offense of a purely criminal nature which has in it the element of evil intent, malice, or willful violation of the law's command. Green's Brice's Ultra Vires, pp. 366-368; Dillon, Municipal Corporations, pp. 1597-1601; 28 Cyc. 1775. Under this rule this information cannot be sustained. The act complained of contains no element of the violation of a public duty imposed upon metropolitan park districts by law. It charges the violation of an act which the state makes a criminal offense under a strictly penal statute, the violation of which, though by a municipal corporation not subject to criminal process, need not go unpunished, as the act itself in section 6580a, Rem. Code, provides that any employer, overseer, superintendent, or other agent of any such employer shall, upon conviction of any violation of the act, be punished, etc.

[2] Penal statutes cannot be violated without some one being guilty of a crime, and in this case the law has specifically provided that the actor may be punished. Although the Metropolitan Park District itself cannot commit the offense charged, some one acting in its behalf and claiming to represent it may. We have found no case sustaining this information, unless it be *People v. Chicago*, 256 Ill. 558, 100 N. E. 194, 43 L. R. A. (N. S.) 954, Ann. Cas. 1913E, 305, where the city of Chicago was convicted under an information charging a violation of a statute very similar to ours, limiting the hours of female labor. The employment in that case was of two females; one a cook, the other a nurse, in a public institution of the city known as the Isolation Hospital. Separate informations were filed, and separate convictions had, the cases being consolidated on appeal. The criminal liability of the city seems to be sustained upon two theories: (1) That the city of Chicago was acting within the powers conferred upon it in maintaining an isolation hospital; and (2) that in so maintaining a hospital it was acting within its private as distinguished from its governmental capacity. If it be granted, as it

seems to be in the Chicago case, that the maintenance and regulation of an isolation hospital is the exercise of an administrative power conferred upon the city of Chicago or permitted to it for its own benefit in its corporate capacity, whether performed for gain or not, or whether in the nature of a business enterprise or not, the city in the exercise of such power is neither sovereign nor immune, and upon this theory the information might be sustained. A municipal corporation is sovereign, and immune only in so far as it represents the state. Its immunity, like its sovereignty, "is in a sense borrowed, and the one is commensurate with the other." *Riddoch v. State*, 68 Wash. 329, 334, 123 Pac. 450, 42 L. R. A. (N. S.) 251, Ann. Cas. 1913E, 1033.

[3, 4] In this state, however, these assumptions and the reasoning based thereon cannot be sustained. Under our statute metropolitan park districts are municipal corporations with specific and distinct powers relating to the acquiring, maintenance, and control of parks in cities of the first class. The operation of a public restaurant is not among the powers conferred, nor is it incident or necessary to any conferred power. It must be therefore regarded as an ultra vires act. Neither in this state is the regulation and maintenance of public parks a private or proprietary act of a municipal corporation, but rests purely within the governmental function of such corporations. *Russell v. Tacoma*, 8 Wash. 156, 35 Pac. 603, 40 Am. St. Rep. 895. The assumptions and reasoning of the Chicago case must therefore fail in their application here.

Our opinion is that the information cannot be sustained, and the judgment is reversed.

MOUNT, MAIN, CHADWICK, PARKER, and HOLCOMB, JJ., concur.

(100 Wash. 444)

HANSEN v. LEMLEY. (No. 14227.)

(Supreme Court of Washington. March 2, 1918.)

1. PLEADING \S 248(4)—AMENDMENT—DEPARTURE BY AMENDMENT.

A written complaint alleged that defendant, knowing plaintiff was a minor, informed him that, if he would work in defendant's business, defendant would take him in as a partner; that plaintiff worked 225 days, and was paid \$45; that defendant at times claimed that they were partners and again that they were not; that plaintiff never understood what their relations were; that he was unable to get any settlement; that he personally served a notice on defendant rescinding and avoiding any agreement regarding a partnership, and demanded payment of the reasonable value of his services; that his services were reasonably worth 30 cents an hour; and that the total sum due him was \$765. An amended complaint alleged that plaintiff worked 2,700 hours for defendant at his special instance and request, that his services were reasonably worth 30 cents an hour, that defendant had paid him \$45, leaving a balance due of \$765, no part of which had been paid. *Held*

that, assuming that a departure can be created by the amendment of a complaint, there was nevertheless no departure, as both complaints sought a recovery on the implied contract that arises when one person performs work for another at the other's request; the allegation of the unfulfilled contract of partnership being only a matter of inducement, or possibly anticipating a defense which might have been stricken on motion.

2. NEW TRIAL \S 44(1)—GROUNDS—MISCONDUCT OF JURORS.

A remark of one woman juror during an adjournment of court, assented to by another juror, that she just hated "that lawyer with the mustache," who was attorney for defendant, was not misconduct justifying a new trial, where no prejudice was reflected by the verdict, especially in view of the well-known extravagances of speech of the present generation.

Department 2. Appeal from Superior Court, Snohomish County; Guy C. Alston, Judge.

Action by Victor Hansen against Charles Lemley. From a judgment for plaintiff, defendant appeals. Affirmed.

E. L. Turner, of Edmonds, for appellant. George W. Louttit, of Everett, for respondent.

CHADWICK, J. Plaintiff brought this action to recover money alleged to be due upon an implied contract to pay for work and labor. In his original complaint he alleged that on or about the 28th day of October, 1915, the defendant, with knowledge that plaintiff was a minor, informed him that, if he would come and work in the garage, repair shop, and automobile agency defendant then owned, defendant would take him in as a partner; that plaintiff began work, and worked for 225 days, averaging more than 12 hours per day; that altogether defendant paid plaintiff the sum of \$45, at times claiming they were partners, then again claiming they were not; that plaintiff never understood just what his relations with defendant were; that plaintiff was unable to get any settlement from defendant; that on July 20, 1916, plaintiff personally served a notice on defendant to the effect that any agreements between plaintiff and defendant regarding a partnership were rescinded and voided, and demanding payment from defendant for the work performed at the rate of 30 cents per hour, less the sum of \$45; that plaintiff's services were reasonably worth 30 cents per hour; that the plaintiff had worked 2,700 hours; that the total sum due and owing to plaintiff was \$765, after crediting defendant with the sum of \$45 above referred to; and that defendant had failed and neglected to pay the same.

A demurrer was overruled. Defendant answered, denying all the material allegations of the complaint, and "admitting" that plaintiff had worked as a partner. An affirmative answer was set up. This was waived at the trial.

After plaintiff's first witness had been

called to testify defendant objected to the introduction of further testimony on the ground that the complaint did not state facts sufficient to constitute a cause of action, and moved for judgment on the pleadings. Thereupon over defendant's objection, plaintiff asked and obtained leave to file an amended complaint. Briefly stated, the amended complaint alleged that from October 28, 1915, to June 9, 1916, the plaintiff worked 2,700 hours for defendant at defendant's special instance and request; that plaintiff's services were reasonably worth 30 cents per hour; that defendant has paid plaintiff the sum of \$45, leaving a balance due of \$765, no part of which sum has been paid.

Defendant did not ask for a continuance, but made oral answer denying all the material allegations of plaintiff's complaint, except the payment of the sum of \$45, which defendant alleged was paid by the partnership existing between plaintiff and defendant. Plaintiff replied, denying that the sum of \$45 was paid by the partnership. The trial resulted in a verdict in favor of the plaintiff for the sum of \$550, upon which judgment was entered.

[1] All assignments of error going to the merit of the case are based on the contention that the cause of action set forth in the amended complaint is a departure from the original complaint. Granting, but without holding, that a departure can be created by the amendment of a complaint, we think there is no departure. *Van Behrens v. Rettkowski*, 37 Wash. 247, 79 Pac. 787; *Cummings v. Weir*, 37 Wash. 42, 79 Pac. 487; *Oldfield v. Angeles Brewing & Malting Co.*, 72 Wash. 168, 129 Pac. 1098. The original complaint stated a cause of action. It was drawn upon the theory that plaintiff had performed work and labor for the defendant for which he was entitled to be compensated. The allegation of an unfulfilled contract of partnership was, at best, only a matter of inducement, or possibly anticipation of a defense. It might have been stricken on motion. The amended complaint alleges that plaintiff performed work and labor for the defendant at his special instance and request. Clearly, then, there is no inconsistency; for in both complaints plaintiff is seeking a recovery, not on any express contract of partnership, or otherwise, but on the implied contract that arises when one person performs work and labor for another at the other's request.

[2] It is assigned that the case should be retried because of the misconduct of "two woman jurors." Their fault is detailed by two men who were witnesses for the defendant. They make affidavits in the same language:

"That upon adjournment of court at the noon hour affiant in company with * * * another witness in said cause, were overtaken and passed upon the street leading from the courthouse to the down town district of Everett by two of

the women jurors who sat in said trial, and who were seated in the upper tier of seats in the jury box; that when said jurors passed affiant he heard the following colloquy between them: One of them said to the other, 'I just hate that lawyer with the mustache,' to which the other replied that 'she did too'; that the lawyer referred to was E. L. Turner, the attorney for the defendant in the above-entitled cause, and could be no other for the reason that said Turner was the only attorney engaged in the trial who wore a mustache."

Counsel insists:

"That these [affidavits] speak for themselves and certainly show prejudice and misconduct on the part of two members of the jury, which we fully believe warrant the granting of a new trial."

Although the fault of the "two woman jurors" may seem grievous to appellant, and well calculated to incite counsel to a just resentment, we cannot make ourselves believe that a showing of prejudice, of which the law will take notice, has been made out. No authorities are cited in support of this assignment of error, nor have we looked for any, depending entirely on the self-evident proposition that, where there are no books of authority, it is always safe to turn the leaves of human experience.

It is not made clear whether the "two woman jurors" were voicing a malice toward counsel for appellant and made reference to his mustache as a mark of identification, or were only innocently voicing the age-old prejudice against the hirsute adornment of the face, which some of the sex have nursed ever since the days of Delilah. Then again we can almost take judicial notice of the fact that the present generation is extravagant of speech. Terms in young ladies seminaries, and even college careers, have sometimes netted no more in the way of a vocabulary, or in power of expression, than "I just hate," "I just love," "It is perfectly grand," "It is perfectly lovely," or "perfectly terrible"—terms applied without reference to real emotion, and to things animate and inanimate from marshmallows to men, and from breakfast foods to works of art.

If we were justified in relying upon our observations of human nature, we would question that part of the affidavits wherein it is alleged that the "other disciple" of the court assented saying "she did, too," for it is more likely that she manifested her approbation with the more familiar words, "I should say."

No prejudice is reflected in the verdict. Prejudice against client or counsel is a thing to be inquired into on voir dire, and we cannot think that the fair jurors would "hate" counsel to the extent, at least, of penalizing his client for a cause so trivial and harmless, and for a condition so easily removed.

Affirmed.

ELLIS, C. J., and MOUNT, MORRIS, and HOLCOMB, JJ., concur.

(100 Wash. 403)

RADER v. SANDER et al. (No. 14230.)
(Supreme Court of Washington. Feb. 26,
1918.)

JUDGMENT ~~C~~743(2)—RES ADJUDICATA—SUB-
JECT-MATTER—PARTIES.

Where plaintiff in a former suit litigated as to the amount of water that should flow from one creek into another, and obtained decree that 60 inches was the maximum amount, such decree is res adjudicata of the total amount of water the creek was entitled to receive, in a subsequent suit between the same parties or their successors involving the same question, although plaintiff has since become the owner of other land on such creek by purchase from one who was not a party to the former action.

Department 2. Appeal from Superior Court, Kittitas County; Ralph Kauffman, Judge.

Action by William H. Rader against Olive Sander and others. From judgment for defendants Sander and Hovey, plaintiff appeals. Affirmed.

Pruyn & Hoeffler and Arthur McGuire, all of Ellensburg, for appellant. Carroll B. Graves, of Seattle, and John H. McDaniels, of Ellensburg, for respondents.

MORRIS, J. Appellant brought this action against respondents and numerous other defendants owning lands riparian to Wilson and Lyle creeks, in Kittitas county, praying that his title to 60 inches of water flowing from Wilson creek into Lyle creek be quieted, with the usual injunctive relief. All of the defendants, save respondents, defaulted. The respondents answered, setting up affirmatively prior rights to the waters of Wilson and Lyle creeks; the respondents Hovey claiming under respondent Sander. Respondent Sander further alleged that on August 12, 1890, a decree was entered in the superior court of Kittitas county, in cause No. 96, entitled Carl A. Sander v. J. B. Jones et al., which decree adjudicated the rights to the use of the waters of Wilson and Lyle creeks adversely to the right now sought to be litigated by appellant, and claimed such decree to be binding and of full force against the appellants. This defense was sustained, and plaintiffs appeal.

The only question, then, arising upon this appeal is whether or not the decree of August 12, 1890, in cause No. 96, is res judicata. The following description of the physical situation, taken from respondent Sander's brief will be helpful:

"Wilson creek is one of two main streams having their common origin in the mountains lying to the north of Kittitas valley. The waters come down a number of canyons and unite and flow in a common channel for a mile or so. Then they divide into two forks, one of which, flowing in a southeasterly direction, is Nanum creek, and the other, flowing in a southwesterly direction, is Wilson creek. Some miles below the forks another and smaller stream, known as Lyle creek, goes out from Wilson creek and runs to the south. Appellant Rader

owns lands along Lyle creek. Respondent Olive Sander owns lands along Wilson creek below the head of Lyle creek."

The plaintiff in cause No. 96 then represented the interest and rights now owned by the respondents. The defendants included this appellant and other owners of lands upon Lyle and upon Wilson creek above the lands of respondents. The purpose of the action was to establish the rights of Sander in the waters of Wilson creek, and to enjoin the defendants from using or diverting the waters in any manner detrimental to the Sander right. The appellant, as the owner of lands lying between Nanum and Lyle creeks, answered in cause No. 96, denying any use or diversion as against Sander, and claiming the right to the use of 70 inches of water from Wilson creek, to flow through Lyle creek to his then lands. The decree established the Sander right to the waters of Wilson creek; found that Lyle creek was a part of Wilson creek; adjudged that Rader and the other defendants had diverted the water from Wilson creek to Lyle creek, to the use of which Sander was entitled; established the respective rights of the parties, including Rader, to the waters of Wilson and Lyle creeks; and then decreed:

"That during the months of April and May of each year when there is an ordinary supply of water in said Wilson creek, 60 inches of said water shall flow down said Lyle creek, and said flow in Lyle creek shall decrease during the month of June according to the stage of water in said Wilson creek until the 1st day of July of each year, at which time it shall cease."

In the present action, it appears that Rader, since the decree in cause No. 96, has become the owner of lands lying between Nanum and Lyle creeks that were, at the time of the former decree, owned by his father, A. J. Rader, who was not a party to the former suit. It is by virtue of this ownership to these subsequently acquired lands that Rader now seeks to obtain an adjudication, claiming as to them the right to the use of 60 inches of the water to flow from Wilson creek into Lyle creek, asserting he is not bound by the decree in cause No. 96, his grantor not having been made a party in that action, nor any water right affecting these lands having there been determined; while respondents contend that, as between rights to the respective waters of Wilson creek and Lyle creek, the former decree is conclusive, and that if, by his subsequent purchase, appellant obtained any rights to the waters of Lyle creek, that right must be enforced against the lands riparian to Lyle creek and not against the lands of respondents upon Wilson creek. It is evident from the language of the decree in cause No. 96, when read in connection with the pleadings, findings of fact, and conclusions of law, that it determined and adjudicated 60 inches as the maximum flow of water from Wilson creek into Lyle creek, and divided this amount of

water to the riparian lands according to the respective rights. The plaintiff in that suit was contending only as to the amount of water that should flow from Wilson creek into Lyle creek. He was not interested, as between the lands riparian to Lyle creek, how that water should be divided. It was not a question of title or ownership, but of the amount of water. The owners upon Lyle creek, while as between themselves there was a question which was adjudicated as to their respective rights, contended mainly against the plaintiff as to the amount of water that should be decreed flowable into Lyle creek. That question, irrespective of how the water was to be divided, was determined and is now *res judicata*. Sixty inches of water is the maximum that can be diverted from Wilson creek into Lyle creek.

The fact that Rader is now suing in a different capacity—as the owner of other lands—does not alter the question one way or the other. The fact remains the same. Lyle creek is entitled to a maximum of 60 inches of water, as established in the former decree. If that decree is to be opened in this suit, or any other affecting the same rights, then the rights of owners of lands upon Wilson creek, quieted in them during all the years that have elapsed since the entry of that decree, presumably passing through various ownerships, made the subject of various contracts, are now subject to change, and partial or total loss. It means the reopening of that decree and a rehearing upon the rights there determined. The capacity which enabled appellant to question the amount of water that should flow from Wilson creek into Lyle creek was his ownership of lands riparian to Lyle creek. The material fact and essential determination was not the capacity in which he sought affirmative relief, but the relief itself. An adjudication of the relative flow of these two creeks was the main fact to be, and which was, determined; not the right or capacity, which enabled him to litigate that fact. In *Bissell v. Spring Valley Township*, 124 U. S. 225, 8 Sup. Ct. 495, 31 L. Ed. 411, it was held that an adjudication in an action on coupons of municipal bonds sustaining the defense that the municipality never executed the bonds, that the bonds were not its legal obligations, was conclusive in a subsequent action brought by the same party on different coupons of the same bonds. In *New Orleans v. Citizens' Bank*, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202, it was held that:

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies."

The controlling question here is whether, under the pleadings in the former suit, the amount of water to be taken from Wilson creek by Lyle creek was a matter in issue and determined as between the parties to this suit. That it was a matter in issue, and a determinative issue, and was actually decided in the former case, is, it seems to us, clear. That it was material is equally clear, for upon its determination depended the question of the amount of water in Wilson creek usable and to be used by the lands upon Wilson creek, and the amount that could be diverted to the lands upon Lyle creek. In *Southern Pacific Railroad Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, the case turned upon whether a prior adjudication of the sufficiency of certain maps as amounting to a definite location as to certain lands thereby brought within its land grant was conclusive of the question of the sufficiency of those maps when the same question was presented in regard to other lands, and the court held that the prior adjudication of that question was controlling. The court said:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

In *Munson v. Baldwin*, 93 Wash. 36, 159 Pac. 1070, citing 2 Black, Judgments, § 767, we held that one of the tests of whether or not a former judgment is *res judicata* is whether or not the facts relied upon for recovery in the second action negative or are inconsistent with the facts in the former judgment. Where there is no direct opposition or inconsistency, but the facts relied upon in both suits may be equally true, there is no bar. Applying this rule to the facts here, it seems clear to us that there is such inconsistency and direct opposition in the two sets of facts that one must necessarily negative the other. Sixty inches of water having been decreed the maximum flow of Lyle creek in the former suit, it cannot now, as between the same parties, be equally true that a greater amount of water is to be taken from Wilson creek and turned into Lyle creek. Such decrees would be in direct opposition to each other. They cannot both stand. Nor can the facts supporting them be equally true.

What we have said is sufficient to state our view of the question presented by the appeal, and the judgment is affirmed.

ELLIS, C. J., and MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

(100 Wash. 426)

STATE ex rel. HUSTON v. BIG BEND LAND CO.

BIG BEND LAND CO. v. HUSTON et ux.

(Nos. 14633, 13502.)

(Supreme Court of Washington. Feb. 27, 1918.)

1. FORCIBLE ENTRY AND DETAINER ~~§~~38(2)—
DISMISSAL FOR WANT OF JURISDICTION —
RESTITUTION.

Though plaintiff, on filing the complaint, in an action of unlawful detainer, caused a writ of restitution to be issued, which was executed by ousting defendants from the land and placing plaintiff in possession, the court, never having acquired jurisdiction to determine the merits, could not, on dismissal, order restitution to defendants, but at most vacation of the order of restitution under which they were ousted; their situation and remedies being the same as though plaintiff, without beginning suit, had gone on the land and forcibly removed them.

On Motion to Recall Remittitur.

2. APPEAL AND ERROR ~~§~~1218 — REMAND —
RECALLING REMITTITUR.

The remittitur, on reversal of judgment for plaintiff in unlawful detainer, with direction to dismiss, on the ground that jurisdiction of defendants was not obtained, will not be recalled, to the end of declaring that defendant's motion for an order in the lower court, on the going down of the remittitur, for an order of restitution, was an appearance seeking affirmative relief, curing all jurisdictional defects, so that the case should be decided on the merits.

Department 2. Original proceeding by the State, on the relation of R. E. Huston for a writ of mandamus against the Big Bend Land Company, and motion by plaintiff in the case of the Big Bend Land Company against R. E. Huston and wife for writ of restitution. Writ and motion denied.

John G. Barnes, of Seattle, for relators. Merritt, Lantry & Merritt, of Spokane, for respondent.

CHADWICK, J. This proceeding arises out of the case of the Big Bend Land Co. v. Huston, 168 Pac. 470. When the remittitur went down, counsel for defendants Huston moved the court—

"* * * for judgment dismissing said action and proceeding, for the costs and disbursements of relators herein, and for an order directing the issuance by the clerk of said court, under the seal thereof, of a writ of restitution directed to the sheriff of Lincoln county, commanding him to restore to relators the possession of the lands and premises hereinbefore described, the possession of which was taken from them by the Big Bend Land Company on the 10th day of March, 1915, by means of the writ of restitution issued and executed as hereinbefore [in the original proceeding] set forth."

The trial judge refused to make the order of restitution. He justifies under our opinion in the main case.

"Our conclusion is that the lower court was without jurisdiction to entertain the action, and the judgment appealed from is reversed and the cause remanded, with direction to dismiss. The parties will be left to enforce such rights, if any, as they possess in some appropriate method, upon which we neither express nor intimate

an opinion." Big Bend Land Co. v. Huston, supra.

It is the contention of the relator that he is entitled to be restored to the possession of the premises from which he was ousted by the Big Bend Land Company under Rem. Code, § 1742:

"If by a decision of the Supreme Court the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of the judgment or order appealed from, either the Supreme Court or the court below may direct an execution or writ of restitution to issue for the purpose of restoring to the appellant his property, or the value thereof. But property acquired by a purchaser in good faith, under a judgment subsequently reversed, shall not be affected by such reversal."

[1] When the main case was before this court, the form of the judgment to be entered by the superior court was carefully considered by the judges, and it was decided that we could not direct any judgment other than one of dismissal, leaving the parties to such rights as they might have under the general rules of law. The defendants in that case, the relators here, attacked the jurisdiction of the court under a special appearance which they maintained throughout. We held that the court had never acquired jurisdiction to determine the merit of the case. If the court did not acquire jurisdiction to determine the merit of the case, it would seem that it would have no jurisdiction to enter a judgment, which from the nature of things must rest in the merits. The most that relators could demand even under the most favorable view of the law would be an order vacating the order of restitution under which they were ousted. *Mail Co. v. Flanders*, 79 U. S. (12 Wall.) 130, 20 L. Ed. 249, but that would not restore them to the possession of the land. To accomplish that end would require an affirmative order based upon a right of possession, which relators have successfully challenged the jurisdiction of the court to try out.

"And if the court has not acquired jurisdiction of the person of the defendant, that is, if no sufficient process has been served upon him, there can be no judgment, even of abatement, rendered against the plaintiff; for the defendant must become a party before the court before he can have judgment." *Black on Judgments* (2d Ed.) § 220; *King v. Poole*, 36 Barb. (N. Y.) 242.

The situation of the relators, in so far as present rights of action and remedies are concerned, is the same as if the Big Bend Land Company had, without beginning suit at all, gone upon the land in controversy and forcibly removed the relators therefrom. The relators have been denied no remedy. They may bring an action for any relief to which they may conceive themselves entitled.

The writ is denied.

On Motion to Recall Remittitur.

[2] On the day that the application for the writ of mandamus was argued, there

came on to be heard also the motion of the plaintiff, the Big Bend Land Company, for a recall of the remittitur, to the end that we should now declare that the defendants have waived their objections to the jurisdiction of the court, and decide the merit of the case. As stated in the fore part of this opinion, defendants moved for an order of restitution upon the going down of the remittitur. It is contended that this is an appearance seeking affirmative relief, and although made after judgment, is a cure of all jurisdictional defects. Many cases are cited as sustaining counsels' contention, but we have persistently refused to recall remittiturs for the purpose of reviewing the records of trial courts. The remedy by appeal, or writ of review, is ample and more orderly. These remedies are designated by statute for the correction of errors in the court below. No statute has ever been enacted to protect against the errors of this court; but, in order that mistakes made in entering final judgments may not go uncorrected, we have, in the exercise of what we have conceived to be our inherent power to cure our own mistakes, recalled remittiturs for the purpose of advising a proper judgment. *Titlow v. Cascade Oatmeal Co.*, 16 Wash. 676, 48 Pac. 406; *State ex rel. Burke v. County Commissioners*, 61 Wash. 684, 112 Pac. 929.

It is not made to appear that any mistake has been made in the entry of judgment but, on the contrary, it appears that the court is proceeding to follow our judgment to the letter.

No legal ground is shown for the recall of the remittitur, and the motion is denied.

ELLIS, C. J., and HOLCOMB and MOUNT, JJ., concur.

(31 Idaho, 316)

**PULLMAN CO. v. STATE BOARD OF
EQUALIZATION et al.**

(Supreme Court of Idaho. March 2, 1918.)

**1. CERTIORARI §39—APPLICATION FOR WRIT
—TIME.**

Application for a writ of review must be made within a reasonable time.

2. CERTIORARI §39—APPLICATION—TIME.

The time within which an appeal may be taken in appealable cases will be deemed to be the limit of a reasonable time for an application for a writ of review, unless exceptional circumstances be shown which justify an extension of time.

Original proceeding by the Pullman Company to obtain a writ of review directed to the State Board of Equalization of the State of Idaho and others. Writ quashed and petition denied.

Hawley & Hawley, of Boise, for plaintiff. T. A. Walters, Atty. Gen., and A. C. Hindman and J. P. Pope, Asst. Attys. Gen., for defendants.

RICE, J. This is an original proceeding brought in this court to obtain a writ of review directed to the state board of equalization and commanding it to certify to this court its records in the matter of the assessment of plaintiff's property in the state of Idaho for the year 1917.

It is alleged in the petition that the order complained of was made in the month of August, 1917. The petition was filed in this court on January 4, 1918. An alternative writ was issued, and the defendants have moved to quash the writ and to set aside the order upon the ground that the petitioner was guilty of laches, in that it had delayed an unreasonable length of time in making application for the relief sought.

[1, 2] The statute does not limit the time within which a writ of review may be prosecuted. Under the statutes an appeal to the Supreme Court must be taken within 90 days after the entry of the judgment appealed from. In the absence of a statute limiting the time within which an application for writ of review may be prosecuted, the rule is that it must be applied for within a reasonable time, which will be deemed to be the time within which an appeal may be taken in appealable cases, unless for good cause shown some other period be fixed.

In the case of *Spooner v. Seattle*, 6 Wash. 370, 33 Pac. 963, it is said:

"The writ of certiorari is in the nature of an appeal, and, while the statute does not fix the time within which the writ should be applied for, it should be applied for within a reasonable time after the act complained of has been done, and two years and upward was not a reasonable time."

And in the case of *State v. Superior Court*, 56 Wash. 287, 105 Pac. 815, it is said:

"While the statute fixes no time within which a writ of review must be applied for, we have held by analogy that the writ must be applied for within the time fixed for taking an appeal."

The leading case in California is that of *Keys v. Marin County*, 42 Cal. 252, in which the court said:

"It has been observed already that in the case at bar nearly two years were permitted to elapse after the entry of the order complained of before application was made for the writ. An appeal to this court from a final judgment of a district court is barred by the lapse of one year; and we are of opinion that, unless circumstances of an extraordinary character be shown to have intervened, the remedy through a writ of certiorari should be held to be barred by the lapse of a like period of time."

See *People v. Mayor of N. Y.*, 2 Hill (N. Y.) 9; *Thompson v. Multnomah County*, 2 Or. 34; *Kimple v. Superior Court*, 66 Cal. 136, 4 Pac. 1149; *Smith v. Superior Court*, 97 Cal. 348, 32 Pac. 322; *Reynolds v. Superior Court*, 64 Cal. 372, 28 Pac. 121; *Crosby v. Probate Court*, 3 Utah, 51, 5 Pac. 552; *State v. Superior Court*, 42 Wash. 684, 85 Pac. 673; *State v. Superior Court*, 84 Wash. 663, 147 Pac. 408; *Detroit v. Murphy*, 95 Mich. 531, 55 N. W. 441; *Petition of Tucker*, 27 N. H.

405; *People v. Commissioners*, 82 N. Y. 506; *Stedman v. Bradford*, 3 Phila. (Pa.) 258; *Long v. Railroad Co.*, 35 W. Va. 333, 13 S. E. 1010; *State v. Milwaukee County*, 58 Wis. 4, 16 N. W. 21; *Hernandez v. Hutchison*, 20 Porto Rico Rep. 484; 11 C. J. 146.

While this question has not been passed upon directly by the Supreme Court of this state, it has been decided that a bill of review, by analogy to an appeal, must be brought within the time limit for prosecuting an appeal. *Hyde v. Lamberson*, 1 Idaho, 539; *McMillan v. Wooley*, 6 Idaho, 36, 51 Pac. 1029.

The petition in this case does not disclose circumstances of a special nature which require an extension of time.

The writ will be quashed and the petition denied. Costs awarded to the defendants.

BUDGE, C. J., and MORGAN, J., concur.

(25 Wyo. 393)

COOK v. ELMORE. (No. 856.)

(Supreme Court of Wyoming. March 18, 1918.)

1. EXECUTORS AND ADMINISTRATORS ⇨131—COLLECTION OF ASSETS—RENTS AND PROFITS OF REAL ESTATE.

Under Comp. St. 1910, § 5556, providing that an executor or administrator is entitled to the possession of all the real and personal estate of the decedent and to receive the rents and profits of the real estate until the estate is settled, an executrix and ancillary administratrix was entitled to recover the rents and profits of land held by defendant in trust for the decedent pending the settlement of the estate.

2. LIMITATION OF ACTIONS ⇨103(2)—ACCRUAL OF CAUSE—TRUST.

Limitations do not run in favor of a trustee of an express trust until he has taken some action amounting to a repudiation of the trust, as his possession is the possession of the cestui que trust, and is not adverse.

3. LIMITATION OF ACTIONS ⇨102(3)—ACCRUAL OF CAUSE—TRUST.

Ordinarily limitations run in favor of a trustee under a constructive or resulting trust from the time the act occurs which creates the trust, but this general rule is subject to an exception, applicable where the cestui que trust is in possession, and the trustee has done nothing inconsistent with the recognition of the trust or has not asserted an adverse claim.

4. LIMITATION OF ACTIONS ⇨102(7)—ACCRUAL OF CAUSE—TRUST.

Where defendant, who was E.'s foreman, purchased land in his own name with E.'s money, which was thereafter used in conducting E.'s stock-raising and ranching business until the formation of a partnership between E. and defendant, and by the partnership under a lease from E. from that time until E.'s death, and the lease provided for the payment of rent to E., but contained nothing as to any land of defendant, and defendant never asserted any adverse claim until after E.'s death, limitations did not run in defendant's favor until that time.

5. EXECUTORS AND ADMINISTRATORS ⇨129(1)—ESTABLISHMENT AND ENFORCEMENT OF TRUSTS—RIGHT TO SUE.

Under Comp. St. 1910, § 5727, providing that land shall descend subject to the payment of the debts of the decedent to the persons therein specified, and section 5562, providing that

actions for the recovery of property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators, in all cases in which they might have been maintained by or against the decedent, an executor or administrator as such has no title to the real estate of a decedent, and cannot sue to establish a resulting trust and compel the conveyance of the land.

Error to District Court, Campbell County; C. H. Parmelee, Judge.

Action by Lydia H. Elmore, as executrix and administratrix of Mike Elmore, deceased, against Claude K. Cook. Judgment for plaintiff, and defendant brings error. Affirmed in part, and reversed and remanded in part.

La Fleche & Diefenderfer, of Sheridan, and Don L. Wakeman, of Gillette, for plaintiff in error. Metz & Sachett, of Sheridan, for defendant in error.

BEARD, J. Lydia H. Elmore, as executrix of the will of Mike Elmore, deceased, and as administratrix of the estate of said Mike Elmore, deceased, brought an action against Claude K. Cook, alleging, in substance, in her petition, that Mike Elmore died on the 10th day of May, 1910, leaving a will which was duly admitted to probate in the state of New York June 9, 1910, and that on June 10, 1910, letters testamentary and of administration were issued to said Lydia H. Elmore as executrix of said will, and that the administration of said estate in the state of New York is still pending; that said will was duly probated in the district court of Campbell county, Wyo., August 4, 1913, and ancillary letters testamentary and of administration were issued to her for the administration of said estate in Wyoming; that she duly qualified and is still acting as such; that in 1901 said Mike Elmore employed and directed the said Cook to purchase for him certain lands situated in said Campbell county, and in pursuance of said arrangement said Cook purchased said lands and received a deed therefor November 21, 1901, which deed was duly recorded in the office of the county clerk and ex officio register of deeds in said county; that said lands were purchased for and with the funds of said Mike Elmore, and that the deed should have been taken in his name, but was erroneously taken in the name of said Cook; that the money for the recording of said deed and for the payment of the taxes on said land, until the time of his death, was furnished by said Elmore; that since his death the taxes have been paid by plaintiff; that from November, 1901, until the time of his death said Mike Elmore occupied and used said lands; that after the death of said Mike Elmore the said Cook, without the consent of plaintiff, or the heirs of said Mike Elmore, deceased, wrongfully entered into possession

of said lands and excluded plaintiff therefrom, and still continues so to do, and claims to be the absolute owner thereof, and has had the use and benefit of said lands since May 10, 1910; that said Mike Elmore did not know that the deed to said land was taken in the name of said Cook, and that as soon as plaintiff learned that Cook claimed said land, and at her first opportunity after her said appointment, she brought the action "to compel the conveyance of said land by the defendant to the plaintiff and to decree the title of said lands to and in the said estate"; that the reasonable rental value of said land is about \$150 per annum, and that plaintiff has been damaged by the wrongful withholding of said lands by defendant in the sum of \$600, no part of which has been paid; that the title of record of said lands still continues in the name of defendant; and that there are no incumbrances of record against the same, or known to plaintiff. The plaintiff prayed—

"judgment against the defendant that the defendant be required to execute a good and sufficient conveyance of the said lands to this plaintiff, and in case of failure thereof that the said lands be decreed by the court to this plaintiff, and that the plaintiff have judgment against the defendant for \$600 damages, and the costs of this action, and for such other and further relief as in equity this plaintiff may be entitled to receive."

The action was commenced August 9, 1913. A general demurrer was filed to the petition, which was overruled, and defendant answered. In his answer defendant denied that the land was purchased by him under any arrangement with Mike Elmore, or with his funds, but alleged that he purchased the same with his own money and for his own use and benefit; that he was the absolute owner of said land, and had been in the peaceable, open, and undisputed possession of the same since he purchased the same, November 21, 1901; admitted that Mike Elmore used said lands for grazing purposes, but alleged that said use was in consideration of the payment of the taxes thereon by said Elmore; admitted that he had excluded plaintiff from said lands since September 5, 1911; denied that the rental value of said land was \$150 per annum; denied that the deed to said land was erroneously taken in his name. Defendant further pleaded:

"That the cause of action sued upon, set forth, and alleged in plaintiff's petition did not accrue within four years immediately preceding the commencement of plaintiff's action."

Plaintiff replied, and denied the affirmative allegations of the answer. The foregoing summary of the pleadings, we think, sufficiently presents the issues.

The case was tried to the court, and the following findings of fact were made by the court (omitting the preliminary statements):

It "finds generally in favor of the plaintiff and against the defendant upon the issues joined herein. The court finds that the facts set out in the plaintiff's petition are true, and that Lydia H. Elmore, as executrix of the estate

of Mike Elmore, deceased, and as heir and sole devisee of Mike Elmore, deceased, is the equitable owner of the lands described in the plaintiff's petition herein and hereinafter set forth in this decree, and that the defendant, Claude K. Cook, holds the legal title to said lands in trust for the heirs and devisees of Mike Elmore, deceased, and that he should be required by the decree of this court to make conveyance of the legal title to said lands and premises to Lydia H. Elmore, as heir and sole devisee of said Mike Elmore, deceased."

Whereupon the court rendered the following decree:

"It is therefore hereby ordered, adjudged, and decreed that Lydia H. Elmore, as executrix of the last will and testament of Mike Elmore, deceased, and as heir and sole devisee of said Mike Elmore, deceased, is the owner in fee simple of the lands and premises described in plaintiff's petition, and that the defendant, Claude K. Cook, holds the naked legal title to said lands and premises in trust for said Lydia H. Elmore, as heir and sole devisee of said Mike Elmore, deceased, which said lands and premises are described as follows, to wit: [Describing the lands.] It is further ordered, adjudged, and decreed that the said defendant, Claude K. Cook, be, and he is hereby, directed and required to convey by good and sufficient deed to the said Lydia H. Elmore the said above-described premises and real estate and the whole thereof, together with all the improvements, ditches, and water rights and hereditaments thereunto belonging or in any wise appertaining; the said deed to be made, executed, and delivered by the said defendant, Claude K. Cook, to the said Lydia H. Elmore within ten days from the entry of this decree, and in failure thereof this decree shall stand as a transfer of the said title of said premises to the said Lydia H. Elmore in fee simple.

"It is further hereby ordered and adjudged that the plaintiff, Lydia H. Elmore, as executrix of the estate of Mike Elmore, deceased, and as administratrix of said estate, have and recover of and from the defendant, Claude K. Cook, \$450 damages sustained by her for the wrongful withholding of said lands and her costs herein, taxed at \$184.65, and that she have execution therefor. To all of which decree and judgment the defendant excepts."

A motion for a new trial was filed by defendant, and by the court denied. Defendant brings error.

The petition contains but one count; but plaintiff prayed not only for the recovery of the rents and profits of the land during the time she alleges she was wrongfully kept out of possession, but also that it be decreed that the defendant holds the legal title in trust, and that he be required to convey the legal title to the plaintiff; and that appears to have been the theory upon which the case was tried and determined. The contentions of counsel for plaintiff in error are that the action was barred by the statute of limitations, but, if not so barred, that the findings, judgment, and decree of the district court are not supported by sufficient evidence.

It appears that from about 1896 to January 1, 1910, Mike Elmore was engaged in the stock-raising and ranching business in Wyoming, and that the defendant, Cook, was his foreman or manager, handled the funds, sold and received the money for stock sold, and paid the expenses of conducting the busi-

ness from money so received or furnished by Elmore, Cook receiving a salary for his services. The land in dispute was inclosed with other lands, and occupied and used in conducting the business; but just when it was so inclosed does not satisfactorily appear. On January 1, 1910, Elmore and Cook entered into a written agreement of copartnership for the purpose of "carrying on a ranching business on the ranch of M. Elmore near Gillette, Wyo.," and further providing:

"That M. Elmore leases to Elmore and Cook the aforesaid ranch for a term of five years for one thousand dollars per year."

From that time until the death of Elmore the land in dispute continued to be occupied and used with the other lands in the inclosure in the same manner in which it had been occupied and used by Elmore prior to the formation of the partnership, no change being made in that respect at the time it was purchased and deeded to Cook. The partnership agreement further provided that Elmore should pay for any improvements made upon the ranch in the way of ditches and reservoirs and for plowing. No land belonging to Cook is mentioned in the agreement. Cook purchased the land November 21, 1901, through one Milo Adams, and charged the purchase price, \$425, to Elmore in his accounts, and it was paid by Elmore. The fee for recording the deed and the taxes on the land thereafter were paid and charged by Cook to Elmore. There was some testimony that Cook had stated that the deed was erroneously made to him instead of to Elmore. There was also testimony to the effect that Elmore had stated, in his lifetime, that the land belonged to Cook. It does not, however, otherwise appear that Elmore had actual notice or knowledge that the title to the land was taken in the name of Cook, or any notice other than that imparted by the record. We have not attempted to set out all of the evidence, but, considering it as a whole, we think it sufficient, as between the parties to this action, to sustain the finding of the district court that Cook held the legal title in trust for Elmore, and that plaintiff was entitled to recover the rents and profits of the land pending the settlement of the estate of Mike Elmore, deceased.

[1] The statute (section 5556, Comp. Stat. 1910) provides that the executor or administrator is entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate until the estate is settled. Therefore the money judgment in favor of the plaintiff and against the defendant should be affirmed, unless the action was barred by the statute of limitations.

[2-4] It is well settled that the statute of limitations does not run in favor of a trustee of an express trust until he has taken some action which amounts to a repudiation of the trust; the reason assigned for the rule being that the possession of the trustee while car-

rying out the purposes of the trust is deemed the possession of the cestui que trust, and the holding by the trustee is not adverse. The rule, however, is different with respect to constructive or resulting trusts; the general rule in such cases being that the statute commences to run from the time the act occurs which creates the trust, or, in other words, when the cestui que trust could bring an action to enforce the trust, and that no repudiation of the trust by the trustee is necessary to start the running of the statute. But to that general rule there is a well defined and recognized exception, viz. when the cestui que trust is in possession, and the trustee has done nothing inconsistent with a recognition of the trust, or has not asserted an adverse claim. In *Lakin v. Sierra Buttes G. M. Co.* (C. C.) 25 Fed. 337, Judge Sawyer said:

"Upon well-settled principles of law the statute does not begin to run against a cestui que trust in possession until the date of his ouster therefrom, no matter whether the trust be express or implied."

And the same rule was approved and followed in *Norton v. McDevitt*, 122 N. C. 755, 30 S. E. 24; *Barrollhet v. Anspacher*, 68 Cal. 116, 8 Pac. 804; *Flanner v. Butler*, 131 N. C. 155, 42 S. E. 547; *Lufkin v. Jakeman*, 183 Mass. 528, 74 N. E. 933; *Boyd v. Boyd*, 163 Ill. 611, 45 N. E. 118.

In this case the land was used in conducting Elmore's business from the time the deed to Cook was executed until the formation of the partnership, and by the partnership from that time until after the death of Elmore. When the written agreement of copartnership was entered into it provided for the payment of rent for Elmore's land, but contained nothing as to any land of Cook; and there is no competent evidence in the record of any adverse claim by Cook until after Elmore's death. Such being the situation, even if the four-year statute of limitations pleaded is applicable, four years had not run since Cook asserted an adverse claim, and the action to recover the rents and profits was not barred.

[5] The only remaining question in the case arises on the finding of the court "that Lydia H. Elmore, as executrix of the estate of Mike Elmore, deceased, and as heir and sole devisee of Mike Elmore, deceased, is the equitable owner of the lands described in the plaintiff's petition," and decreeing that Lydia H. Elmore, as executrix of the last will and testament of Mike Elmore, deceased, and as heir and sole devisee of said Mike Elmore, deceased, is the owner in fee simple of said lands, and requiring Claude K. Cook to convey said lands to said Lydia H. Elmore. Upon the death of Mike Elmore whatever title, if any, which he had to the land in controversy, either passed by his will to some devisee or devisees, or, if not devised, then it descended to his heirs, subject to the payment of his debts. Section 5727, Comp. Stat. 1910. In this case the will was not intro-

duced in evidence. It is not alleged, nor is there any evidence in the record of any kind showing or tending to show, what disposition of the land in question, or of any of his property, Mike Elmore made by his will. It incidentally appears in the testimony that Lydia H. Elmore is the widow of deceased, but it also appears that he had at least one son who survived him, and who testified as a witness in the case. How the court could find from the evidence in this record that Lydia H. Elmore, as executrix, and as heir and sole devisee, is the equitable owner of the land, we are at a loss to understand. So far as the record discloses, she acquired no title as executrix, and as administratrix no title to the real estate of deceased vested in her. True, she had, in either case, the right to the possession of the real estate owned by Mike Elmore at the time of his death; but the title passed to the devisee or heirs at the instant of his death. The plaintiff, in her capacity as executrix or administratrix, in which she sues, could not maintain an action to establish and enforce such a trust as is here alleged and to require the legal title to be conveyed to her. The statute (section 5562, Comp. Stat. 1910) provides:

"Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators, in all cases in which the same might have been maintained by or against their respective testators or intestates."

It is well known that our probate statutes were taken directly from the statutes of California in force at the time of the adoption of our Code of Probate Law and Procedure in January, 1891. As early as 1881 the Supreme Court of California had construed the section last above quoted in the case of *Janes v. Throckmorton*, 57 Cal. 368. In that case the action was brought by the heirs of the deceased, and it was objected that they were not the proper parties, and that the action should have been brought by the administrator under the provisions of the statute. It was held that the statute did not confer upon the administrator the power to compel a conveyance of the title to himself. The court said:

"The present action is brought to establish a trust, and to compel defendant to convey the legal title to real estate to the plaintiffs as heirs at law of *Janes*. On his death his title, then an equity, passed to the heirs, as was held in the cases last cited; and unless it can be maintained, which we think cannot be done, that the administrator is entitled under our statute to have the title to the property conveyed to him, it would seem clear that he is not the proper party to bring this action."

The decision in that case was cited, approved, and followed in *Field v. Andrada*, 106 Cal. 107, 39 Pac. 323. See, also, *Johnston v. Johnston*, 173 Mo. 91, 73 S. W. 202, 61 L. R. A. 166, 96 Am. St. Rep. 486.

The reason for the rule, we think, is obvi-

ous. The executor or administrator, as such, is vested with no title to the real estate of the deceased, and if such an action could be maintained, it would not unite the legal and equitable title. The only effect would be to substitute one trustee for another, and that without the consent of the cestui que trust, the real party in interest, and not a party to the action. On that branch of the case the petition fails to state facts sufficient to constitute a cause of action. It is not sufficient to state facts sufficient to constitute a cause of action in favor of some one against a defendant, but the facts stated must constitute a cause of action in favor of the plaintiff against the defendant. *Railroad Co. v. City of Bellaire*, 67 Ohio St. 297, 65 N. E. 1007; *McKenney v. Minahan*, 119 Wis. 651, 97 N. W. 489.

For the reasons above stated, the decree of the district court that Lydia H. Elmore, as executrix of the last will and testament of Mike Elmore, deceased, and as heir and sole devisee of said Mike Elmore, deceased, is the owner in fee simple of the lands in controversy, and that defendant, Cook, holds the naked legal title thereto in trust for her as heir and sole devisee, and requiring defendant, Cook, to convey the land to her, and on his failure to do so, the decree to stand as a transfer to her of the title to the land in fee simple, is erroneous.

The judgment, in so far as it awards judgment in favor of plaintiff against defendant for the rents and profits of the land, is affirmed. In so far as it decrees the plaintiff to be the equitable owner of the land and requires defendant to convey to her, or attempts to vest the title in her by the decree, it is reversed. The case will be remanded to the district court, with directions to vacate and set aside the decree which vests the title in Lydia H. Elmore, and for further proceedings not inconsistent with this opinion. The case being affirmed in part and reversed in part, the plaintiff in error will be allowed his costs in this court, except costs of his brief.

Affirmed in part, and reversed in part.

POTTER, C. J., and BLYDENBURGH, J., concur.

(25 Wyo. 406)

ESSELSTYN v. OWL CREEK COAL CO.
(No. 930.)

(Supreme Court of Wyoming. March 18, 1918.)

APPEAL AND ERROR §407(2) — SERVICE OF SUMMONS IN ERROR — "COMMENCEMENT OF PROCEEDINGS IN ERROR."

An original summons in error, not served before return day, confers no jurisdiction, nor does the filing of a praecipe for an alias summons and service of the summons more than 60 days after the filing of the petition in error constitute the commencement of proceedings in error, under Comp. St. 1910, § 5111, as amended by Laws 1917, c. 70, prescribing procedure to obtain review.

Error to District Court, Hot Springs County; P. W. Metz, Judge.

Action between E. E. Esselstyn and the Owl Creek Coal Company, a corporation. Judgment for the latter, and the former brings error. Motions to quash the service of the original summons in error and the alias summons in error. Motions granted, and proceedings dismissed.

Goddard & Clark, of Billings, Mont., for plaintiff in error. C. A. Kutcher, of Sheridan, and C. A. Zaring, of Basin, for defendant in error.

BEARD, J. The petition in error in this case was filed December 10, 1917. Præcipe for summons in error was filed, and summons in error issued the same day and made returnable on or before January 10, 1918. Service of said summons was made January 24, 1918, and returned and filed January 28, 1918. Præcipe for alias summons in error was filed February 23, 1918, and alias summons in error was issued on that day and made returnable on or before March 25, 1918, was served February 25, 1918, and returned and filed February 27, 1918. Defendant in error, appearing specially for that purpose, has submitted motions to quash the service of the original summons in error, for the reason that it was not served until after the return day; also to quash the alias summons in error for the reason that it was not issued or served until more than 60 days after the filing of the petition in error. Chapter 70, S. L. 1917, amending and re-enacting section 5111, Comp. Stat. 1910, provides:

"The proceeding to obtain such reversal, vacation, or modification, shall be by petition in error filed in the court having power to make the reversal, vacation or modification, and setting forth the errors complained of. There shall also be filed at the same time a præcipe for summons, or the affidavit hereinafter provided for, or both as the case may be. Thereupon a summons shall issue and be served in the manner provided by law for the service of summons in civil actions, and service on the attorney of record in the original case shall be sufficient. Summons shall be made returnable thirty days after its date unless said date would fall on Sunday or on a legal holiday in which case it shall be made returnable on the next succeeding secular or business day. * * * If service is not procured on said summons, a like alias summons shall be issued upon the filing of a præcipe therefor. To constitute the commencement of such proceedings in error service of summons must be made within sixty days from the filing of the petition in error. * * * When service of summons or publication of notice is made, as above provided, the proceedings in error shall be deemed commenced as of the date of filing the petition in error."

It is only necessary to refer to the statute above quoted for authority to grant the motions in this case. The original summons, not having been served during the life of the writ, conferred no jurisdiction of the person of the defendant in error. "After

the return day a writ loses its vitality, and service made thereafter is a nullity, conferring no jurisdiction over the person so served." 1 Enc. P. & P. 600, and note 2. And, as the præcipe for the alias summons was not filed, and the summons was not issued or served until more than 60 days after the filing of the petition in error, such summons and service did not, according to the plain language of the statute, constitute the commencement of proceedings in error, based upon such petition, and said summons should be quashed. The motions, therefore, will be granted, and the service of the original summons, and the alias summons will be quashed. And inasmuch as the time within which service of a summons based upon petition in error now on file has expired and as service made hereafter would not constitute the commencement of those proceedings in error, it is further ordered by the court on its own motion that said proceedings in error be dismissed.

Service of original summons and alias summons quashed, and proceedings in error dismissed.

POTTER, C. J., and BLYDENBURGH, J., concur.

(25 Wyo. 400)

CALKINS v. WYOMING COAL MINING CO. et al. (No. 903.)

(Supreme Court of Wyoming. March 18, 1918.)

1. MASTER AND SERVANT §232 — INJURIES TO SERVANT—SCOPE OF DUTIES.

Recovery could not be had for the death of a servant, whose duty it was to turn off electricity with a stick and not to repair apparatus, who was killed while attempting to fix a switch, especially where he had been instructed to do something else at the time.

2. TRIAL §169 — DIRECTING VERDICT—EVIDENCE.

Where it clearly appears to the trial court that giving the evidence its full probative force, together with all reasonable inferences deducible therefrom, it fails to establish a claim or defense, it is the duty of the court to so instruct the jury.

Error to District Court, Sheridan County; C. H. Parmelee, Judge.

Action by Edward G. Calkins, administrator of the estate of Myron Chamberlain, deceased, against the Wyoming Coal Mining Company, a corporation, and the Sheridan County Electric Company, a corporation. Judgment for defendants on directed verdicts, and plaintiff brings error. Affirmed.

Fred H. Free, of Sioux City, Iowa, and Fred H. Blume, of Sheridan, for plaintiff in error. Charles A. Kutcher and D. P. B. Marshall, both of Sheridan, for defendants in error.

BEARD, J. The plaintiff in error brought an action against the defendants in error to recover damages for the death of Myron Chamberlain, alleged to have been caused

by the negligence of defendants. At the close of plaintiff's evidence, the court granted the motions of each of the defendants for a directed verdict. The court thereupon instructed the jury to return a verdict in favor of each of the defendants, which was done, and judgment was entered accordingly. Plaintiff brings error.

The defendant Sheridan County Electric Company was engaged in the business of generating, selling, and distributing electricity for lights and power, and at the time of the accident complained of was furnishing electricity over its wires to defendant the Wyoming Coal Mining Company at a certain substation owned and operated by the coal company. At the time Chamberlain met with death, he was, and for some time prior thereto had been, in the employ of the coal company as a laborer caring for said substation and the machinery and appliances therein, which machinery and appliances consisted of certain wires, insulators, transformers, converters, switches, etc. Plaintiff alleged, in substance, in his petition: That said substation was defectively constructed and maintained, in that the building was constructed of sheet iron and that the line wires entering the building and connecting with certain switches were placed not more than 14 inches from a certain iron pipe in the building forming a "ground." That said wires carried, when in operation, 23,000 volts of electricity and were not insulated. That said switches were about 9 feet from the floor of the building and were operated with wooden sticks in turning on and off the current at the substation. That deceased was about 56 years of age, did not know of said defects, and was ignorant of the dangers connected with handling said electric current, and had not been warned of the danger by defendants. That on the day of the accident the coal company informed Chamberlain by telephone that the current was shut off from said substation. That, relying on such information, he placed a ladder against the wall and climbed up to one of said switches, which had become disarranged and out of repair, to repair the same, and, his body coming in contact with said iron pipe and said switch, he was instantly killed. That he did not know that the current was then on said wire.

The defendants, separately, answered denying any negligence on the part of either, and alleged that the death was caused by the negligence of said Chamberlain. Alleged that a short time before the death of Chamberlain he was directed by the general manager of the coal company to pull out the stick switches at the substation and to then immediately go to the mine and order the men to cease work for the night and come out of the mine. But for some reason unknown to defendants he procured a ladder from outside the building, and, with knowledge of the dan-

ger, carelessly and negligently climbed up to said switch and wire. The coal company further pleaded assumption of risk by Chamberlain.

A careful consideration of all of the evidence, we think, fully establishes the following stated facts: That the substation and the machinery therein were constructed, installed, and maintained substantially as alleged. That Chamberlain at the time of his death was, and for four or five months prior thereto had been, employed by the coal company as a laborer in said substation looking after and attending to the machinery therein. That he was about 56 years of age and a man of ordinary intelligence. That he had been informed that there were 22,000 volts of electricity passing through the switches mentioned. That it is not practical to insulate wires carrying 22,000 volts of electricity. That the switches were operated by means of wooden poles about six feet in length, and that there was no danger in so operating them. That it was not a part of Chamberlain's duties to repair the switches, but was his duty if a fuse burned out of the end of a switch stick to remove the stick, put a fuse therein, and replace the switch stick. That such repair was not attended with danger. That on the evening of the accident Chamberlain was directed by the general manager of the coal company by telephone "to pull the switches and notify the men to come out of the mine; that there would be no more power to-night; that there was trouble at the plant at Acme." Another witness states that the directions to Chamberlain were "to pull out the stick switches and go down in the mine and get the men out; that there wouldn't be any more power until Bibb and his men got out there at 9 o'clock." That, upon receiving such instructions, Chamberlain pulled the switch sticks, but it does not appear that he then went into the mine and called the men out. He procured a ladder, placed it against the wall near one of the switches, climbed up to the iron pipe which was about twelve feet from the floor of the building, and came in contact with the pipe and the switch or wire, and was thereby killed. That the current was on the wires at that time, and the switches were not out of repair.

[1] Upon the facts of the case as we understand them from the record, and as above briefly stated, there appears to us to be only one conclusion fairly to be arrived at, and that is that the direct and proximate cause of the death of Chamberlain was his own negligence in voluntarily and outside the line and scope of his duties going into a place of danger; and, not only so, but in disregard of his instructions at the time. He was directed to pull the stick switches and then go into the mine and call the men out. He was informed, accordingly to the testimony of one witness, that the trouble was elsewhere (at Acme) and, according to another witness, to

pull the stick switches and then go into the mine and call the men out, and that men from the electric company would be there at 9 o'clock. Whether or not he went into the mine as directed, after he pulled the switches, does not appear from the evidence. If he did not, he was clearly violating his instructions in doing what he did. And if he in fact went into the mine and called the men out, he must have returned and attempted to investigate or remedy a supposed defect which he had been informed would be attended to by men from the electric company. We think it clearly appears that had deceased kept within the scope of his employment and the discharge of his duties, and had not disregarded his instructions, the accident would not have happened. It is proper also to state that there is no allegation in the petition that it was the duty of Chamberlain to repair or attempt to repair the switches.

[2] When it clearly appears to the trial court that upon the evidence produced, giving to it its full probative force, together with all reasonable inferences deducible therefrom, it fails to establish in law a claim, or defense, it is not only the right but the duty of the court to so instruct the jury. So in this case, had it been submitted to the jury on the evidence contained in the record, and had the jury returned a verdict in favor of plaintiff and against either of the defendants, it would in our opinion, have been the duty of the court to have set it aside.

We discover no prejudicial error in the record, and the judgment of the district court is affirmed.

Affirmed.

POTTER, C. J., and BLYDENBURGH, J., concur.

(28 Wyo. 416)

HATCH BROS. CO. v. BLACK et al.
(No. 884.)

(Supreme Court of Wyoming. March 18, 1918.)

1. DEDICATION ⇐60—ACCEPTANCE BY PUBLIC—PERSONS BOUND.

A dedication of a highway which is accepted by public user, while binding upon the dedicatory and those holding under him, does not require the public authorities to maintain or care for the highway.

2. DEDICATION ⇐1 — HIGHWAYS ⇐7(1) — "PRESCRIPTION."

The distinction between a highway by prescription and one by dedication is that "prescription" is an adverse holding under color of right, while a "dedication," whether expressed or implied, rests upon the consent of the owner.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dedication; Prescription.]

3. DEDICATION ⇐45 — ACCEPTANCE — QUESTIONS FOR JURY.

What facts constitute an acceptance of a dedication and when such acceptance takes place are questions necessarily differing with each separate case, and are to be submitted to the jury under proper instructions.

Error to District Court, Uinta County; John R. Arnold, Judge.

On petition for rehearing. Rehearing denied.

For former opinion, see 165 Pac. 518.

Payson W. Spaulding, of Evanston, and Bagley & Ashton, of Salt Lake City, Utah, for plaintiff in error. B. M. Ausherman, of Evanston, for defendants in error. Corthell, McCollough & Corthell, of Laramie, amici curiæ.

BLYDENBURGH, J. Defendants in error filed a petition for rehearing herein, and additional counsel joined therein and requested to be heard, and stated in their brief that "the establishment of a highway by acts of the unofficial public is a question of immense import," and "much public interest has been manifested in the opinion of the court on this question since it was first handed down," and "it is to be regretted that the case was not argued orally, and that it was not submitted to the consideration of a full bench." On account of these suggestions and representations an oral argument was ordered on the petition for rehearing, and a very able and exhaustive argument of the question involved was heard by a full bench, and elaborate briefs were filed in addition to those originally filed in the case.

It was admitted at the argument on this hearing that the case would have to be sent back for a new trial for the reasons stated in the opinion relating to the evidence as to damages, and it is not sought to change the judgment of this court in that respect, but it is contended that this court was in error in holding virtually that a highway could be established in Wyoming by an acceptance of the grant or dedication by the federal government under the act of July 26, 1866, by user by the public without any official act on the part of the county authorities. In fact this is the only question presented by the petition for rehearing. The general law on the subject is well stated in 13 Cyc. p. 465:

"An offer of dedication, to bind the dedicatory, need not be accepted by the city or county or other public authorities, but may be accepted by the general public—to deny this would be to deny the whole doctrine of dedication. The general public accepts by entering upon the land and enjoying the privileges offered, or, briefly, by user. Except when user is relied on to raise a presumption of dedication, the duration of the user is wholly immaterial. It is not necessary that such user should continue any definite length of time, or that so long as the persons enjoying it have done so as members of the general public and not as neighbors or licensees, or otherwise in their individual capacity, they should be of any defined number. While no dedication will be presumed from user alone, unless the user has been so long and so general that the public convenience would be materially affected by its interruption, no such requirement applies strictly as to the user which constitutes the acceptance of a dedication otherwise established; it being only necessary that those who would naturally be expected to enjoy

it do, or have done so, at their pleasure and convenience."

That this doctrine pertained in Wyoming, and that there can be an acceptance of the federal dedication by user under the laws of the territory of Wyoming at least prior to 1886 is evident from the statutes as quoted in the original opinion herein, and was admitted at the hearing, but it was contended that the statutes of the territory, beginning with 1877, perhaps, and certainly from 1886, and the statutes of the state since its admission, especially the act of 1895, are inconsistent with an acceptance by public unofficial user of the federal grant, and in fact repealed the common-law right originally recognized. The congressional act of 1866 (Act July 26, 1866, c. 262, 14 Stat. 253 [U. S. Comp. St. 1916, § 4919]), was passed to give the public a right of way over the public lands of the United States that they could not have acquired in any other way.

"The object of the grant," it was said in *Wells v. Pennington County* (1891) 2 S. D. 1, 48 N. W. 305, 39 Am. St. Rep. 758, "was to enable the citizens and residents of the states and territories where public lands belonging to the United States were situated to build and construct such highways across the public domain as the exigencies of their localities might require, without making themselves liable as trespassers. And when the location of the highway and roads was made by competent authority or by public use, the dedication took effect by relation as of the date of the act; the act having the same operation upon the lines of the road as if specifically described in it. * * *

The parties to a dedication are the owners and the public; and it must be remembered that the public is an ever-existing grantee, capable of taking dedications for public uses, and its interests are a sufficient consideration to support them."

This dedication by Congress to the public of rights of way for highways over the public lands of the United States is a valuable right, and it is not to be presumed that the Legislature in this state, where distances are great, county funds from taxation applicable to road work comparatively small and inadequate to meet the demands of the inhabitants in different parts of the county, where roads in new and sparsely settled portions of the state of necessity have to be made and traveled by the public without the aid of the county authorities, intended to abrogate and annul this right and open the way to legalized blackmail of the county authorities by fencing up such used roads and requiring the county thereafter to condemn and pay damages for a way otherwise belonging to the public, unless such intention is so clearly expressed by the enactment that no other conclusion can be reached. This was especially true at the time of the passage of the act of Congress in 1866 in the then mountain territories, and there were few public authorities that could take charge of roads and highways, the taxable property from which funds could be raised was so small as to be negligible and the distances so great between settlements, the

only methods of transportation, even for the necessities of life for the most part, were wagons or pack trains, it must have been necessarily presumed that the acceptance of this grant by user by the general public was to be usual one. The grant has been held to be one in present, although floating in character until the locus in quo is established, either by legislative action as in those jurisdictions which declared all section lines public roads, by surveys by the public authorities or by becoming definitely marked upon the ground by public user, either of which methods becomes an acceptance and all subsequent settlers or locators took the land from the government subject to the easement of the public thus granted. The original act of 1866 (Laws 1869, c. 26, p. 330) in the first section mentions all the different kinds of highways, and recognized the common-law doctrine of establishment of highways by user without declaring any specific method or enacting any new law in this regard. It will be observed that the early act, while prescribing the method by which roads might be changed, altered, or new roads laid out by the county, does not anywhere enjoin on the county authorities the duty to maintain or keep in repair the highways mentioned in the act. The conditions at the time of this act were much the same in Wyoming as stated above at the time of the passage of the congressional act, and the five counties of the territory extended from Colorado to the Montana line, taxable property was small in amount, distances to be traveled were great, and the settlements far apart.

This act remained in force until the act of March 12, 1886, which appears as chapter 99, Laws of 1886, and was entitled an act concerning roads and highways. The first section of this act is as follows:

"That all county roads shall be under the supervision of the board of county commissioners of the county wherein said road is located, and no county road shall be hereafter established, nor shall any such road be altered or vacated in any county in this territory except by authority of the county commissioners of the proper county."

This is the first legislative word in Wyoming that specifically placed any roads under the supervision of the county commissioners and enjoined a duty upon the county officials to maintain and keep them in repair. This act provides for the election or appointment of road supervisors, and prescribes their duties, and the means for working the roads, but it is significant that wherever a duty is imposed by the act upon county officials in this chapter, it mentions *county* roads, and prescribes the width of *county* roads, etc. This act repeals in terms the act of 1869 which had become chapter 102 of the Compiled Statutes of 1876, but did not repeal any common-law doctrine thereby, and that it still recognized that the congressional grant could be accepted by public user, and that

other highways existed and could be established besides those county roads provided for in the act in regard to which a duty of maintenance and repair was imposed upon the county officers is shown by section 32, which was as follows:

"When any public road, heretofore laid out or traveled as such, or hereafter to be laid out or traveled as a public road, crosses any stream of water, and such stream is at any time during the year fordable where such road crosses or shall cross the same, the said ford and the banks of the stream adjacent thereto, and the roadway or track usually traveled leading to and from such highway, to and from such ford, shall be deemed and taken to be a part, portion and continuation of such public road and highway. Any person who shall obstruct any such ford, or the road leading thereto, * * * shall be liable to the same penalties as for obstructing a public highway."

[1] This clearly recognizes the right to establish public roads by travel or public user without action by the public authorities. This act clearly shows that the object sought to be accomplished by the Legislature was prescribing those roads and highways in regard to which a duty was imposed to maintain or keep in repair. And this is in accord with the authorities that a dedication for a highway which is accepted by public user, while binding upon the dedicator and those holding under him, does not require the public authorities to maintain or care for the highway.

"Although the rule is almost unquestioned that user by the general public will not, in addition to binding the dedicator and consummating the dedication, bind the public authorities so that they will be responsible for its care and maintenance, this subject has presented difficulties and has caused confusion. The general rule is that the public by user cannot so accept as to bind the municipality." 13 Cyc. 466.

The act of 1890 (Laws 1890, c. 86) did not in any way change the law in this respect, and the act of 1891 (Laws 1890-91, c. 97) merely amended the act of 1890, although it amended the first section of the act of 1890 by specifically adding to the declared public highways others beside *county* roads, and then specifically declares, as in the acts of 1869 and 1890, that *county* roads shall be under the management and control of the county commissioners, and shall not be established or vacated except by them. The act of 1895 (Laws 1895, c. 69), which is the present law of the state at all affecting this matter, in section 1, re-enacts the first paragraph of the law of 1891, and adding "national" to state, territorial, and county roads then enacts, in a separate sentence, the provision which led to the instruction declared erroneous in the original opinion in this case:

"All roads that have been designated or marked as highways on government maps or plats in the record of any land office of the United States within this state, and which have been publicly used as traveled highways, and which have not been closed or vacated by order of the board of the county commissioners of the county wherein the same are located, are declared to be public highways until the same are closed or vacated by order of the board of county

commissioners of the county wherein the same are located, and the board or officer charged by law with such duty shall keep the same open and in repair the same as in the case of roads regularly laid out and opened by order of the board of the county commissioners."

This provision clearly designates such roads as are to be added to those which the county authorities are required to maintain and repair, and in no way affects other highways upon which this duty may not be imposed. It is especially significant that this act places in a separate section the provision regarding the *county* roads which was contained in the one section of the former act, section 2 being as follows:

"All county roads shall be under the supervision, management and control of the board of the county commissioners of the county wherein such roads are located, and no county road shall hereafter be established, altered or vacated in any county in this state, except by the authority of the board of the county commissioners of the county wherein such road is located, except as in this act provided."

Other sections of this last act as to width of *county* roads are substantially the same as in the former acts, and the act re-enacts without change, in section 57, section 32 of the act of 1886, containing these significant words:

"When any public road heretofore laid out or traveled as such or hereafter to be laid out or traveled as a public road," etc.

This is carried into the Wyoming Compiled Statutes as section 2571, and is the present law of the state, clearly recognizing the right of the public by traveling a road as a public road to accept the congressional grant or dedication. The repealing section of this act, section 64, after repealing each of the prior statutes regarding roads and highways, expressly enumerating them, closes with these significant words:

"Any and all rights obtained by, secured to, or vested in the public or any person, corporation or association of persons under laws existing at the time of the taking effect of this act, are hereby preserved and continued in force the same as if this act had not been passed."

It is evident it was not the legislative intention to take from the public a valuable right of acceptance of the federal grant, but to preserve to it every and all rights it had.

While doubtless the county commissioners could accept the federal dedication by survey and other acts fixing the locus of a road over the public domain, such method or a direct act of the Legislature is not exclusive of an acceptance by the public by unofficial user, as has been held in those states where section lines had been designated as highways. In the case of Cemetery Association v. Meninger, 14 Kan. 312, Justice Brewer, in holding a dedication could be established by user, on page 316, said:

"No formal acceptance by any particular authorities is essential. The mere user by the public may be of such a character as to constitute an acceptance. Indeed, such user by the public with a knowledge of the owner may be sufficient evidence of both the dedication and the

acceptance. We know this doctrine is denied by some courts, but it seems to us to rest upon the soundest principles."

Although it was pointed out in the original opinion that in the case of *Commissioners v. Patrick*, 18 Wyo. 130, 104 Pac. 531, 107 Pac. 748, this court was "considering the question of the establishment of a highway over private lands by prescription, and that the federal grant was not involved in the case," counsel is persistent in claiming that the *Patrick* Case settled by its holding and reasoning the question here involved and says:

"Highways by prescription rest upon implied dedication. We believe it is universally held that in all cases where highways may be or have been established by public user for the length of time required in the local jurisdictions to create the right, such right has always rested upon the supposition or presumption of an original dedication by the owner."

[2] Counsel is in error in this statement, and does not seem to grasp the great distinction between a highway by prescription and one by dedication. Prescription is an adverse holding and under color of right. Dedication, whether express or implied, rests upon the consent of the owner, and, while it is not necessary to invoke common-law fictions or fallacious presumptions to sustain modern short-time statutes of limitations which are well-designated statutes of repose, fixing time within which actions may be commenced, it is said in 37 Cyc. pp. 18, 19:

"By the better opinion, however, the doctrine of prescription, as applied to highways, is based on the presumption of an antecedent exercise of the power of eminent domain by the proper authorities."

And a large number of authorities from many states are cited in the notes to sustain the text.

The word "user" has been invoked in three different ways and purposes in the various cases relating to highways: First, where it is sought to hold that a highway may be acquired by prescription in adverse user and under color of right, and where there is any definite entity as the county officials upon whom it devolves to assert this right as hostile and adverse to the owner, it is generally held that the evidence must show some attempt at least to assert a right by such officials, and it was so held in the *Patrick* Case; second, where it is attempted to show that a highway exists, not by adverse user, but by acquiescence of the owner and user by the public, where it is held that a long user by the public without objection from the owner is necessary to imply a dedication as well as an acceptance by the public; and, third, where there is an express dedication and acceptance of the same is sought to be shown by user in any of the ways stated above. Only the third class has any application to the matters involved in this case,

the acceptance of the federal grant, but counsel and some courts have not clearly separated the doctrines applied to the different classes of cases in which this matter of user is discussed. This court, in both of the opinions in the *Patrick* Case, very carefully confined its statements to the matter under consideration, viz. to questions of a highway by prescription over privately owned lands, and the numerous quotations from that case in counsel's brief show that the court confined its statements to matters relating to prescription. The first quotation used is as follows:

"The question * * * is, can a road so located be diverted from its original course to and over lands of another, *in the absence of dedication by the owner*, without official action or the assumption of control by the board, and by long-continued use by the public, become a public or county road?"

And the next quotation:

"In addition to the use of the road by the public *in the absence of a dedication, express or implied*, by the owner of the land, other than by his mere silence, assumption of control and jurisdiction over it by the board of county commissioners for the period of limitation should be shown." (Italics are ours.)

This last quotation states in a nutshell the whole matter of what was decided in the *Patrick* Case. These expressions not only expressly do not apply to matters of dedication, and not even implied dedication was considered, but at least infer that in cases of dedication a road may become a public highway by public user. And so as to the other quotations from the *Patrick* Case, in each, by specific language the things said are limited to the question of prescription. The one relative to the absence of a statute in Wyoming may serve as an example:

"There has never existed in this state a statute to the effect that the mere use of a road by the public *may ripen into a title or right thereto by prescription*, but in some states there is such a statute, which is held to qualify the common law rule."

[3] It is not necessary to pursue this discussion further. We hold, as in the original opinion, that there is nothing in our statutes that takes away the right of the public to accept by unofficial user the federal grant of rights of way over the public domain so as to bind subsequent grantees of the government, but our statutes seem to distinctly recognize that right. As to what facts will constitute an acceptance or when such acceptance takes place are questions that will of necessity differ with each separate case, and such are to be submitted to the jury under proper instructions of the court. A rehearing will be denied.

Rehearing denied.

POTTER, C. J., and BEARD, J., concur.

(41 Mont. 486)

LINDEMAN v. PINSON et al. (No. 3854.)

(Supreme Court of Montana. Feb. 27, 1918.)

1. TAXATION ⇨761—TAX DEED—VALIDITY.

A tax deed indicating that about 247 lots situated in 21 different blocks were sold en masse is void upon its face, since the court knows the different blocks were separated by streets and alleys, and that the lots were therefore noncontiguous.

2. VENDOR AND PURCHASER ⇨133 — CONTRACT OF SALE—BREACH—"DELIVER GOOD AND SUFFICIENT DEED."

A contract to deliver a good and sufficient deed imports that the vendor will furnish a good title, and is breached where a vendor without title tenders a quitclaim deed sufficient in form.

3. TAXATION ⇨803 — LIMITATIONS — VOID TAX DEED—SETTING ASIDE.

Revised Code, § 2654, as amended by Laws 1909, c. 50, prohibiting actions to annul tax deeds, unless commenced within two years after issuance of the tax deed, is inapplicable to a tax deed void upon its face.

Appeal from District Court, Powell County; George B. Winston, Judge.

Action by Linus Lindeman against John F. Pinson and Bertha Pinson. Judgment for plaintiff, and defendants appeal. Affirmed.

Thomas F. Shea, of Deer Lodge, for appellants. W. E. Keeley, of Deer Lodge, for respondent.

LESLIE, District Judge. This action was brought by Linus Lindeman against John F. Pinson and Bertha Pinson, his wife, to recover damages for the breach of a contract entered into between the parties on the 2d day of November, 1912, whereby defendants agreed to sell and convey to the plaintiff lots 11 and 12, in block 7, Syndicate addition to Deer Lodge, Mont., upon payment to them of the agreed purchase price. By the terms of the contract, which is set forth in full in plaintiff's second amended complaint, the plaintiff was obligated to pay \$10 cash upon the execution of the agreement and \$165 in monthly installments of \$10 each, with annual interest upon the deferred payments until the purchase price should be paid. With respect to defendants' liability under the contract, after complete payment to them, it reads:

"When the vendee has fulfilled all the conditions of this contract a good and sufficient deed shall be executed by the vendors, their heirs, executors or administrators, to the vendee, his heirs or assigns."

In view of the admissions of counsel for both parties at the trial, the cause was relieved of all questions of fact except as to the character of title held by the defendants to said lots, and it is unimportant to refer further to the pleadings. The cause was tried by the court sitting without a jury, resulting in a judgment for the plaintiff. Defendants

have appealed from the judgment and from an order denying them a new trial.

It was admitted on the trial that the plaintiff had complied with all of the conditions imposed upon him by the terms of the contract, and, further, that before the institution of this action and again at the trial, the defendants tendered to the plaintiff a quitclaim deed to said lots sufficient in form as a quitclaim deed. Thereupon, for the purpose of showing the source of title in defendants to the lots in question, plaintiff introduced five separate deeds. The first a tax deed, dated March 31, 1894, from the county treasurer of Deer Lodge county, assuming to convey to Christian Schurch 247 lots in 21 different blocks in the Syndicate addition to Deer Lodge, and including the lots in controversy. The next, a quitclaim deed dated May 5, 1894, from Christian Schurch and wife to T. E. Crutcher, conveying, among others, the said lots 11 and 12. Another, dated June 28, 1905, from Thomas E. Crutcher, quitclaiming said two lots to Edward Scharnikow. A bargain and sale deed dated December 12, 1908, conveying said lots from said Scharnikow and wife to L. C. Beattie, and, finally, a quitclaim deed dated December 3, 1912, from L. C. Beattie to J. F. Pinson.

The defendant J. F. Pinson and W. E. Keeley were sworn and testified as witnesses on behalf of defendants, but their testimony throws no light upon the subject-matter involved in this case. The above-noted admissions of the parties at the trial, the deeds above referred to, and the unimportant testimony of said Pinson and Keeley, constitute the sum of the testimony in the case, and the determination of the rights of the parties resolves itself into the solution of the question whether the tender of the quitclaim deed to the plaintiff was a sufficient compliance on the part of the defendants, with the terms of their contract.

[1] The tax deed received in evidence in the case shows on its face that certain lots variously numbered, consisting of about 247, and situated in 21 different blocks, ranging in their numbers from 1 to 151, in the Syndicate addition to Deer Lodge, and embracing said lots 11 and 12 in block 7, were assessed all together, and that they were sold en masse for \$21, "being the whole amount of the taxes, interest and costs then due and remaining unpaid on said property." As was said in *North Real Estate, L. & T. Co. v. Billings L. & T. Co.*, 36 Mont. 356, 367, 93 Pac. 40, 44:

"We know, of course, that blocks in cities and towns are bounded by streets and alleys, and it therefore follows that the lots in these different blocks could not be adjoining lots. * * * Under the statute there is no doubt that a deed would not be invalid because it conveys a number of lots or parcels of land; but it is equally clear to us that, where a deed shows on its face that several noncontiguous parcels

of property were sold en masse, the deed is void."

In *Horsky v. McKennan*, 53 Mont. 50, 61, 162 Pac. 376, 379, a case bearing facts with respect to assessment, tax sale procedure and deed, similar to this case, it is said:

"We entertain no doubt that such a sale as this deed discloses was in contravention of the law and a deed which shows it is void on its face"—citing the first above-named case and *Rush v. Lewis & Clark County*, 36 Mont. 566, 93 Pac. 943.

A further discussion of the invalidity of the tax deed in this case is needless.

[2] Schurch acquired no title to the lots herein involved, and the defendants, claiming to derive title through that source, stand in no better situation. When they obligated themselves to execute "a good and sufficient deed" to their vendee, something more was contemplated by all of the parties than the execution and delivery of a quitclaim deed "sufficient in form" but barren of substance. A covenant to execute and deliver a good and sufficient deed imports that the vendor will furnish a good title to the land in question. A purchaser may bargain for a doubtful title, but he should not be held to have done so unless upon satisfactory evidence it appears that it was his intention so to do. The record in this case discloses nothing that militates against the conclusion that it was the intention of the parties, embodied in their contract, that the plaintiff should pay the agreed price for the lots, and when he did so that the defendants would execute to him a deed conveying to him a good title to the same. Many of the cases bearing upon this subject may be found in 39 Cyc. cited in support of the text, at pages 1442 and 1484-1486. The quitclaim deed tendered to the plaintiff by the defendants was a nullity, and at best could have conveyed only such title as the grantors had at the time of its execution. *Wetzstein v. Largey*, 27 Mont. 212, 70 Pac. 717.

[3] Counsel for appellants in his brief invokes the provisions of section 2654, Revised Codes, as amended by chapter 50 of the Session Laws of 1909. It has no force or effect as disclosed by the record in this case, and any discussion upon the subject with respect thereto is foreclosed by what was said in *Horsky v. McKennan*, at page 64 of 53 Mont., 162 Pac. 376, supra. This being an action for breach of contract, and the plaintiff having sustained by ample proof the burden of the alleged breach by the defendants, the other assignments are not deserving of further consideration.

No error appearing in the record, the judgment and order are affirmed.

SANNER and HOLLOWAY, JJ., concur. BRANTLY, C. J., being absent, takes no part in the foregoing decision.

(54 Mont. 463)

THRIFT v. THRIFT. (No. 3875.)

(Supreme Court of Montana. Feb. 27, 1918.)

1. DIVORCE — 202 — ALIMONY — SUFFICIENCY OF SERVICE OF PROCESS.

A divorce decree, being in personam so far as it awards alimony in a sum certain, is invalid, as to such award, if based upon substituted service alone.

2. DIVORCE — 249(1), 261 — ALIMONY — IMPOUNDING PROPERTY BEFORE AWARD.

If property of husband defending divorce suit is impounded by the plaintiff, judgment for alimony in a sum certain, even though rendered on substituted service, may be satisfied out of the property, but not otherwise, or, as authorized by Rev. Codes, § 3685, the property itself may be set over to the wife's use for a limited period; but under no circumstances can the court transfer the title to the wife absolutely.

3. DIVORCE — 250 — DISPOSITION OF PROPERTY.

That separate funds of a wife, suing for divorce, may have been employed in the improvement of lands standing in her husband's name, does not create a trust or interest in the property itself in her favor.

4. DIVORCE — 290 — DECREE — CUSTODY OF CHILD IN ANOTHER STATE.

A divorce decree, since it has no extraterritorial force, is a nullity in so far as it attempts to operate upon the status of a minor child residing in another state.

5. APPEAL AND ERROR — 714(5) — SUFFICIENCY OF RECORD — AIDED BY BRIEFS.

The Supreme Court is bound by the record, and may not decide cases upon statements contained in the briefs.

Appeal from District Court, Chouteau County; John W. Tattan, Judge.

Action by Florence Thrift against Harmon Thrift. From an order denying plaintiff's motion, he appeals. Reversed and remanded.

Stranahan & Stranahan, of Ft. Benton, for appellant. H. S. McGinley, of Ft. Benton, for respondent.

HOLLOWAY, J. Upon the trial of this case the district court granted a divorce in favor of the plaintiff, awarded her alimony in a specific sum, payable monthly, transferred to her absolutely certain real property belonging to the defendant, and gave to her the custody of a minor child, the issue of the marriage. The defendant and the child were residents of Indiana. Service of summons was made by publication, and there was no appearance by defendant before trial. Subsequently defendant appeared specially and moved to have eliminated from the decree the provisions for alimony, the transfer of the real estate, and the custody of the child. The motion was denied, and this appeal is from the order.

[1] 1. In so far as the decree awards alimony in a sum certain, it is in personam (14 Cyc. 745), and it is now settled beyond controversy that such a decree cannot be rendered upon substituted service alone. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Silver Camp Min. Co. v. Dickert*, 31 Mont.

488, 78 Pac. 967, 67 L. R. A. 940, 3 Ann. Cas. 1000.

[2, 3] 2. The decree assumes to transfer to plaintiff absolutely 160 acres of land belonging to defendant and acquired by him under the homestead laws of the United States, without having first brought the property under the control of the court by appropriate proceedings. If this property had been impounded, a judgment for alimony in a sum certain, even though rendered on substituted service, might have been satisfied out of the property, but not otherwise (*English v. Jenks*, 54 Mont. —, 169 Pac. 727), or the property itself might have been set over to the use of the wife for a limited period, as authorized by section 3685, Revised Codes; but under no circumstances could the court transfer the title absolutely, and, having failed to subject the property to its control, the order affecting it is void. The fact that separate funds of the wife may have been employed in the improvement of these lands does not create a trust or interest in the property itself in her favor. *Cizek v. Cizek* (on rehearing), 69 Neb. 797, 96 N. W. 657, 99 N. W. 28, 5 Ann. Cas. 464, and note. Moreover, the court did not assume to transfer to plaintiff her own property, but the property of the husband.

[4] 3. The decree has no extraterritorial effect, and in so far as it attempts to operate upon the status of the minor child residing in Indiana, it is a nullity. *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; *Cooley's Constitutional Limitations* (7th Ed.) p. 584.

[5] In his brief, counsel for respondent asserts that defendant and the child were residents of Montana, only temporarily absent, and that defendant has accepted the fruits of this decree and may not appeal from it. If these facts appeared in the record, different questions would be presented; but there is not even a suggestion of either. We are bound by the record, and may not decide these cases upon statements contained in the briefs.

The order is reversed, and the cause is remanded, with directions to modify the decree in conformity with defendant's motion.

SANNER, J., concurs. The CHIEF JUSTICE, being absent, takes no part in the foregoing decision.

(54 Mont. 461)

STATE ex rel. TOPLEY v. DISTRICT COURT OF FOURTH JUDICIAL DIST. IN AND FOR RAVALLI COUNTY et al. (No. 4183.)

(Supreme Court of Montana. Feb. 26, 1918.)

COURTS — 207(2) — WRIT OF SUPERVISORY CONTROL—SCOPE.

Supervisory control will not be exercised to review an order of the district court refusing to set aside a default divorce decree, rela-

trix having an adequate remedy by appeal, time for which has not expired, there being no hardship peculiar to the case or different from that suffered by all appellants, and the special interest in the state claimed as sufficient to warrant the proceeding justifying a motion to advance.

Proceedings by the State, on the relation of Mary J. Topley, against the District Court of the Fourth Judicial District in and for the County of Ravalli and R. Lee McCulloch, a judge thereof, to review an order of said district court refusing to set aside a decree of divorce entered by default in the case of John W. Topley against relatrix. Proceeding dismissed.

S. J. Bischoff, of Missoula, for relatrix. Geo. T. Baggs, of Stevensville, and Harry H. Parsons, of Missoula, for respondents.

SANNER, J. Supervisory control to review an order of the district court of Ravalli county, refusing to set aside a decree of divorce entered by default. We state the facts substantially as conceded by respondents in their brief, to wit: John W. Topley filed in said court his complaint for divorce against the relatrix, Mary J. Topley. He claimed residence in Montana, she being in New York. The complaint was weak and defective; the issuance of the alias summons was at least irregular. Service or purported service was by publication and not personal. In due time the default of the relatrix was entered, and the decree rendered without legal notice to her, actual or constructive. Immediately upon learning of the facts she filed a motion to set aside the decree upon the grounds, mainly, that the court had no jurisdiction of the person of the relatrix or of the subject-matter of the action, and that the decree was procured through fraud practiced upon the court. This was supported by numerous exhibits and affidavits, accompanied by a proposed answer sufficient on its face. The motion was heard, and on January 23, 1918, was overruled.

Just why on such a state of facts, ignoring the detailed strength of relatrix's showing, the court refused to set aside the decree and open the default is to us incomprehensible. But the relatrix has an adequate remedy without resort to this most extraordinary of all legal proceedings. The order referred to is appealable; the time for appeal has not expired, and will not expire for yet a little while. No hardship peculiar to the case or different from that suffered by all appellants is presented, and the special interest in the state claimed as sufficient to warrant this interposition would justify a motion to advance. This proceeding will not lie unless there is no appeal, or the remedy by appeal is inadequate. (In re Weston, 28 Mont. 207, 72 Pac. 512; *State ex rel. Carroll v. District Court*, 50 Mont. 428, 147 Pac. 612; and we cannot permit it to be used as a convenience

or shorter route to precedence over other causes equally entitled to our consideration.

For this reason the proceeding is dismissed at relatrix's cost.

Dismissed.

HOLLOWAY, J., concurs. BRANTLY, C. J., being absent, did not hear the argument, and takes no part in the foregoing decision.

(54 Mont. 438)

COMO ORCHARD LAND CO. v. MARKHAM et al. (No. 3874.)

(Supreme Court of Montana. Feb. 25, 1918.)

1. PLEADING \S 360(1)—MOTION TO STRIKE—EFFECT.

A motion to strike has the effect of demur as admitting allegations attacked.

2. FRAUD \S 31—ELECTION OF REMEDIES.

A person injured by the fraudulent acts of another may elect to rescind, or may affirm the transaction and sue for damages.

3. FRAUD \S 9—ELEMENTS.

False representations as to material matters, from which damages proximately result, constitute actionable fraud.

4. FRAUD \S 13(2)—SUPERIOR KNOWLEDGE.

If the party expressing the opinion possesses superior knowledge, such as would reasonably justify the conclusion that his opinion carries with it the implied assertion that he knows the facts which justify it, his statement is actionable if he knows that he does not honestly entertain the opinion because it is contrary to the facts.

5. FRAUD \S 11(1) — MATTERS OF FACT OR OPINION.

An opinion may be so blended with facts that it amounts to a statement of facts sustaining a charge of fraud.

6. FRAUD \S 22(1) — OPPORTUNITY TO INVESTIGATE.

If the complaining party examined the property (the subject-matter of the transaction) or had the opportunity at hand to examine it, and failed without fault of his adversary, he cannot plead his own bad judgment in the one case, or his negligence in the other, as a foundation for legal liability.

7. FRAUD \S 22(1)—DUTY TO INVESTIGATE.

While the law does not reward the negligence or folly of a buyer, it does not require him to pursue an independent investigation to ascertain the truth or falsity of the seller's representations when the property is situated a long distance from the place of the transaction and an investigation would entail great expense.

8. FRAUD \S 64(5)—QUESTIONS FOR JURY.

In suit to foreclose purchase-money mortgage on Montana land, where defendants counterclaimed damages for fraudulent representations as to the land, which was sold for orchard purposes, it being inferable from the counterclaim that the sale took place in Wisconsin where defendants resided, whether, under the circumstances, defendants were negligent in failing to go to Montana to investigate the truth of the representations, was for the jury.

9. FRAUD \S 64(3)—QUESTIONS FOR JURY.

In suit by orchard land company to foreclose purchase-money mortgage, where defendants, residents of a distant state, counterclaimed for false representations as to the land, whether, under the advantageous position occupied by plaintiff, its opinions were not so blended with alleged facts as to constitute them fraudulent representations, was for the jury.

10. FRAUD \S 20—QUESTIONS FOR JURY.

In suit by Montana orchard land company to foreclose purchase-money mortgage on land sold under agreement that vendor would plant the land to orchards and cultivate it for five years, where defendant counterclaimed damages for false representations, alleging representations that the locality where the lands are situated was a long-tried fruit district, free from serious crop failures, damaging frosts, or harmful pests; that fruits of hardy and semihardy varieties prosper in the locality as nowhere else in the United States; that the demand for Montana grown fruits exceeded the supply, and there was a ready home market at remunerative prices; that orchards operated by plaintiff in the vicinity had been successful, yielding large profits on the investments; that apple growing has been very profitable in this vicinity, it being understood that these lands would be devoted principally to apple raising; and that plaintiff had available expert knowledge of the business which would be applied to the end that proper selections of trees would be made and conditions injuriously affecting the industry avoided—while very broad and even immoderate in the terms employed, were none of them as a matter of law so inherently improbable that defendants, as reasonably prudent persons, ought to have questioned their verity.

11. FRAUD \S 20—RELIANCE ON REPRESENTATIONS—CREDULITY OF PLAINTIFF.

Defendants in action for fraud inducing a purchase should not be heard to say that his representations were so immoderate that plaintiff had no right as a reasonably prudent person to rely on them, for a fraudulent vendor cannot appeal to the law to extol his deceit and condemn the credulity of his victim.

12. VENDOR AND PURCHASER \S 36(1)—FALSITY OF REPRESENTATIONS.

The falsity of representations as to land sold depends, not on whether such representations affect the quality of the land, but on whether such representations affect the value of the land for the purpose for which the land is sold.

13. VENDOR AND PURCHASER \S 33—FALSITY OF REPRESENTATIONS AS TO VALUE — "ACTUAL FRAUD."

Within Rev. Codes, § 4978, defining "actual fraud," representations of vendor of orchard lands sold under agreement that vendor would plant the lands to orchards and cultivate them for five years; that the locality where the lands are situated was a long-tried fruit district, free from serious crop failures, damaging frosts, or harmful pests; that fruits of hardy and semihardy varieties prosper in the locality as nowhere else in the United States; that the demand for Montana grown fruits exceeded the supply, and there was a ready home market at remunerative prices; that orchards operated by plaintiff in the vicinity had been successful, yielding large profits on the investments; that apple growing has been very profitable in this vicinity, it being understood that these lands would be devoted principally to apple raising; and that plaintiff had available expert knowledge of the business which would be applied to the end that proper selections of trees would be made and conditions injuriously affecting the industry avoided—if false, constituted fraud.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actual Fraud.]

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

Action by the Como Orchard Land Company against Stuart H. Markham and an-

other. From judgment for plaintiff, defendants appeal. Reversed and remanded.

Walsh, Nolan & Scallon, of Helena, for appellants. O'Hara & Madeen, of Hamilton, for respondent.

HOLLOWAY, J. This suit was instituted to foreclose a mortgage given to secure an indebtedness of \$4,500. The defendants admit the execution of the notes and mortgage and, by way of affirmative defense or counterclaim, allege: That in May, 1909, they purchased from the plaintiff the lands described in the mortgage and that the indebtedness sued upon represents the unpaid balance of the purchase price. That the lands were sold by plaintiff and purchased by defendants for orchard purposes. That plaintiff agreed to plant the lands to orchards and cultivate them for five years. That defendants were residents of Wisconsin, without experience in fruit raising and without any knowledge of the lands except such knowledge as they gained from the information furnished by plaintiff. That, to induce the purchase, plaintiff represented to defendants (b) that the locality where the lands are situated was a long-tried fruit district, free from serious crop failures, damaging frosts, or harmful pests; (d) that fruits of hardy and semihardy varieties prosper in the locality as nowhere else in the United States; (e) that the demand for Montana grown fruits exceeded the supply and that there was a ready home market at remunerative prices; (g) that orchards operated by plaintiff in the vicinity had been successful, yielding large profits on the investments; (h) that apple growing has been very profitable in this vicinity, it being understood that these lands would be devoted principally to apple raising; and (k) that plaintiff had available expert knowledge of the business which would be applied to the end that proper selections of trees would be made and conditions injuriously affecting the industry avoided. It is alleged that all of these representations were false; were known to plaintiff to be false when made; that they were intended to be accepted as true and to be acted upon; that they were believed and acted upon by defendants to their damage, and that but for them the lands would not have been purchased; that defendants were lulled into a sense of security by subsequent statements of the same character and did not discover that they had been imposed upon until within six months of the date this action was instituted.

Upon motion of plaintiff, the trial court struck out all the allegations of misrepresentation and, defendants declining to plead further, suffered judgment to be entered against them and appealed.

[1] The motion to strike has the effect of a demurrer, and for the purposes of this

appeal all the allegations stricken are deemed to be true. Reduced to its lowest terms, the question presented is: Are these representations, or any of them, of such character as to furnish the basis for relief under the circumstances?

[2] It is elementary that a person injured by the fraudulent acts of another may elect to rescind or may affirm the transaction and sue for damages. 12 R. C. L. p. 405. In order to state a cause of action for rescission, it is necessary for the complaining party to allege that he has restored to the other party everything of value which was received under the contract, or that he has offered to make restitution upon condition that the offending party do likewise, unless it is made to appear that the latter is unable or positively refuses to do so. Rev. Codes, § 5065; 18 Ency. Pl. & Pr. 829. The counterclaim contains none of these necessary allegations and will not justify rescission.

[3] Does it state a cause of action for damages? It does if the representations are material and it can be said that damages flow therefrom in the sequence of cause and effect.

Probably the most familiar example of fraud consists of telling a deliberate and intentional falsehood concerning a material matter. It is sometimes said that the expression of an opinion furnishes no ground for legal relief to one who relies upon it to his injury. Other authorities, however, modify this rule and limit the immunity to cases where the statement amounts to nothing more than an opinion and the parties have equal knowledge of the subject-matter, or equal means of knowledge. *Van Horn v. O'Connor*, 42 Wash. 513, 85 Pac. 260; *Aitken v. Bjerkvig*, 77 Or. 397, 150 Pac. 278.

In *Butte Hardware Co. v. Knox*, 28 Mont. 111, 72 Pac. 301, this court said:

"Mere expressions of opinion or of judgment do not, except in particular cases, which must be shown by the pleadings, constitute actionable fraud or false representations."

And this doctrine was approved in *Ott v. Pace*, 43 Mont. 82, 115 Pac. 37. But in neither case was any attempt made to amplify the subject or designate the circumstances under which the expression of an opinion might constitute fraud.

[4, 5] We think the following rule is sustained by reason and the authorities: If the party expressing the opinion possesses superior knowledge, such as would reasonably justify the conclusion that his opinion carries with it the implied assertion that he knows the facts which justify it, his statement is actionable if he knows that he does not honestly entertain the opinion because it is contrary to the facts. *Edward Barron Estate Co. v. Woodruff*, 163 Cal. 561, 128 Pac. 351, 42 L. R. A. (N. S.) 125. So, likewise, an opinion may be so blended with facts that it

amounts to a statement of facts. *Sheer v. Hoyt*, 13 Cal. App. 662, 110 Pac. 477.

Authorities may be found which, by making a liberal allowance for the optimism of a seller, refuse to hold him legally responsible for "puffing his own wares" or engaging in so-called dealer's talk, even though his statements do not square with the truth, and this upon the theory that no sensible person ought to be influenced by such considerations; but even this rule, thus broadly stated, is not generally looked upon with favor at the present time. *Prescott v. Brown*, 30 Okl. 428, 120 Pac. 991. Of course, statements may be so extravagant that even the most credulous person ought not to believe them, and the law cannot undertake to reward mere folly. From the very nature of the subject there cannot be any definite rule by which to determine whether representations do or do not constitute fraud. The utmost that can be done is to judge the representations involved in the particular case, by the results which ought reasonably to be anticipated from a reliance upon them, by one whose situation is such that he may rightfully accept them as true.

[8-9] If the complaining party examined the property (the subject-matter of the transaction), or had the opportunity at hand to examine it, and failed without fault of his adversary, he cannot plead his own bad judgment in the one case, or his negligence in the other, as a foundation for legal liability. *Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950. But while the law does not reward the negligence or folly of a buyer, it does not require him to pursue an independent investigation to ascertain the truth or falsity of the seller's representations when the property is situated a long distance from the place of the transaction and an investigation would entail great expense. *Becker v. Clark*, 83 Wash. 37, 145 Pac. 65. It is not alleged specifically that the sale of these lands took place in Wisconsin, but we think it is fairly inferable from the counterclaim, considered in its entirety. It was therefore a question for the jury whether, under the circumstances, the defendants were negligent in failing to investigate. It was also a question for the jury whether, under the advantageous position occupied by the plaintiff, its opinions were not so blended with alleged facts as to constitute them fraudulent representations within the rule above.

[10, 11] Some of these representations are very broad, even immoderate in the terms employed; but we do not think that it can be said, as a matter of law, that any one of them is so inherently improbable that defendants, as reasonably prudent persons, ought to have questioned its verity. It is rather an unsavory defense for plaintiff to say:

"I made these representations to induce the sale, knowing they were false; but defendants

were foolish not to suspect I was a knave." *Jacobsen v. Whitely*, 138 Wis. 434, 120 N. W. 286.

A fraudulent vendor cannot appeal to the law to extol his deceit and condemn the credulity of his victim.

[12, 13] It is no answer for plaintiff to make that these representations, if false, do not affect the quality of the lands. Defendants had the right to select the purpose for which they would be devoted, and, since they were sold for orchard purposes, the question is: Do these representations, if false, affect the value of the lands for the purposes intended? It would seem to follow as a natural consequence that these lands would be worth much less for fruit raising if the locality was subject to late frosts in the spring or early frosts in the fall, or if it was infected with harmful insect pests, or if hardy or semihardy varieties could not be made to prosper, or if the home market was already glutted with Montana grown fruits, or if other orchards in the vicinity had proved failures, or if plaintiff did not have expert knowledge of the business available for use in making proper selections of trees for planting or in the care of the orchards during the prebearing period. We have omitted reference to such other representations as we deem immaterial under the circumstances. For instance, it is alleged that plaintiff represented that there was available an ample supply of water for irrigation; but it is not alleged that these lands require irrigation.

The representations considered herein fall within the definition of fraud contained in section 4978, Revised Codes, and for this reason the court erred in striking them from the answer.

The judgment is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

SANNER, J., concurs. BRANTLY, C. J., being absent, takes no part in the foregoing decision.

(54 Mont. 436)

GRANT v. WILLIAMS, Justice of the Peace, et al. (No. 3866.)

(Supreme Court of Montana. Feb. 2, 1918.)

1. MALICIOUS PROSECUTION §50 — COMPLAINT—SUFFICIENCY.

A malicious prosecution complaint held defective because not alleging that the proceedings were instituted maliciously.

2. FALSE IMPRISONMENT §20(1)—COMPLAINT—SUFFICIENCY.

A false imprisonment complaint, alleging that defendant acted as town marshal when unlawfully and wrongfully arresting plaintiff, but not stating that he acted without a warrant or process, is defective in view of Rev. Codes, § 7962, subd. 15, creating a rebuttable presumption that official duties were regularly performed.

3. FALSE IMPRISONMENT §20(1)—PLEADING—ALLEGATIONS—SUFFICIENCY.

A pleader's extravagant use of the terms "wrongfully" and "unlawfully" will not dispense

with the necessity of stating facts on which issue may be joined.

Appeal from District Court, Blaine County; John W. Tattan, Judge.

Action by Hugh L. Grant against W. H. Lutz, L. V. Bogy, and Edward Price, and F. N. Williams as Justice of the Peace. From a judgment in favor of the first three named defendants, plaintiff appeals. Affirmed.

See, also, 54 Mont. —, 169 Pac. 286.

R. E. O'Keefe, of Chinook, for appellant. John Collins, of Dillon, for respondents.

HOLLOWAY, J. The facts out of which this controversy arises are set forth fully in Grant v. Williams et al., 54 Mont. —, 169 Pac. 286. This appeal is from the judgment in favor of defendant Lutz and his sureties, Bogy and Price.

[1] 1. It is not alleged in the complaint that Lutz acted maliciously in instituting the proceedings in the justice court, and for this reason a cause of action for malicious prosecution is not stated. Smith v. Davis, 3 Mont. 109; Grorud v. Lossi, 48 Mont. 274, 136 Pac. 1069; Stephens v. Conley, 48 Mont. 352, 138 Pac. 189, Ann. Cas. 1915D, 958.

[2, 3] 2. The complaint charges that defendant Lutz acted in his official capacity as town marshal of Chinook when he arrested the plaintiff, but it fails to allege that he acted without warrant or other sufficient legal process. From the facts stated, the presumption arises that Lutz performed an official duty in a regular manner (Rev. Codes, § 7962, subdiv. 15), and to make out a cause of action for false imprisonment the burden was imposed upon the plaintiff to state facts sufficient to overcome this presumption and to disclose wherein the violation of his liberty was unlawful. This he failed to do. The most extravagant use of the terms "wrongfully" and "unlawfully" will not serve to relieve the pleader of the necessity of stating facts upon which issue may be joined. Going v. Dinwiddle, 86 Cal. 633, 25 Pac. 129.

The complaint does not state a cause of action, and the court ruled correctly in sustaining the demurrer.

The judgment is affirmed.

Affirmed.

SANNER, J., concurs. **BRANTLY, C. J.**, being absent, did not hear the argument and takes no part in the foregoing decision.

(54 Mont. 422)

SCHWAB v. McVEY. (No. 3869.)

(Supreme Court of Montana. Feb. 14, 1918.)

1. LANDLORD AND TENANT §20—LEASES—CERTAINTY.

Written instrument naming the parties, fixing the term at five years, referring to the land leased, and providing only that no rent shall be paid for the first year and that thereafter the landlord shall receive one-third of all the crop

and one-half of the increase of any stock placed on the land, and providing that any improvements made shall be placed on the premises by the lessee, is void for uncertainty, and is not enforceable, since it requires nothing to be done, but merely states who shall do it if it is done.

2. CONTRACTS §9(1) — ENFORCEABILITY — DEFINITENESS.

Under Rev. Codes, § 4999, providing that a contract with a single object so vaguely expressed as to be unascertainable is void, to constitute an enforceable contract the agreement of the parties must be sufficiently certain and explicit that their full intention may be ascertained to a reasonable degree of certainty.

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

Action by George Schwab against Worth McVey. Judgment on directed verdict for defendant and order denying new trial, and plaintiff appeals. Affirmed.

E. C. Kurtz and H. C. Packer, both of Hamilton, for appellant. Geo. T. Baggs, of Stevensville, for respondent.

HOLLOWAY, J. This action in claim and delivery was brought to recover possession of certain grain, or its value in the event that possession cannot be had. By his answer, defendant admits that he is in possession of the property and admits its value as claimed by plaintiff. He denies all the other allegations of the complaint and, by way of affirmative defense, alleges that on March 10, 1913, he leased from plaintiff for a term of five years a ranch consisting of 800 acres of unbroken land; that during the season of 1913 he broke 127 acres; that in 1914 plaintiff solicited him to break additional ground, but that he refused to comply except upon condition that he be given the entire crop to be raised on such newly plowed ground during the first crop season; that plaintiff agreed to this condition; that he (defendant) plowed 100 acres of sod and seeded it to grain in the spring of 1915; and that the grain in controversy was raised on that 100 acres during the first crop season after it was broken. The reply admits the execution of the lease of March, 1913, and denies all other allegations of the answer. At the conclusion of the testimony the court directed a verdict for defendant, and plaintiff appealed from the judgment and from an order denying him a new trial.

There is not any substantial conflict in the evidence. Either plaintiff or defendant was entitled to prevail as a matter of law, and the only question presented by the record is: Did the trial court err in directing the verdict for defendant?

The lease of March, 1913, names the plaintiff as first party and defendant as second party, fixes the term at five years, refers to the land leased, and then contains this paragraph only:

"It being understood and agreed between both parties that no rent shall be paid for the year

ending March 1, 1914, and that thereafter said first party shall receive one-third of all the crop raised each year, his share of same to be delivered at the threshing to the said first party, said second party to have the threshing done at his expense; it being also understood that one-half the increase from any stock placed upon the land during the life of this lease, by said first party, shall belong to said first party; it also being understood that any and all improvements put upon the land shall be so placed by the second party."

The trial court held this lease void for uncertainty, and held further that the only binding contract between the parties was the oral agreement of 1914, under which defendant plowed the 100 acres and raised thereon the grain in controversy.

[1] Upon the trial, counsel for the respective parties proceeded upon the theory that the written lease is valid, that defendant relies upon the oral agreement as constituting a modification of the terms of the lease, and that the only controversy arises over the question: Was that oral agreement executed or executory? If it were necessary to a determination of these appeals to do so, we should be inclined to hold that the oral agreement was fully executed and that evidence of its terms was properly admitted under section 5067, Revised Codes, or that the judgment might be justified upon a different theory, viz. the lease does not require McVey to do any plowing, and therefore the agreement under which the plowing was done and the crop raised in 1915 was an agreement independent of the lease and not a modification of it; but we agree with the trial court that the lease of 1913 is void for uncertainty. The only definite provision in it secures to defendant the possession of the land for five years, but there is not any consideration for this agreement. Beyond that, the lease does not bind either party to do anything. It does not provide that any plowing shall be done. It provides that after the first year Schwab shall receive one-third of all the crops raised each year, but it does not require McVey to raise any crops. It also provides that Schwab is to have one-half of the increase of any stock he may place on the land during the life of the lease, but it does not require him to place any stock on the land. It also provides that any and all improvements put upon the land shall be so placed by McVey, but it does not require any improvements to be placed on the land.

[2] It is an elementary rule of law that, to constitute an enforceable contract, the agreement of the parties to it must be sufficiently certain and explicit that their full intention may be ascertained to a reasonable degree of certainty. 6 R. C. L. p. 644.

"If an agreement be so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void; for neither the court nor the jury can make an agreement for the parties." Price v. Stipek, 39 Mont. 426, 104 Pac. 195.

Section 4999, Revised Codes, provides:

"Where a contract has but a single object, and such object is * * * so vaguely expressed as to be wholly unascertainable, the entire contract is void."

We approve the disposition made of this case by the trial court. The judgment and order are affirmed.

Affirmed.

SANNER, J., concurs. BRANTLY, C. J., being absent, takes no part in the foregoing decision.

(54 Mont. 446)

GLOVER v. CHICAGO, M. & ST. P. RY. CO.
et al. (No. 3800.)

(Supreme Court of Montana. Feb. 26, 1918.)

1. MASTER AND SERVANT §83(5)—SCOPE OF EMPLOYMENT.

Where a telegraph operator, while off duty, was injured by defect in roadmaster's gasoline speeder on which he was journeying to a nearby town to procure supplies, on the roadmaster's invitation, the railroad company was not liable to him as employé, since he was journeying neither to nor from his work, was engaged upon his own private business, and was actuated in his choice of ways to reach his destination by motives entirely personal.

2. MASTER AND SERVANT §143 — RULES — KNOWLEDGE BY SERVANT.

If a telegraph operator, injured by riding on a company gasoline speeder on business of his own, had no knowledge of the company's rule forbidding employés to ride on such speeders of the company, he would not be bound by it.

3. MASTER AND SERVANT §144 — RULES — CUSTOMARY DISREGARD OF RULE.

If it was the custom of railroad employés to ride on railroad's gasoline speeders on their private business, a company rule forbidding such riding could not control as to an employé so riding injured by defect in the speeder.

4. CARRIERS §240 — PASSENGERS — PERMISSION TO RIDE.

Where attitude of railroad company towards employés riding on railroad's gasoline speeders on their private business was, at most, one of permission, not of obligation, it was not liable to an employé so riding, injured by defect in speeder, on the theory of his being a passenger.

5. CARRIERS §240—RAILROADS §276(2)—LICENSEES—EMPLOYÉ RIDING ON GASOLINE SPEEDER.

Where railroad employé, injured while riding on private business on the roadmaster's gasoline speeder, had, aside from the roadmaster's invitation, no warrant for so riding other than acquiescence implied from custom, he was a mere licensee, to whom the company owed no duty to keep its speeder in good condition or to operate it with caution.

6. MASTER AND SERVANT §88(5)—AUTHORITY OF ROADMASTER.

A railroad roadmaster, inviting another employé to ride with him on his gasoline speeder, had no authority to create any higher relation of such employé to the railroad than a mere licensee; his duties being circumscribed and confined to maintenance of way.

7. RAILROADS §276(2)—DUTY TO GUEST.

A railroad company owes to a guest riding on its gasoline speeder the duty to use reasonable care for his safety.

8. NEGLIGENCE — 121(2) — RES IPSA LOQUITUR.

Where the happening of an accident is not necessarily inconsistent with ordinary care, *res ipsa loquitur* cannot apply.

Appeal from District Court, Missoula County; Theo. Lentz, Judge.

Action by William H. Glover against the Chicago, Milwaukee & St. Paul Railway Company and another. From judgment for plaintiff, defendants' appeal. Reversed and remanded.

Henry C. Stiff, of Missoula, and Geo. W. Korte, of Seattle, Wash., for appellants. Harry H. Parsons, of Missoula, and Edward Horsky, of Helena, for respondent.

SANNER, J. On June 18, 1914, the plaintiff (respondent here) was injured while riding upon a gasoline speeder driven by the defendant Grimes upon the defendant company's tracks between East Portal and Saltese, in this state. He claims the right to recover upon these allegations of his complaint: That he was at the time a telegraph operator employed by the defendant company at East Portal and was en route to Saltese for the purpose of obtaining groceries and other food supplies for himself; that the defendant Grimes was and still is a roadmaster of the railway company, whose authority as such extended over this and other portions of its line and who as such possessed and used said speeder; that the speeder was made to and did seat more than one person and was capable of running at a high and dangerous rate of speed; that after January 1, 1914 (at which time certain privileges of free transportation for foodstuffs theretofore extended by the company to its employes at East Portal were revoked) "it became and was the custom of the defendants to take or invite said employes at said place on said motorcar and similar cars and convey and carry them to a station where said materials could be purchased and obtained, and elsewhere;" that on the day of the accident plaintiff boarded said speeder pursuant to such invitation; that unknown to him, but known, or by the exercise of due care knowable, to the defendants, the speeder "was in a defective and dangerous condition, in that one of the iron bolts which had to do with holding and keeping in place one of the wheels thereof was loose, unconnected, and wholly inadequate for said purpose, and at said time carelessly and negligently left and maintained in such condition;" that the defendants negligently failed to inspect the car or to warn the plaintiff of its defective condition; that with the car in such condition the defendants started with the plaintiff thereon down grade from East Portal to Saltese, and "negligently and carelessly ran, operated, and propelled said car at a high, rapid, and dangerous rate of speed, so that, and by reason thereof, the said bolt so negligently and carelessly kept in said car came loose from said car, the rod holding said wheel in place by reason thereof came loose therefrom, and the said car, by reason thereof, while going at said careless and dangerous rate of speed, jumped the tracks * * * casting the plaintiff violently to the ground," inflicting the injuries referred to. To this complaint demurrers and motions were addressed, and, these being overruled, separate answers were filed, the effect of which was to join issue and to plead that the derailment and plaintiff's injuries were due to his own misbehavior while riding said car.

The evidence adduced by the plaintiff tended to show the following: His journey to Saltese was to procure supplies for himself; it then was and for several months had been the custom for employes to be taken upon the speeders and motorcars of the company both ways from East Portal on private business of their own as well as upon company business, which custom was so open and notorious as to charge the defendants with knowledge thereof; on this particular occasion the plaintiff was personally invited by Grimes to go upon the speeder and did so to avoid paying the fare, amounting to 25 cents, upon the regular passenger train; they left a few minutes ahead of the passenger train which was scheduled to run over that stretch of track at not more than 25 miles an hour; the derailment was caused by the distance rod between the wheels on one side of the speeder coming loose, due to the breaking of the bolt intended to keep the rod in place, and while the speeder, operated by Grimes, was traveling approximately 35 miles an hour.

The defendants, appealing from the judgment against them, as well as from an order denying their motion for new trial, insist that no actionable negligence is alleged in the complaint or established by the evidence. It is elementary, of course, that one who seeks a recovery for actionable negligence must show: (1) That the defendant was under a legal duty to protect him from the injury; (2) that the defendant failed to perform the duty; and (3) that the injury was proximately caused by the defendant's delinquency. *Ellinghouse v. Ajax Live Stock Co.*, 51 Mont. 275, 152 Pac. 481, L. R. A. 1916D, 836; *Barry v. Badger*, 54 Mont. —, 169 Pac. 34. The plaintiff insists that he has met these requirements, although upon just what theory of duty neglected is not very clearly explained.

[1] As to Grimes, the plaintiff was undoubtedly a guest; as to the company, his relationship must have been (a) employe, (b) passenger, (c) licensee, (d) guest, or (e) trespasser. That he was not an employe within any rule of obligation due to him as such, or conversely, within any rule by which the company could be answerable for his acts,

[1] As to Grimes, the plaintiff was undoubtedly a guest; as to the company, his relationship must have been (a) employe, (b) passenger, (c) licensee, (d) guest, or (e) trespasser. That he was not an employe within any rule of obligation due to him as such, or conversely, within any rule by which the company could be answerable for his acts,

is perfectly clear. He was off shift, journeying neither to nor from his work, engaged upon his own private mission, actuated in his choice of ways to reach his destination by motives entirely personal. *Ellinghouse v. Ajax Live Stock Co.*, supra, 18 R. C. L. pp. 580-584, § 86 et seq. No recovery, therefore, can be justified upon the theory of duty arising out of the relation of master and servant.

[2, 3] It is equally clear that he was not a trespasser. Suggestion is made that the evidence on the part of the plaintiff shows a rule forbidding employes to ride upon the motorcars of the company; but whether this rule really existed at the time of the accident, or, if it existed, whether the plaintiff had knowledge of it may well be doubted. If he had no knowledge of it, of course he could not be bound by it (*Pascoe v. Nelson*, 52 Mont. 405, 158 Pac. 317), and if it was more honored in the breach than in the observance—as the custom to the contrary would seem to indicate—it could not control in the face of that custom (*Alexander v. Great Northern Ry. Co.*, 51 Mont. 565, 577, 154 Pac. 914). Granting the custom, and that the plaintiff was on the speeder pursuant to it, recovery could not be defeated on the ground that the company owed him no duty save to refrain from wanton or willful injury.

[4] Although the plaintiff testified to the view that he was a passenger, we think this too must be negatived. With regard to the use of its speeders by employes engaged in missions of their own, the attitude of the company was, at most, one of permission, not obligation. It was plainly not bound by any law or agreement to carry them in this way. Indeed, the plaintiff makes no claim that he had a right to be so carried, but he shows a very clear perception that the company was not obliged to carry him in any way except for hire, or pursuant to a pass applied for and furnished, upon the trains regularly provided for passenger service, one of which was shortly to arrive. The complaint is not framed, the case was not tried, the jury were not instructed upon the passenger theory, and therefore it must be eliminated as a tenable basis for the recovery in this case.

[5, 6] It is our present view that, as to the company, the status of the plaintiff was that of a mere licensee. We think this follows from the fact that, aside from the invitation of Grimes, no warrant for using the speeder is shown, other than acquiescence implied from custom. If this be true, plaintiff accepted the conditions as he found them; the company owed him no duty to keep its speeder in good condition or to operate it with caution. 17 R. C. L. 594, § 98; *Martin v. Northern Pac. Ry. Co.*, 51 Mont. 31, 37, 83, 149 Pac. 89; *Pollock on Torts* (10th Ed.) pp. 544-547. Nor was Grimes vested with authority to create any higher relation. The plaintiff calls him an

officer of the company and not an employé; but his duties were circumscribed, confined to maintenance of way; he was furnished with the speeder as he was with a pass and a freight permit to facilitate the performance of these duties; beyond this he had no authority and could no more create a relationship to the company, with its liabilities, through sharing the speeder than he could through sharing the permit or the pass.

[7, 8] Let it be assumed, however, that the plaintiff was something more than a mere licensee—say a guest—one present by invitation, implied as to the company, express as to Grimes. Thus, both defendants stand or fall by the same test, to wit, the duty to use reasonable care for the plaintiff's safety. *Montague v. Hanson*, 38 Mont. 376, 383, 387, 99 Pac. 1063. In what way was that duty breached under the pleadings and evidence here presented? The breach of duty alleged is that the defendants suffered the car to get out of order and ran it at a rate of speed which was excessive and dangerous in view of its condition. In other words, the defective condition and the speed—not either alone—caused the derailment and the injury. This being true, it does not suffice to show that the speed was great, but it must appear that under conditions known, or with reasonable care knowable, to the defendants, the speed was dangerous; or, to put the matter in another form, we must determine that there was a negligent failure to know or correct the condition of the car. And here the evidence is altogether lacking as to either defendant. It is inferable from the evidence that the bolt above referred to broke and thus released the distance rod, causing the wheels to lose their proper distance or alignment. There is not a word to indicate that the break was due to any defect known, obvious, or observable either to the company or to Grimes, and nothing to warrant the view that either the company or Grimes had failed to adequately inspect the car before its use. Apparently the plaintiff proceeded upon the theory that such a showing was unnecessary, although failure to inspect was alleged in the complaint; but, as the happening of the accident is not necessarily inconsistent with ordinary care, *res ipsa loquitur* cannot apply. In this respect, therefore—and this is the only respect in which the defendants could be held to answer—the case fails.

It is unnecessary to consider the other assignments of error, which in fact are not argued in appellants' brief. The judgment and order appealed from are reversed and the cause is remanded for retrial.

Reversed and remanded.

HOLLOWAY, J., concurs. BRANTLY, C. J., being absent, takes no part in the foregoing decision.

(54 Mont. 429)

DAVIS v. STEWART, Governor, et al.
(No. 4127.)

(Supreme Court of Montana. Feb. 18, 1918.)

1. PUBLIC LANDS \S 158 $\frac{1}{2}$, New, vol. 2A
Key-No. Series—SCHOOL LANDS—SALE—VAL-
IDITY—"TOWN."

The meaning of the word "town" as used in Const. art. 17, \S 1, prohibiting sales of school lands within three miles of the limits of a town, as disclosed by debates in constitutional convention, is the popular definition of the word "town," and includes all such aggregations of houses and inhabitants as are located upon a regularly platted town site, regardless of whether the town is incorporated.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Town.]

2. PUBLIC LANDS \S 158 $\frac{1}{2}$, New, vol. 2A
Key-No. Series—SCHOOL LANDS—SALE—VAL-
IDITY—"LIMITS OF TOWN."

In view of debates in constitutional convention disclosing that the word "limits," as used in Const. art. 17, \S 1, prohibiting sale of school lands within three miles of the limits of any town was intended to mean the outside boundaries of the town as indicated upon regularly filed plats, in view of Comp. St. 1887, $\S\S$ 2011-2039, it must be assumed that the adoption of such article of the Constitution was made with full knowledge of such existing law, and that the three-mile distance from the limits of the town would necessarily be measured from the nearest point shown upon the town-site plat.

3. PUBLIC LANDS \S 158 $\frac{1}{2}$, New, vol. 2A
Key-No. Series—SCHOOL LANDS—SALE—VAL-
IDITY—"TOWN."

The town of Square Butte, located on a regularly platted town site, with stores, elevators, school, post office, and residences, is, though unincorporated, a town within the meaning of Const. art. 17, \S 1, so as to prevent sale of school land lying within three miles thereof.

Appeal from District Court, Chouteau County; John W. Tattan, Judge.

Action between Albert H. Davis and Samuel V. Stewart, as Governor, and others, submitted to the district court upon an agreed statement of facts. Judgment for defendants, and plaintiff appeals. Affirmed.

Stranahan & Stranahan, of Havre (William T. Pigott, of Helena, of counsel), for appellant. S. C. Ford and R. L. Mitchell, both of Helena, for respondents.

SPENCER, District Judge. This action was submitted to the district court of Chouteau county, upon an agreed statement of facts, presenting for decision the following question:

"Is Square Butte a 'town' within the meaning of article 17, section 1, of the Constitution of the state of Montana, so as to prevent the sale of a quarter section of state land lying within three miles thereof?"

The court answered in the affirmative and, in accord with the stipulation that such answer should be followed by a dismissal of the action, judgment for the defendants was entered. From that judgment the plaintiff appeals.

The agreed statement shows: That at an auction duly advertised by the respondents

and held May 4, 1915, there was offered for sale a certain tract of state lands containing 172.72 acres and lying within three miles of Square Butte in Chouteau county; that the appellant who was and is a person qualified to purchase state lands attended said sale and made the highest and best bid for said tract; that the same was struck off to him at his bid, to wit, \$20 per acre, which was the price at which said land had been appraised by the state; that he thereafter tendered to the proper officers 15 per cent. of the purchase price of said tract and stands ready and willing to pay for the same and to do all things necessary as purchaser thereof, but the respondents have refused and still refuse to proceed further with the sale because, after the sale and before the tender, the state land officers discovered the fact that the tract in question lies within three miles of Square Butte; "that on May 4, 1915, Square Butte was an aggregation of dwelling houses and stores located upon a branch line of the Chicago, Milwaukee & St. Paul Railway, between Lewistown and Great Falls, Mont., in section 3, township 20 north, range 12 east; that Square Butte consists of a railway station, post office, two general mercantile stores, one delivery barn, three grain elevators, one school, eight dwelling houses, and ten small cabins or shacks, one hotel and saloon; that Square Butte is a platted town site, the plat of which has been duly filed in the office of the clerk and recorder of Chouteau county, Mont., and that it has a population of 70 people, and that no proceedings have ever been had at any time for the incorporation of the said Square Butte."

Accepting the foregoing as all of the facts essential to a determination of the question involved in this appeal, and keeping especially in mind those portions of the agreed statement which detail the number and kind of buildings in Square Butte and the population thereof; that Square Butte is a platted town site, and that the plat thereof is duly filed in the office of the clerk and recorder of Chouteau county, it becomes necessary, if the judgment of the lower court is to be sustained, (a) to delve into a labyrinth of uncertain definitions of the word "town," and (b) to consider the prevailing conditions and surrounding circumstances, the subject-matter under consideration and the objects to be attained at the time of the adoption of sections 1 and 2 of article 17, as part of our state Constitution in 1889. Those sections read:

"Sec. 1. All lands of the state that have been, or that may hereafter be granted to the state by Congress, and all lands acquired by gift or grant or devise, from any person or corporation, shall be public lands of the state, and shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised; and none

of such land, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of, except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States. Said lands shall be classified by the board of land commissioners, as follows: First, lands which are valuable only for grazing purposes. Second, those which are principally valuable for the timber that is on them. Third, agricultural lands. Fourth, lands within the limits of any town or city or within three miles of such limits: Provided, that any of said lands may be re-classified whenever, by reason of increased facilities for irrigation or otherwise, they shall be subject to different classification.

"Sec. 2. * * * The land of the fourth class shall be sold in alternate lots of not more than five acres each, and not more than one-half of any one tract of such lands shall be sold prior to the year one thousand nine hundred and ten (1910)."

[1] (a) To arrive at a definite point in number of inhabitants or number or character of business houses, or geographical limitations, when a community assumes the dignity of a town in its popular sense is quite impossible, and a review of various definitions by the lexicographers and text-writers, as well as decisions by the courts of last resort throughout the country, enlightens us but little, and discloses the fact to be that whether a certain community is to be classed as a town or not, as contemplated by article 17, § 1, of our Constitution, depends entirely upon its own surroundings, such as number of inhabitants, number of buildings, and character of business houses, whether located upon a regularly platted town site or not, and why it aspires to be promoted to the more exalted station in its growth.

No one would undertake to say that a motley collection of ten buildings, housing as many or more persons, and irrespective of whether such buildings were business houses or not, and irrespective of its regularity in geographical location, was under all circumstances a town, any more than would any one deny that, in popular significance, at least, an aggregation of 600 houses furnishing shelter for an equal number of people, used for residences, mercantile stores, blacksmith shops, saloons, warehouses, markets, a post office, and other business purposes, was a town, even though unincorporated. Certainly, it could not be successfully contended that a community qualified to meet the statutory requirements for incorporation would not be entitled to be dignified by the word "town."

In *State ex rel. Powers v. Dale*, 47 Mont. 227, 131 Pac. 670, Ann. Cas. 1914D, 227, the court said:

"The term 'town' has a general and popular, as well as a technical, meaning. In common parlance it has had an almost unvarying significance; derived from the Anglo-Saxon 'tun,' it

originally meant 'a collection of houses inclosed by a hedge, wall, or palisade' (Century Dictionary); it still means 'any considerable collection of dwelling houses, as distinguished from the adjacent country' (Standard Dictionary), or 'an aggregation of houses so near to one another that the inhabitants may fairly be said to dwell together' (38 Cyc. 596).

* * * It is quite true that in both the Constitution and the Codes the term 'city or town' is used without any definite prefix, but under circumstances which make it clear that only incorporated cities or towns is meant; and a further investigation also discloses the frequent legislative use of the term 'city or town' without any definite prefix, but under circumstances which would render it absurd to hold that only incorporated cities and towns is meant. * * * It is not correct to say that, whenever an unincorporated town is meant, it has been explicitly so declared, or that the use of the term 'town' without the definite prefix, is in all cases intended to be an incorporated town."

See, also, *Milville Gaslight Co. v. Vine-land L. & P. Co.*, 72 N. J. Eq. 310, 65 Atl. 504; *Ralls v. Parrish*, 105 Tex. 253, 147 S. W. 564.

In popular use and acceptance the words "city," "town," and "village" present nothing obscure. "The word 'town' is more comprehensive than either of the others; it is a generic word, applicable as well to a city as to a village. In England a city was distinguished from other towns by the fact that it had a cathedral, and was the residence of a bishop, but in this country the name 'city' is used ordinarily to designate the larger classes of towns. The name 'village' always carries to the mind the idea of a small urban community. A city is a town, and a village is a town, but the word 'city' or 'village' indicates the size of the town." *State ex rel. Scott v. Lichte*, 226 Mo. 273, 126 S. W. 466. See, also, *Territory ex rel. Kelly v. Stewart et al.*, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106; *Rapalje & Lawrence Law Dict.* 1282; 1 *Blackstone*, 114; 2 *Bouvier Law Dict.* 603. The principal and essential idea conveyed "is that of oneness, community, locality, vicinity * * * a body of people collected or gathered together in one mass * * * and having a community of interest because residents of the same place." *City of Denver et al. v. Coulehan*, 20 Colo. 471, 39 Pac. 425, 27 L. R. A. 751; *Siskiyou L. & M. Co. v. Rostel et al.*, 121 Cal. 511, 53 Pac. 1118. In fact, the word "town" in its popular significance has been accepted by all the writers to mean substantially the same thing, although defined in different language, and when you have an aggregation of inhabitants and houses used for various purposes so near to one another that the inhabitants may fairly be said to dwell together, you have a town in the common acceptance of the word. Of course, the statutes of this state leave no uncertainty as to what a town is, viewed in the light of the statutes covering municipal incorporations, and for all purposes of statutory construction in that connection the matter is settled and requires no

comment. Rev. Codes, § 3208, and amendments, and sections 3202 and 3206.

(b) But to say that Square Butte is a town as popularly defined, only brings us half way to the conclusion sought upon this appeal. Did article 17, § 1, of our Constitution contemplate an "incorporated town," and, if not, what was intended by the use of the word "limits"? From what point would the three-mile limit be measured? Article 17, § 1, of the Constitution must be construed in the light of conditions prevailing at the time of its enactment in 1889, and after observing the language used by the framers of our Constitution, the subject-matter under consideration, and the object to be attained (*State v. Keeler*, 52 Mont. 205, 217, 156 Pac. 1080, L. R. A. 1916E, 472, Ann. Cas. 1917E, 619, citing *State ex rel. Jackson v. Kennie*, 24 Mont. 45, 60 Pac. 589; *State ex rel. Hillis v. Sullivan*, 48 Mont. 320, 325, 137 Pac. 392; *State ex rel. McGowan v. Sedgwick*, 46 Mont. 187, 127 Pac. 94; *Northern Pac. Ry. Co. v. Mjelde*, 48 Mont. 287, 137 Pac. 386) all of which justify the conclusion that the framers of the Constitution did not intend "incorporated" towns when they used the word "town" without prefix in section 1 of article 17, but that undeniably they intended towns as popularly contemplated, and had in mind the then existing statutes covering the location of "town sites" when they used the word "limits."

At the time of the Constitutional Convention in 1889 the Congress of the United States had granted to the state of Montana portions of this great empire for the support, use, and maintenance of our common schools. Discussion was had at that convention as to the manner of handling, using or disposing of such lands for the advantage and best interests of the schools, and to that end the debate covered the question whether the towns referred to should be "incorporated" or unincorporated; whether the distance from the limits of the town was to be one mile or six; whether the word "limits" sufficiently designated a point from which to measure distance if the town were unincorporated, and the object of extending the distance to more than one mile, viz. to lessen the probability of sale until such time as the town near which the land was situated had had an opportunity to grow, and thereby enhance the value of said lands and secure more money to the state for the benefit of its common schools.

The matter came before the convention upon "propositions 34 and 35" offered for adoption as parts of the Constitution. Proposition 34 contained a classification identical with that found in section 1 of article 17 above; except as to lands of the fourth class, and these, as stated in proposition 34, were "lands within the corporate limits of any incorporated town or city within a mile of such limits and which are worth more than

\$50 per acre." According to the record of the convention proceedings (pages 2385 to 2387, 2391, 2428 to 2430, all inclusive), Mr. Myers, of Yellowstone, offered an amendment to strike from the language above quoted the word "incorporated" and the words "and which are worth more than \$50 per acre," stating that his objects were "to take the sense of the convention as to whether they desire to retain the lands adjacent to incorporated cities only or incorporated towns," and "as to whether they desire to sell lands that are worth less than \$50 per acre." In the discussion which followed, as elsewhere in the debates of the convention, its attention was called to the fact that relatively few of the urban communities in Montana had been incorporated; and Mr. Collins, of Cascade, expressing favor towards Mr. Myers' amendment, said:

"But I would like to see it go a little further. The one-mile limit is too near; it should be made five or six miles, because school lands, within six miles of any growing little town in Montana, or any city or incorporated town, are valuable."

Other expressions were in similar vein, and in consequence the convention struck out the words "corporate" and "incorporated" in proposition 34, leaving the word "town" without any prefix, and extended the distance to three miles, seen in the present provision. And as we are amply authorized to examine the proceedings of the constitutional convention to assist in determining the intent of the convention and the understanding they had of the meaning of certain words and phrases (*State v. Camp Sing*, 18 Mont. 128, 142, 44 Pac. 516, 32 L. R. A. 635, 56 Am. St. Rep. 551; *Northern Pac. Ry. Co. v. Musselshell County*, 54 Mont. —, 169 Pac. 53), it conclusively appears that all argument is now foreclosed as to the sense in which the word "town" was used, and whether incorporated or unincorporated towns were referred to and intended.

[2] But lastly, conceding Square Butte to be a town, though unincorporated, it yet could not meet the requirements of the Constitution without "limits." The agreed statement of facts discloses that:

"Square Butte is a platted town site, the plat of which has been duly filed in the office of the clerk and recorder of Chouteau county."

Upon page 2430 of the proceedings of the convention, supra, we find the attention of the convention called to the fact that there might be difficulty in defining the limits of an unincorporated town, whereupon Mr. Burleigh, of Custer county, observed that the "existing law" required the limits to be defined. The existing laws referred to were the Compiled Statutes of 1887, sections 2011 to 2039, inclusive, and contained provisions for applications by the citizens of any town, whether incorporated or unincorporated, to create or own town sites; for surveying the land comprising the proposed town site and

submitting plat and survey to the board of county commissioners; for laying off the town site into lots, blocks, streets, and alleys, and filing plat thereof in the office of the clerk and recorder after acceptance by the board of county commissioners, etc. Sections 2011 to 2039, inclusive, Compiled Stat. of 1887.

So we must assume that when the convention adopted article 17, § 1, it did so with full knowledge of the existing laws covering platted town sites, and contemplated towns located upon town sites as the same were platted and filed in the office of the clerk and recorder, and that therefore the three-mile distance from the limits of the town would necessarily be measured from the nearest point shown upon the town site plat.

[3] From all of the foregoing it follows that Square Butte, located upon a platted town site, with its stores, elevators, school, post office, and residences, is, though unincorporated, a town within the meaning of article 17, § 1, of the Constitution of the state of Montana, so as to prevent the sale of a quarter section of state land lying within three miles thereof; that there was no error as complained of by appellant; and that the judgment of the lower court should be affirmed. It is so ordered.

Affirmed.

SANNER and HOLLOWAY, JJ., concur.
SPENCER, Judge of the Thirteenth Judicial District, sat in place of the Chief Justice.

(54 Mont. 456)

STATE v. CATERNI. (No. 3850.)

(Supreme Court of Montana. Feb. 26, 1918.)

1. CRIMINAL LAW § 974(1)—MOTION IN ARREST—DEFECTS IN INFORMATION—VARIANCE.

Since, under Rev. Codes, §§ 9353, 9200, a motion in arrest lies only for certain defects appearing on the face of the indictment or information, not waived by failure to demur, resort to evidence extrinsic to the indictment or information to show that it does not accurately state the facts is not permissible on such motion.

2. HOMICIDE § 17 — KILLING ONE PERSON INTENDING TO MURDER ANOTHER—"MURDER IN FIRST DEGREE."

Killing one person undesignedly in the attempt to murder another, although not a guiltless homicide, is not murder in the first degree; the deliberate, premeditated design specifically to kill the person who was killed or to kill him as one of a crowd being lacking.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Murder in First Degree.]

3. HOMICIDE § 300(11)—SELF-DEFENSE—INSTRUCTIONS.

Where one accused of having killed a ten year old child, defended on ground that if he killed the child it was undesigned and in the course of defending himself against the child's brother, an instruction offered by the state, on self-defense, requiring accused to be in fear of the deceased, was error.

4. CRIMINAL LAW § 368(2)—EVIDENCE—RES GESTÆ.

Evidence was admissible for accused that deceased's brother was practically running amuck the entire evening, armed with a stiletto, quarreling with and threatening other persons besides accused; such matter being *res gestæ*.

5. HOMICIDE § 191—EVIDENCE.

Such evidence, within proper limits, was admissible as tending to support accused's claim of fear as well as to show who was the aggressor, and thus responsible for the killing.

6. HOMICIDE § 125—UNINTENTIONAL KILLING IN SELF-DEFENSE AGAINST ANOTHER.

Proof that accused killed one person undesignedly while properly defending himself against another entitles him to acquittal.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

John Caterni was convicted of murder, and appeals. Reversed and remanded.

Peter Breen and A. C. McDaniels, both of Butte, for appellant. S. C. Ford, of Helena, Frank Woody, of Butte, and R. L. Mitchell, of Helena, for the State.

SANNER, J. John Caterni, convicted in the district court of Silver Bow county of murder in the first degree, seeks a reversal of the judgment against him and of an order denying his motion for new trial, upon several grounds, chief among them these:

[1] 1. That the information is insufficient to withstand the motion in arrest of judgment duly made and by the court denied. The motion as made covered a wide field, but its principal point is that the information charges the intentional killing of Rocchino Calvetti, whereas the evidence in the case shows that if Rocchino Calvetti was killed by Caterni, such killing was accidental and unintentional, the shot being aimed at and intended for Severino Calvetti. The contention is invalid. A motion in arrest lies only for certain defects appearing on the face of the indictment or information, not waived by failure to demur. Sections 9353, 9200, Rev. Codes. There was no demurrer to this information, and whether it tells a true story or not, it is upon its face clear, specific, and sufficient. Resort to evidence extrinsic to it to show that it does not accurately state the facts is not permissible on motion in arrest. State v. Tully, 31 Mont. 365, 371, 78 Pac. 760, 3 Ann. Cas. 824.

[2] 2. That the verdict is not warranted by the evidence in this: It does not show the killing of Rocchino by Caterni, but does show that the shot which killed Rocchino, if it came from Caterni, was delivered by the latter in his necessary self-defense against Severino Calvetti, and was not intended for Rocchino, but for Severino. Briefly stated, the situation as described by the record is that Rocchino was a child ten years old; as the result of an altercation in which Severino Caterni, and perhaps others, not including Rocchino, were engaged, Caterni, con-

ceiving himself to be in danger of his life from Severino, shot twice at the latter, and it is claimed by the state that both shots took effect, one killing Severino and the other Rocchino. As to whether Rocchino was in fact shot by Caterni, and whether Caterni was acting in self-defense, the evidence is more or less conflicting, but the conflict must be taken as resolved against Caterni by the verdict of the jury. That he did not in fact desire or purpose to shoot or kill Rocchino must, however, be conceded, for all the evidence is to that effect. How, then, stands the verdict in this situation, remembering that the statute requires, as a constituent of murder in the first degree, a deliberate, premeditated design to kill (Rev. Codes, § 8292)? The general rule as stated in 13 R. C. L. at pages 745, 746, is that the slayer "is guilty or innocent exactly as though the fatal shot had caused the death of the person intended to be killed; the intent is transferred to the person whose death has been caused." But in this jurisdiction the law is settled otherwise. Section 21, chapter 4, Fourth Division, Compiled Statutes 1887, applied by this court in *Territory v. Rowand*, 8 Mont. 110, 19 Pac. 595, is the same as our present section 8292, Revised Codes; and in that case four opinions were written which, though differing in other respects, do all agree that a charge of murder in the first degree against R. for the premeditated, intentional killing of B. was not sustained by evidence showing that B. was killed undesignedly in an effort by R. to accomplish the murder of M. *Territory v. Rowand*, 8 Mont. 110, 121, 19 Pac. 595; *Id.*, 8 Mont. 432, 438, 20 Pac. 688, 21 Pac. 19. In such case the homicide is of course not a guiltless one, but it is not murder in the first degree because the specific intent required by the statute, the deliberate, premeditated design specifically to kill the person who was killed or to kill him as one of a crowd, is lacking; and it becomes murder in the second degree or manslaughter, according to the circumstances. See, also, *People v. Robinson*, 6 Utah, 101, 21 Pac. 403.

[3] 3. That the district court misdirected the jury in its charge, especially in instructions 14, 16, 17, and 19. Instructions 14, 16, and 17 explicitly authorize the jury to convict of murder in the first degree. In view of what we have just said, these instructions were improper and, as the jury followed them, manifestly prejudicial. Instruction 19, offered by the state, undertook to present the theory and limitations of self-defense; but it was ill adapted to this particular case because it required Caterni to be in fear from the deceased Rocchino. Caterni never claimed to be in fear of Rocchino; his claim—by which he was bound for good or ill—was that if he killed Rocchino, it was undesigned and in the course of self-defense

against Severino. Other instructions make this apparent; there was no need for the confusion created by No. 19.

[4-6] 4. That the court erred in excluding evidence tending to show that Severino Calvetti was practically running amuck the entire evening, armed with a stiletto, quarreling with and threatening other persons besides the accused. This was all *res gestæ*; but independently of that, it was a proper subject of inquiry which the accused was entitled to pursue within the limits of a reasonable liberality, as tending to support his claim of fear as well as to show who was the aggressor and thus responsible for the tragic end. *State v. Whitworth*, 47 Mont. 424, 133 Pac. 364; *State v. Hanlon*, 38 Mont. 557, 100 Pac. 1035. The theory of the exclusion seems to have been that upon the trial for killing Rocchino, the acts and conduct of Severino were irrelevant; but this ignores the right of Caterni to contend that Rocchino was killed undesignedly while Caterni was properly defending himself against Severino; yet Caterni was entitled to so contend and to be acquitted if his contention should be upheld, as the jury were told with more or less clarity in the instructions.

5. That the court erred in very many other rulings in the course of the trial, covered by 85 assignments. Some of these have merit, others not; and as we are confident that upon a retrial valid ground of complaint will not recur, we deem it unnecessary to further discuss them.

The judgment and order appealed from are reversed, and the cause is remanded for new trial.

Reversed and remanded.

HOLLOWAY, J., concurs. BRANTLY, C. J., being absent, takes no part in the foregoing decision.

(176 Cal. 738)

HALL v. THURSTON. (L. A. 4063.)

(Supreme Court of California. Dec. 14, 1917.)

1. BILLS AND NOTES — 524 — TITLE TO SUSTAIN ACTION — EVIDENCE.

The possession of notes, showing no payments thereon duly indorsed by the payee, constitutes a *prima facie* showing of plaintiff's right to recover, which, coupled with proof that the transfer complained of made to plaintiff's assignor was done by order of the board of directors of a rightful holder, of which board defendant was a member present and acting, is sufficient.

2. BILLS AND NOTES — 489(3) — ACTIONS — DEFENSES — PLEADING.

The rejection of defendant's offer in evidence of a purported agreement between himself and his assignee of his own indorsed notes for the purpose of showing equities in defendant's favor by which plaintiff would be bound is not error, where such equities or agreements were not pleaded.

3. BILLS AND NOTES — 489(3) — PLEADINGS — BONA FIDE PURCHASERS AFTER MATURITY.

Where, under Code Civ. Proc. § 368, a note is assigned, after maturity any defenses existing

in favor of the maker at the time or before notice of assignment are not available, unless pleaded.

4. BILLS AND NOTES §427(3) — **PAYMENT AND DISCHARGE.**

The maker's payment of a note to a former holder after notice of transfer was at his peril.

Department 2. Appeal from Superior Court, Los Angeles County; A. J. Buckles, Judge.

Action by F. R. Hall against L. F. Thurston. Judgment for plaintiff, and defendant appeals. Affirmed.

B. F. Woodard and E. J. Fleming, both of Los Angeles, for appellant. A. C. Routhe, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. This is an appeal by the defendant from a judgment entered in favor of plaintiff upon two promissory notes made by defendant, payable to his own order and by him indorsed and delivered to the International Security Company (a corporation), of which one Newton J. Skinner was at the time president.

The complaint alleges that after their maturity the notes were for a valuable consideration transferred by said corporation to said Skinner, who thereafter for value transferred them to one George C. Smith, by whom they were delivered to plaintiff. The answer admits the making and delivery of the notes to the International Security Company for a valuable consideration and as a defense to the cause alleges that at all the times mentioned the notes were the property of said corporation, and that "Skinner falsely and fraudulently secured possession thereof"; that no transfer of the same was made by said corporation; and "that prior to the commencement of the action plaintiff paid to said International Security Company the entire indebtedness represented by said promissory notes, together with interest thereon."

[1] Upon the ground of want of sufficient evidence to sustain the same appellant attacks the finding that after the maturity of the notes they were for a valuable consideration transferred to and became the property of Newton J. Skinner. In the absence of want of consideration pleaded for the making of the notes, we are unable to perceive the materiality of the finding so far as it concerns defendant. However, conceding it to be material, possession of the notes by plaintiff, duly indorsed by the payee therein named, and upon which no payments appear to have been made, was as to plaintiff a sufficient prima facie showing to establish his right to recover thereon. In addition to this fact, there was evidence tending to show that the notes were, by resolution of the board of directors of the International Security Company, ordered transferred in settlement of an account known as the Magee account in which Skinner had some interest, which transfer so made by the president of the company ap-

pears to have been ratified by the board of directors of which defendant was a member present and acting in the transaction.

[2] The action of the court in sustaining plaintiff's objection to defendant's offer in evidence of a written agreement made by him with the International Security Company acting through Skinner, then president of said company, is assigned as error. Appellant claims this agreement related to said notes and modified their terms in reference to his obligation for the payment thereof, and thus, as between the defendant and the company created equities in his favor whereby plaintiff was bound. A sufficient answer to his contention and the alleged error predicated upon the ruling of the court in sustaining plaintiff's objection to the question asked defendant, "Did you make an agreement (with the company) by which these notes were not to be paid?" is that no such equities or agreements were pleaded and no tender made by answer of any issue under which the document was admissible in evidence. Moreover, the agreement on its face makes no reference to the notes involved in the action. There was no error in the ruling.

[3] Immediately following the ruling upon the question last referred to counsel for defendant said, "Your honor rules that we cannot put in any evidence as to the payment of these notes?" to which the court replied, "It is just about that way." For the reason that the answer did not allege facts constituting any defense to the notes in the hands of plaintiff as legal holder thereof the ruling was correct. They were payable to the maker by whom they were indorsed, and hence passed by delivery. *Bank of Lassen Co. v. Sherer*, 108 Cal. 513, 41 Pac. 415. The delivery constituting an assignment thereof was made by the International Security Company after the notes had matured. As provided in section 368 of the Code of Civil Procedure, they were as to plaintiff subject to any defenses existing in favor of defendant at the time or before notice of the assignment. As stated, the only defense pleaded was that plaintiff was not the owner of the notes (as to which the court upon sufficient evidence found in favor of plaintiff), and the alleged fact that defendant prior to the commencement of the action paid, not the notes, but "the indebtedness represented by said promissory notes" to the International Security Company. Clearly if at the time of the transfer made by the company defendant had paid the notes, or if subsequent thereto he had without notice of the assignment made payment, such facts, if pleaded, would constitute a defense. *Bank of Stockton v. Jones*, 65 Cal. 437, 4 Pac. 418. It is not alleged, however, that payment was made before notice of the transfer. Indeed, we may say the state of the record is such that defendant could not truthfully have made such allegation. Hence, since proof of the allegation, in the absence of evidence that

payment was made prior to notice, as to which there was neither averment nor offer of evidence, would constitute no defense to the action.

[4] After the transfer of the notes prior to payment thereof, of which fact defendant by uncontradicted evidence is shown to have had notice, payment thereof if made by him to the International Security Company, having, as he knew, no interest therein, was at his peril. The judgment is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

(176 Cal. 745)

**DESERET WATER, OIL & IRRIGATION
CO. v. STATE.** (Sac. 2081.)

(Supreme Court of California. Dec. 14, 1917.)

**APPEAL AND ERROR §835(2) — REHEARING—
MATTERS NOT URGED ON ORIGINAL HEARING.**

Where, in a suit to condemn land within a national forest reservation as land of the state, the defense that the state had parted with its title by offering the land to the United States as a basis for lieu land selections was treated as in issue, and evidence thereon was introduced, and the decisions of the state and federal Supreme Courts were based thereon, the objection could not be made on a rehearing in the state Supreme Court that the pleadings were insufficient to present this defense.

In Bank. Appeal from Superior Court, Mono County; William S. Wells, Judge.

On rehearing. Judgment reversed.

For former opinion, see 167 Cal. 147, 138 Pac. 981.

U. S. Webb, Atty. Gen., and John T. Nourse, Deputy Atty. Gen. (Percy V. Long, City Atty., and J. F. English, Asst. City Atty., both of San Francisco, amici curiae), for the State. A. H. Ricketts and Metson, Drew & Mackenzie, all of San Francisco, and Horatio Allen, for respondent.

PER CURIAM. Upon appeal to this court the judgment of the trial court was affirmed, for reasons given in the opinion. 167 Cal. 147, 138 Pac. 981. Under writ of error to the Supreme Court of the United States (243 U. S. 415, 37 Sup. Ct. 394, 61 L. Ed. 821), that court decided that the construction which this court put upon the federal statute, therein following the decision of the highest federal court which had spoken upon the matter (*Hibberd v. Slack* [C. C.] 84 Fed. 571), was erroneous, and that, while the state of California had acquired title to the lands in question it had waived its right to such lands. The lands were withdrawn from sale by the state by an act of the Legislature, and the surveyor general of the state had offered the land back to the United States as bases for lieu land selections. The effect of the acts of the state under the construction which the Supreme Court of the United States has put upon the federal statute is not doubtful. In equity the state of Cali-

fornia has surrendered its title to these lands to the United States, and only the action of an executive department of the United States—the Land Office—is necessary to complete the legal transfer of title.

Upon rehearing before this court, however, it is argued that the sole allegation touching this matter is simply that the state alleges "that the land described in plaintiff's complaint is surveyed land and is wholly situate within the exterior boundaries of a permanent reservation." It is contended that this allegation is insufficient to present the defense that the state had thus parted with its title, and that to treat it as presenting such a defense would be to do violence to the admissions in the pleading that the land is owned by the state of California. But to this it must be answered that at the trial the pleadings were accepted as being sufficient to present the issue which was elaborately discussed in the former decision of the case and which formed the subject of review by the Supreme Court of the United States. The matters having been accepted as being questions in issue, evidence having been addressed to them pro and con, and the decision by this court and by the Supreme Court of the United States having been based thereon, respondent cannot be heard upon the objection which it now presents.

It follows therefrom that the judgment appealed from must be reversed, and it is ordered accordingly.

(176 Cal. 687)

BUDD v. HUGHES et al. (L. A. 4068.)

(Supreme Court of California. Dec. 13, 1917.)

1. EVIDENCE §391 — PAROL EVIDENCE AFFECTING WRITING—BILLS OF SALE.

Oral evidence will not be received to vary the terms of a written instrument, a rule applicable in actions between parties to a bill of sale.

2. EVIDENCE §419(7)—PAROL EVIDENCE AFFECTING WRITING — NONAPPLICATION OF RULE WHERE CONTROVERSY IS BETWEEN PARTY TO WRITING AND ONE NOT A PARTY.

Where the lessor of a motion picture theater, having re-entered for nonpayment of rent, executed bill of sale of the personality therein, including theater chairs installed by her tenant, to a corporation, selling and transferring the property for \$7,500, in action by the assignee of the tenant against the lessor's executor and executrix to recover for the personality thus wrongfully sold, evidence that other considerations than the tenant's personality entered into the transaction resulting in the bill of sale was not inadmissible as varying the terms of the bill of sale, since where the controversy is between a party to a written contract, and one who is neither a party nor privy to one who is, the rule excluding parol evidence to explain, vary, modify, or contradict a writing does not apply.

3. APPEAL AND ERROR §1071(1)—HARMLESS ERROR—FINDING OF NO INDEBTEDNESS.

In an action for money had and received by defendant for plaintiff's use, error in finding that defendant was not indebted to plaintiff's

assignor in any sum was cured by judgment rendered for plaintiff for \$2,000.

4. APPEAL AND ERROR ¶883—HARMLESS ERROR—COMPELLING PLAINTIFF TO AMEND.

Where the court, at close of trial, stated the allegations of the complaint were such that judgment could not be given in plaintiff's favor without amending, though on the evidence he was entitled to recover, whereupon plaintiff under protest amended, he was not in a position to assert he was prejudiced by the court's action, as it was optional with him whether or not he amended and took judgment, or, in the absence of amendment to like effect in the answer, let judgment other than as confessed therein go for defendant.

5. PLEADING ¶8(2)—CONCLUSION OF LAW.

A complaint alleging that defendant was holding certain property as trustee for plaintiff pleaded a mere conclusion.

6. TRUSTS ¶352—CONVERSION OF PERSONALTY IN THEATER BY SALE—RIGHT OF TENANT TO ENTIRE PRICE.

Where the lessor of a motion picture theater, whose lessee placed certain personalty therein, after re-entry sold the whole business for a lump sum, there was no such commingling of goods as entitled the lessee to the whole purchase price received, when the value of his goods thus converted by the lessor was readily ascertainable.

Department 2. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Harold Budd against Henry West Hughes and Rosy B. Hughes, as joint executor and executrix, respectively, of the last will and testament of Mattie W. Hughes, deceased. From a judgment for plaintiff, and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

Willis S. Mitchell and Davis, Kemp & Post, all of Los Angeles, for appellant. W. W. Butler, of Los Angeles, for respondents.

VICTOR E. SHAW, Judge pro tem. This action grew out of the following facts: Under a lease executed to him by Mattie W. Hughes, the assignor of plaintiff was a tenant of a building in Los Angeles wherein he conducted a moving picture business known as the College Theater. In connection therewith he installed theater chairs and other personal property, the use of which was required in operating the playhouse. The lessee having made default in the payment of his rent, the lessor, pursuant to a judgment rendered in her favor in an action for unlawful detainer, re-entered the premises wherein plaintiff had left the personal property and used the same in carrying on the business from December 15, 1911, to January 15, 1912, upon which last-mentioned date she, by bill of sale executed to a corporation of which E. J. Tally was chief owner, sold and transferred the personal property for a consideration therein specified of \$7,500 for the recovery of which sum this action was instituted. The court gave judgment in favor of plaintiff for the sum of \$2,000, from which,

and an order denying his motion for a new trial, he prosecutes this appeal.

The complaint contains two counts, one for money had and received by defendant for plaintiff's use, and the other based upon the theory that defendants' testatrix held the property as an involuntary trustee for plaintiff to whom she was accountable, not for the value of the goods converted, but for the \$7,500 alleged to have been received therefor.

The chief error upon which appellant contends for a reversal is that the court over his objection received evidence tending to show that while the personal property described in the bill of sale as shown thereby constituted the sole and only consideration for the payment of the \$7,500, other considerations did in fact enter into the transaction, chief among which was a five-year lease of the College Theater at a greatly reduced rental from that specified in plaintiff's lease, and the good will of an established business. That this was true clearly appears not only from uncontradicted testimony, but from the fact that the execution of the bill of sale followed a contract made the preceding day by the agent of Mattie W. Hughes, whereby as said agent he agreed for said sum of \$7,500 to deliver the bill of sale transferring the personal property contained in said theater, together with a five-year lease of the premises, for a specified rental, which lease was executed by said Mattie W. Hughes as agreed to by her said agent.

[1, 2] In support of his contention appellant invokes the elementary principle that oral evidence will not be received to vary the terms of a written instrument, and hence the parties to this action are bound by the language of the bill of sale, the terms of which cannot, it is claimed, be varied by parol evidence. That such rule is applicable in actions between parties to a bill of sale is conceded. *Hodson v. Varney*, 122 Cal. 619, 55 Pac. 413. Plaintiff, however, was not a party to the written instrument, and in no wise bound thereby. Had the sale of the property by Hughes been made for one-half in value of the property, could it be said that such fact would limit plaintiff's right to recover in an action for the conversion? Clearly not. And in such controversy, since one of the parties is free to show the true character of the transaction, it must follow that the other party to the action is likewise free. "Where the controversy is between a party to a written contract and one who is neither a party to it or privy to one who is, the rule excluding parol evidence to explain, vary, modify or contradict the writing does not apply." 11 Am. & Eng. Ency. of Law, 550; *Smith v. Moynihan*, 44 Cal. 53; *Greve v. Echo Oil Co.*, 8 Cal. App. 275, 96 Pac. 904; *Hussman v. Wilke*, 50 Cal. 250. The reception of evidence disclosing the true charac-

ter of the transaction to be otherwise than as shown by the writing was not error.

[3] Conceding the court erred in finding that Mattie W. Hughes was not indebted to plaintiff's assignor in any sum whatever for money had and received for his use and benefit, such error as to him was cured by the judgment rendered in his favor for \$2,000.

[4] Error is predicated upon the fact that the court at the close of the trial stated that the allegations of the complaint were such that while upon the evidence plaintiff was entitled to recover judgment it could not be given in his favor without amending the complaint; that otherwise judgment must go for defendant. Thereupon plaintiff under protest amended his complaint. Clearly it was optional with plaintiff whether or not he amended and took judgment for \$2,000, or in the absence of an amendment to like effect in the answer let judgment other than as confessed therein go for defendant. In no event is he in a position to assert that he was prejudiced by the action of the court.

[5, 6] The complaint alleged that "Mattie W. Hughes was holding the said property" as trustee for plaintiff. Other than this mere conclusion, the facts pleaded show an ordinary case of conversion of the property which it is alleged she sold for \$7,500. This allegation is denied. Hence it devolved upon plaintiff to show what defendant received for the property, and this the court by sufficient evidence found to be the value thereof fixed at \$2,000. Assuming that in the broad sense of the term a trust existed there was no such commingling of goods that entitled plaintiff to the whole purchase price received when as shown the value of the goods was readily ascertainable. As well might it be said that one who sells 100 head of cattle, among which is wrongfully included an animal belonging to his neighbor, must, on like ground, turn over to his neighbor the entire proceeds of sale received for the herd.

The judgment and order are affirmed.

We concur: MELVIN, J.; HENSHAW, J.

(176 Cal. 729)

In re SMITH'S ESTATE. (L. A. 5227.)
(Supreme Court of California. Dec. 14, 1917.)

1. WILLS — 322 — PROBATE — TESTAMENTARY CAPACITY — CONTEST — ORDER OF PROOF.

The court in its discretion could require proponents to make formal proof of the execution of the will before proceeding with the contest.

2. WILLS — 348 — DENIAL OF PROBATE — GROUNDS.

The court having ordered proponents to make formal proof of the execution of the will before proceeding with the contest, and they having refused to introduce any testimony, probate was properly denied.

3. WILLS — 334 — ORDER DENYING PROBATE — FINDINGS — NECESSITY.

In such case, no findings were necessary to support the order denying probate; it not being

a decision upon facts, but practically a nonsuit for want of evidence.

Department 1. Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

In the matter of the estate of William A. Smith, deceased. From an order denying probate granted on the motion of W. A. Snyder, contestant, D. O. Dobson and another, proponents, appeal. Affirmed.

Earl E. Moss, of Ventura, for appellants.
J. W. Wiley and Wiley & Lambert, all of Bakersfield, for respondent.

SHAW, J. D. O. Dobson and Sarah J. Henderson filed a petition for the probate of a document alleged to be the last will of William A. Smith, deceased. Thereafter W. A. Snyder filed a contest of said will, on the ground that the same was not duly executed by the decedent. Upon the hearing the proponents, Dobson and Henderson, who are the appellants here, moved the court to require the contestant to prove that he was an interested party, entitled to maintain a contest of the will, before proceeding further in the case. Snyder moved the court to require the proponents to first make the formal proof of the execution of the will. The court granted the latter motion and directed the appellants to proceed first with their formal proof. This they refused to do, and thereupon refused to offer any proof whatsoever of the due execution of the will. The contestant then moved the court to deny the admission of the will to probate. The court granted the motion and, as we infer, made an order accordingly, from which the proponents appeal. The order appealed from is not a part of the record, as the Code requires. Code Civ. Proc. § 951. We gather the above facts from the notice of appeal and from the undisputed statements of the respondent's brief.

[1, 2] There is no merit in the appeal. The court may direct the order of proof in such cases, and in its discretion could require the proponents of the will to introduce their evidence of its execution before proceeding with the contest. Estate of Latour, 140 Cal. 437, 73 Pac. 1070, 74 Pac. 441; Estate of Cullberg, 169 Cal. 365, 146 Pac. 888. The court having so ordered, and the appellants thereupon refusing to introduce any testimony, the court could not do otherwise than to deny the probate of the document offered as a will. Though the court had power to require that the contestant first prove his interest in the estate, it was not bound to do so. Estate of Land, 166 Cal. 540, 137 Pac. 246.

[3] No findings were necessary to support the order complained of. It was not a decision upon facts, but practically a nonsuit for want of any evidence. Under the circumstances, the question whether or not the con-

testant had sufficiently alleged that he was interested in the estate is immaterial.

The order is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

(176 Cal. 731)

HOME SAV. BANK OF LOS ANGELES v.
LOS ANGELES CITY REALTY CO.
et al. (L. A. 4005.)

(Supreme Court of California. Dec. 14, 1917.)

1. CORPORATIONS ⇨232(2)—SUBSCRIPTION TO STOCK—FULL PAYMENT.

If a corporation issued 300 shares of its stock, of a par value of \$100, in return for the transfer to it of notes and real estate valued by it at \$30,000, the transaction having been entered into in good faith, the shares were fully paid.

2. CORPORATIONS ⇨232(2)—SUBSCRIPTION TO STOCK—PAYMENT.

If a corporation issued 300 shares of its stock, of a par value of \$100 each, to D. for notes and property turned over to the corporation at less than \$20,000, it having been agreed between D. and B. that out of the shares issued to D., B. should have 100, and the property transferred by D. having been intended to pay for his own 200 shares, nothing had been paid on B.'s 100 shares transferred to him by D.

3. CORPORATIONS ⇨232(1) — MINUTES OF COMPANY—CONCLUSIVENESS AGAINST CREDITORS.

The entry in the minutes of a corporation that 300 shares of stock had been paid for in full was not conclusive against creditors of the corporation entitled to disclose the true nature of the transaction between the company and the two subscribers to the 300 shares.

4. APPEAL AND ERROR ⇨1011(1)—REVIEW—CONFLICTING EVIDENCE.

The Supreme Court on appeal cannot say that the trial court, in resolving a conflict of testimony, should have believed the evidence offered by one side rather than the other.

5. CORPORATIONS ⇨269(3) — PAYMENT FOR SHARES—SUFFICIENCY OF EVIDENCE.

In an action by a creditor of a corporation to recover unpaid subscriptions from stockholders, evidence held to warrant the finding that nothing had ever been paid on the 100 shares issued to one stockholder and transferred by him to another.

Department 1. Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by the Home Savings Bank of Los Angeles, a corporation, against the Los Angeles City Realty Company, a corporation, C. M. Du Vernet, J. A. Bullard, and others. From judgment for plaintiff against defendants Bullard and Du Vernet, and from an order denying his motion for new trial, defendant Bullard appeals. Judgment and order affirmed.

F. C. Austin and Samuel Barnes Smith, both of Los Angeles, for appellant. Goudge, Williams, Chandler & Hughes, of Los Angeles, for respondent.

SLOSS, J. Los Angeles City Realty Company (a corporation) made and delivered its promissory note for \$5,000 to C. M. Du Ver-

net, who indorsed it to the plaintiff. The plaintiff, having recovered judgment against said realty company and Du Vernet for the amount of said note, brought this action against J. H. Bullard and others, as stockholders of the Los Angeles City Realty Company, to recover the unpaid subscriptions alleged to be due from them on their shares. The complaint alleged that Bullard had subscribed for, and was the owner of, 95 shares, of the par value of \$100 each, for which nothing had been paid to the corporation. Judgment was sought against him and his codefendants for the amounts remaining unpaid on their several subscriptions, not exceeding the amount due on the judgment against the corporation. The defendants answered, alleging, among other things, that the shares of stock held by them had been paid for in full. Findings were waived, and judgment was entered in favor of plaintiff against J. H. Bullard and C. M. Du Vernet. J. H. Bullard appeals from the judgment, and from an order denying his motion for a new trial.

The only point made in support of the appeal is that the evidence does not support the implied finding that nothing had been paid on the 95 shares of stock owned by appellant. It appears that J. H. Bullard had been the owner of 200 shares of the stock of the corporation. One hundred shares were issued to him January 31, 1907. For these he paid, in cash, \$10,000, the full par value of the stock. No liability was claimed with respect to this issue. One hundred other shares were transferred to Bullard by Du Vernet. They formed a part of 300 shares which had been originally issued by the corporation to Du Vernet. Of the 100 thus transferred to Bullard, 5 were owned by Kittle L. Austin, leaving in Bullard the 95 shares mentioned in the complaint.

[1] The point in dispute between the parties was whether the 300 shares issued to Du Vernet had been fully paid for by him. The appellant introduced evidence which tended to answer this question in the affirmative. The resolution of the board of directors of the corporation authorizing the issue of the 300 shares to Du Vernet declared that said shares were issued in consideration of the transfer by Du Vernet of certain notes and certain real estate, valued at \$30,000. The appellant Bullard testified that this value had been placed upon the notes and realty so transferred, and that the corporation had accepted them at that value. According to Bullard they were worth more than \$30,000. If the transaction between the corporation and Du Vernet was truthfully described in the resolution, and if it was entered into in good faith, the shares must be regarded as fully paid. But, on the other hand, Du Vernet, who was called as a witness by the respondent, testified that he had been engaged in business for himself before the organiza-

tion of the Los Angeles City Realty Company; that when the corporation was formed it was agreed between him and Bullard that out of the 300 shares issued to him he was to have 200 and Bullard 100; that the notes and real property turned over by Du Vernet to the corporation were, in fact, valued and taken at something less than \$20,000, and were intended to pay for the 200 shares which were to go to Du Vernet. The 300 shares were issued to him, and 100 of them were taken by Bullard.

[2-4] If this testimony was true, it supported the finding that nothing had ever been paid on the 100 shares thus passing to Bullard. To be sure, the records of the corporation showed on their face that the 300 shares had been paid for in full. But the entry in the minutes was not conclusive against creditors of the corporation, who were entitled to disclose the true nature of the transaction. *Herron Co. v. Shaw*, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265. It is argued by the appellant that Du Vernet's testimony should not have been accepted by the trial court. Such an argument is futile here. There was nothing inherently improbable in the story told by Du Vernet. The trial court was simply called upon to resolve a conflict of testimony, and we cannot, on appeal, say that it should have believed the evidence offered by the one side, rather than the other.

[6] It may be added that the corporate records themselves are not altogether in accord with the appellant's claim. In February, 1908, about a year after the issue of the stock in controversy, the president made a report in which he stated that the company had, on February 1, 1907, "purchased the assets consisting of secured and unsecured notes and certain real estate of C. M. Du Vernet, amounting to \$19,945.95." With this evidence to support the theory of the respondent, there can certainly be no force in the claim that the evidence did not warrant the finding complained of.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; LAWLOR, J.

(176 Cal. 734)

FARR v. WOLCOTT et al. (L. A. 4063.)

(Supreme Court of California. Dec. 14, 1917.)

1. BILLS AND NOTES — 523 — ASSIGNMENT AND TRANSFER—SUFFICIENCY OF EVIDENCE.

In an action on a note, evidence held insufficient to show the sale, assignment, and transfer of the note by the payee to plaintiff's transferror bank, and the indorsement, transfer, and delivery by the bank to plaintiff.

2. PLEDGES — 44 — PLEDGE OF NOTE AS SECURITY—PAYMENT OF LOAN.

Where the payee of a note borrowed its amount from a bank on the security of the note, accompanied by his own guaranty in the form of his personal check, until the loan was paid the note remained in the bank's hands as a

pledge, but when the payee repaid the loan the bank's lien was extinguished, and it held the note thereafter as a mere depositary for the payee.

3. BILLS AND NOTES — 511 — EVIDENCE—MATERIALITY.

In an action on a note on which the payee borrowed its amount from a bank on its security, accompanied by his own security, the bank transferring the note for collection to plaintiff, the payee being the real owner of the note having paid the loan, the makers thereof were entitled to credit for any payments received by him, and evidence that he had been paid \$5,000 collected by him, which he had agreed to apply on the indebtedness, was admissible.

Department 1. Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by Roy J. Farr against N. A. Wolcott and others. From a judgment for plaintiff, and an order denying their motion for new trial, defendants appeal. Judgment and order reversed.

Roland G. Swaffield, of Long Beach, and Stutsman & Stutsman, Tanner, Odell, Odell & Taft and Williams, Goudge & Chandler, all of Los Angeles, for appellants. F. C. Austin and Samuel Barnes Smith, both of Los Angeles, for respondent.

SLOSS, J. The complaint alleges that on May 16, 1910, the Los Angeles City Realty Company, a corporation, made, executed, and delivered its promissory note, whereby it promised to pay to the order of J. H. Bullard, trustee, on or before three years after date, the sum of \$15,000, and interest payable monthly, with an option to the holder to declare the principal due on default in the payment of interest; that before the delivery of said note the defendants, by writing thereon, guaranteed the payment of the note in words as follows:

"For value received, we jointly and severally guarantee payments of this note, and any renewal thereof and hereby waive protest, demand and notice of nonpayment. [Signed] N. A. Wolcott. E. M. K. Wolcott. F. A. King."

The complaint alleges that on July 1, 1912, and before maturity, J. H. Bullard, trustee, sold, assigned, and transferred the note to the United States National Bank; that in due course of business said bank indorsed said note and delivered same to plaintiff, who is now the lawful holder thereof. It is alleged that the maker of the note has defaulted in the payment of interest since January 16, 1911; that no part of the principal has been paid, except \$151.19, and that the balance of the principal, together with interest from February 16, 1911, is due. Prior to the filing of the complaint the plaintiff exercised his option to declare the whole sum due, and demanded payment from the maker, which was refused.

N. A. and E. M. K. Wolcott answered jointly, and defendant King filed a separate answer. The answers deny, among other things,

the making of the note, its transfer to the United States National Bank by Bullard, or by said bank to the plaintiff. They also deny the allegation of nonpayment of the note. The answers seek, in addition, to set up the invalidity of the note itself, and the rescission by the defendants of their guaranty because of fraudulent misrepresentations alleged to have been made to them. The court found that the note was made as alleged, and found in favor of the plaintiff on the allegations of nonpayment and of indorsement and delivery of the note. It also found that no fraudulent representations had been made by the payee to the defendants. There is a finding:

"That the allegations of the defendants that said note was not duly executed are not true; * * * and that the defendants have no legal standing to question the execution thereof."

Judgment was entered in favor of the plaintiff as prayed, and defendants appeal from such judgment and from an order denying their motion for a new trial.

[1, 2] The bill of exceptions contains specifications of insufficiency of the evidence assailing, among other things, those regarding the sale, assignment, and transfer of the note by Bullard to the United States National Bank, and the indorsement, transfer, and delivery by the bank to the plaintiff. We think the attack upon these findings well founded. The only evidence of the transaction between Bullard and the United States National Bank was that of O. M. Souden, vice president of said bank. His testimony was, in effect, that Bullard came to him and asked if the bank would discount the note. Souden refused to do so. Bullard thereupon offering to guarantee the note, Souden told him that the bank would loan him money upon it if he would guarantee it. Bullard indorsed the note to the bank without recourse, and was immediately handed a check for \$15,000. Bullard at the same time handed the bank his check for \$15,000, which was the form agreed upon for his guaranty of the note. Bullard's check, which apparently was drawn on the United States National Bank, was passed through the bank's books the following day and charged to Bullard's account. The amount was applied to the payment of the loan which had been made to him.

"As soon as the transaction was over," Mr. Souden testified, "the note was filed away for the account of Dr. Bullard. * * * We considered it as Dr. Bullard's property. When we cashed Dr. Bullard's check and marked this loan card paid, the loan which we had made to Dr. Bullard on that day was then and there paid."

While in the earlier part of his testimony Mr. Souden had said that the bank "bought the note," his later and more detailed explanation, of which we have given the substance, shows plainly that the real nature of the transaction was that Dr. Bullard borrowed \$15,000 from the bank on the security of the note, accompanied by his own guaranty in the form of his personal check. Until this

loan was paid, the note remained in the hands of the bank as a pledge. When, on the following day, Dr. Bullard paid the loan, the lien was extinguished, and the note was thereafter held by the bank as a mere depository for Dr. Bullard, the true owner. The indorsement to the plaintiff was concededly without consideration, and for purposes of collection only. There is no evidence that the bank, which was thus holding the note for Dr. Bullard, the true owner, had any authority to make a transfer of it for purposes of collection, or otherwise.

[3] But, if it could be inferred from the entire record that the transfer to plaintiff was made with the sanction and approval of Dr. Bullard, it still remains that the plaintiff, in suing the defendants on their guaranty, was acting as agent for Dr. Bullard, rather than for the bank. In this aspect it becomes important to consider the ruling of the court excluding evidence on an offer by the defendants to prove that \$5,000 had been paid on the note by means of money collected by Dr. Bullard, which, as defendants claimed he had agreed with the maker of the note to apply upon this indebtedness. If, as we have endeavored to show, Dr. Bullard was the real owner of the note, and of the guaranty indorsed upon it, no question of bona fide holder can arise. He was certainly bound by his own act, and the defendants were entitled to credit for any payments actually received by him. It was manifest error to reject the proffered testimony.

Various other questions of interest are suggested, or suggest themselves. They are, however, not presented in the briefs with the care and thoroughness which their importance deserves. We shall not, therefore, at this time undertake to express any opinion regarding their merits. In preparation for a new trial it would be well for counsel on both sides to more fully investigate these points, among which we may mention: (1) The question of the right of the guarantors to attack the binding force of the note as against its maker; (2) whether the doctrine protecting a bona fide holder of negotiable paper taking for value before maturity has any application to a contract of guaranty like the one in suit; (3) whether a note payable to J. H. Bullard, trustee, is to be regarded in law as a note payable to the person named, as an individual, or may be shown to have been given to him in a representative capacity; (4) whether the fact (assuming that it could be shown) that Bullard was acting as trustee for another has any bearing on the validity of the corporate action authorizing the note, when it appears that Bullard's own vote as director was necessary to the passage of the resolution under which the note was made; (5) in what respects the liabilities of a guarantor whose contract has been written on a negotiable instrument differ from those of an indorser.

Some or all of these questions may become

important on a new trial, and it is due to the trial court that they should be more adequately presented than they have been on this appeal.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; LAWLOR, J.

(177 Cal. 587)

LEWIS v. HAYES et al. (S. F. 7561.)

(Supreme Court of California. Feb. 21, 1918.
Rehearing Denied March 21, 1918.)

1. PARTNERSHIP \Leftrightarrow 199—ACTIONS—PARTIES.

Plaintiff, in an action for damages for a libel published concerning her, could not recover for business losses sustained by a partnership of which she was a member, without joining the other members as plaintiffs, in view of Code Civ. Proc. § 382, requiring parties united in interest to join as plaintiffs.

2. APPEAL AND ERROR \Leftrightarrow 1066 — HARMLESS ERROR—INSTRUCTION.

In a libel suit for publishing an article that plaintiff had leprosy, where there was no evidence from which the jury could have found that the article was privileged, an instruction that the article was not privileged could in no event be prejudicial to defendant.

3. LIBEL AND SLANDER \Leftrightarrow 124(8)—DAMAGES—INSTRUCTIONS.

As in suit for publishing an article that plaintiff had leprosy, the amount of damages depended upon the extent of the defamation, the court properly submitted the question of damages without expression other than that implied from the statement that the article was libelous per se.

4. LIBEL AND SLANDER \Leftrightarrow 124(1)—MODIFICATION OF REQUESTED INSTRUCTIONS—"OBLOQUY."

In suit for publishing an article stating that plaintiff had leprosy, that the court modified defendant's requested instruction that "the word obloquy is defined as blame, reprehension" by adding "a cause of disgrace or reproach" constitutes no cause for complaint.

[Ed. Note.—For other definitions, see Words and Phrases, Obloquy.]

Department 2. Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Carrie L. Lewis against E. A. Hayes and others. From a judgment for plaintiff and an order denying new trial, the Mercury Publishing Company appeals. Judgment modified and affirmed, and order affirmed.

Nicholas Bowden, of San Jose, for appellant. Louis Oneal and Owen D. Richardson, both of San Jose, for respondent.

VICTOR E. SHAW, Judge pro tem. Action to recover both general and special damages for a libel published by defendant and appellant of and concerning plaintiff. Judgment went for plaintiff, from which, and an order denying defendant's motion for a new trial, defendant appeals.

The case was here on a former appeal (Lewis v. Hayes, 165 Cal. 527, 132 Pac. 1022, Ann. Cas. 1914D, 148), to the opinion in

which reference is made for a full statement of the facts involved.

The claim for special damages as set out in the complaint was based upon the fact that at the time in question plaintiff was engaged in keeping a rooming house and also conducted a dancing school, the revenues from both of which ventures were impaired. The jury by special verdict fixed plaintiff's damage for loss to the rooming house business at \$300, and that for loss to the business of the dancing school at \$700. The errors complained of relate chiefly to rulings of the court touching these special damages.

[1] In the course of the trial it was for the first time made to conclusively appear that plaintiff's sister was a partner with her in conducting both the rooming house and dancing school. Appellant insists that, since the loss was sustained by the copartnership, plaintiff alone could not maintain the action for the recovery of special damages suffered by her as a member thereof, and hence it is claimed the court erred in denying defendant's motion, seasonably made at the close of the evidence, to withdraw from the jury the issue as to special damages. This contention must be sustained. Any actual loss to plaintiff measurable in money was the result of damage to the copartnership business in which she and her sister Helen were jointly interested. Her special damage, as appeared from her testimony, was based solely and alone upon the damage to the business of the firm of which she was a member. If its business was damaged by any wrongful act of defendant, then, under section 382 of the Code of Civil Procedure, the partners jointly interested therein should be joined as plaintiffs in an action where recovery may be had for the whole injury to the copartnership business. The law will not tolerate a division of a joint right of action into several actions. *Nightingale v. Scannell*, 6 Cal. 506, 65 Am. Dec. 525; *Hughes v. Boring*, 16 Cal. 81. In 18 *American and English Encyclopedia of Law*, page 1055, the author says:

"It is not, however, necessary that partners against or concerning whom words actionable per se have been uttered or published should join in seeking their remedy, for one partner may in a separate suit recover whatever damages have been caused to him by the libel or slander, but he cannot recover for any special damage which has resulted to the firm as such." (Italics ours.)

See, also, *Robinson v. Merchant*, 7 Q. B. 918; *Havemeyer v. Fuller*, 60 How. Prac. (N. Y.) 316. Respondent, in support of the action of the court, has cited a number of cases, among them *Rosenwald v. Hammerstein*, 12 Daly (N. Y.) 377; *Const. Pub. Co. v. Way*, 94 Ga. 120. None of them, however, are applicable to the facts here presented, but are to the effect that, where the libelous article concerns both a partnership and its members individually, such individuals may sue separately for their individual dam-

ages, but, as said in *Collier v. Postum Cereal Co., Ltd.*, 150 App. Div. 169, 134 N. Y. Supp. 847:

"They do not hold that each may recover in separate suits the damages caused to him as a member of the firm"

—which is precisely what plaintiff is seeking to do in this action. It would seem clear that if the recovery sought by the individual partner was for special damage only arising from loss to the business, he could not maintain such action, since he would not be affected as an individual. Neither, where partners sue jointly for damages to the firm business, could they recover general damages sustained by each as individual members of the firm. As said in the case last cited:

"We think that the converse of that proposition holds good, and that the true rule is that the damages to the copartnership must be recovered by the partners jointly, and that damages to the partners individually must be recovered by the partners separately; otherwise it would be necessary to have a partnership accounting in a libel suit, and we can perceive no reason for making a distinction as far as the point under consideration is concerned, between actions for libel and those for other torts, or even for breach of contract."

Our conclusion is that the court erred in not granting defendant's motion to withdraw from the jury all consideration of the question relating to special damages. Under her own testimony, plaintiff was not entitled to recover such damage, and the jury should have been instructed accordingly. This view renders it unnecessary to discuss other alleged errors touching the subject of such damage.

[2] Appellant complains of instruction numbered 5, wherein the court charged the jury that as a matter of law the publication of the article was not privileged. The evidence touching the character of the article is substantially the same as that offered on the former trial. On appeal from the judgment therein defendant insisted that the publication of the article was privileged within the meaning of subdivision 4, § 47, Civil Code. It was there said:

"The article nowhere purports to be a report of any public official proceeding, or of anything said in the course thereof, nor was it, in fact, such a report."

There was no evidence upon which the jury could have found the article to be a privileged publication, and hence in no event could the instruction be deemed prejudicial.

[3, 4] The court instructed the jury that the publication complained of was, as a matter of law, libelous per se, and that upon proof of the falsity plaintiff was entitled to recover at least nominal damages, but that "you, however, are the sole judges as to the degree or extent to which the publication complained of was, and is, defamatory, or to which it exposed plaintiff to obloquy or caused her to be shunned or avoided." Objection is made to that part of the instruc-

tion inclosed in quotation marks, the ground therefor being that the jury was charged upon matters of fact. The article was, as stated, actionable per se. *Simpson v. Press Pub. Co.*, 33 Misc. Rep. 228, 87 N. Y. Supp. 401. Plaintiff was entitled to at least nominal damages. The amount of damage, however, which she was entitled to depended upon the extent of the defamation and exposure to obloquy. Very properly this question was submitted to the jury without expression other than that as implied by the statement that it was libelous per se. Defendant's requested instruction that "the word obloquy is defined as blame, reprehension" was by the court modified by adding thereto the words "a cause of disgrace or reproach." The definition in substantial form so given by the court was approved in *Bettner v. Holt*, 70 Cal. 270, 11 Pac. 713, and finds support in the standard dictionaries, and hence constitutes no cause for complaint.

In so far as the trial and proceedings relate to the subject of plaintiff's general damage, which, as found by the jury, was \$2,750, the record discloses no prejudicial error. As heretofore stated, however, the court erred in not granting defendant's motion to withdraw from the jury all consideration of the question of special damage arising out of the injury to the partnership business of plaintiff and her sister and on account of which claim for special damage the jury awarded her \$1,000. To this extent the judgment is erroneous.

Therefore it is ordered that the judgment herein be modified by deducting therefrom as of the date of the entry thereof the sum of \$1,000, and, as thus modified, the same, and the order appealed from, are affirmed.

We concur: MELVIN, J.; WILBUR, J.

(177 Cal. 555)

PEOPLE ex rel. Board of State Harbor Com'rs
v. SOUTHERN PAC. CO. (S. F. 7385.)

(Supreme Court of California. Feb. 18, 1918.)

1. PLEADING §120(1)—SUFFICIENCY OF DETAILS—INCONSISTENT ALLEGATIONS.

In an action by the board of state harbor commissioners to recover possession of parcels of land alleged to constitute portions of Channel street in the city of San Francisco, an answer not expressly denying that the lands were portions of Channel street, but alleging that they constituted parts of block 22, as delineated upon a map of the beach and water lots of such city, put in issue the question whether the parcels were situated in Channel street or in block 22.

2. EVIDENCE §383(9) — DOCUMENTARY EVIDENCE—WEIGHT AND EFFECT.

Such map showing that block 22 lay immediately northerly of and abutted upon Channel street and formed no part of such street, but giving no figures showing the width of the streets or the size of the blocks, constituted no evidence that the parcels described in the complaint were portions of Channel street.

3. MUNICIPAL CORPORATIONS — RECOVERY OF POSSESSION — BURDEN OF PROOF.

Conceding that the court would take judicial notice that the state was the owner of Channel street, the burden was on plaintiff to introduce evidence sufficient to establish the fact that the possession of the defendant complained of encroached upon Channel street, and, having failed to do this, a nonsuit was properly granted.

4. EVIDENCE — JUDICIAL NOTICE — OFFICIAL MAPS.

The court takes judicial notice of the Red Line Map of the beach and water lots of the city of San Francisco, but cannot take judicial notice of the extent of the possessions of the various persons occupying lands within the red lines.

5. NAVIGABLE WATERS — PRESUMPTION AS TO NAVIGABILITY.

Under Act March 26, 1868 (St. 1867-68, p. 355), providing that there should be a navigable canal in the middle of Channel street in San Francisco 140 feet wide, strips outside of the 140-foot channel are presumptively not in navigable water.

6. EVIDENCE — JUDICIAL NOTICE — GEOGRAPHICAL FACTS.

By Act March 26, 1851 (St. 1851, p. 307), the state granted to the city of San Francisco for 99 years the lots and blocks shown on a map of the beach and water lots of that city. Act March 26, 1868 (St. 1867-68, p. 355), provided for a navigable canal in the middle of Channel street 140 feet wide. St. 1877-78, p. 263, § 2, gave the board of state harbor commissioners jurisdiction over Channel street as far as the ebb and flow of tide water. *Held* that, assuming that some of the blocks granted to the city may not have been reclaimed, and that the tide still ebbs and flows over them, the court cannot take judicial notice that any particular block granted by the state to the city is still subject to the ebb and flow of the tide.

7. NAVIGABLE WATERS — LANDS UNDER WATER — GRANTS BY STATE — PRESUMPTIONS.

The presumption is that blocks granted by the state to the city of San Francisco for 99 years by the Act of March 26, 1851 (St. 1851, p. 307), even if within the ebb and flow of the tide, were not navigable, or that the public easement for navigation was intended to be abandoned as to them, and that consequently they are not now within the jurisdiction of the state harbor commission.

In Bank. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Three actions by the People, on relation of the Board of State Harbor Commissioners, against the Southern Pacific Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Daniel A. Ryan, of San Francisco, for appellant. Frank McGowan, of San Francisco, for respondent.

SHAW, J. Three cases pending in the superior court between the parties hereto, numbered respectively in that court 13097, 13099, and 13555, were, by stipulation of the parties, tried together upon the same evidence. They each involve the same questions of law and fact, but differ in regard to the description of property involved. The complaints state

causes of action for the recovery of possession of parcels of land alleged to be portions of Channel street, in the city and county of San Francisco, and to be the property of the state of California. They are strips of land 30 feet wide, occupying spaces aggregating about 500 feet, running east and west, between Fifth and Sixth streets. The complaint alleges that Channel street is an arm of the bay of San Francisco, and has a width of 200 feet; that the tidewaters of the bay regularly ebb and flow over and upon the same, and that said street is dedicated to public use for navigation and commerce as a part of the navigable waters of the state; that the state is, and always has been, seised in fee and entitled to the possession thereof; that the relator is entitled to its possession and control as an agency of the state; and that the defendant is in possession of the said parcels, holding without right. The prayer was for the recovery of possession only.

The answer denies that Channel street is an arm of San Francisco Bay, or that tidewaters of the bay ebb and flow thereon, or that the state is the owner thereof. It also denies the dedication to public use, and denies that the state or any of its agents has the right to the possession or control thereof. It does not expressly deny the allegation that the lands described in the complaint are portions of Channel street. It avers that the defendant has acquired title to said parcels by adverse possession, and is now the owner thereof. It further alleges that said parcels of land constitute parts of block 22, as delineated upon a map of the beach and water lots of the city of San Francisco, known as the "Red Line Map," surveyed by William M. Eddy in 1851, which said lots and blocks were granted by the state of California to the city of San Francisco for the period of 99 years by the act of March 26, 1851 (Stats. 1851, p. 307, G. & S. p. 764), and that by mesne conveyances from the city of San Francisco the defendant has become the owner of all the right, title, and interest of said city therein, and is now lawfully entitled to the possession, and is in possession thereof, as successor in interest of said city.

Upon the trial plaintiff introduced in evidence the aforesaid Red Line Map, showing the relative positions of block 22 and Channel street. A witness then testified on behalf of the plaintiff that he was the engineer of the state harbor commission, and that he had examined the said Red Line Map, and was unable from the scale noted thereon to determine the length or width of the blocks thereon delineated. Upon this evidence the plaintiff rested its case. Thereupon the defendant moved the court for a judgment of nonsuit, on the ground that the plaintiff had not shown either the title, possession, or right of possession to the land described in the complaint. The motion was granted, and there-

upon judgment was given in favor of the defendant for its costs. From this judgment the plaintiff prosecutes these appeals.

[1] The pleadings put in issue the question whether the parcels of land were situated in Channel street or in block 22. *Burris v. People's Ditch Co.*, 104 Cal. 253, 37 Pac. 922. In order to make out its case it was necessary for the plaintiff to prove that they were in Channel street. The case was tried and submitted upon that theory. The act of 1851 under which the aforesaid Red Line Map was prepared purports to grant to the city of San Francisco, for the term of 99 years from March 26, 1851, the use and occupation of all the lots of land delineated on said Red Line Map. The right of possession of the said lots, block 22 being one of them, thereupon passed from the state to the city of San Francisco, except as modified by section 6 of the act, which declares that nothing therein shall be construed "as a surrender by the state of its right to regulate the construction of wharves or other improvements, so that they shall not interfere with the shipping and commercial interests of the bay and harbor of San Francisco."

[2, 3] The Red Line Map showed that block 22 lies immediately northerly of and abutting upon Channel street, and that it forms no part of that street. It constituted no evidence of the fact in issue that the parcels described in the complaint were portions of Channel street, unless supplemented by additional evidence showing the width of Channel street, and that the boundaries as set forth in the complaint, if extended thereon, would include portions of Channel street instead of portions of said block 22. The map gives no figures showing the width of the streets or the length and width of the blocks. The appellant in its brief admits that it does not show the width of Channel street, or of block 22. No other proof on the subject was offered. Conceding, as claimed, that the court will take judicial notice of the fact that the state is the owner of Channel street, the burden remained upon the plaintiff to introduce evidence sufficient to establish the fact that the possession of the defendant complained of encroached upon the legal boundaries of Channel street. Having failed to do this, the court properly granted the nonsuit.

[4-7] The appellant argues that all of the land inclosed within the Red Line Map was originally tideland belonging to the state; that the effect of the grant by the act of 1851 was to convey to San Francisco a 99-year estate in all the lots delineated on the map, but that those of the streets which were arms of the bay and constituted navigable waters remained in the control and possession of the state, notwithstanding that grant (*People v. Williams*, 64 Cal. 498, 2 Pac. 393); that one who asserts a change of the character of the land from tideland to upland must show the facts; and hence that the defendant has the burden of proving that its possessions were

not a part of Channel street, but consisted of portions of block 22, and that, as the court had no judicial knowledge that the property in possession of the defendant was not within the boundaries of Channel street, it must presume that they were within that street, and that the plaintiff was entitled to possession thereof. We cannot see the force of this reasoning. The court takes judicial notice of the Red Line Map (*Merritt v. Barta*, 158 Cal. 381, 111 Pac. 259), but it cannot take judicial notice of the extent of the possessions of the various persons who occupy lands within the red lines. The act of March 26, 1868 (Stats. 1867-68, p. 355), declared that there should be a navigable canal in the middle of Channel street which was to be 140 feet wide. If Channel street was laid off to be 200 feet in width, which plaintiff alleged, but did not prove, the courses and distances given in the plaintiff's descriptions would bring the strips in controversy outside and northerly of this 140-foot channel, and presumptively they would not be in navigable water. Section 2 of the act of 1878 (Stats. 1877-78, p. 263) declares that the jurisdiction of the board of state harbor commissioners over Channel street shall extend as far as the ebb and flow of tidewater. The appellants argue that, as all of the land was originally under the ebb and flow of tidewater, any one who claims possession under the grant of 1851 must show that his land is above high tide, and that, in the absence of such showing, the court should have found that the parcels possessed by the defendant were under the ebb and flow of the tide, and consequently within the jurisdiction of the harbor commission. We need not determine here whether or not the grant of 1851 transferred to the city of San Francisco the power to exclude from navigation the blocks delineated upon the map, as distinguished from the streets, notwithstanding provisions of the act of 1878. Assuming that some of the blocks may not have been reclaimed, and that the tide still ebbs and flows over them, there is no law which requires the court to take judicial knowledge of the extent of such flow. The court cannot know that any particular block is still subject to the ebb and flow of the tide. The presumption from the grant of 1851 would be that the blocks, even if within the ebb and flow of the tide, were not navigable, or that the public easement for navigation was intended to be abandoned as to them, and consequently that they are not now within the jurisdiction of the state harbor commission. The evident purpose of the grant of 1851 was to enable the city of San Francisco to cause the said blocks to be put in possession of private individuals, who might possess and improve the same, and, during the term of the estate given to the city at least, exclude them from use for navigation. If the plaintiff claims otherwise with respect to the particular property in controversy, it was incumbent upon it to offer evidence to prove

that it constituted a part of the navigable channel.

The principles which control the rights of the state in tide lands, its powers to make dispositions of such lands, and the rights of municipalities to whom it has delegated the disposition, supervision, and control of such lands, have been the subject of extended consideration by this court in cases decided since the present action was begun. *People v. California Fish Company*, 166 Cal. 576, 138 Pac. 79; *People v. S. P. Co.*, 166 Cal. 614, 138 Pac. 94; *People v. S. P. Co.*, 166 Cal. 627, 138 Pac. 103; *People v. Banning Co.*, 166 Cal. 630, 138 Pac. 100; *People v. Banning Co.*, 166 Cal. 635, 138 Pac. 101; *People v. Banning Co.*, 167 Cal. 643, 140 Pac. 587; *People v. Banning Co.*, 167 Cal. 652, 140 Pac. 591; *Patton v. L. A.*, 169 Cal. 521, 147 Pac. 141; *Knudson v. Kearney*, 171 Cal. 250, 152 Pac. 541. The last case cited deals particularly with the subject of dispositions of tidelands to the city of San Francisco in furtherance of navigation. The briefs in the present case discuss these questions extensively, and endeavor to apply the principles there laid down to the facts existing in this case. In view of the lack of evidence to prove possession, we do not think the questions arise, and therefore we decline to consider them.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; WILBUR, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 596)

In re RYAN'S ESTATE. (S. F. 8448.)

(Supreme Court of California. Feb. 23, 1918.)

1. WILLS \S 421 — JUDGMENT ADMITTING TO PROBATE—COLLATERAL ATTACK.

A judgment admitting a will to probate, from which an appeal was taken, and which had become final, could not be collaterally attacked by motion to strike on the ground that it was not a will.

2. JUDGMENT \S 486(1) — COLLATERAL ATTACK.

A decree in a proceeding in rem pronounced by a court competently jurisdictioned is not absolutely void because it plainly disobey the law.

Department 2. Appeal from Superior Court, Alameda County; Wm. H. Wells, Judge.

In the matter of the estate of John G. Ryan, deceased. Motion by James Reid and Mary Fitzgerald to strike from the records of the probate court the purported will of the deceased of which H. B. Mehrmann was proponent. From an order denying the motion, the contestants appeal. Affirmed.

George Ingraham, of Oakland, for appellants. Abe P. Leach and Harry E. Leach, both of Oakland, for respondent.

MELVIN, J. This is an appeal from an order denying the motion of appellants to strike from the records of the probate court the alleged and purported last will and testament of the deceased. It appears that in 1910 appellants filed in the superior court a contest of the will of John G. Ryan, deceased, and a petition for the revocation of the probate thereof. Respondent, Mehrmann, answered, a trial was had upon issue joined, and a judgment and decree was entered in favor of the said Mehrmann finding, among other things, "that said instrument contains the matters and things required by law to be contained and set forth in a last will." Subsequently an appeal was taken by these appellants to this court, and the judgment of the superior court had become final before the present motion was made.

[1] The sole contention of appellants is that the purported will is not in reality a will at all and disposes of no property. But this is a question which we need not discuss, because, in our opinion, the judgment and decree is invulnerable to collateral attack such as that which appellants seek to make in this proceeding. The superior court at the time it made the order admitting the will to probate not only had the instrument before it, but also had the advantage of parol evidence as to the attending circumstances connected with its execution. *Mitchell v. Donohue*, 100 Cal. 202, 34 Pac. 614, 38 Am. St. Rep. 279. But, aside from this fact, it is the rule in California that a judgment admitting a will to probate is a judgment in rem, and may not be thus collaterally attacked. *Matter of the Will of Warfield*, 22 Cal. 51; *Rogers v. King*, 22 Cal. 72; *Estate of Twombly*, 120 Cal. 350, 52 Pac. 815.

[2] Counsel for appellants seems to pin his faith upon the case of *Blacksher Co. v. Northrop*, 176 Ala. 190, 57 South. 743, 42 L. R. A. (N. S.) 454, in which the Supreme Court of Alabama held that a decree showing on its face that a will admitted to probate was not attested as required by statute is subject to collateral attack. Even if we were to follow the reasoning of that case, it would hardly be authority in California, particularly in view of the fact that in the opinion great stress is laid upon the point that the invalidity of the will appears upon the face of the decree, while in the matter at bar appellants sought to show the invalidity of the will by proof aliunde. In that case Mr. Justice McClellan filed a very powerful dissenting opinion in which, among other things, he said:

"The idea that a decree in a proceeding in rem pronounced by a court competently jurisdictioned to so pronounce is absolutely void because it plainly disobeys the law is, it seems to me, a startling proposition, the consequences of which will be, if applied, profound, widespread, and recurrently surprising. Res judicata, as referred to collateral assaillment, becomes a shadow merely, instead of a wholesome and im-

peratively necessary doctrine, if such an idea finally and fully prevails."

With these sentiments we thoroughly agree, but, even if we were inclined to follow the reasoning of the majority of the court in that case, we would find ourselves confronted by a different doctrine established for many years in California.

It follows that the order appealed from must be affirmed; and it is so ordered.

We concur: VICTOR E. SHAW, Judge pro tem; WILBUR, J.

(176 Cal. 711)

MAHAFFEY et al. v. INDUSTRIAL ACCIDENT COMMISSION. (S. F. 8362.)

(Supreme Court of California. Dec. 14, 1917.)

MASTER AND SERVANT—§385(1)—WORKMEN'S COMPENSATION ACT—FIXING ANNUAL EARNINGS.

Employment in the work of cleaning roofs, preliminary to painting them, in which an employé was injured, being irregular and only occasional, his average annual earnings are to be fixed, not according to the method provided by Workmen's Compensation Act (St. 1913, p. 279) § 17, subds. 1, 2, as amended by St. 1915, pp. 1086, 1087, both of which contemplate a kind of employment that is permanent and steady, but according to subdivision 3, as amended by St. 1915, p. 1087, providing that, where the foregoing methods cannot reasonably and fairly be applied, such earnings shall be taken at such sum as shall reasonably represent his average annual earning capacity in the kind of employment in which he was injured, or in any employment comparable therewith, but not of a higher class, which sum must be arrived at by ascertaining from evidence what his earning capacity in fact was.

In Bank. Certiorari by N. W. Mahaffey and another against the Industrial Accident Commission. Award annulled, and proceedings remanded.

Redman & Alexander, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondent.

SLOSS, J. Certiorari to review an award of the Industrial Accident Commission. Mahaffey, one of the petitioners, was a contractor. In the performance of contracts for repairing and painting roofs, he sometimes found it necessary, before painting a roof, to have the moss and dirt scraped from the shingles. Rees was employed by Mahaffey to do work of this character, and while so employed fell from a roof and was injured. The commission found he had sustained a permanent partial disability equal to 25¼ per cent. of total disability, entitling him to a disability indemnity of 65 per cent. of his average weekly earnings for a period of 101 weeks. Workmen's Comp. Act, § 15. The average annual earnings were found to be \$900, and the average weekly earnings \$17.31. Certain payments having already been made before the institution of the proceedings, the commission found the balance

due to be \$209.50. The petitioners, who are the employer and his insurance carrier, attack the award upon the ground principally, that the evidence does not sustain the finding with respect to Rees' average weekly earnings.

Rees was 68 years of age, and not engaged in any fixed or steady employment. He owned some improved real property, and devoted part of his time to its care and repair, and to looking after some property belonging to his wife. He also took occasional jobs from Mahaffey in cleaning roofs, and was sometimes employed casually by others in different kinds of work. He was paid by Mahaffey at the rate of \$3 a day. The work of cleaning roofs was, however, intermittent in character, and it is clear from all the testimony that Rees was not engaged in it for more than 15 to 20 days a year. Mahaffey had hired other men to do work of the same kind; but, as he testified, it was a special kind of work, and he could not readily "pick up" men to do it. The evidence in the record, and every inference that may fairly be drawn, indicate that employment of this kind was occasional and irregular, and that neither Rees nor any one else was employed steadily at it.

The commission fixed the employé's annual earnings at 300 times his daily wage. This, we think, was not in accord with the statutory provision applicable to the case shown by the evidence. Under section 17 of the Workmen's Compensation Act, weekly earnings shall be one fifty-second of the average annual earnings, and average annual earnings are to be arrived at as follows:

"(1) If the injured employé has worked in the same employment, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily earnings, wage or salary which he earned as such employé during the days when so employed.

"(2) If the injured employé has not so worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of three hundred times the average daily earnings, wage or salary which an employé of the same class, working substantially the whole of such immediately preceding year, in the same or a similar kind of employment, in the same or a neighboring place, earned during the days when so employed.

"(3) In every case where for any reason the foregoing methods of arriving at the average annual earnings of the injured employé cannot reasonably and fairly be applied, such annual earnings shall be taken at such sum as shall reasonably represent the average annual earning capacity of the injured employé at the time of the injury in the kind of employment in which he was then working, or in any employment comparable therewith, but not of a higher class."

Subdivision 1 obviously cannot be looked to in the present case, because Rees had not worked in this employment during substantially the whole of the preceding year. The

commission seems to have gone on the view that subdivision 2 was the governing provision. But we think this subdivision equally inapplicable. Under its terms the annual earnings are measured by 300 times the daily earnings of an employé of the same class working substantially the whole of the preceding year in the same or a similar employment. As we have indicated, there is no evidence that any one else engaged in this employment or a similar one did or could work during substantially the whole of the year. Both subdivisions 1 and 2 contemplate a kind of employment which is permanent and steady, and which, for that reason, affords to an employé the possibility, at least, of earning annually an amount measured by the number of working days in a year, estimated and fixed by the act at 300. Where this kind of employment is not shown to exist, the case falls within subdivision 3, under which the annual earnings are to be taken as the sum which will "reasonably represent the average annual earning capacity" of the employé "in the kind of employment in which he was then working, or in any employment comparable therewith, but not of a higher class." Under this subdivision, the amount of annual earnings is not reached by multiplying the employé's daily earnings by any arbitrary figure, but by ascertaining from the evidence what his earning capacity in fact was. The evidence before the commission did not show that Rees could have earned in the employment in question, or in any employment comparable to it, anything more than the amount which he had actually earned in the past, which was but a fraction of the amount fixed by the commission as his average annual earnings. The award must therefore fail, inasmuch as the commission's authority to make an award depends upon evidence tending to show the existence of the conditions justifying the award.

The award is attacked upon a further ground, but this, we think, involves merely a question of fact, upon which the commission's finding is conclusive if it have any support in the record. The finding is not without such support.

The award is annulled, and the proceeding remanded to the commission for further proceedings not inconsistent with the views herein expressed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

(177 Cal. 570)

TURNER et al. v. EAST SIDE CANAL & IRRIGATION CO. (Sac. 2742.)

(Supreme Court of California. Feb. 20, 1918.)

1. Costs \Leftrightarrow 222 — ALLOWANCE — STATUTES — CHANGE OF RULES.

Although, when a brief was printed, recovery of expense therefor as costs was not lawful,

such may be so allowed under provisions of Code Civ. Proc. § 1027, which later, but before decision on appeal, went into effect; costs being but an incident to a judgment.

2. Costs \Leftrightarrow 254(1) — APPEAL — EXPENSE OF TRANSCRIPT — "ACTUALLY PAID OUT IN CONNECTION WITH APPEAL."

In view of Code Civ. Proc. § 1027, specifying "amounts actually paid out," where appellant used a transcript of the evidence, which she secured and paid for prior to the judgment appealed from, and was at no expense therefor thereafter, the expense of such transcript cannot be taxed as costs on appeal.

In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Elizabeth Turner, administratrix of William C. Turner, deceased, and others, against the East Side Canal & Irrigation Company, a corporation. After judgment, appeal, and reversal (169 Cal. 652, 147 Pac. 579), order was made denying defendant's motion to tax costs, from which it appeals. Reversed, with directions.

James F. Peck, of San Francisco (Charles W. Byrnes, of San Francisco, of counsel), for appellant. Edward F. Treadwell, of San Francisco, Frank H. Short, of Fresno, and George F. Buck, of Stockton, for respondents.

ANGELLOTTI, C. J. On an appeal by the plaintiffs in this action the part of the judgment appealed from was reversed. 168 Cal. 103, 142 Pac. 69. Upon the going down of the remittitur the plaintiffs filed a memorandum of their costs on appeal. A motion to have costs taxed by the court was made by defendant, and this motion was denied. We have here an appeal by defendant from the order denying this motion.

[1] The appeal presents the question of the right of plaintiffs to recover as costs of the appeal the amounts shown by two items of the memorandum of costs. The statute in force at the time the decision of reversal by this court was rendered (June 29, 1914) was, so far as material, as follows:

"The party entitled to costs, or to whom costs are awarded, may recover all amounts actually paid out by him in connection with said appeal and the preparation of the record for the appeal, including the costs of printing briefs; provided, however, that no amount shall be allowed as costs of printing briefs in excess of fifty dollars to any one party." Section 1027, Code Civ. Proc.

The memorandum of costs included an item of \$50, being part of the cost of printing plaintiffs' brief on their appeal. The objection to this item is that at the time the brief was printed and filed there was no law authorizing the recovery of any part of the expense thereof as costs. After such filing and prior to our decision of reversal the statute was amended to read as hereinbefore set forth. Defendant's claim is that the statute may not be read as applicable to briefs printed and filed prior to the taking effect of the amendment. Precisely the sit-

uation here presented was presented in *Cain v. French*, 29 Cal. App. 725, 156 Pac. 518. On the theory that costs are but an incident of a judgment, and that the rule pertaining to their allowance may be changed or modified by statute during the pendency of the proceeding, it was held by the District Court of Appeal of the First District that the statute in force at the time the judgment on the appeal is given controls, and that the party was therefore entitled to recover the cost of printing the brief, not exceeding \$50. A petition for a hearing in this court, was denied. That costs are but an incident to the judgment has many times been declared, as it was in *Begbie v. Begbie*, 128 Cal. 154, 60 Pac. 667, 49 L. R. A. 141, where it was also said that their recovery is governed by the statute in force at the time the right to have them taxed accrued. This appears to be the general rule. In so far as costs on appeal are concerned, this time, as was held in *Eaton v. Southern Pacific Co.*, 31 Cal. App. 379, 160 Pac. 687, is the time of the rendition of the judgment on appeal. We think the question presented was correctly decided in *Cain v. French*, supra. It follows that the lower court did not err in allowing this item.

[2] The other item was one of \$882.60, being for "Preparing record on appeal, transcript of testimony, 8,826 folios, at 10cts., \$882.60." It sufficiently appears from the affidavit of one of the plaintiffs' attorneys that no amount whatever was actually paid out, or, indeed, any pecuniary liability incurred, in the matter of this transcript of testimony at any time after the judgment appealed from was given, or, so far as appears, with any view to taking any appeal. At the time of the trial, which, according to the affidavit, commenced in the year 1906, the trial court ordered the testimony written up at the expense of the parties for the purposes of the trial, and plaintiffs at the same time ordered an extra copy for their own use, thereby obtaining the same at one-half the rate charged for a single copy. The amount charged and then paid by plaintiffs to the shorthand reporter for this extra copy was \$882.60, and it is this payment that plaintiff seeks to recover as costs of appeal. Subsequently the judgment was given against plaintiffs, and they, in due time, took their appeal. On that appeal plaintiffs presented the record provided by section 953a et seq. of the Code of Civil Procedure (enacted in 1907), which includes a transcription of the notes of the shorthand reporter of the proceedings at the trial, certified by him and settled by the judge. To procure such a record, which will be available for use on an appeal, it is essential that the party preparing to appeal shall, within a specified time after judgment, file a demand for the preparation of the same, in pursuance of which the reporter transcribes his notes and certifies the same, being paid by such party the

charge allowed by law therefor. Such a payment, of course, can be recovered as a cost of appeal, being an amount actually paid out in the preparation of the record on appeal. In the case at bar the plaintiffs, having made the demand, arranged with the reporter to use, in making up his transcript, their copy which they had obtained and paid for during the trial. This was done, and, as we have said, it sufficiently appears that nothing whatever was paid out by plaintiffs on account thereof. It would have cost double the amount to have had the reporter prepare a new transcript in the usual way for the purposes of the appeal, and the whole thereof would have been recoverable as costs. Defendant has not waived, by stipulation or otherwise, the right to object to this item of alleged costs. The question is whether, under these circumstances, the original cost of the transcript to the plaintiffs can be recovered by them as costs of appeal.

We are satisfied that, in view of the language of our statute (section 1027, Code Civ. Proc.), and notwithstanding much apparent reasonableness in plaintiffs' claim, this question must be answered in the negative. The right to recover costs exists solely by virtue of statute (*Begbie v. Begbie*, 128 Cal. 154, 60 Pac. 667, 49 L. R. A. 141), and warrant for their recovery must be found in some statute. In the absence of statutory authorization, it cannot avail that under the circumstances of a particular case it appears to a court that a charge is, as matter of fact, fair and reasonable. Our statute regarding this matter is plain and unambiguous, and clearly confines the recovery of costs of appeal to "amounts actually paid out * * * in connection with said appeal and the preparation of the record for the appeal, including the costs of printing briefs," etc. We are utterly at a loss to see how, upon the facts here shown, it can reasonably be held that, in so far as this transcript is concerned, any amount was "actually paid out," either "in connection with said appeal" or in "the preparation of the record for the appeal." By reason of the fact that plaintiffs, at the time the judgment against them was given, already had a transcript of the proceedings of the trial and were able to arrange with the reporter without cost to them to certify that transcript, they were put to no cost whatever by reason of the appeal, in so far as the preparation of a record for the appeal was concerned. The record for the appeal under section 953a, in so far as the reporter's transcript is concerned, is the transcript furnished by him in response to the legal demand therefor, made after judgment and within the time and in the manner specified in the section. When the record is prepared under this section, it is the money that the appellant is actually compelled to pay out to obtain this record that he is entitled to recover. If perchance he is able, by arrangement

with the reporter, to so utilize in the preparation of the reporter's transcript material that he had acquired before judgment and then owns, that the reporter's charge will be lessened, or, as here, entirely obviated, so much the better for all parties, for him in the event that he loses on appeal, and for the adverse party in the event that he wins. But the original cost of that material is not an expense to which he was put by reason of the appeal (Bank of Woodland v. Hiatt, 59 Cal. 580), and was not money actually paid out in connection with the appeal or in the preparation of the record for the appeal. While the facts are somewhat different, the expense of this transcript was just as must "purely an expense in the conduct of the case in the superior court and * * * not a part of the preparation of the record for the appeal," as was the transcript in *Eaton v. Southern Pacific Co.*, 31 Cal. App. 379, 160 Pac. 687, and this, altogether regardless of whether it was a legitimate item of costs in that court. It was not a cost of appeal. In view of the plain language of our statute, we cannot adopt the view enunciated in *Akerly v. Vilas*, 23 Wis. 628. It follows, from what we have said, that the item in question should not have been allowed.

There is no force in the claim that the cost bill was not properly verified.

The order appealed from is reversed, with directions to the court below to disallow the item of \$882.60 for transcript of testimony, and to tax plaintiffs' costs on said appeal at the sum of \$80.75.

We concur: WILBUR, J.; MELVIN, J.; SLOSS, J.; SHAW, J.; VICTOR E. SHAW, Judge pro tem.; RICHARDS, Judge pro tem.

(177 Cal. 550)

THOMAS v. FURSMAN et al. (S. F. 7569.)
(Supreme Court of California. Feb. 18, 1918.)

1. ACKNOWLEDGMENT §54—EFFECT—"EXECUTION."

Under Code Civ. Proc. § 1933, providing that the execution of an instrument is the subscribing and delivering of it, with or without affixing a seal, section 1948, providing that every private writing, except last wills and testaments, may be acknowledged, or proved and certified, in the manner provided for the acknowledgment of conveyances of real property, and section 1961, declaring that every instrument conveying or affecting real property, acknowledged and proved, or certified as provided, may, together with the certificate of acknowledgment or proof, be read in evidence without further proof, an assignment of a cause of action, duly acknowledged in the same manner as a conveyance of real property, where uncontradicted and produced by the assignee, requires a finding of due execution and delivery.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Execute.]

2. NEW TRIAL §108(3)—NEWLY DISCOVERED EVIDENCE—RIGHT TO NEW TRIAL.

Where, on defendant's testimony, the court found that a person to whom plaintiff's as-

signor furnished supplies and materials was not defendant's agent, newly discovered evidence that after such finding defendant commenced an action, filing a verified complaint alleging that such person was his agent, necessitates a new trial, for it is obvious that defendant must either have falsely testified, or made a false affidavit.

In Bank. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Floyd C. Thomas, substituted for M. A. Varney, against H. C. Fursman and others. From a judgment for defendant Waymire, and an order denying new trial, plaintiff appeals. Reversed, and cause remanded for new trial.

Joseph K. Hutchinson and Walter Slack, both of San Francisco, for appellant. H. L. Clayberg and Clayberg & Whitmore, all of San Francisco, for respondents.

RICHARDS, Judge pro tem. This is an appeal from a judgment in favor of the defendant R. Waymire, and from an order denying the plaintiff's motion for a new trial. The action was brought to recover for services rendered and for machines, materials, and supplies furnished by one M. A. Varney to the defendants in connection with the performance of certain annual assessment work upon certain placer mining claims at Searles Lake in San Bernardino county; said claims having each been located in the name of one or other of the several defendants herein. These several locations appear to have been made by one Henry E. Lee, acting on behalf of each of the defendants in the making thereof, and the plaintiff alleged that he had been employed by said Henry E. Lee as the agent of each of said defendants to furnish, equip, and operate two automobiles, which were to be used in transporting the necessary men, material, and supplies required in doing the annual assessment work of each of the defendants upon these claims. The defendant Waymire in his verified answer denied the authority of said Lee to act as his agent in the employment of the plaintiff, or to use the machines, materials, or supplies alleged to have been furnished by him. The cause came on for trial in the early part of the year 1914, and on April 13th of that year the trial court made a minute order directing judgment in favor of the plaintiff and against the defendant Waymire. The action had originally been begun in the name of said Varney, but in the meantime and prior to said order for judgment the plaintiff had made an assignment of his claim to Floyd C. Thomas, who, after said order for judgment, moved the court for permission to have himself substituted as plaintiff in the action, and also for leave to file an amended complaint setting up such assignment, and also correcting certain other discrepancies in the original com-

plaint. The court granted said motion, and after such amendment had been made and on June 14th filed its findings and judgment in favor of the substituted plaintiff in the action.

On the same day the defendant Waymire served and filed a notice of motion to set aside the judgment just entered against him, upon the ground, among others, that no copy of the complaint as amended had been served upon him. The court granted said motion and permitted the defendant Waymire to answer the amended complaint. This he did, at first by way of demurrer, which the court overruled; whereupon he filed an answer, repeating his former denials and further denying the sufficiency of the assignment of the cause of action. The court thereupon proceeded to hear evidence upon the issue presented as to the genuineness and due execution of said assignment and as to the delivery thereof, with the result that judgment was ordered in favor of the defendant Waymire, the court making general findings in his favor upon the issue of the alleged want of authority in Lee to act as his agent in the employment of the plaintiff's assignor, or in the use of the machines, material, and supplies alleged to have been furnished by the latter. The court also particularly made its finding in favor of Waymire upon the issue as to the due execution and delivery of the assignment, holding that due execution or delivery of such assignment had not been proven.

The plaintiff in due time moved for a new trial upon a number of grounds, among which was the insufficiency of the evidence to justify the finding of the court that no proper delivery of the assignment in question had been shown, and upon the further ground of newly discovered evidence. In support of this latter ground the plaintiff filed an affidavit setting forth the fact that after the trial of the cause, wherein the defendant Waymire had testified that Henry E. Lee was not his authorized agent in making the arrangements with the plaintiff's assignor upon which this suit was predicated, he (Waymire) had commenced an action against several of his former associates in the matter of making the locations at Searles Lake and of doing the assessment work thereon, and that in his verified complaint in said action, which was made a part of said affidavit, said Waymire had averred explicitly that the said Henry E. Lee was his duly authorized agent in relation to all such matters. The plaintiff's motion for a new trial having been denied upon all the grounds stated, he prosecutes this appeal from the judgment and order so made.

[1] In support of the appellant's contention that the trial court was in error in its finding to the effect that the due execution and delivery of the assignment of the original plaintiff's cause of action to the substituted plaintiff and present appellant herein had not been proven, appellant called attention in his

opening brief herein to the fact that the written assignment in question had been produced in court by the attorney of record originally for the assignor, but at the time of trial for the assignee, who knew nothing of his own knowledge as to the signature of the assignor or as to the delivery of the assignment, his only knowledge upon the subject being derived through correspondence with certain other attorneys who had retained him to represent the original plaintiff, and from whom he had received the assignment in question. It is, to say the least, very doubtful, whether this evidence standing alone in the record would have been sufficient to have supported a finding as to the due execution and delivery of the assignment in question; but upon petition for rehearing the appellant for the first time directs our attention to the fact, as shown in the record, that the assignment in question was acknowledged before a notary public, who had duly certified to the execution thereof by the assignor.

This additional showing being entirely uncontradicted puts a new phase upon the situation, and furnishes sufficient prima facie proof of the due execution and delivery of the assignment in the absence of evidence to the contrary. Section 1933 of the Code of Civil Procedure provides that:

"The execution of an instrument is the subscribing and delivery of it, with or without affixing a seal."

Section 1948 of the Code of Civil Procedure provides that:

"Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment or proof of conveyances of real property, and the certificate of such acknowledgment or proof is prima facie evidence of the execution of the writing in the same manner as if it were a conveyance of real property."

Section 1951 of the Code of Civil Procedure provides that:

"Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding without further proof."

The assignment in question having been thus duly acknowledged and attested and having been produced in court from the possession of the assignee, and there having been introduced no evidence whatsoever to controvert the prima facie showing of the due execution and delivery of said assignment thus made, the trial court was in error in making its finding contrary to the facts thus proven.

[2] The other points urged by the appellant as grounds for a reversal relate, with one exception, to matters of procedure during the trial of the cause and are not of sufficient merit to require consideration here. The appellant, however, contends that the court improperly denied his motion for a new trial upon the ground of newly discovered evidence, and since this point relates directly to

the credibility of the defendant Waymire, upon whose testimony as a witness at the trial the court made its finding to the effect that Henry E. Lee was not the authorized agent of said Waymire in making the engagements with the plaintiff's assignor out of which this action arose, the appellant's contention in this regard merits consideration here. Upon the trial of the cause the defendant Waymire testified in positive terms that said Henry E. Lee was not his agent, and had no authority as such to engage the services or use the machines, material, or supplies of the plaintiff's assignor as set forth in the complaint. Upon his testimony as thus given the court found in his favor upon this issue. Upon motion for a new trial the plaintiff produced the verified complaint of said Waymire in an action commenced by him subsequently to his testimony as thus given, wherein said Waymire explicitly averred that said Henry E. Lee was his duly authorized agent at all of the times and in relation to all of the matters wherein the services of the plaintiff's assignor had been enlisted. This showing was undisputed by the said defendant Waymire, and in our opinion it furnished, in view of the circumstances of this case, a compelling answer why the plaintiff's motion for a new trial should have been granted, since it showed that the defendant Waymire had certified falsely either as a witness at the trial of the instant case or as a complainant in the subsequent one.

Upon both of the foregoing grounds, therefore, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; WILBUR, J.

(177 Cal. 537)

In re BRADY'S ESTATE.

BRADY et al. v. BROPHY et al.
(S. F. 8431.)

(Supreme Court of California. Feb. 18, 1918.
Rehearing Denied March 18, 1918.)

1. EXECUTORS AND ADMINISTRATORS — JURISDICTION TO APPOINT — RESIDENCE — EVIDENCE.

Evidence held to show that deceased's residence was in Marin county and not in San Francisco, so that the court was without jurisdiction to appoint administratrices in the county of San Francisco.

2. EXECUTORS AND ADMINISTRATORS — JURISDICTION TO APPOINT — RESIDENCE — EVIDENCE.

Where deceased deliberately changed his residence from San Francisco to Marin county, indicating such change by having his registration as a voter in San Francisco county canceled and by registering in Marin county, the entry of his name in telephone books by his daughter as a resident of San Francisco was entitled to no weight in determining his residence.

Department 1. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Proceedings in the estate of William J. Brady, deceased. From an order appointing Elizabeth F. Brophy and another as administratrices of the estate, Edward R. Brady and another appeal. Reversed.

Metson, Drew & Mackenzie, of San Francisco (E. H. Ryan, of San Francisco, of counsel), for appellants. Walter H. Linforth and Charles F. Hanlon, both of San Francisco, for respondents.

SHAW, J. This is an appeal from an order appointing the respondents administratrices of the estate of William J. Brady, deceased.

Brady died in the city and county of San Francisco, on April 11, 1917. The respondents Elizabeth F. Brophy and Gabrielle G. Traynor, daughters of said decedent, filed a petition in the San Francisco superior court, asking that they be appointed administratrices of said estate. The appellants Edward R. Brady, a son, and Mary L. Hyde, a daughter of said decedent, appeared in opposition to the application, and alleged that at the time of the death of said decedent he was not a resident of the city and county of San Francisco, but was a resident of the county of Marin, and that in consequence thereof the superior court of the city and county of San Francisco had no jurisdiction of the estate. The only question presented upon this appeal is whether or not the said decedent was a resident of San Francisco or a resident of the city of Ross in the county of Marin. The finding of the court was that he was a resident of San Francisco, and thereupon letters were issued to the respondents as prayed for. The substance of the evidence may be briefly stated.

For some 20 years prior to his death Brady had owned a house which he occupied as a home, at 182 Devisadero street, in San Francisco, and another house situated in the city of Ross, in the county of Marin, which he also occupied as a home, spending five or six months of each year during the winter in San Francisco, and five or six months during the summer in Ross. Until the year 1914 he claimed the city of San Francisco as his residence, and registered as a voter and voted there. His habit of life during all these years was, as above stated, to live about half of each year in San Francisco, and the other half in Ross. During the time he lived in San Francisco he frequently went to Ross at week-ends, and remained there a day or two, returning then to San Francisco. It was also his habit while he stayed in San Francisco to go to Ross each day and return to San Francisco in the evening. He kept a large part of his clothing in Ross while sleep-

ing in San Francisco. In July, 1914, he had his registration in San Francisco canceled, and registered as a voter in Marin county, stating in his affidavit for that purpose that his residence was at the city of Ross. He had nine children, including the two respondents, seven of whom resided in and about San Francisco. The two respondents did not testify. The other five children living near San Francisco testified as witnesses, declaring that at the time of changing his registration, and afterwards, the decedent repeatedly said to them that he had changed his residence from San Francisco to Ross with the purpose of becoming a citizen of Ross. In pursuance of this intent and under this registration he voted at Ross in that year at the primary election, and also at the general election. Thereafter, in February, 1916, he again registered as a voter in the county of Marin, declaring that his residence was in precinct No. 2, in the city of Ross. In pursuance of this registration he again voted in that city at the primary election in August. He also told Mr. Metson and Mr. Drew, the only other persons who testified, that he was a resident of Ross, and that he voted there. This was all the evidence on the subject of his residence, except the telephone books and the San Francisco City Directories for 1914, 1915, and 1916, each of which showed an entry of his name, and gave his residence at 182 Devisadero street, San Francisco. There was no proof, however, that either of these entries was authorized by him, but his daughter, Mrs. Hyde, who lived with him and kept house for him, testified that she had his name put in the telephone book because nobody knew where to find him, and that her father never used the telephone. There was also admitted in evidence a notice of his death, published thereafter in a newspaper, and a certificate from the California state board of health, showing the report of his death made by his son, Edward R. Brady. Each of these documents stated that his residence was 182 Devisadero street. Each of course was prepared after his death.

[1] We do not think that the court below was justified from this evidence in finding that the deceased, at the time of his death, was a resident of San Francisco. His habit of living a part of the time in San Francisco, and a part of the time in Ross, and of maintaining substantially the same sort of an establishment at each place, made the place of his residence depend upon his intention as manifested by his acts and declarations on the subject. The outward evidences as to his residence were the same with respect to each place. He had the absolute right to fix the place of his residence at either place as he chose.

[2] The evidence that he did change the

place of his residence from San Francisco to Ross is positive, clear, and convincing, and it comprises all the substantial evidence on the subject. A court is not at liberty to overrule the determination of the decedent, or to disregard such evidence, in the absence of any substantial evidence to the contrary. The entries in the telephone books were first inserted in 1914, and they were explained by the testimony of Mrs. Hyde that she had them inserted so that people would know where to find him in San Francisco. The entries in the directories were not shown to have emanated from Brady, and, in the face of his conduct and declarations as to his residence in Ross, they are entitled to no weight as evidence of legal residence. The presumption that a person is innocent of crime is very strong, and it is not to be assumed, in the absence of substantial evidence of the fact, that Brady committed perjury in making his affidavits of registration. The fact that his original place of residence was San Francisco is of no force to raise the presumption that it continued to be there after the year 1914, as against the positive evidence that in that year he deliberately changed it to the city of Ross. The evidence does not support a finding that at the time of his death he was a resident of San Francisco.

The order is reversed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

(177 Cal. 560)

RANSOME-CRUMMEY CO. v. BENNETT et al. (S. F. 6859.)

(Supreme Court of California. Feb. 20, 1918.)

1. MUNICIPAL CORPORATIONS §567(2)—COMPLAINT—CONSTRUCTION.

Complaint in action to foreclose lien of assessment for street improvement must be held sufficient as against objection that it shows that the resolution of intention for the work was fatally defective in its description of the location of the proposed work; it being impossible to say from the face of the description that it is either void or uncertain.

2. MUNICIPAL CORPORATIONS §567(2) — STREET IMPROVEMENT — ASSESSMENT — COMPLAINT.

Complaint in action to foreclose lien of assessment for street improvement should show compliance with the requirement of the charter that the bid be accompanied by "noncollusion" and "nonprivate agreement" affidavits.

3. APPEAL AND ERROR §1169(3)—AFFIRMANCE FOR DEFECT IN COMPLAINT—JUDGMENT FOR DEFENDANT ON MERITS.

Though by omission of an allegation, a complaint does not state facts sufficient to constitute a cause of action, and general demurrer thereto was improperly overruled, yet the record making it manifest judgment for defendant, after a trial on the merits, was in no way based on or due to any defect in the complaint, it will not be sustained on the ground of insufficiency of the complaint; it not appearing it cannot be amended to obviate the defect.

4. MUNICIPAL CORPORATIONS ¶48 — **FREEHOLD CHARTER—"AMENDMENT."**

A city's freehold charter adopting as part thereof the general street law as amended "and as hereafter amended," a subsequent repeal of part of such law, while taking away the power thereby conferred, is not an amendment of the charter within Const. art. 11, § 8, limiting method of amendment to election.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Amendment.]

5. MUNICIPAL CORPORATIONS ¶408(2)—**IMPROVEMENTS—EXEMPTION—AGREEMENT—REPEAL OF STATUTE.**

Where after a city, under power of Vrooman Act (St. 1885, p. 160) § 20, accepted a street with exemption of abutting property from assessment for subsequent repairs, such section was repealed (St. 1911, p. 626), such property ceased to be so exempt as to subsequent repairs; the exemption being only a gratuity, and containing no element of contract.

6. MUNICIPAL CORPORATIONS ¶562(1) — **STREET IMPROVEMENTS — VALIDITY OF ASSESSMENT—SURETY ON BOND.**

That the surety on the various bonds required of bidder and contractor for street improvement was not of the character required by the city's charter, a resident freeholder or a domestic corporation, the bonds being otherwise good and sufficient, and accepted and approved by the proper officers, is not available as a defense in an action to foreclose the lien of the assessment for the improvement.

In Bank. Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by the Ransome-Crummey Company against S. F. Bennett and others. From an adverse judgment, plaintiff appeals. Reversed and remanded.

R. M. F. Soto, of San Francisco (Morrison, Dunne & Brobeck, of San Francisco, of counsel, and Fabius T. Finch and Paul F. Fratesa, both of San Francisco, amici curiæ), for appellant. Will M. Beggs, R. O. McComish, and Beggs & McComish, all of San Jose, for respondents. Morrison, Dunne & Brobeck, J. A. Cooper, L. M. Hoefler, and George F. Snyder, all of San Francisco, amici curiæ.

ANGELLOTTI, C. J. This is an action by a street contractor to foreclose the lien of a street assessment on account of street improvements in the city of San Jose. Defendant Bennett was sued as the owner of the property; the other defendants being alleged to have or claim some interest or lien which, if it exists, is subject to plaintiff's alleged lien. Defendants had judgment and plaintiff appeals therefrom on the judgment roll alone. By a decision heretofore rendered by this court the judgment was affirmed, but that decision was vacated and a rehearing granted for the purpose of giving further consideration to some of the questions involved.

In the superior court a demurrer was interposed to the complaint by defendant Bennett and it was overruled. All the defendants answered, and the case was tried upon the merits. Findings were filed which, while in the main in favor of the plaintiff as

against Bennett, were in two respects (hereinafter to be considered) in accord with affirmative allegations of his answer. It was upon these two matters that the court below based its judgment for defendant Bennett, notwithstanding that it found all of the material allegations of the complaint to be true. On this appeal, the defendants (respondents) insist, in support of the judgment, that the complaint did not state facts sufficient to constitute a cause of action, and that for this reason, regardless of any other, the judgment must be affirmed. Appellant, while claiming that the complaint sufficiently states a cause of action, insists that under the circumstances, respondents cannot be heard to make this objection on this appeal.

[1] It was urged in respondents' brief that the complaint was insufficient in two respects. One objection was that it showed that the resolution of intention for the work was fatally defective in its description of the location of the proposed work. As to this objection, the district court of appeal of the First district, in deciding this case, substantially said that it could not be determined from the face of the description that it is either void or uncertain, and that in considering the question of the sufficiency of the pleading it must be regarded as sufficient. In this view we concur.

[2, 3] The other objection to the complaint in this behalf is based upon the failure of the complaint to specifically allege the making and filing of the "noncollusion affidavit" and the "nonprivate agreement affidavit." To a proper understanding of this claim, as well as the other objections urged against the assessment, it is necessary to make a brief statement. The freeholders' charter of the city of San Jose, adopted in the year 1897 and in force at the time of these proceedings, adopts and makes part of itself, where not inconsistent with its express provisions, the general street law, commonly known as the Vrooman Act (St. 1885, p. 147), as the said law was at the time of the adoption of the charter, and as such law "hereafter shall be amended." In view of the express provision of the charter to that effect, its provisions prevail over those of the Vrooman Act wherever a conflict exists. Barber Asphalt Paving Co. v. Costa, 171 Cal. 138, 152 Pac. 296. A charter provision requires that each bid for street work shall be accompanied by the affidavit of the bidder to the effect that his bid is genuine and not collusive or sham, and that he has not connived or agreed, directly or indirectly, with any other bidder or person to put in a sham bid, etc. Another provision requires that before any assessment is made, the contractor must file another affidavit "to the effect that he has not entered into any private agreement, verbal or written, with any person liable to be assessed for said work, or with any one in his

behalf, to accept a price from him less than the price named in said contract, nor to make any rebate or deduction to him from such price." The filing of these affidavits is essential to a valid assessment, and a complaint in an action to foreclose such an assessment which fails to show such filing does not state facts sufficient to constitute a cause of action. *Barber Asphalt, etc., Co. v. Costa*, supra. The complaint here does not specifically allege the filing of these affidavits, and on this ground respondent claims it is fatally defective. Appellant claims that, by necessary inference from the matters specified in the complaint, such filing is sufficiently shown. For the purposes of this decision we shall assume that there was no sufficient allegation in this behalf. The question then is whether respondents should be heard, under the circumstances shown by the record, to use the language of our former opinion in this case, to urge the point, not in reversal, but in support of the judgment which they recovered upon wholly different grounds. The record demonstrates that the court adhered to its order overruling the demurrer throughout the case. The action was tried upon the merits. The findings recite that "witnesses were sworn and examined, and evidence introduced on behalf of the respective parties and the cause submitted to the court for decision." It is obvious that appellant was permitted to introduce evidence in support of all the allegations of its complaint, for the court found that all of the allegations of the complaint except that as to the inferiority of the lien of the defendants other than Bennett are true. There were two findings in favor of Bennett, based upon affirmative allegations of his answer, one to the effect that the roadway of the street had previously been accepted by the city with an agreement to keep the same in repair thenceforth, and the other to the effect that the bonds furnished by the contractor were not in accord with the requirements of the charter of San Jose. In its conclusions of law the court said "as conclusions of law from the foregoing facts, the court finds," etc. The judgment given for defendants (respondents) was not one of nonsuit, nor was it a judgment on the pleadings. By its very terms it was based on the findings of fact, and in so far as Bennett was concerned was manifestly based on the conclusion of the court as to the legal effect of the findings on the affirmative allegations of the answer to which we have referred. It does not appear that the facts were such that the complaint could not have been so amended as to obviate the objection made.

We are satisfied that under the circumstances this court should not affirm the judgment on account of this defect in the complaint, and that to do so would manifestly be most unjust. It is true that a defendant does not waive such an objection by answering and proceeding to trial, and that he

will be heard to urge it on his appeal from any judgment based thereon by which he is aggrieved. But he will not always be heard to invoke such an objection to sustain a judgment or order in his own favor based on other grounds. It has been held by this court that on an appeal by a plaintiff from an order dismissing an action made under subdivision 7, § 581, Code of Civil Procedure, the defendant will not be heard to urge the insufficiency of the complaint to state a cause of action as a ground for affirmance, if the court cannot see that the objection cannot be obviated by amendment (*Pacific Pav. Co. v. Vitzelich*, 141 Cal. 4, 74 Pac. 352), and that the same thing is true on an appeal by a plaintiff from an order denying his motion for a new trial, the court saying, among other things:

"At all events, this is true in cases like the present, where the alleged defect is merely technical, and can be remedied by an amendment." *County Bank v. Jack*, 148 Cal. 437, 83 Pac. 705, 113 Am. St. Rep. 285.

In our former opinion (superseded by this opinion) it was said, through Mr. Justice Henshaw:

"It will not be held in such a case as this, for the reasons briefly to be given, that a defendant whose general demurrer has been overruled and who has thereafter gone to trial and secured a judgment upon some wholly foreign ground to that presented by the general demurrer, can have that judgment sustained because of the defect in the complaint. The reason is that the law strongly favors the determination of litigation upon the merits, and that uniformity in the administration of justice is a fundamental right. *San Jose Ranch Co. v. San Jose Land & Water Co.*, 126 Cal. 322 [58 Pac. 824]. Conceding respondent's contention that his grounds of general demurrer were well taken, the court in overruling that demurrer thereby declared to the litigants its conviction that the complaint was sufficient. Had it sustained the demurrer, plaintiff as matter of right would have been entitled to amend and by this amendment these issues would perhaps have been eliminated from the case. * * * Thus by the method here invoked a litigant with whom the court rules as to the sufficiency of his complaint will, because of the error of the trial court, be forever debarred from the right to a trial of his cause of action upon the merits. The true principle we conceive to be this: That if after general demurrer to the complaint has been overruled, it shall be made to appear upon an appeal such as this that the complaint is not amendable in the particular complained of, then the respondent on appeal will be heard to urge this fact in support of the judgment. Such was the case presented in *Bell v. Thompson*, 147 Cal. 689 [82 Pac. 327], where the respondent on appeal urged the insufficiency of the complaint to charge a cause of action. This court upheld the contention and said: 'The absence of this necessary averment doubtless arose from the fact that it was impossible for the pleader under the facts, to make such an allegation.' But where as here, it is not made to appear that the complaint was not amendable, it would be manifestly unjust to permit the respondent to support a judgment upon a ground which the trial court refused to recognize as valid when, if it had recognized it as valid, the plaintiff could and would have met the objection by amendment."

To these views we adhere. We are, of course, speaking only of a case in which the

record makes it manifest that the judgment given for the defendant was in no way based upon or due to any defect in the complaint.

[4, 5] As to the finding of a previous acceptance by ordinance of August, 1889, of the roadway of the street by the city of San Jose, with the agreement on its part to thereafter keep the same in repair, the material facts, very briefly stated, are as follows: The only legal basis for such an acceptance was to be found in section 20 of the Vrooman Act, as it then existed. This section substantially provided that whenever any street or portion thereof has been or shall be fully constructed to the satisfaction of the superintendent of streets and of the city council, and is in good condition throughout, etc., the same shall be accepted by the city council, by ordinance, and thereafter shall be kept in repair and improved by the city. According to the finding such an ordinance was adopted by the city in August, 1889, as to the roadway here involved. We shall assume that the facts were such as to authorize the enactment of this ordinance under this section, and that it was a valid enactment precluding further repair and improvement of the roadway at the expense of the property fronting thereon for so long as it remained effective. But section 20 of the Vrooman Act was repealed on April 5, 1911 (St. 1911, p. 626), and there was not, when the proceeding for street work here involved was subsequently commenced, any such provision either in the Vrooman Act or the freeholders' charter of the city of San Jose. As to this repeal, and the effect thereof, it was said in our former opinion (superse- ded by this opinion):

"Appellant contends that the repeal struck dead the ordinance of acceptance. Respondent makes answer that when the charter of San Jose in 1897 adopted the Vrooman Act as part of itself, that act became a part of the charter, beyond legislative control, and that consequently the repeal by the Legislature of section 20 did not affect the validity and vitality of that section, so made a part of the charter, which continued to be the subsisting law of San Jose. It is true that a freeholders charter adopted as was this, is amendable only in the manner prescribed by section 8, art. 11, of the Constitution, and that in municipal affairs the provisions of such charter are paramount to general laws covering the same subject-matter. But San Jose's freeholders charter in terms declares (article 8, c. 1, § 1, charter of San Jose; Stats. 1897, p. 615), that the general street law of 1885 'as since amended and as hereafter shall be amended, is hereby adopted as a part of this charter.' And where such a charter thus makes a part of itself a general legislative enactment pertinent to the administration of its municipal affairs, and expressly provides that that enactment as thereafter it may be modified by the general Legislature shall still be the controlling law of the municipality, such modification by way of amendment of the general law which the Legislature may enact is not within the prohibition of the Constitution, which is designed to prevent the autonomy of the city in its municipal affairs from being limited, affected, or impaired by the general Legislature without consent of the city, and it is therefore held that the legislative repeal of section 20 of the Vrooman Act operated to repeal the power confer-

red upon the city of San Jose in the matter under consideration. As to the effect of that repeal but little need be added to what has gone before. The exemption from future taxation awarded to property owners who have paid for the improvement of a street fronting on their land is a gratuity—a privilege conferred by the supreme lawmaking power, the Legislature, containing in it no element of contract, conferring upon the property owners no vested right, and therefore subject to repeal by the Legislature at any time, without inflicting upon the property owner any grievance of which he can be heard to complain. It is true that his property is exempt while the law of exemption remains upon the books, but when in its wisdom the Legislature sees fit to withdraw this favor the exemption is at an end. So says Cooley (Const. Lim. [7th Ed.] 396): 'For it is conceded on all sides, that if the exemption is made as a privilege only, it may be revoked at any time. And it is but reasonable that the exemption be construed with strictness.' Upon the subject-matter the decisions are uniform and harmonious. City of Seattle v. Kelleher, 195 U. S. 351 [25 Sup. Ct. 44. 49 L. Ed. 232]; Ettore v. Tacoma, 228 U. S. 148 [33 Sup. Ct. 428, 57 L. Ed. 773]; Carstens v. Fond du Lac [137 Wis. 465] 119 N. W. 117; Bradley v. McAtee, etc., 70 Ky. [7 Bush] 667 [3 Am. Rep. 309]; Broadway Baptist Church v. McAtee, 71 Ky. [8 Bush.] 508 [8 Am. Rep. 480]; Ladd v. City of Portland [32 Or. 271] 51 Pac. 634 [67 Am. St. Rep. 526]; City of Rochester v. Rochester Ry. Co. [182 N. Y. 99] 74 N. E. 953 [70 L. R. A. 773]; Durkee v. City of Barre [81 Vt. 530] 71 Atl. 819; Miller v. Hageman, 114 Iowa, 195 [86 N. W. 281]; People ex rel. Coney Island Jockey Club v. Purdy [152 App. Div. 175] 136 N. Y. Supp. 667."

To these views we adhere. It follows that the facts embraced in this finding constitute no defense to plaintiff's action.

[6] As to the finding in regard to the bonds, which was simply that the various bonds furnished by plaintiff "were not bonds by individual sureties, nor were they given by a corporation organized under the laws of the state of California as provided by the charter of the city of San Jose": The charter contained a provision to the effect that no surety on any bond required in such proceeding shall be taken unless he be a resident freeholder in the state of California, and, further, that a bond of a surety company organized under the laws of the state of California may be taken if approved by the mayor and common council. The first bond here involved was one given by the contractor when tendering his bid for the contract to the common council; the Vrooman Act prohibiting the consideration of any bid unless accompanied by a check or a bond, the penalty being in the nature of liquidated damages to the city, in case the bidder after receiving the award failed to enter into the contract. The second and third were bonds required by such act to be given by the contractor on entering into his contract, one inuring to the benefit of all persons, etc., performing services or furnishing material to the contractor for the work and the other in favor of the city, conditioned for the faithful performance by the contractor of his contract. All of these bonds were given, and they were all, according to the findings, "good and sufficient." The bid of the contrac-

tor, accompanied by the first bond, was considered and the contract awarded to plaintiff. It thereupon entered into the contract. The second and third bonds were accepted and approved by the proper officers. The work contracted to be done was fully done in accord with the contract to the satisfaction of the proper officers and accepted. The question is whether under these circumstances the fact that the surety on these bonds, otherwise good and sufficient, was not of the class designated by the charter, is available as a defense in an action to foreclose the lien of the assessment. We think this question is correctly answered in the negative by what was said and held in *Miller v. Mayo*, 88 Cal. 568, 26 Pac. 364, and *Greenwood v. Morrison*, 128 Cal. 350, 60 Pac. 971, and on further consideration we are satisfied that *Manning v. Den*, 90 Cal. 610, 27 Pac. 435, decided nothing to the contrary. It follows that the facts embraced in this finding constitute no defense to plaintiff's action.

From what we have said it follows that the judgment finds no sufficient support in the findings and must be reversed. Plaintiff should be allowed by the superior court to amend its complaint if so advised.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: SLOSS, J.; SHAW, J.; MELVIN, J.; WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 574)

RANSOME-CRUMMEY CO. v. COULTER.
(S. F. 6870.)

(Supreme Court of California. Feb. 20, 1918.)

MUNICIPAL CORPORATIONS — 443 — STREET IMPROVEMENTS — ASSESSMENTS — VALIDITY — PRIVATE AGREEMENT.

The provision of a city charter that, when the work of a street improvement under any contract shall have been completed, the contractor shall make and file an affidavit that he has not entered into any private agreement with any person liable to be assessed for the work to accept a price from him less than that named in the contract, and no assessment shall be made till such affidavit is filed, and any such agreement shall, as to all persons liable to be assessed for such work, other than the parties to the agreement, avoid any assessment for the work, refers only to a private agreement with relation to some contemplated street improvement by the city under the street law, and not to a private contract between a contractor and property owners for the doing of street work directly for them, and not under contract with the city, as one long before, and having no reference to, any contemplated improvement by the city.

In Bank. Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by the Ransome-Crummey Company against William A. Coulter. From an

adverse judgment, plaintiff appeals. Reversed and remanded.

R. M. F. Soto, of San Francisco (Morrison, Dunne & Brobeck, of San Francisco, of counsel), for appellant. William A. Coulter, of San Jose, in pro. per.

ANGELLOTTI, C. J. This is an appeal by plaintiff from a judgment in favor of defendant in an action to foreclose a street assessment lien. The claims of respondent in support of the judgment, as shown by his brief, with one exception, are substantially the same as those made by the respondents in *Ransome-Crummey Co. v. Bennett et al.* (S. F. 6859) 171 Pac. 304, this day decided, and there being no material difference in the facts, the decision in that case disposes of such claims.

The one exception is as to the matter of an alleged private agreement by the contractor, with certain of the property owners liable to be assessed for the work.

The proceeding for the street work here involved, the regrading and paving of the roadway of the crossing of Santa Clara and Twelfth streets, etc., was initiated October 9, 1911, by the adoption of a resolution of intention and the contract therefor was awarded to plaintiff February 2, 1912.

The trial court found in regard to this substantially as follows: A private agreement of June 21, 1909, was entered into by plaintiff, with certain owners of lots fronting on East Santa Clara street, defendant not being a party (it appearing from his answer that he did not acquire his property until April, 1912), "for the paving and improving of said street, including the crossing, from Fourth street to the Coyote bridge, for the agreed sum of 16 cents a square foot for asphalt paving, including concrete foundation, and grading, and for catch-basins, each \$35." The plaintiff was awarded its city contract on February 2, 1912, which contract included catch-basins at \$75 each, and pavement, including concrete foundation and regrading, at 25 cents per square foot, and "was largely in excess of the contract with private citizens for the same material and work." The two contracts, the one private, the other with the city, included the roadway of the crossing of Santa Clara and Twelfth streets.

In this connection defendant's reliance is on a provision of the charter of San Jose, which is as follows:

"When the work under any contract shall have been completed, the contractor shall make out and file in the office of the superintendent of streets an affidavit to the effect that he has not entered into any private agreement, verbal or written, with any person liable to be assessed for said work, or with any one in his behalf to accept a price from him less than the price named in said contract, nor to make any rebate or deduction to him from such price, and no assessment shall be made until this affidavit is

filed. *Any such agreement shall be deemed a fraud upon all persons liable to be assessed for such work*, other than the property owners who were parties to the agreement, and shall operate to void as to such persons so defrauded, any assessment made for the work done under said contract." (Italics are ours.)

We think it manifest that this charter provision has no application to the situation shown by the finding referred to.

The whole purpose of such a provision is perfectly clear. It was to meet by express provision of law such a situation as was presented in *Brady v. Bartlett*, 58 Cal. 350, with a view to preventing any collusion or private agreement between the street contractor and some of the property owners with reference to a proceeding by the city under the street law for street improvement, which might tend to the pecuniary disadvantage of the other property owners. Reasonably construed the language used has reference only to a private agreement with relation to some contemplated street improvement by the city under the street law, and simply forbids any private arrangement between the contractor and some of the property owners with relation to that improvement when made by the city by which he agrees to accept from them less than the amount to which he would be entitled under his contract with the city and the assessment based thereon. It has no reference whatever to such a contract as the finding here shows—a private contract between a contractor and property owners for the doing of street work directly for them, and not under contract with the city. The finding makes it perfectly clear that the private contract in this case, made over 15 months before the initiation of the proceedings here involved, was simply a contract for the doing of work by the contractor directly for the property owners, who were to pay him a stipulated price therefor, and that it had no reference to any contemplated street improvement by the city. It is unnecessary to consider other claims of appellant in regard to this finding. In view of our conclusion as to the proper construction of the charter provision, the facts found do not constitute a defense to plaintiff's claim. The conclusion of the trial court, based thereon, that the "nonprivate agreement affidavit" filed by plaintiff was false, was erroneous.

For the reasons we have given the judgment must be reversed. Plaintiff should be allowed by the lower court to amend its complaint if it be so advised.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: SLOSS, J.; SHAW, J.; MELVIN, J.; WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 525)

WALKER v. SELMA FRUIT CO., Inc.
(S. F. 7523.)

(Supreme Court of California. Feb. 18, 1918.)

CORPORATIONS §—579(1)—TRANSFER OF CORPORATE PROPERTY—CONSTRUCTION.

The debtor corporation's charter having been forfeited, the contract of a new corporation by which it agreed to purchase lands, patent applications, machinery, brands, all packing material and supplies on hand, and all contracts for supplies of the debtor corporation, and agreed to carry out all contracts for fruit for delivery after August 1, 1908, and to pay for all expenses previous to such date in developing markets, did not bind the new corporation to pay for fruit previously acquired by the debtor corporation for which there had been an account stated on August 1, 1908.

In Bank. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Nellie M. Walker, as administratrix of the estate of William E. Walker, deceased, against the Selma Fruit Company, Incorporated. Judgment for plaintiff, and defendant appeals. Reversed.

Harris & Hayhurst and L. L. Cory, all of Fresno, for appellant. Everts & Ewing, of Fresno, and Charles R. Holton, of Whittier, for respondent.

ANGELLOTTI, C. J. In May, 1907, plaintiff's intestate entered into a contract of sale with the Selma Fruit Company, a corporation, covering his raisin crop for that year on 20 acres in Fresno county, the same to be delivered to the company not later than December 1, 1907. The raisins were delivered to said company during that year. On August 1, 1908, there was a balance of \$3,005.51 due Mr. Walker from the Selma Fruit Company for these raisins; an account being then stated between them. In 1911 plaintiff brought and maintained to judgment an action for this balance against the Selma Fruit Company and its directors as trustees; the charter of the corporation having been forfeited for failure to pay its license tax. The judgment being entirely unsatisfied, plaintiff subsequently brought this action thereon against the Selma Fruit Company, Inc., a new corporation organized subsequent to August 1, 1908, to which had been transferred the business of the Selma Fruit Company. Judgment was given in her favor against this new corporation for the full amount of the claim with interest. The defendant appeals from such judgment.

This judgment can be sustained only on the theory that by a written agreement of August 1, 1908, between the Selma Fruit Company and T. H. Elliott, on the one hand, and a committee of subscribers of the capital stock of a corporation then proposed to be organized (which it may be conceded was this defendant), on the other, the new corporation, through this committee, assumed the obligation of satisfying all the obligations of

the Selma Fruit Company existing on that date. The complaint was framed and the action was tried solely on this theory, and there is nothing in the evidence adduced on the trial that would support the judgment on any other theory. Passing then all other points made by appellant, we take up the question of the proper construction of this agreement.

From its recitals this agreement appears to be supplemental to a previous agreement dated June 17, 1908, for the sale by the Selma Fruit Company and T. H. Elliott of certain patent applications of Elliott, and "fourteen lots with the packing houses, machinery, brands, etc., of the Selma Fruit Company, all packing material and supplies on hand and all contracts for supplies in connection with said business, and contracts for the purchase of about one hundred tons of raisins." It further recites the appointment of the committee by the subscribers of the proposed new corporation to make arrangements to immediately take over the business of the Selma Fruit Company and the use of the machinery covered by the patent applications. It then provides substantially as follows:

The business of the Selma Fruit Company and the use of the premises and machinery shall be continued by the Selma Fruit Company, commencing August 1, 1908, "for and on behalf of said corporation so to be formed by said committee * * * until said new corporation shall be formally organized and shall by formal resolution take over the operating of said business for its own account."

"All the contracts made by said Selma Fruit Company for the delivery of dried fruit and raisins by growers on and after August 1, 1908, and all contracts made by said company for the sale of dried fruits or raisins, for delivery after August 1, 1908, shall be carried out by said Selma Fruit Company for and on behalf of said new corporation."

"All expenses accrued and accruing on business maturing after August 1, 1908, in connection with said business and all obligations and profits in connection with said business after said date shall be accounted for to said new corporation."

"Any expenses incurred by said Selma Fruit Company previous to August 1, 1908, in developing the markets and corresponding with brokers and dealers in regard to contracts for business maturing subsequent to August 1, 1908, and unearned insurance premiums subsequent to said date, shall be paid for by said new corporation, subject to an accounting to be had later on."

"All business contracted on or after August 1, 1908, shall be subject to the consideration and approval of the parties of the second part hereto."

"It is understood that said Selma Fruit Company shall have the privilege of using the facilities of the house to finish the processing, seeding, packing, and shipping of the raisins heretofore bought by them and now on hand, subject to cost of labor and materials used to be paid by them."

Provision is then made for an accounting to the new corporation of all expenses and profits of the operation of the business under the agreement, and it is also provided that, if the new corporation is not formed, or if it fails to provide within a reasonable time for

the taking over of the property transferred "according to this agreement and the agreement of June 17, 1908, and its modifications and extensions," all such property "shall revert" to the Selma Fruit Company and Elliott. It is declared that an inventory "of the packing material and supplies on hand" which are to be transferred under the terms of said agreement is attached, but this inventory was not shown by the evidence.

We are unable to see in this anything importing an assumption on the part of the purchaser, the proposed new corporation, of any liability of the Selma Fruit Company on account of raisins actually purchased by and delivered to said company prior to August 1, 1908. Of course, it is apparent from this instrument that the new company was purchasing from the vendors the plant, machinery, good will, trade-marks, patent rights, "packing material and supplies on hand, and all contracts for supplies in connection with such business," together with some contracts for the purchase of about 100 tons of raisins, all with a view to taking over and thenceforth carrying on the business theretofore carried on by the Selma Fruit Company, but this implies no transfer of debts due the company on business already done, or the assumption of debts due from the company on account of such business. It does not even appear that any transfer of raisins or dried fruit already bought by and delivered to the company was contemplated. In this connection respondent relies on the words in the recitals "all packing material and supplies on hand and all contracts for supplies in connection with said business," but manifestly the word "supplies," as here used (unless the inventory referred to shows otherwise), should not be held to include raisins and dried fruit bought and on hand. Raisins and contracts for the purchase and delivery of raisins are so specifically provided for as to make such a construction unreasonable, in the present condition of the record at least. The specific provision that the Selma Fruit Company shall have the privilege of using the facilities of the house to finish the processing, seeding, packing, and shipping "of the raisins heretofore bought by them and now on hand," paying the cost of labor and materials used therein, indicates clearly enough that there was no transfer of the stock of raisins actually owned and possessed by the company. The provision that the new company will pay expenses incurred by the Selma Fruit Company previous to August 1, 1908, "in developing the markets and corresponding with brokers and dealers in regard to contracts for business maturing subsequent to August 1, 1908, and unearned insurance premiums subsequent to said date," clearly indicates absence of any intent that debts accrued prior to August 1st, and not specially provided for by the agreement, were to be assumed by the purchaser.

The agreement shows very clearly the intention that the contracts for the delivery of fruit or raisins by growers in which the new company was to have any concern were those only in which the delivery was undertaken for or after August 1, 1908. The plain idea was that the transfer of the business was to be practically as of that date, and that, inasmuch as the new corporation had not then been created, the Selma Fruit Company was to continue to operate the business for the new corporation until its organization, accounting to the new corporation for "all expenses accrued and accruing on business maturing after August 1, 1908, in connection with said business and all obligations and profits in connection with said business after said date." As to "business maturing" prior to August 1, 1908, as was the situation with reference to the transaction here involved, it is plain that there was no intent that the purchaser should acquire any right or assume any obligation.

Certain expressions in the opinion of the District Court of Appeal of the Third Appellate District in *Stevens v. Selma Fruit Co., Inc.*, 18 Cal. App. 242, 123 Pac. 212, are not in accord with our conclusion. That case differed very materially in its facts from the case at bar, and, in so far as the opinion states that by the language of the agreement (which was the very agreement here involved) the intention was that the purchaser should take over all the properties of the Selma Fruit Company and assume all its obligations, we think the views expressed were entirely unnecessary to a decision of the case. We have no disposition to question the correctness of the decision in that case, but we cannot concur in the expressions in the opinion to which we have specially referred.

The judgment is reversed.

We concur: SLOSS, J.; VICTOR E. SHAW, Judge pro tem.; SHAW, J.; MELVIN, J.; WILBUR, J.

(177 Cal. 606)

WRIGHT v. LOAIZA et al. (S. F. 8413.)

(Supreme Court of California. Feb. 23, 1918.)

LIMITATION OF ACTIONS § 29(2) — "BOOK ACCOUNT."

An undertaker's book entries against a defendant do not constitute a "book account" against his codefendant and sister, who had agreed to pay part of such charges, within Code Civ. Proc. § 337, subd. 2, which, prior to its amendment by St. 1917, p. 299, provided a four-year limitation period upon open book account actions, but an action thereon was outlawed as to the sister after the two-year period prescribed for oral contracts by section 339, subd. 1.

[Ed. Note.—For other definitions, see Words and Phrases, Book Account.]

Richards and Victor E. Shaw, Judges pro tem., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; W. R. Guy, Judge.

Action by Harold L. Wright against W. Y. Loaiza and Dolores Loaiza. A judgment for plaintiff was affirmed, as to Dolores Loaiza, by the District Court of Appeal, First District (166 Pac. 369), and she appeals. Judgment reversed.

Leon E. Morris, of San Francisco, for appellant. T. A. Perkins and McCutchen, Olney & Willard, all of San Francisco, for respondent.

SLOSS, J. This action was brought against W. Y. Loaiza and Dolores Loaiza, brother and sister, to recover a balance of \$465.30 claimed to be due to N. Gray & Co., a corporation, plaintiff's assignor, for materials furnished and services rendered in connection with the funeral of a deceased brother of the defendants. The total amount of the bill was \$615.30. The arrangements for the funeral were made by W. Y. Loaiza, who acted for himself and his sister, Dolores. The sister had authorized him so to do, stating that she would pay all of the charge over \$150. These facts were communicated to N. Gray & Co. at the time the order was given. Subsequently W. Y. Loaiza paid \$150 on account of the charge. The court gave judgment against the defendant Dolores for the balance of \$465.30, and she takes this appeal.

By her answer the appellant pleaded the bar of section 339, subd. 1, of the Code of Civil Procedure. The only question is whether the court's finding against this plea is sustained by the evidence.

More than two years elapsed between the accrual of the liability and the commencement of the action. The contract was not in writing, and the action was therefore barred unless it may be viewed as governed by subdivision 2 of section 337. Before its recent amendment (Stats. 1917, p. 299), that subdivision fixed a four-year period of limitation for actions "to recover a balance due upon a mutual, open, and current account or upon an open book account." The view of the court below was that the action was one upon an open book account.

[1] About the time of the rendition of the services, N. Gray & Co. made an entry of the agreed amount in a book designated as "Funeral Record." The charge was made against W. Y. Loaiza, and the subsequent payments made by him were credited on this account. Appellant's name did not appear in any form on the books of plaintiff's assignor. The briefs discuss at some length the question whether entries so made constitute an open book account. We need not go into this, since we are satisfied that, so far as the appellant is concerned, the action cannot be regarded as one upon a book account at

all. A book account is defined as a "detailed statement, kept in a book, in the nature of debit and credit, arising out of contract or some fiduciary relation." 1 C. J. 597. A necessary element is that the book shall show against whom and in whose favor the charges are made. 1 C. J. 598. We do not see how book entries of charges against, and credits in favor of, A. alone can be said to constitute a book account against B. within the meaning, at least, of section 337. It may fairly be assumed that the idea underlying the enactment of both subdivisions of this section was that a longer period of limitation might well be allowed where the existence of the claim sued upon was supported by some kind of written evidence. Where, on the other hand, the establishment of the contract rests on oral testimony only, the law requires the action to be brought before the lapse of time may prevent the production of witnesses, or impair their memories. If this view be correct, the action against Dolores must be regarded as one upon an oral contract, and not one upon a book account. There is no account or other writing which in any way indicates her liability. To connect her with the transactions at all, resort must be had to parol testimony. Decisions from other jurisdictions are cited in the briefs on both sides. But these cases deal with an entirely different subject-matter, and they throw no light on the question before us.

We conclude, therefore, that the evidence does not support the finding against the defendant's plea that the action was barred.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; WILBUR, J.

RICHARDS, Judge pro tem. I dissent: The facts of the case are correctly set forth in the main opinion. In our view, however, the only question in the case is as to whether the entries made in the books of the plaintiff's assignor constitute an open book account as to the defendant Dolores Loaiza.

The account sued upon has all the elements of a book account according to the definition of that term. It was entered in a book. It was a detailed statement in the nature of debit and credit, arising out of a contract. It contained the names of a creditor and debtor. So far as the defendant W. Y. Loaiza is concerned, it is undeniable that it was a book account; and, since W. Y. Loaiza made payments which from time to time were credited upon it, it was as to him an open book account. *Mercantile Trust Co. v. Doe*, 26 Cal. App. 246, 146 Pac. 692. Was it also a book account as to his sister Dolores Loaiza? The evidence showing the authorization of W. Y. Loaiza as the agent of Dolores Loaiza to incur the indebtedness and hence, of necessity, to create the account, is undisputed. In ordering the goods in question

W. Y. Loaiza acted in the dual capacity of a principal and of agent for his sister, Dolores Loaiza and was so understood to be acting by the creditor at the time of the creation of the account. This being so, his name upon the creditor's books represents both his principalship and his agency, as fully as though the name of his principal had been inserted. The authorities are in practical uniformity upon the proposition that an action may be brought against the principal upon an account for goods charged upon the books of a creditor to the agent, and that in this respect book accounts and simple contracts in writing, made in the name of an agent, stand upon the same footing. 1 *Mechem on Agency*, § 1424; 2 *Mechem on Agency*, § 2055; *Clark & Skyles on Agency*, § 458. In *Mechem on Agency*, § 2055, *supra*, it is stated that:

"The cases are very numerous in which orders, proposals and informal contracts of all kinds, though nominally in the name of the agent, are really an account of the principal. In such cases the principal is liable, and he may also sue."

In *Clark & Skyles on Agency*, § 458, it is stated to be the rule that a principal may be sued on a contract made in the name of his agent, and that this rule applies not only to oral contracts, but to all simple contracts in writing, and parol evidence is admissible to show that a person, executing a written contract in his own name, did so in fact as the agent of an undisclosed principal. The text of the foregoing authorities is founded in part upon the following cases, in each of which the action was against the principal upon an account standing in the name of the agent: *Meeker v. Claghorn*, 44 N. Y. 349; *Foster v. Persch*, 68 N. Y. 400; *Dyer v. Swift*, 154 Mass. 159, 28 N. E. 8; *Gardner v. Bean*, 124 Mass. 347; *Lyon v. Chamberlain*, 41 Mich. 119, 1 N. W. 983; *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314. In the case last above cited, which was an action to recover a balance due upon a building contract, in the name of an agent, the court says:

"That a party not mentioned in a simple contract in writing may be charged as a principal upon oral evidence even where the writing gives no indication of an intent to bind any other person than the signer is as well settled as any part of the law of evidence."

In an action either upon a book account or upon a written contract, the book in the one case, and the writing in the other, are merely the evidence of the transaction, and no distinction can be drawn as to their admissibility in evidence when the fact of the agency is shown. Had this action been brought within the period of the two-year limitation, to recover upon the original account, there would seem to be no question upon the strength of the foregoing authorities as to the right of the creditor to recover against Dolores Loaiza upon this account, standing as it did in the name of her agent, W. Y.

Loalza, after proof of his agency. This action, however, was brought to recover a balance due upon said account after the two-year period of limitation for actions upon simple accounts had expired. The defense of Dolores Loalza is the statute of limitations. The respondent's answer to this defense is that the account had become an open book account by reason of payments made thereon by W. Y. Loalza prior to the commencement of this action, and hence that, this action being one to recover the balance due upon an open book account, the period as to it is four years, as provided in subdivision 2 of section 337 of the Code of Civil Procedure, as said section and subdivision read at the time this action was begun. It must be admitted that this action has become an open book account as to W. Y. Loalza, by virtue of his payments thereon. Mercantile Trust Co. v. Doe, supra. Why has it not also become an open book account as to his principal, Dolores Loalza, for a like reason? The same reasons and the same authorities which would render this a book account against Dolores Loalza, under the name of her agent, W. Y. Loalza, would render it an open book account against her, if by the payments thereon it had become an open book account against him. It is true the payments were not made by her, but they were made by her coprincipal upon this account, and were made for her benefit and in order to reduce, as they did reduce, the amount of her liability thereon. Having thus received the full benefit of these payments made by her coprincipal, who was also her agent upon this account, and which had the effect of keeping the account open as to him, is she in a position to claim that it was closed as to her so as to entitle her to plead the two-year limitation as her sole defense to this action? There would seem to be neither reason nor justice behind such a contention.

The judgment should be affirmed.

I concur: VICTOR E. SHAW, Judge pro tem.

(177 Cal. 540)

NORTHWESTERN MUT. LIFE INS. CO. v. ROBERTS, State Treasurer.

MASSACHUSETTS MUT. LIFE INS. CO. v. SAME.

(S. F. 7585.)

(Supreme Court of California. Feb. 18, 1918. Rehearing Denied March 18, 1918.)

1. TAXATION \S 137—PROPERTY EXEMPT—RETURNED PREMIUMS—"EVERY."

Const. art. 13, § 14, subd. "b," providing that "every insurance company or association doing business in this state shall annually pay the state a tax of one and a half per cent. upon the amount of the gross premiums received upon its business done in this state less return premiums and reinsurance in companies or associations authorized to do business in this state,"

imposes a tax upon "every" insurance company or association, whether a stock or mutual concern, doing business within the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Every.]

2. TAXATION \S 140 — PROPERTY EXEMPT — "RETURN PREMIUMS."

In Const. art. 13, § 14, subd. "b," imposing a tax upon the gross premiums of every insurance company or association doing business in the state, less "return premiums," the quoted words must be confined to that portion of the premium which has been unearned and which insured has the legal right to have returned.

3. TAXATION \S 140 — PROPERTY EXEMPT — "RETURN PREMIUMS."

The excess of income over cost of insurance, which does not merely represent the excess of premiums over cost of insurance, but income from forfeitures, lapses, etc., paid by mutual benefit life insurance companies to members as dividends, cannot be deemed "return premiums" within Const. art. 13, § 14, subd. "b," exempting such premiums from taxation.

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Consolidated actions by the Northwestern Mutual Life Insurance Company and by the Massachusetts Mutual Life Insurance Company against E. D. Roberts, as State Treasurer. Judgments for defendant, and plaintiffs appeal. Affirmed.

David L. Levy, Walter Shelton, and Campbell, Weaver, Shelton & Levy, all of San Francisco, for appellants. U. S. Webb, Atty. Gen. (John W. Stetson, of Oakland, of counsel), for respondent.

RICHARDS, Judge pro tem. These are appeals from judgments rendered in favor of the defendant. The cases were consolidated upon the trial and upon appeal, being identical as to the legal principles involved. These actions were brought against the defendant as treasurer of the state of California to recover certain taxes paid by each of said plaintiffs under protest, which said taxes it was claimed by each of said plaintiffs had been illegally assessed and levied by the state board of equalization, and illegally collected by the defendant as state treasurer. The plaintiffs are each mutual benefit insurance companies. The particular taxes claimed by them to have been illegally assessed and unlawfully collected were assessed, levied, and collected in pursuance of article 13, § 14, subd. "b," of the Constitution of California as amended in the year 1910, so as to include said subdivision, which reads in part as follows:

"Every insurance company or association doing business in this state shall annually pay to the state a tax of one and a half per cent. upon the amount of the gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state."

The single question involved in these appeals turns upon the construction to be giv-

en to the phrase "return premiums" as used in the provision of the Constitution above quoted. The contention of the plaintiffs in both of these cases is that this phrase must be given a construction which will be broad enough to include those sums which mutual benefit insurance companies annually pay to their insured membership in the form of what has heretofore been known as "dividends," but which, according to the plaintiffs' contention, is none other than the excess of premiums above the actual cost of insurance which has been prudentially collected from their membership in order to provide against contingent or possible loss during the year, and which, not having been needed or used for such purposes, is returned to them, and hence, under the construction of this phrase in the subdivision of the Constitution under review for which the plaintiffs contend, is returned premiums, and as such not subject to taxation. Turning to the subdivision of the Constitution above quoted in which this phrase occurs, there are several observations regarding its general language which may serve to clarify this discussion.

[1] In the first place it is to be noted that this provision of the Constitution has for its purpose an increase in the revenues of the state by the imposition of a tax upon every insurance company or association doing business within it. It is made to apply equally to fire insurance companies or associations and to life insurance companies or associations, and to each of these, whether the particular insurance company or association, either fire or life, is doing business as a stock concern, dividing its profits periodically among its members, regardless of whether these are also insured in it, or is doing business as a mutual concern, dividing its excess periodically among the body of its insured membership. The foregoing consideration is important in determining the construction to be placed upon the particular clauses of the Constitution under review, since it could not be seriously contended that the framers of this constitutional amendment had in mind one definition of the meaning of the clause in question in its application to one of the foregoing kinds of insurance companies or associations and quite a different meaning as applied to another. In other words, the interpretation to be put upon this phrase must be one applicable indifferently to each and to all of the general class of institutions subject to this form of taxation.

Proceeding from this point, it next becomes important to inquire whether the phrase "return premiums" had taken on a particular or technical significance in relation to any classes of insurance concerns included within the general terms of this amendment prior to the time of its adoption. As to this question there is no dispute among the parties to these proceedings, for it is

conceded that in so far as the phrase "return premiums" had relation to fire insurance companies or associations doing business as stock concerns, and also in a more limited degree to life insurance companies or associations of the same character, the phrase "return premiums" had acquired a limited and technical significance, not only in this state, but generally in the insurance world, which meaning had become so definitely fixed as to have found a place in the law dictionaries and in the recognized text-books upon fire and life insurance. In Black's Law Dictionary the phrase is listed and is defined to mean:

"The repayment of the whole or a ratable part of the premium paid for a policy of insurance upon the cancellation of the contract before the time fixed for its expiration."

In Bouvier's Law Dictionary the phrase is also found and is similarly defined. In Joyce on Insurance and also in Elliott on Insurance—the two main modern text-books on this branch of the law—there are to be found in each an entire subdivision devoted to the subject of "return of premiums and assessments," in which these terms are given application to cases wherein the risk has not attached, or where the policy is void, or has been issued through a mistake of law or fact, or has been procured through fraud and the like, and wherein the use of the phrase is limited to the class of cases above enumerated. Joyce on Ins. c. 35; Elliott on Ins. § 299. See, also, Dawson's Elements of Life Ins. p. 168. Nowhere, in fact, so far as the industry of counsel in the search for precedents have gone, or as our own independent research has extended, had the phrase "return premium" ever been given in the domain of either fire or life insurance, prior to the enactment of the amendment to our Constitution under review, any other than the limited meaning in which that phrase has been defined and discussed by the law dictionaries and law-writers above referred to. And to this statement may be added another and a conceded fact by the parties herein, which is that the phrase "return premium" had never, prior to the adoption of the said amendment to the Constitution, been used or employed by mutual benefit insurance companies or associations anywhere in relation to the excess in the income of these concerns distributed periodically among their members. These considerations become all the more significant when we look to the origin of the phrase "return premium" in its relation to our California law. As early as 1862 the Legislature passed a statute imposing a tax upon foreign insurance companies and their agencies doing business in California. Stats. of Cal. 1862, p. 243. By the terms of this act an annual statement was required from the office or agency of every insurance company to be filed with the treasurer of the county in which such office or agency was

located, exhibiting the gross amount of premiums collected by each, less the gross amount of "return premiums." The act further provided for a tax of 2 per cent. on the amount of gross premiums so reported after deducting "return premiums" upon all fire, marine, and inland risks, and a tax of 1 per cent. on the amount of premiums collected from life risks. In 1903 (St. 1903, p. 359), the substance of this early statute was carried into the Political Code, with the exception that its application was expressly limited to fire insurance companies. It is to be noted, however, that the precise language of the present constitutional amendment is to be found in this section of the Political Code, thus indicating the source from which the framers of the amendment derived its phraseology. Pol. Code, § 622a. This section of the Code was amended in 1905 (St. 1905, p. 136), and again in 1907 (St. 1907, p. 162), but its phrasing in respect to the point in question remained the same. In the meantime the Civil Code had been dealing with the same subject. In the year 1872, article VIII, title XI was enacted in that Code, in which article occur a number of sections treating of the subject of return of premiums, wherein are set forth the several conditions under which a return of premium may be had and may be enforced by the insured. These include cases where no part of the interest of the insured in the thing insured is exposed to the perils insured against, or where the policy has been surrendered before its time expires, or where the contract of insurance is voidable for fraud, or where there is an overinsurance by several insurers. Civ. Code, §§ 2616 to 2622, inclusive. The use of the phrase is thus found to be limited in the Civil Code to practically the same meaning embraced in its definition by the dictionaries and text-writers already referred to. Such was the state of the law and such was the limited meaning attributed with practical unanimity to the term "return premiums" at the time the amendment to the Constitution under review was framed by the Legislature and adopted by the people of California.

[2] Without doubt its use in defining a certain portion of the gross premiums of insurance companies to be excepted from the taxes imposed by the amendment might have been limited by express terms to life or fire insurance companies or associations doing business as stock concerns, or such meaning might have been in the same manner extended so as to include the cases of income over the cost of insurance which mutual benefit companies or associations are wont to distribute among their membership; but, in the absence of such a differentiation, we are constrained by rules of interpretation, too well known to require recital, to the giving to the phrase "return premiums," as used generally in this clause of the amendment to the Constitution, the one and only meaning which

had been universally assigned to it for a long time prior to the date of the adoption of said amendment and which it bore by general acceptance at that time. Its meaning and application as thus interpreted must be confined to that portion of the premium of all insurance companies or associations affected by the amendment which has, for the reasons above referred to, been unearned, and to the return of which the insured has a right enforceable at law. It is clear that as to such portions of the gross premiums of insurance companies or associations as they are, for the reasons stated, not lawfully entitled to retain, no tax should be levied, and that it is to such portions of their premiums as they are thus lawfully bound to return that the exemption in this constitutional amendment was intended to apply.

[3] It is, however, strenuously and elaborately argued on behalf of the appellants herein that they and each of them come strictly within the class of mutual benefit insurance companies or associations the plan and purpose of which is to furnish insurance to the body of their membership at cost, and not to make a profit out of the business done, nor to accumulate any sum which would be distributable as dividends in the usual and ordinary acceptance of that term; that the amount of premiums periodically collected from their membership is only increased above the bare cost of insurance in order to protect them and their members against such unforeseen contingencies or extraordinary outlays as might arise during any year; and that when these do not occur the excess above the ascertained cost of insurance is returned to their membership under the name or form of dividends, but that it constitutes in fact a return of the excess of premiums collected, and hence should be included in the exemption provided for in the Constitution. The argument is specious, and were it founded entirely in fact is one which might well be presented to the Legislature or the people in an effort to effect a change in the phraseology of the constitutional amendment under review, but it cannot be availed of to procure from the courts another and different interpretation of a phrase which has been found to have had by universal usage a more restricted meaning at the time it was engrafted upon the law. Besides, it is by no means conceded by the respondent that the argument is founded in fact, for, while it may be admitted that mutual insurance companies or associations are theoretically committed to the policy of providing insurance to their members at cost, and of theoretically returning to them the excess of premiums prudentially collected for the purpose of taking care of unforeseen contingencies, the truth is that the so-called dividends which these institutions periodically distribute among their members, and which we are urged herein to define as "return premiums," do not actually represent the outworking of

these theories, and are not in fact limited to such excess, and do not, in practical effect, result in a return to the membership of these institutions the actual excess in premiums above the cost to each of his insurance. According to the evidence presented in these cases, mutual benefit insurance companies or associations have other sources of income than that of premiums. They derive certain incomes from forfeitures, surrenders, and lapses; also from the increase in the value of investments in securities or in lands, and from rents and interest on investments and loans, and from annuities. These are intermingled with premiums received in the general calculations of the earnings of the institution, and out of the funds thus accumulated there are paid the overhead expenses, the sums falling due on policies, the amounts to be set aside as reserve, etc. From this accumulation derived from these various sources is also paid periodically to its members such an amount as the business of the institution justifies, in the form of what, prior to the adoption of the constitutional amendment in question, was known and defined as dividends, but which is now sought to be designated as "return premiums." A consideration of the sources of the funds thus distributed discloses that these cannot, by any refinement of bookkeeping or of reasoning be made to represent either the actual excess over cost of insurance paid by the membership of these institutions, nor the actual return to each member of his excess of premium over the cost of insurance to him.

Aside, therefore, from the conclusion which we have felt impelled to draw as to the meaning of the phrase "return premiums," derived from its previous use, we thus discover that the amounts periodically distributed by these institutions among their membership in the form of dividends cannot be deemed "return premiums" when considered either from the viewpoint of the variety of sources from which they are derived nor from that of the conceded fact that they do not represent as to each member of the institution the excess of premium over cost of insurance which he has actually paid. In this connection it may be noted, as having a more or less important bearing upon this phase of the discussion, that there is no agreement, either express or implied, between the premium payer and the mutual benefit company or association of which he is a member, to the effect that he shall have insurance at cost, or that he shall have any enforceable right to receive or recover any amount in the form of a return premium or otherwise corresponding to the excess which he has paid in premiums over the cost of insurance. The amount of premium to be paid by each member is fixed by a consideration of the business principles governing successful insurance companies or associations whether they are stock or mutual benefit concerns. The premium once paid is gone from its payer

forever, unless it can come back to him in the form of dividends or profits upon the business of the institution to which he belongs, and in which business the same principles of prudential management and wise and careful investment prevail as those regulating insurance of every kind and form. From this viewpoint the fact that the premium payer is or is not also a member, or in that sense a shareholder, in the particular form or class of insurance company or association with which he has chosen to be allied, ceases to be a matter of more than minor consideration. The framers of the constitutional amendment in question drew no distinction between the insurance companies or associations to be affected by the form of taxation it imposes, and evidently, by its general terms, intended that the gross premiums received by all insurance companies or associations indifferently should not be deleted by dividends in the levy of the state tax thereon. It is to be noted in this immediate connection that the state of California is unique among the commonwealths of this country in the phrasing of its laws relative to the imposition of taxes upon insurance companies or associations doing business within it. No other state, save one, has expressly laid its tax upon the gross premiums of such institutions, or has in express terms exempted from the effect of such taxation "return premiums." As a result of this there is a paucity of cases bearing directly or by any close analogy upon the question involved in the present controversy. Counsel for appellants cite a number of cases which it is claimed touch the point at issue here. Their chief reliance is upon the case of *Mutual Benefit Life Ins. Co. v. Herold* (D. C.) 198 Fed. 199. That was a case involving a construction of the federal Corporation Tax Act (Act Aug. 5, 1909, c. 6, 36 Stat. 112, § 38, U. S. Comp. St. Supp. 1911, p. 946), by the terms of which a special excise tax was to be levied upon all insurance companies organized under the laws of the United States or of any state or territory "equivalent to one per cent. upon the entire net income * * * received within the year from all sources." The action was brought by the plaintiff to recover from the defendant, a collector of internal revenue, certain taxes paid to him under said statute, upon the contention that certain dividends which it claimed represented an excess of premiums collected from its members, and which were accredited upon the amount of premiums such members were to pay in the succeeding year, were not to be classed as "income received" by the plaintiff so as to be subject to such taxation. The statement of facts in the case assumes that these dividends so applied were in fact merely excess premiums previously collected, a fact not conceded in the instant case, and the decision is predicated upon this assumption: but, aside from this, the distinction between that case and also the other cases

which counsel cite as having followed its doctrine, is obvious, consisting, as it does, in the quite different phrasing of the law in each case. We do not regard this line of cases relied upon by the appellants herein as authority for the construction which they would have us place upon the peculiar wording of the constitutional provision here under review. The only other state having a statute with the same wording as that of the California law is the state of New Mexico, which, subsequently to the passage of our constitutional amendment, embodied its precise language in an act imposing taxes upon insurance companies in that state. In a case arising under said act the Supreme Court of New Mexico, by a decision of two of its three justices, held that dividends of mutual benefit life insurance companies were to be classed as return premiums and were to be deducted as such from the gross premiums of such companies subject to taxation. *Life Ins. Co. v. Chavez*, 21 N. M. 264, 153 Pac. 303. This decision is based upon the reasoning of the case of the Mutual Benefit Life Ins. Co. v. Herold, *supra*, and makes no reference to the history of the amendment to the California Constitution, from which the precise language of the act it assumes to construe was obviously taken. It is sufficient to say that we do not regard this case as controlling or even persuasive authority in the decision of the instant case. It may be said in conclusion that while the authorities upon the general subject of taxation of the incomes or earnings of insurance companies or associations are numerous and are quite conflicting, they depend so largely upon the peculiar wording and differing phraseology of the statutes of the several states, or of the United States, upon this subject, as to render unprofitable an attempt to review or harmonize them here. From what has heretofore been stated, we are of the opinion that the contentions of the appellants herein as to the construction to be placed upon the amendment to the Constitution in question cannot be sustained.

The judgments are affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 577)

WESTERN UNION TELEGRAPH CO. v.
COMMERCIAL PAC. CABLE CO.
(S. F. 7792.)

(Supreme Court of California. Feb. 20, 1918.)

1. TELEGRAPHS AND TELEPHONES §34—DISCRIMINATION.

Where a Pacific cable company with its terminus in San Francisco had as its chief customers two telegraph companies, its requirement of one telegraph company that to the latter's messages received for cable transmission there be added the words "via San Francisco" and the date of acceptance, making four

or five words in all, to be paid for at the regular cable toll of \$1 per word, was not a necessary or reasonable requirement in the conduct of its business; such words not being required to be added to the cable messages of other customers, including the other telegraph company.

2. TELEGRAPHS AND TELEPHONES §34—DISCRIMINATION.

The discrimination arising out of the enforcement of such requirement against one telegraph company alone was unjust and unlawful; its effect, in adding an additional charge or toll upon each cable message sent for such company of approximately \$5 a message, when no similar charge was exacted from the other telegraph company, being to increase the latter's business at the expense, amounting practically to the exclusion, of the telegraph company discriminated against, in relation to that particular field.

3. ESTOPPEL §99—EQUITY §65(3)—TELEGRAPHS AND TELEPHONES — DISCRIMINATION.

In suit by telegraph company against cable company to enjoin discriminatory requirement of additional words at toll rates on cable messages received through plaintiff, plaintiff was not estopped to claim such discrimination was unreasonable and unjust because it had itself been guilty of attempts to impose and enforce similar requirements as to adding words and tolls in the course of its own business throughout the country, for the maxim that he who comes into equity must do so with clean hands has reference to the particular transaction in which relief is sought, and not to the general morals or conduct of the plaintiff.

4. TELEGRAPHS AND TELEPHONES §67(4) — LOSS OF PROFITS—DISCRETION OF COURT.

In action by telegraph company against cable company for discrimination in charges, where damages claimed by plaintiff for shrinkage of its cable business during the enforcement of the discrimination were objected to as involving elements too remote and speculative for admeasurement, the fixing and allowance of \$1,000 as damages for such shrinkage was not an unreasonable exercise of the court's discretion, where some falling off in plaintiff's business as a direct result of the discrimination was admitted, and the evidence adduced furnished some more or less definite data from which to make the approximation on which the court based its findings and judgment as to such probable loss.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Western Union Telegraph Company against the Commercial Pacific Cable Company. From judgment for plaintiff, defendant appeals. Affirmed.

Garret W. McEnerney and Percy E. Towne, both of San Francisco (Wm. W. Cook, of New York City, of counsel), for appellant. Beverly L. Hodghead, of San Francisco (Albert T. Benedict, of New York City, of counsel), for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in favor of plaintiff in an action to have established that certain charges and tolls exacted by the defendant from the plaintiff for the transmission of its messages over the Pacific cable to Oriental points are discriminatory and excessive, and

to have the defendant enjoined from the imposition and exaction of such charges and tolls, and to recover damages for injuries alleged to have been sustained by the plaintiff through such demand and exaction. The main facts of the case are not the subject of much controversy, though the conclusions drawn from them by the respective parties to the action are widely divergent. The defendant, Commercial Pacific Cable Company, is the owner of the Pacific Ocean cable having its American terminus at San Francisco and extending by way of Hawaii to the principal ports in China, Japan, and the Philippine Islands. This cable was constructed in 1902, and was put into operation in the following year. The American business transmitted over it westward originates in all parts of the United States where there are telegraph offices, and is transferred to the cable wires at San Francisco. The two principal suppliers of business in the way of cablegrams to the defendant have from the inception of the operation of its cable been the plaintiff, Western Union Telegraph Company, and the Postal Telegraph Cable Company. These two companies have offices scattered generally throughout the United States, and are not only competitors in the business of local telegraphy, but are also competitors and rivals in the business of receiving and forwarding messages for trans-Pacific telegraphy by the defendant's cable lines. This latter competition and rivalry began when the defendant's cable was opened for operation in 1903, and still continues. The defendant has from the beginning charged a uniform rate or toll of \$1 per word for messages from San Francisco to the Orient. This charge or toll is collected by the telegraph company receiving the message for transmission at the point of its acceptance, in addition to its charge for the local service to San Francisco, and is paid by the company receiving it to the defendant. Prior to 1908 this charge or toll was uniform in its application to its chief competing customers. The defendant, though by the terms of its articles of incorporation it apparently contemplated the establishment by itself of a system of cable and telegraph lines to be owned by it extending from the Orient eastward as far as New York, has never, in fact, constructed or operated any telegraph lines to the eastward of San Francisco, which latter point has always been, and still remains, its terminal. In the year 1908 the defendant entered into an arrangement with the Postal Telegraph Cable Company, by which the latter corporation agreed to construct and maintain a telegraph line between New York and San Francisco for the transmission exclusively of cable messages. The result of this agreement was the establishment between the defendant and the Postal Telegraph Cable Company of friendly relations in which the plaintiff did not share. On May 23, 1908,

the defendant company gave notice to the plaintiff that thereafter there would be added to each of the latter's messages delivered to defendant for transmission to the Orient, the words "via San Francisco," together with the date of the acceptance of the message at San Francisco, making four or five words in all; and that upon such added words the plaintiff would be required to pay the regular charge or toll of \$1 per word. The effect of the enforcement of this requirement was to add approximately \$5 to the cost of each cablegram delivered by the plaintiff to the defendant for transmission by its cable to Oriental points. A like addition of these words was not required by the defendant from the Postal Telegraph Cable Company, nor were they added to its messages, nor was a like charge or toll exacted by defendant from it. The direct result of the enforcement of this rule against the plaintiff was an increase in the cost of cable messages accepted by plaintiff for transmission to the Orient over the defendant's cable to the extent of such added charge or toll over that required to be paid for a like service by its competitor and rival, the Postal Telegraph Cable Company. The plaintiff paid under protest these added charges for about two months after the date of their imposition, and then, and on July 23, 1908, commenced this action for an injunction and for damages.

The trial court made its findings in the plaintiff's favor upon the issues tendered in the pleadings, and rendered its judgment accordingly, enjoining the defendant from the further imposition of these added charges and tolls. It also found the plaintiff entitled to recover the sum of \$1,582.12, the amount actually paid by it as a result of the said exaction, and the further sum of \$1,000 damages for injuries to plaintiff's business during the period of its imposition.

While the record contains many assignments of error on the part of the appellant, they all revolve about its four main contentions in this appeal. These are: First, that no added charge or toll is made by defendant against the plaintiff; that the charge or toll in question is made by the Postal Telegraph Cable Company, and whatever recourse, if any, plaintiff has is against it and not against the defendant; second, that the requirement of the added words to the plaintiff's messages is reasonable and necessary in the conduct of the defendant's business, and hence the added charges and tolls are proper; third, that any discrimination that may exist in favor of the Postal Telegraph Cable Company is neither unjust nor unreasonable, but is justified by the relation between the defendant and that company; fourth, that the court erred in its judgment for damages against the defendant, especially in its award of \$1,000 for injuries to the plaintiff's business, such damages being too remote and speculative to be justified.

As to the first of these propositions we are of the opinion that the evidence does not sustain the appellant's contention. The evidence was without serious conflict that the defendant is and was at all times the owner of the Pacific cable since its construction from and including its terminus in San Francisco to its various Oriental termini; that the defendant exacted from all customers using said cable the full amount of its usual charges and tolls from San Francisco to all points westward, and that such charges and tolls, in so far as they refer to the words of the message itself, were and are collected from both the Postal Telegraph Cable Company and the plaintiff herein without division or reduction; that the cable operator at San Francisco has supervision over all the defendant's cable operators wherever located, and keeps accounts of all its messages and reports the same directly to the defendant in its New York office, and that its customers make settlements upon these reports, paying directly to the defendant the sums shown therein to be due. It is true that by virtue of the aforesaid friendly arrangement between the defendant and the Postal Telegraph Cable Company the San Francisco office of the latter is also the office of the defendant, and that the operator there in charge is an employé of the Postal Telegraph Cable Company, and that the forwarding of all cable messages is accomplished through the Postal Telegraph Cable Company by the use of its offices, instruments, and employés; but the evidence sufficiently shows, and we think the court correctly found, that in performing these various services the Postal Telegraph Cable Company acts merely in the capacity of an agent for the defendant, and that it at all times acted as such agent in the addition of the words indicated to the plaintiff's cable messages and in the imposition and collection of the charges or tolls thereon which gave rise to this action.

Some emphasis is placed in the argument of counsel for appellant upon the form of the written agreement between the defendant and the Postal Telegraph Cable Company which is attached as an exhibit to its answer herein, but an examination of that document does not induce a change of view as to the relation of agency between the parties to it in so far as the operation of the San Francisco office which is the terminus of defendant's cable is concerned, nor as to the imposition of the charges or tolls of which the plaintiff complains. In addition, however, to this, it appears that this written agreement was not formulated or entered into between the parties to it until several months after the present action was begun, and must have little, if any, influence in the determination of these issues.

[1] The next contention of the appellant is that the requirement that the words, "via San Francisco," together with the further

words giving the date of receipt of plaintiff's messages, is a reasonable and necessary requirement in the conduct of defendant's business, and hence that the charges therefor were proper and lawful. The evidence does not sustain this contention. It is conceded that the addition of these objectionable words was not requested by the plaintiff and were of no benefit to it, and were not requisite in order to clarify, identify, or improve in any way its cable messages. That they are not a necessary regulation in the conduct of the defendant's business is shown by the fact that like words are not added to the cable messages of the Postal Telegraph Cable Company or of any of its customers save only the plaintiff herein. Had the defendant been able to show that the addition of the words in question was required of all customers delivering to it cable messages for Oriental transmission, it might with a show of reason, backed by quite respectable authority, urge that the requirement of the addition of these words with the consequent charge therefor was a reasonable regulation; but the very authorities which the appellant cites as sustaining its claim in respect to the reasonableness of this exaction show that the basis of the claim must be laid in the fact that the requirement is applied impartially to all customers without distinction from whom the cable company receives messages for transmission. It was so expressly held in the case of *Atlantic & Pacific Tel. Co. v. Western Union Tel. Co.*, 4 Daly (N. Y.) 527, which is relied upon by appellant as sustaining its views, wherein the court, referring to a similar requirement and the reasons for it, said:

"Whatever may be the [form] grounds for adopting it, no court of justice would hold that such a regulation is unreasonable, if it is applied by the defendants to all telegraph companies in New York, without distinction, from whom they receive messages for transmission to Europe."

In the absence, however, of such a showing and in the presence of the conceded fact as to the two chief customers of the defendant seeking the transmission of cable messages, the imposition of the added words, with the consequent increase of tolls, is required of the one but not of the other, the inference is irresistible that the rule imposing this unequal burden upon the plaintiff alone is not a necessary or reasonable regulation in the conduct of the defendant's business, and is not therefore defensible upon that ground. This will appear all the more plainly a little later when its effect upon the plaintiff's cable business is the subject of review.

[2, 3] The appellant's third contention, to the effect that whatever discrimination may exist against the plaintiff and in favor of the Postal Telegraph Cable Company, arising out of the addition to the messages of the former of the required words with the consequent charges or tolls, is neither unjust nor

unreasonable requires little more than its mere statement to supply its refutation. The uniform charge of the defendant upon cable messages proper was and is a dollar a word. When to this charge or toll there was super-added an additional charge or toll of approximately \$5 upon each cable message sent for the plaintiff when no similar charge was exacted upon messages received for like transmission from its chief competitor, the Postal Telegraph Cable Company, the inevitable result would follow that the latter, being thus able to send cable messages to the Orient by the defendant's cable cheaper than its rival could do to the extent of approximately \$5 a message, would have a speedy increase in that line of business at the expense, amounting practically to the exclusion, of its rival in relation to that particular field. That these facts and consequences are sufficient to show an unjust and unlawful discrimination the authorities fully establish. *Wyman on Pub. Ser. Corp.* vol. 2, §§ 1286, 1290, 1291, 1299; *Postal Telegraph Co. v. Cumberland T. & T. Co. (C. C.)* 177 Fed. 726; *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765; *Hutchison on Carriers*, § 243; *Commercial Cable Co. v. Western Union Tel. Co. (Interst. Com. Com'n R.)* decided May 21, 1917. The friendly arrangement between the defendant and the Postal Telegraph Cable Company out of the existence of which this discrimination obviously arose can afford no justification for defendant consistent with the well-settled principles of equity governing the business of common carriers in their relation to their competing customers and to the public at large. The only serious attempt on the part of defendant to justify this evident discrimination is to be found in its contention that the plaintiff is estopped to claim that as to it the discrimination is unreasonable and unjust because of the fact that it has itself been guilty of attempts to impose and enforce precisely the same requirements as to adding words and tolls in the course of its business throughout the country, and has used, and is in fact still using, the same sort of discrimination among its customers in so doing. In its attempt to plead and prove by specific example the plaintiff's alleged delinquencies in respect to these matters, the defendant was frustrated by the action of the trial court through its order sustaining a demurrer to the defendant's supplemental answer setting forth the particulars of the plaintiff's sins in this regard and by the further refusal of the court to permit testimony to be offered in support of the defendant's claim. There was no error in the action of the court in respect to these rulings. The maxim that he who comes into a court of equity must do so with clean hands has reference to the particular transaction in which relief is sought, and not to the general morals or conduct of the person seeking such relief. Were it otherwise,

courts of equity would have found themselves largely restricted in their powers to afford relief to that certain class of litigants which have most frequently sought to invoke their aid in modern times. We find no merit, therefore, in the defendant's plea of an estoppel to the plaintiff's claim of an unjust discrimination in the instant case.

[4] The final contention of the appellant is that the trial court was in error in its findings and judgment awarding plaintiff damages. The appellant does not very seriously complain that the court's award of \$1,582.12, claimed and proven by the plaintiff to have been the amount which it actually paid for the transmission of the added words under the operation of the regulation of which it complains, was an improper allowance, nor do we think that it could well object to this item of damages. But the appellant insists that as to the allowance of \$1,000 as damages to the plaintiff for the alleged shrinkage of its cable business during the enforcement of the regulation complained of, these elements of damage are too remote and speculative for admeasurement in the form of damages or for fixation at the amount awarded plaintiff. It admits with no dispute that the plaintiff would have some falling off in business, with its consequent loss of profits, as a direct result of the discrimination of which it complains. The injury which it would thus suffer through the loss of such probable profits has heretofore been held by this court to be the proper subject of admeasurement of damages in cases where the evidence disclosed a reasonable possibility of their approximate estimation. *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Pacific Steam Whaling Co. v. Alaska Packers' Ass'n*, 138 Cal. 638, 72 Pac. 161; *McQuilkin v. Postal Telegraph Cable Co.*, 27 Cal. App. 698, 151 Pac. 21. In the case at bar the averments of the plaintiff's verified complaint in respect to this particular element of damage were not controverted by the defendant, its general denial thereof being stricken from its answer on motion and not having been replaced by an amendment thereto. The court, nevertheless, took testimony in respect to such averments, the plaintiff producing several witnesses in support thereof and the defendant contenting itself with a cross-examination of these witnesses. From the evidence thus elicited it appeared that immediately prior to the imposition of the added charges and tolls upon its cable messages the plaintiff had been receiving for cable transmission over defendant's lines to the Orient an average of 30 messages a day from various parts of the United States, and that almost immediately after the said imposition of these added charges and tolls the number of these messages so received by plaintiff declined to an average of from 10 to 15 per day, which shrinkage in business continued up to the date of the institution of this action and the issuance of the injunction there-

in. There was also some evidence as to the cost and profit to the plaintiff in the sending of messages to the Orient by means of the defendant's cable as compared with that of the transmission of like messages to the same eastern points by way of the Atlantic cables. From the evidence thus adduced the trial court was furnished some more or less definite data from which to make the approximation on which it made its findings and judgment as to plaintiff's probable loss of patronage and profits from the defendant's wrongful act. We are unable to say that the amount fixed by the court as its estimate of such loss was an unreasonable exercise of its discretion in that regard. The finding and judgment in that respect will not, therefore, be disturbed.

No other points being presented for consideration upon this appeal, the judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; SHAW, J.; MELVIN, J.; WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

(36 Cal. App. 1)

ARMSTRONG v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 2424.)

(District Court of Appeal, Second District, California. Jan. 12, 1918. Rehearing Denied by Supreme Court March 11, 1918.)

MASTER AND SERVANT — §362 — WORKMEN'S COMPENSATION ACT—"EMPLOYÉ"—"CASUAL EMPLOYMENT."

Under Workmen's Compensation Insurance and Safety Act (St. 1913, pp. 279, 284) § 14, defining "employé," and excluding therefrom any person whose employment is both casual and not in the usual course of the trade, business, profession, or occupation of his employer, a carpenter, employed for over three months at day wages to erect a dwelling house for the owner, was an employé, and entitled to compensation when injured; his employment not being casual, not in the usual course of his employer's business.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

Application by Thomas V. Hardwick for workmen's compensation; opposed by Leroy Armstrong, employer. To review an award of the Industrial Accident Commission of the State of California in favor of the applicant, the employer petitions for a writ of review. Award affirmed.

Kuster & Salisbury, of Los Angeles, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

CONREY, P. J. On writ of review to determine the validity of an award made by respondent Commission.

Thomas V. Hardwick was employed by the petitioner Leroy Armstrong to work as a carpenter on day wages in the erection of a

dwelling house to be occupied by the employer and his family. After Hardwick had been so employed for about three months, and while he was engaged in work on the employer's house, an accident occurred, whereby Hardwick received the injuries for which compensation has been awarded. It is admitted by respondent that the employment of Hardwick was not in the usual course of the trade, business, profession, or occupation of the employer. Respondent contends, however, that the employment was not "casual" within the meaning of the Workmen's Compensation Act, and that, therefore, the liability exists. This contention covers the only question for determination in this proceeding.

Section 14 of the Workmen's Compensation, Insurance, and Safety Act, in its definition of the word "employé," as used in that act, excludes therefrom "any person whose employment is both casual and not in the usual course of the trade, business, profession, or occupation of his employer." That clause was considered by this court in *Blood v. Industrial Accident Commission*, 30 Cal. App. 274, 157 Pac. 1140, where we referred to decisions from other jurisdictions where the same subject was under consideration. In that case the claimant was employed at a daily wage to apply two coats of paint to a two-story frame building at that time occupied by the owner. The employment was not for any definite period of time, but the evidence showed that the work would reasonably have been done within two weeks. After entering upon his work the claimant was accidentally injured while engaged in the work. This court held that the employment was casual, and as it was also not in the usual course of any business of the employer, the award was annulled. In *Maryland Casualty Co. v. Pillsbury et al.*, Commissioners, etc., 172 Cal. 748, 158 Pac. 1031, the claimant was employed by the day to repair a farm tractor. On his behalf argument was made that the employment was permanent as being "for an indefinite period which may be severed by either party." The court replied that this definition of permanent employment did not fit the hiring of the claimant Snow, who was employed by the day. "There was nothing indefinite about it, except the time which might be consumed in making the necessary repairs on the tractor, but nevertheless Snow was hired for the definite period reasonably necessary for the fixing of that particular machine." Held, that the employment was "casual" in the sense of being "incidental" and "occasional"; that being undoubtedly the definition of the word as used in the statute. In *Miller & Lux, Inc., v. Industrial Accident Commission*, 32 Cal. App. 250, 162 Pac. 651, we have the opinion of the first District Court of Appeal upon the same question, illustrated by somewhat different facts.

There the claimant was employed as a carpenter and as the foreman in charge of the construction of a "14-room cottage" located upon the land of the employer. After having continued in this employment for a period of 57 days, and while so employed, the claimant suffered the accidental injury for which compensation was awarded to him by the commission. After a statement of the facts, the court held that the applicant's employment was neither casual nor out of the usual course of business of the employer, and the award was affirmed. The court said:

"The cases collected with much industry and cited by counsel for the petitioner will, when analyzed, show that the rule depended in each case upon its particular state of facts; and that as to these facts they may each be easily differentiated from the case at bar. To hold that the applicant's employment to act as foreman over a number of other carpenters in the erection of a 14-room building, involving an engagement of several months of regular and daily recurring labor, to be 'casual' would, in our opinion, restrict the operation of the statute beyond its reasonable and liberal interpretation."

In Michigan the Workmen's Compensation Act (Pub. Acts Mich. 1912 [Ex. Sess.] No. 10), does not include in its benefits any person whose employment is but casual. An instructive case under that statute is *Dyer v. James Black Masonry & Contracting Co.*, 192 Mich. 400, 158 N. W. 959. The employer was the principal contractor engaged in the construction of a building in the city of Detroit. Finding it necessary to have some person to look after the delivery of glass at the building and see to the unloading of the glass, the employer arranged with the claimant Dyer to do this work from time to time as the glass arrived. The claimant was injured while thus employed. In that case some of the principal decisions are referred to, including those relied upon by us in *Blood v. Industrial Accident Commission*, supra. It was held that the employment of the claimant was not casual.

With respect to this particular question, we think that the case of *Miller & Lux, Inc., v. Industrial Accident Commission*, supra, is closely like the case at bar, and the language which we have quoted from that decision is applicable here. Our own decision in *Blood v. Industrial Accident Commission*, supra, does not necessarily conflict with this conclusion. The claimant there was employed to do work, which was in the nature of repairs to an existing building. The claimant was employed at a fixed rate per day, but his contract was one of employment for the entire job, which was fixed and limited in its amount and in the description of the work which claimant was to do. It is not reasonably possible to set forth a hard and fast definition of casual employment, whereby every case may be determined like a mathematical problem. It is our opinion that the award made by the commission is based upon

a correct application of the statute to the facts of this case.

The award is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

(68 Okl. 32)

SHARUM v. JOHNSTON et al. (No. 8484.)
(Supreme Court of Oklahoma. Feb. 26, 1918.)

(Syllabus by the Court.)

INDIANS \S 27(6) — ACTION FOR TITLE AND POSSESSION OF HOMESTEAD—SUFFICIENCY OF EVIDENCE.

Record examined, and held, that the findings of fact of the trial court are contrary to the evidence.

Error from District Court, Cherokee County; John H. Pitchford, Judge.

Action by Ellis Wofford against A. H. Sharum and others, with answer and cross-petition by defendant Sharum, whereupon plaintiff dismissed his cause of action and answered the cross-petition. Judgment for Wofford, and Sharum brings error. Reversed and remanded, with directions.

Benjamin B. Wheeler, of Muskogee, for plaintiff in error.

KANE, J. This was an action by Ellis Wofford, a Cherokee freedman, one of the defendants in error, as plaintiff, against the plaintiff in error and the other defendants in error, as defendants, to recover title and possession of 40 acres of land which had been allotted to Ellis Wofford as his homestead. After the plaintiff in error Sharum had answered and filed a cross-petition in which he alleged that he was the owner in fee simple of said land and prayed that the title and possession thereof be quieted in him, the plaintiff, Ellis Wofford, dismissed his cause of action, this leaving nothing before the court but the issues joined by the cross-petition of the plaintiff in error Sharum, and the answer thereto filed by Ellis Wofford. Upon issues thus joined there was a trial to the court, who made special findings of fact and conclusions of law favorable to Wofford, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

As the case on its merits turns on the sufficiency of the evidence to support the findings of the court below, we need only notice the principal assignment of error relied upon by counsel for plaintiff in error which he states in his brief as follows:

"The court erred in finding that the plaintiff, Ellis Wofford, had not reached the age of majority, to wit, 21 years of age, according to the enrollment records of the commissioner to the Five Civilized Tribes, on the 9th day of April, 1910; said finding being contrary to the evidence in the trial of said cause; and the court erred in not finding as a fact that the plaintiff Ellis Wofford became 21 years of age, accord-

ing to said enrollment records, on the 8th day of April, 1910."

The evidence shows that the land involved was the homestead of Ellis Wofford, a Cherokee freedman, and that the deed through which Sharum claimed title was executed by Wofford on the 10th day of April, 1910. The evidence relied upon to establish the majority of Wofford on that date consisted of the census card supplemented by a transcript of the evidence of Napoleon Wofford, a brother of the allottee, taken before the land office at the time Ellis Wofford enrolled, which were duly certified as a correct copy of the enrollment record. This enrollment record shows that Ellis Wofford was enrolled as a Cherokee freedman on the 8th day of April, 1901, and that at that time he was 12 years of age. As the deed under which Sharum claims was executed subsequent to the act of May 27, 1908 (35 Stat. 312, c. 199), the enrollment record must be deemed conclusive evidence of the age of the allottee. *Scott v. Brakel et al.*, 43 Okl. 655, 143 Pac. 510. The enrollment record showing that the allottee was 12 years of age on April 8, 1901, it only requires a simple mathematical calculation to determine that he was 21 years of age on the 8th day of April, 1910, the day before he executed the deed to Sharum.

Inasmuch as we are not favored with a brief by counsel for defendant in error, we are unable to conjecture upon what ground the trial court found to the contrary, or to conceive any sound theory upon which such finding can be affirmed. Therefore the contention of counsel for plaintiff in error that the findings of the trial court are contrary to the evidence must be sustained.

The judgment of the court below is reversed and the cause remanded, with directions to grant a new trial. All the Justices concur.

LUSK et al. v. RYAN, County Treasurer.
(No. 7889.)

(Supreme Court of Oklahoma. Feb. 12, 1918.)

(Syllabus by the Court.)

1. STATUTES §21, 64(8) — REVENUE ACT — CONSTITUTIONAL PROVISIONS.

Section 7, Act July 5, 1913 (Session Laws 1913, c. 240, art. 1), is not a bill for the raising of revenue, but simply provides a procedure for the recovery of illegal taxes paid, and is separable from other parts of said act, and is therefore in no wise in conflict with section 33, art. 5, of the Constitution, notwithstanding other parts of said act may be violative of the Constitution.

2. TAXATION §543(6)—ILLEGAL TAXES—ACTION TO RECOVER—PETITION.

In an action to recover illegal taxes which have been paid, a petition which alleges the grounds upon which the illegality of such tax

is predicated, that such illegal tax was paid to the officer authorized by law to receive it, and that at the time such payment was made notice was given by the party paying such taxes to the officer collecting such tax that suit would be brought against such collecting officer for the recovery of the illegal taxes so paid, contains all the necessary averments of facts as to render such petition invulnerable to demurrer "that the petition does not state facts sufficient to constitute a cause of action."

3. TAXATION §543(6)—ILLEGAL TAXES—ACTION TO RECOVER—PETITION.

In an action under section 7, Session Laws 1913, c. 240, art. 1, for the recovery of money paid on account of an illegal tax, it is not necessary, to constitute a good petition, to aver therein that such payment was made under duress.

4. EVIDENCE §23(1), 33 — JUDICIAL NOTICE — GENERAL LAWS — MEETING AND FINAL ADJOURNMENT OF LEGISLATURE.

The courts of record of this state will take judicial notice of the date of the passage and approval of general laws passed by the Legislature of this state, and the date of the meeting and final adjournment of the Legislature of this state.

5. SUFFICIENCY OF PETITION.

The petition in this case has been carefully examined, and found to contain every necessary averment of facts to state a cause of action against the defendant for the recovery of money paid for illegal taxes.

Commissioners' Opinion, Division No. 1. Error from District Court, Okmulgee County; Earnest B. Hughes, Judge.

Suit by James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad Company, and the company, against M. Ryan, County Treasurer of Okmulgee County, Okl. Demurrer to amended petition sustained and petition dismissed, with judgment against plaintiffs for cost, and they bring error. Reversed and remanded, with instructions to overrule the demurrer.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and Fred E. Suits, both of Oklahoma City, for plaintiffs in error. R. E. Simpson, Co. Atty., and Fred M. Carter, both of Okmulgee, for defendant in error.

COLLIER, C. This is a suit instituted by the plaintiffs in error against the defendant in error to recover certain illegal and excessive taxes paid by the plaintiffs in error to the defendant in error. Hereinafter the parties will be designated as they were in the trial court. The petition is very voluminous, and it is unnecessary for a proper understanding and determination of the question involved in this case to set it out in full. It is sufficient to state that said petition avers an excessive, illegal, and unauthorized levy of taxes, that it sets out the grounds upon which is predicated that said tax is excessive, illegal, and unauthorized, that one-half of said alleged illegal taxes amounted to \$1,970.31, which was the full amount of the taxes payable at

the time and in the manner provided by law, which said amount was paid by the plaintiff to the defendant, the officer authorized by law to collect the same, that at the time of making said payment plaintiff gave written notice to the defendant of the specific grounds upon which the excessive, illegal, and unauthorized levy was predicated, and that suit would be brought by the plaintiff against the defendant for the recovery of the money so paid, and that plaintiffs would hold defendant and Okmulgee county liable for the same. To the amended petition defendant interposed demurrer because the said amended petition does not state facts sufficient to constitute a cause of action against the defendant and in favor of the plaintiffs. The court sustained the demurrer, and the plaintiff electing to stand upon said amended petition, the court dismissed the petition and rendered judgment against the plaintiff for costs. To reverse the said action of the court this appeal is prosecuted.

This action is brought under section 7 of the Session Laws of 1913, p. 633, which reads as follows:

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for a recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days, and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein. If, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

[1] We are first met with the contention, on the part of the defendant that said section 7, supra, being a revenue measure, is unconstitutional and void for the reason that said act was passed during the last five days of the Legislature, in violation of section 33, art. 5, of the Constitution. We are of the opinion, and so hold, that section 7, art. 1, Act July 5, 1913 (Session Laws 1913, p. 633), is not a bill for the raising of revenue, but simply provides a procedure to recover illegal taxes paid, and said section 7 is separable from the other provisions of the act, and may stand notwithstanding other parts of the act must fall, and therefore said section 7 is in no wise in conflict with section 33, ar-

ticle 5, of the Constitution. This court in *Anderson v. Ritterbusch*, County Treasurer, 22 Okl. 761, 98 Pac. 1002, held:

"'Revenue laws' are those laws only whose principal object is the raising of revenue, and not those under which revenue may incidentally arise. * * * 'Revenue bills' are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue. * * *"

In the matter of the assessment of the Sprinkle Co., 170 Pac. 1147, Commissioner Hooker follows the holding of Judge Hardy in *Black et al. v. Geissler et al.*, 159 Pac. 1124, and, passing upon the identical section 7 here under review, says:

"This statute in question cannot be classed as a revenue measure, and therefore is not subject to the objection 'that it was passed during the last five days of the session.'"

[2-4] It is true, as contended in the brief of plaintiff, that there was no proof offered as to when the Legislature adjourned, but the contention of the plaintiff that the question of "when the Legislature adjourned must be raised by answer and proof" is without the slightest force, as the courts will take judicial knowledge of the time of the final adjournment of the Legislature of this state. 16 Cyc. 906C; *Perkins v. Perkins*, 7 Conn. 558, 18 Am. Dec. 120.

"This court will take judicial knowledge of the Legislature and its established and usual course of proceeding." James, *Commentaries on Evidence*, vol. 1, p. 511.

"The courts take judicial notice of the public and private official acts of the legislative department of the state, and of all matters with the Legislature and its proceedings." *French v. Senate*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756; *Prince v. Skillin*, 71 Me. 361, 36 Am. Rep. 325.

"So a court will recognize the time of the commencement and close of a session of the Legislature." 15 R. C. L. p. 1110; *Richardson v. McChesney*, 218 U. S. 487, 31 Sup. Ct. 43, 54 L. Ed. 1121.

In the instant case it was only necessary to constitute a petition invulnerable to the demurrer interposed to allege with particularity that the tax complained of was levied in excess of the estimate of the requirement of the school district for the fiscal year; that said tax was paid to the officer authorized by law to collect the same; that same was paid; and that at the time of said payment the plaintiff in error gave notice to the officer collecting the tax, showing the grounds of complaint against the collection of said tax, and that suit would be brought against the officer for a recovery of the money paid. Whether or not said taxes were paid under duress is not germane to the issue here, and therefore it is not necessary to pass upon the insistence of the plaintiff that said payment was so paid.

If the tax levied was in excess of the requirement of the necessities for the school district, it was illegal and void as to such excessive levy. *St. Louis & S. F. Ry. Co. v.*

Haworth, County Treasurer, et al., 48 Okl. 132, 149 Pac. 1086.

[5] The demurrer, of course, admits that said levy was excessive; and, the petition averring all of the allegations necessary to be averred to constitute a good petition under the act under which this action is brought (section 7, supra)—the court committed reversible error in sustaining the demurrer to the petition.

This cause is reversed and remanded, with instructions to the trial court to overrule the demurrer to the petition.

• PER CURIAM. Adopted in whole.

(66 Okl. 203)

ALWOOD et al. v. HARRISON et al.
(No. 8271.)

(Supreme Court of Oklahoma. Sept. 25, 1917.
Rehearing Denied Nov. 6, 1917.)

(Syllabus by the Court.)

ATTACHMENT — 228—BILLS AND NOTES —
445—MORTGAGE PROVISION—ACCELERATION—
ACTION—TIME OF ACCRUAL.

An action was commenced on February 25, 1916, on a promissory note dated December 1, 1914, payable two years after date, with interest payable annually, the payment of which said note was secured by a mortgage containing the provision that upon default in the payment of any interest when due the whole of said sum or sums of interest shall become due and payable. Default was made in the payment of the interest due on said note December 1, 1915. Held: (1) That said provision relates alone to a foreclosure of the said mortgage, and that said provision in said mortgage does not accelerate the time of payment of said note. (2) That said action upon said note was prematurely brought, and that an attachment sued out at the time said action on the note was brought, based upon the grounds set out in subsection 9 of section 4812, Rev. Laws 1910, was on motion properly set aside and discharged, on the grounds that the debt set forth in the cause of action of the plaintiff, and in the affidavit for attachment herein, was not due at the time of said action.

Commissioners' Opinion, Division No. 1. Error from District Court, Creek County; Earnest B. Hughes, Judge.

Action by R. S. Alwood and another against Isabelle Harrison and Ed Harrison, with affidavit of attachment, in which R. B. Leeka intervened. Motion to dissolve attachment sustained, motion to set aside the judgment and order and for a new trial overruled, and plaintiffs bring error. Judgment sustaining motion to dissolve attachment affirmed.

Asp, Snyder, Owen & Lybrand, of Oklahoma City, and R. B. Thompson, of Sapulpa, for plaintiffs in error. Pat Malloy, of Tulsa, and Parker & Simons, of Enid, for defendants in error.

COLLIER, C. On February 25, 1916, plaintiffs in error, hereinafter styled plaintiffs, instituted this action in the district court of Creek county to recover upon a

promissory note executed by Isabelle Harrison and Ed Harrison, two of the defendants in error, hereinafter called defendants, to the plaintiffs in error, which said note is dated December 1, 1914, for the sum of \$8,000 payable two years after date, the payment of which said note was secured by a mortgage upon lands in Ouster county, and real estate in Kansas, which said mortgage, as averred in the petition, contained the following provisions:

"Now if said party of the first part shall pay or cause to be paid to said parties of the second part, their heirs or assigns, said sum of money in the above-described note mentioned, together with the interest thereon, according to the terms and tenor of the same; then this mortgage shall be wholly discharged and void; and otherwise shall remain in full force and effect. But if said sum or sums of money or any part thereof, or any interest thereon, is not paid when the same is due, and if the taxes and assessments of every nature which are or may be assessed and levied against said premises, or any part thereof, are not paid when the same are by law made due and payable, the whole of said sum or sums and interest thereon shall then become due and payable, and said parties of the second part shall be entitled to the possession of said premises."

It was also averred in the petition in this case that there had been a default by the defendants in error Isabelle Harrison and Ed Harrison in payment of the interest due December 1, 1915, upon the note sued upon.

On the same day that said original suit was filed plaintiff in error filed an affidavit for attachment, which said affidavit, omitting caption, is as follows:

"R. S. Alwood, of lawful age, being first duly sworn, upon his oath deposes and says:

"That he is one of the plaintiffs in the above-entitled action; that the said plaintiffs have brought this action in this court to recover from the said defendants the sum of \$8,640, with interest thereon from the 1st day of December, 1915, at the rate of 8 per cent. per annum upon one promissory note in writing, dated December 1, 1914, and due and payable two years after date, a copy of which said note is hereto attached, marked for identification, 'Exhibit A,' and is here referred to and made a part of this affidavit in attachment, together with the sum of \$864, as and for an attorney's fee for said plaintiffs, as provided in said note.

"This affiant further says that as a part of the same transaction, the said defendant Isabelle Harrison did execute, acknowledge, and deliver to the said plaintiffs her certain mortgage deed in writing, dated the 14th day of December, 1914, on the following described real estate situated in Custer county, state of Oklahoma, to wit: 'The south half of the southeast quarter, and the south half of the southwest quarter of section 30, and the northwest quarter of the northwest quarter of section 31, all in township 15 north of range 17 west of the Indian Meridian.'

"Affiant further says that the said mortgage deed was executed and delivered to the plaintiffs by the said Isabelle Harrison for the purpose of securing the said promissory note, a copy of which is hereto attached as Exhibit A; that by the terms of said mortgage deed it was expressly provided as follows, to wit: 'Now if said party of the first part shall pay or cause to be paid to said parties of the second part, their heirs or assigns, said sum or sums of money in

the above-described note mentioned, together with interest thereon, according to the terms and tenor of the same, then this mortgage shall be wholly discharged and void; and otherwise shall remain in full force and effect. But if said sum or sums of money or any part thereof, or any interest thereon, is not paid when the same is due, and if the taxes and assessments of every nature which are or may be assessed or levied against said premises, or any part thereof, are not paid when the same are by law made due and payable, the whole of said sum or sums and interest thereon shall then become due and payable, and said parties of the second part shall be entitled to the possession of said premises.

"Affiant further says that the said defendants, and each of them, have failed, neglected, and refused to pay the interest due upon said note on the 1st day of December, 1915, and that there is now due and remaining unpaid thereon the full sum of \$8,640, with interest thereon from the 1st day of December, A. D. 1915, at the rate of 8 per cent. per annum.

"Affiant further says that the said claim of the said plaintiffs against the said defendants, and each of them, for the sum of \$8,640, with interest thereon from the 1st day of December, 1915, is just, and affiant believes and avers and states that the plaintiffs ought to recover of and from said defendants the said sum of \$8,640, with interest thereon from the 1st day of December, 1915, at the rate of 8 per cent. per annum.

"Affiant further says that the said defendants fraudulently contracted the said debt, and fraudulently incurred the liability and obligation for which this suit has been brought, in this, to wit: That the said defendants, at the time of the execution and delivery of said note and the mortgage deed aforesaid, executed and delivered the same to these plaintiffs in consideration of the sale by these plaintiffs to said defendant Ed Harrison of a certain livery stable, with horses, wagons, buggies, harness, and a complete livery stable outfit, which said plaintiffs sold to the said defendant, Ed Harrison, for the agreed price and sum of \$10,000, \$2,000 cash, and the balance of said purchase price was represented by the said note, Exhibit A aforesaid, and secured by the said mortgage aforesaid; that at the time of the execution and delivery of said note and said mortgage, and the sale and delivery by these plaintiffs to the said defendant of said livery stable and stock of horses, wagons, buggies, harness, and paraphernalia, the said defendants represented that the said lands above described, situated in Custer county, state of Oklahoma, were of the full value of \$10,000; that the plaintiffs had not seen the said land; had no knowledge of its value or the kind, character, or quality of the said land, and relied wholly upon the representations of said defendants as to the value thereof.

"Affiant further says that the said land is not of the value of to exceed the sum of \$4,000, and that the same is incumbered by mortgage in the sum of \$2,000, and that the said land over and above the first mortgage thereon is not of a value greater than the sum of \$2,000.

"Affiant further says that at the time of said sale of said livery stable and property to the said defendants, the said defendants represented to the said plaintiffs that the said Isabelle Harrison, one of the makers of said note and the mortgagor in the said mortgage herein mentioned and described was well worth the sum of \$65,000; that at the time of said representations these plaintiffs were not advised and had no means of knowing what the said defendant Isabelle Harrison was worth in property, or where the said property was located, and relied solely upon the representations of said defendant Ed Harrison in relation thereto.

"Affiant further says that each, all, and every of said representations so made by the defendant Ed Harrison, at the time of said sale, was

false and untrue, and by the said Ed Harrison known to be false and known to be untrue, and the said defendant Ed Harrison well knew that these plaintiffs relied upon the said representations and made the said sale of said livery stable, wagons, horses, harness, buggies, and the said complete livery outfit to the said defendant Ed Harrison, relying upon the said representations so made by the said Ed Harrison to be true.

"Affiant further says that after diligent inquiry as to the worth of said defendant Isabelle Harrison, he is informed and believes and alleges and states the fact to be that the said Isabelle Harrison is execution proof, and that she is not able to respond to any judgment that may be rendered upon the said note, and that the amount of the said note and the interest thereon cannot be collected from the said defendant Isabelle Harrison by execution.

"Affiant further says that the said defendant Ed Harrison is insolvent and has no property out of which the said sum can be collected, except the livery stable, horses, buggies, wagons and harness, and the said livery outfit sold to the said Ed Harrison by the plaintiffs as aforesaid.

"Further affiant saith not.

"R. S. Alwood.

"Subscribed in my presence and sworn to before me this 25th day of February, A. D. 1916.

"[Seal.]

"Ray McElhinney, Deputy Court Clerk."

Bond was executed by plaintiff in error, and order of attachment was issued and levied upon real and personal property described in an inventory attached to the sheriff's return of the order of attachment belonging to the defendants in error, of the aggregate value of about \$17,000.

On the 6th day of March, 1916, the said defendants, Isabelle Harrison and Ed Harrison, filed in said case a motion to dissolve the said attachment, which said motion, omitting caption, is as follows:

"Come now the defendants named in the above-entitled action, and move the court to dissolve the order of attachment issued herein and to release all of the property levied on pursuant to said order of attachment by the sheriff of Creek county, Okla., and for grounds of said motion allege and state: That the plaintiffs and the defendants, prior to the execution of the note and mortgage set forth in the petition of plaintiffs and the affidavit for attachment, made, executed, and entered into a contract in writing; that said contract, by the terms thereof, included all of the agreements and representations between the parties covering all of the transactions concerning said property and the execution of said note and mortgage sued on and described in the petition of plaintiffs; that said contract was executed in duplicate, and a duplicate copy thereof is in the possession of the plaintiffs. A true and correct copy of said contract is hereto attached.

"Defendants deny that they, or either of them, at the time, or at any time prior thereto, of the execution and delivery of said note and mortgage represented to the said plaintiffs that the real estate situate in Custer county, Okla., was of the value of \$10,000, or made any representation relative thereto, and deny that they, or either of them, made any statement or representation to the plaintiffs to the effect that the defendant Isabelle Harrison was well worth the sum of \$65,000, or any other sum, or made any statement relative to her financial responsibility, but allege that all representations and statements concerning said transaction were embodied in the said written contract above referred to, and no such statement or representations,

as aforesaid, were contained in said written contract. Defendants allege the fact to be that prior to the execution of said note and mortgage, and during the said negotiations leading up to said contract, they requested the said plaintiffs to make a trip to Custer county, Okl., that they might see and make their own appraisal of the value of said Custer county real estate, and for such purpose offered to defray the necessary expenses of the plaintiffs incurred in making such investigation.

"Defendants deny that they fraudulently contracted the said debt, evidenced by said note, and fraudulently incurred the liability and obligation for which the action in the entitled cause is maintained, but aver the fact to be that said note was executed and said mortgage given in perfect good faith and with the honest intention of paying the obligation thereby incurred when the same would be due. That it is the present intention of said defendants to make payment of said note when the same falls due.

"Defendants deny that the obligation and debt evidenced by said note of said defendants is due, but allege that the same will not become due until the 1st day of December, 1916. Defendants admit that the total amount of interest due upon said note was not paid the 1st day of December, 1915, but allege that said plaintiffs for a valuable consideration waived the payment of said interest. That as a part of the said consideration for agreement to waive said payment on said date and extend the time therefor, defendants paid, and said plaintiffs accepted, the sum of \$100 in part payment of said interest and as a consideration of said extension. That the said extension was agreed upon by the plaintiffs and defendants for such time as would enable the plaintiffs to make an investigation of the value of the property covered by said mortgage, with the view of a proposed transfer of said property to the plaintiffs and the making of a complete settlement of said debt.

"Defendants deny that they, or either of them, are insolvent, or were at the time the attachment was sued out.

"Defendants alleged that the property attached and held by the sheriff for the plaintiffs pursuant to the order of attachment issued herein and the property covered by mortgage for the security of the payment of said note far exceeds the amount of plaintiffs' claim, to wit, the sum of \$8,640, in that said property so attached and covered by mortgage is of the approximate value of \$42,000, and that by reason thereof said attachment is excessive and oppressive.

"Defendants allege that this action was prematurely brought, and that the note sued on was not due at the time of the institution of said suit.

"Defendants deny that the real estate in Custer county is of the value of \$2,000 over and above incumbrances, but allege the fact to be that the same is well worth \$4,000 over and above any incumbrances.

"Defendants allege that most of the property attached in this action, as described in the return of the sheriff herein, was, at the time of such levy and prior thereto, covered by a valid and subsisting chattel mortgage in the sum of \$2,000, with accrued interest to, and in favor of the First National Bank of Drumright, Okl. That said plaintiffs and the sheriff of Creek county, Okl., at the time of the levy on said property, had actual knowledge and constructive notice of the existence of said mortgage, that neither said plaintiffs nor the sheriff before levying said writ paid or tendered to said bank, or deposited with the county treasurer of Creek county, Okl., for the use and benefit of said bank, the amount of said debt and interest by said mortgage secured, as provided by law.

Pat Maloy and Earl Foster,

"Attorneys for Defendants.

"Know all men by these presents, that the Tri-State Livery Company, by its manager Mr.

M. J. Marvin, hereinafter known as the party of the first part, and E. D. Harrison, known as the party of the second part, have this day entered into the following contract, to wit:

"For and in consideration of the sum of \$10,000.00 the said party of the first part agrees to sell, transfer and deliver all of its horses, wagons and harness, and etc., pertaining to the Tri-State Livery Co. business, together with buildings located in Drumright and Dropright, Oklahoma, including all buildings and lots in Dropright with the exception of one heavy team of gray and black mares, together with six (6) colts and wagon and harness, and also all tools and material and etc., contained in blacksmith shop now located on said lots in Drumright, the said party of the second part agrees to pay rent on said ground for a period of one year at the rate of \$20.00 per month, and said party of the first part is to furnish and guarantee to lease the said lot now occupied by the blacksmith shop for a period of one year from the first of December at the rate of \$20.00 per month.

"The above contract is condition of the faithful performance of the said party of the second part to pay to the said party of the first part the sum of \$2,000.00 cash and the balance of \$8,000.00 with interest at 8 per cent. from date in two years from December 1. The said party indebtedness being secured by notes for like amount said notes to be secured by 200 acres of land located in Custer county, Oklahoma, and one barn located in Kiowa, Kansas, all the above property is free from all incumbrances and loans, with the exception of \$2,700.00 which is against the said farm.

"And to better secure the above indebtedness the party of the second part agrees that his mother, Mrs. Doll Harrison of Tulsa, Oklahoma, is to sign all the said notes."

On the 6th day of March, 1916, R. B. Leeka, hereinafter called intervenor, filed a motion and interplea, which said motion and interplea, omitting caption, is as follows:

"Comes now R. B. Leeka by his attorneys, Parker & Simons, and makes application to the court to be allowed to intervene in this action and to file herein his motion asking that the attachment sued out herein by the plaintiffs and levied upon certain property claimed to be the property of said defendants and which said property is described and set out in the inventory and appraisal returned and filed herein by the sheriff be vacated, set aside and held for naught and for grounds therefor said R. B. Leeka alleges and says:

"That at the time of the transaction referred to in the affidavit for attachment of the plaintiffs, wherein the said plaintiffs claim to have sold to the said defendant Ed Harrison a certain livery stable, with horses, wagons, buggies, harness, and complete livery outfit, the facts are that the said plaintiffs, for the purpose of transferring the title of said personal property, made, executed, and delivered to this intervenor, R. B. Leeka, their bill of sale of all of the property by them conveyed as the consideration for the \$10,000 referred to in said affidavit, of which \$2,000 was paid to them in cash by the said R. B. Leeka and the balance of which was evidenced by a promissory note for \$8,000 signed by the said defendants Ed Harrison and Isabelle Harrison. That the said plaintiffs, at the time of said transaction, well knew, and the fact was that the title to all of the personal property being sold by the said plaintiffs to the defendant Ed Harrison was transferred to the said R. B. Leeka for the purpose of securing him and indemnifying him against the moneys which he was advancing at that time, and had advanced for the use and benefit of said Ed Harrison and for future advances, if any, to be made by him for the said Ed Harrison, and that pursuant to such arrangement, the said R. B. Leeka borrowed

the sum of \$2,000 from the First National Bank of Drumright, Okl., and made, executed, and delivered to said bank a chattel mortgage to secure note given therefor upon all the property sold by the plaintiffs to said Ed Harrison, and which said money was borrowed and the said chattel was given to said bank with the full knowledge and consent of said plaintiffs herein, and the fact was, and is, that the said R. B. Leeka borrowed said money from the First National Bank of Drumright, giving his note therefor, and said chattel mortgage to secure the same, for the purpose of obtaining said money to be paid to the plaintiffs, and that said mortgage still remains unsatisfied as a valid and subsisting mortgage and first lien upon the property sold by the plaintiffs to the said defendant Ed Harrison, and attached in this action, and that there is still due and unpaid on said mortgage debt the sum of \$1,000 and accrued interest, and that neither the said plaintiffs, nor the sheriff who levied said attachment upon said property, or either of them, have tendered to said First National Bank of Drumright, Okl., the amount due and owing on said chattel mortgage or deposited the amount thereof with the county treasurer of Creek county for the use and benefit of said bank.

"That after said transaction and the sale of said personal property to the defendant, Ed Harrison by the plaintiffs, the said defendant Ed Harrison acquired additional horses and livery equipment of various kinds, and started two additional livery stables, one at Shamrock and one at Capper, both in Creek county, Okl., and that the property sold by the plaintiffs to the defendant Harrison at the time of such transaction was contained in two livery outfits, one at Drumright and one at Markham, both in Creek county, Okl. That at the time of the attachment sued out herein, the property seized under said order of attachment was located at the four places above named, and consisted of four separate livery stables with their equipment. That after the transaction constituting the alleged sale of the property by the plaintiffs to said defendant Ed Harrison, and after he had started said additional livery stables at Shamrock and Capper, he gave a new and additional chattel mortgage to said First National Bank of Drumright, Okl., for the purpose of securing the new note of \$1,000, representing the additional loan from said bank and which said note was signed by said R. B. Leeka, as surety. That said chattel mortgage covers the property located at Shamrock and Capper, which has been attached by the sheriff in this action, and is a valid and subsisting lien upon said property and is unpaid, and neither the plaintiffs nor the sheriff have tendered or offered to pay the First National Bank of Drumright the amount of said mortgage, nor deposited the amount of said mortgage debt with the county treasurer of Creek county for the use and benefit of the First National Bank of Drumright, Okl.

"Intervener further alleges that after the transaction of the sale of said property by the plaintiffs to the defendant Ed Harrison, and in the matter of enlarging and extending said livery business and of enabling the said defendant Ed Harrison, to increase said business, this intervener furnished him with additional equipment for said livery stables, part of which consisted of the consolidation of the equipment of another livery stable which had been owned by said R. B. Leeka, with the business of the said Ed Harrison and of property and moneys invested in said business and furnished to the said Ed Harrison by the said R. B. Leeka to the approximate amount of \$2,500 and for all of which advances and investments the said R. B. Leeka held and still holds the bill of sale given to him by said plaintiffs, investing the legal title to said property in him as security therefor.

"That in addition to the indebtedness above

set forth, owing from the said Ed Harrison to the said R. B. Leeka, the said Ed Harrison owes the said R. B. Leeka a general balance of approximately \$3,800 for other indebtedness and advancements and to secure the payment of which it was agreed between the said Ed Harrison and said R. B. Leeka that the aforesaid bill of sale should be held by the said R. B. Leeka as security for all of said indebtedness, and that the said bill of sale is in truth and in fact a mortgage in favor of the said R. B. Leeka for the purpose of securing him for all of the above and foregoing indebtedness, and that the said plaintiffs had actual and constructive knowledge of said bill of sale, and made said bill of sale themselves to said R. B. Leeka pursuant to the request of said Ed Harrison and said R. B. Leeka, for the purpose of carrying out their agreements and arrangements as aforesaid. That all of said indebtedness above set forth is still due, owing, and unpaid, and both, by reason of the mortgages above set forth to the First National Bank of Drumright, Okl., and of said bill of sale by which this intervener holds title to said property, as security for the obligations above set forth, this intervener claims, alleges, and sets forth that said property is not subject to attachment at the hands of these plaintiffs.

"Now, therefore, the said R. B. Leeka prays the court that said attachment be dissolved, set aside, and held for naught and for all proper relief."

On hearing the motion to dissolve the attachment upon the question of the commission of the fraud alleged in the affidavit for the attachment, as the grounds thereof, evidence was introduced, which evidence, by reason of the views we take of the case, we deem unnecessary to recite. The court sustained the motion to dissolve the attachment "upon the sole and only ground that the indebtedness set forth as the cause of action of the plaintiff and in the affidavit for attachment herein, was not due at the time of the commencement of this action," to which ruling of the court said plaintiff duly excepted. Thereupon the said plaintiffs filed their motion to set aside the judgment and order of the court, to grant the plaintiffs a new trial herein, which motion was overruled, excepted to and error brought to this court.

There are no assignments of error set out in the voluminous brief of the plaintiffs, and their only contentions are that the fraud alleged in the affidavit for attachment was proved by a preponderance of the evidence, and that the note sued upon, by reason of the said provision in the mortgage which is hereinbefore set out *hæc verba*, was due at the time this action was commenced. Whether or not fraud was practiced by the defendants, or either of them, in the purchase of the property, for which the note described in the petition in the instant case was given, in our opinion, and we so hold, is entirely immaterial to determine the issues involved in this cause; and, even if it be admitted that fraud was proved to have been practiced upon the plaintiffs in error by defendant in the purchase of said property, which we do not hold and as to which fact we express no opinion, it would not authorize the court to have sustained the attachment, for the note upon which this action is predicated was not due

at the time the action was commenced. Section 4812, Revised Laws 1910, provides that at and after the commencement of a civil action the plaintiff may have attachment against the property of the defendant. It is certainly true that a civil action to recover upon a promissory note cannot be legally commenced prior to the maturity of the note sued upon, and that an attachment will not lie unless the debt upon which the attachment is predicated is due, except in the case provided by section 4864, Revised Laws 1910, which said section has no field of operation in the instant case.

Therefore the pivotal question involved in this case is, was the note which is the basis of the action upon which the attachment issued due at the time suit thereon was commenced? We are unable to agree with the contention of the plaintiff that by reason of the provision in the mortgage a failure of the defendants to pay interest as provided in said note accelerated the time of the payment of the note—admitting that defendants were in default of the annual interest due—as we are of the opinion and so hold that said provision only operates to accelerate the time of payment of said note where a foreclosure of a mortgage is sought, and that default in the payment of said interest did not work the maturity of the note and antedate the time of its payment stated in the note when, as in the instant case, an action is brought upon the note alone and an attachment based upon said note is issued and levied.

It is true that the authorities are in conflict upon the vital question involved in this case—the time of maturity of the indebtedness which is the basis of this action and the attachment issued and levied—but we think, and so hold, that the weight of authority is in accord with the conclusion we have reached.

"When notes are secured by mortgage or deed of trust which provides that all becomes due and payable on default in the payment of any one of them when it becomes due or upon default in the payment of interest, such default will render all due for the purpose of foreclosing the mortgage, but according to the better opinion it does not render them due for other purposes before the time fixed by their terms, as for the purpose of a personal action or judgment on such other notes as are not due by their terms." 7 Cyc. 860.

"Where a deed of trust provides that in default in the payment of interest, the whole note shall become due for the purpose of foreclosure, the entire note becomes due for that purpose whenever the interest becomes due and remains unpaid. But, except for that purpose, the note is not affected by a deed of trust." Board of Trustees of Westminster College v. Peirsol et al., 161 Mo. 270, 61 S. W. 811.

"A promissory note is not affected as to the date of its maturity by the terms of a deed of trust securing it, declaring that it shall become due on default of payment of another note, except for purposes of enforcing the mortgage

security." Owings et al. v. McKenzie, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154.

"Where a deed of trust given to secure the payment of several notes falling due at different dates provided that if any note should remain unpaid after it fell due then all the notes should become due, the notes become due only for the purpose of distributing the fund realized by the sale under the power. Such provision will not authorize the rendition of a personal judgment against the maker [thereof] before the notes mature." William T. Mason v. Joseph S. Barnard and Eliza B. Fithian, 36 Mo. 385.

"A negotiable promissory note, due in the future, according to its terms, cannot be brought to immediate maturity through a clause in the mortgage given to secure the same, authorizing the mortgagee to declare the debt, or note due upon default in any of the provisions found in the mortgage." White v. Müller, 52 Minn. 367, 54 N. W. 736, 19 L. R. A. 673.

The conflict in authorities upon the vital question involved in this case we think has been resolved in this court in favor of the conclusion reached by us in the cases of Phillips v. Williams et ux., 33 Okl. 766, 127 Pac. 1072; Core v. Smith, 23 Okl. 909, 102 Pac. 114.

In the case of Phillips v. Williams et ux., supra, Turner, Chief Justice, quotes with approval the following syllabus in McClelland v. Bishop, 42 Ohio St. 124:

"Where there is a series of negotiable notes in the usual form, for distinct sums of money, payable at distinct and specified times in the future, with a mortgage to secure each, according to its tenor and effect, which contains a stipulation that, if default be made in the payment of any one, then each and all should fall due, and this mortgage to become absolute as to all said notes remaining unpaid at the happening of such default," held, that such stipulation relates to the remedy by foreclosure or other proceedings under the mortgage, and upon such default, the mortgage may be foreclosed for the whole debt. It is a stipulation for the advantage of the mortgagee, and of full force as to a remedy on the mortgage, but does not operate to vary or extinguish the obligations expressed on the face of the notes themselves for general purposes."

In Core v. Smith, supra, it is held:

"Where a note, payable two years after date, with interest payable semiannually, secured by mortgage providing, 'But if said sum or sums, or any part thereof, or any interest thereon, is not paid when the same is due, and if the taxes and assessments of every nature, which are or may be assessed and levied against said premises, or any part thereof, are not paid when the same are by law made due and payable, then the whole of said sum or sums and interest thereon, shall and by these presents become due and payable,' is in default for nonpayment of interest and taxes on the third Monday in January, 1898, held, that a cause of action upon such default does not accrue within the meaning of the statute of limitation * * * so as to start the running of said statute."

The judgment of the trial court in sustaining the motion to dissolve the attachment is affirmed.

PER CURIAM. Adopted in whole.

(67 Okl. 36)

COLLINS et al. v. GARVEY et al. (No. 9373.)
(Supreme Court of Oklahoma. Oct. 9, 1917.
Rehearing Denied Oct. 30, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR 544(1) — TRANSCRIPT OF RECORD—CASE-MADE.

Where the only errors alleged are in overruling the motion for a new trial, and in not rendering judgment for plaintiff in error on pleadings, this court will not consider same upon a transcript of the record and in the absence of a case-made.

Error from District Court, Woodward County; J. C. Robberts, Judge.

Action between Luke B. Collins and another and John Garvey and another. Judgment for the latter, and the former bring error. Dismissed.

Swindall & Wybrant, of Woodward, for plaintiffs in error. D. P. Marum, of Woodward, and Embry, Crockett & Johnson, of Oklahoma City, for defendants in error.

OWEN, J. The only assignments alleged in the petition in error are that the court erred in overruling the motion for a new trial, and that the court erred in not rendering judgment for plaintiff in error on the pleadings. The appeal was taken by transcript, and there has been no case-made or bill of exceptions filed. Defendant in error has filed motion to dismiss the appeal. Under the rule announced by this court in the case of *Miller v. Markley*, 152 Pac. 345, and authorities there cited, the motion must be sustained. The appeal is therefore dismissed.

(68 Okl. 31)

LONSDALE v. SCHLEGEL. (No. 8466.)
(Supreme Court of Oklahoma. Feb. 26, 1918.)

(Syllabus by the Court.)

1. EVIDENCE 222(6)—ADMISSIONS—LIABILITY ON ACCOUNT.

Evidence that, prior to the institution of the action, the defendant admitted he owed the amount sued for, is admissible in support of plaintiff's cause of action on an open account.

2. TRIAL 296(1)—INSTRUCTION—CURE OF ERROR.

While an instruction standing alone may be subjected to criticism as being indefinite and uncertain, yet if other instructions fairly submit the material issues to the jury, reversible error is not committed.

3. TRIAL 295(5)—INSTRUCTION—THEORY OF CASE.

Record examined, and held, that the instruction complained of, when considered in connection with other instructions given, fairly states the law applicable to the theory of the case upon which it was commenced and tried.

Error from Superior Court, Tulsa County; M. A. Breckinridge, Judge.

Action by O. U. Schlegel against E. F. Lonsdale. Judgment for plaintiff, and defendant brings error. Affirmed.

J. J. Henderson, of Tulsa, for plaintiff in error. Randolph, Haver & Shirk, of Tulsa, for defendant in error.

KANE, J. This was an action upon an open account, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. The petition, which was in the usual form, with a verified statement of account attached thereto, further alleged that prior to the commencement of the action the defendant acknowledged the correctness of the account sued upon, and agreed that the amount due should bear interest at the rate of 8 per cent. per annum for the purpose of inducing the plaintiff to withhold suit and extend the time of payment for a short time, and that said extension has long since expired. The answer of the defendant consisted of a general denial and allegations setting up defensive matter, to the effect that, the defendant had paid certain of the items set forth in the account attached to the petition, for which he was not allowed credit. And by way of cross-petition he alleged that the plaintiff was indebted to him in the sum of \$711.35, as per an itemized statement attached to his cross-petition. Wherefore he prayed judgment against the plaintiff in the sum of \$457.57. The reply to this amended answer and cross-petition consisted of a general denial. Upon trial to a jury there was a verdict for the plaintiff in the sum of \$966.60, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

[1, 3] The only assignment of error argued by counsel for plaintiff in error in his brief is that the trial court erred in giving instruction No. 1 to the jury. We do not think this so-called instruction was erroneous. Indeed, it does not attempt to state any applicable principle of law, but purports to be merely a résumé of plaintiff's theory of the case. It is probably true that in making this statement the court did not follow with absolute fidelity the language used by counsel for plaintiff in outlining the theory of his case in his petition; but, notwithstanding this, we do not believe that the instruction given is subject to the criticism leveled at it, that is, that it instructed the jury that plaintiff's action was an action on an account stated, and not upon an open account. The plaintiff alleged that the defendant is indebted to him on an open account, and that the defendant admitted that the account sued on was correct. In the testimony of the plaintiff, he stated that the defendant admitted the correctness of this account, and agreed to pay it with interest; while the defendant in his testimony denied that he admitted the correctness of this account. The jury may or may not have believed that the defendant admitted the account. If they believed that

he did not admit it, there was still ample evidence in the record to prove it correct, and practically no evidence tending to disprove it. If the jury did believe the defendant admitted the correctness of this account, it would only be cumulative evidence tending to corroborate the other evidence offered for the purpose of establishing the open account. Neither the allegations of the petition as to the admissions of the defendant, nor the testimony offered to establish such admissions, nor the statements relating thereto by the court in the instruction complained of, were inconsistent with the theory that the action was on an open account. The rule is well settled that:

"An account may be supported without proof as to the particular items by proving that defendant had admitted the account to be correct. In other words, evidence of a stated account is sufficient proof to support plaintiff's cause of action on an open account, and therefore it may be supported by an implied, as well as an express, admission, as by the assent which is presumed from acquiescence in an account rendered." 1 Corpus Juris, 662.

It is also well settled that, in an action to recover a balance due on an account for goods sold, evidence that prior to the institution of the suit, plaintiff and defendant had a settlement, and that defendant admitted he owed the amount sued for, is not such a variance as will defeat recovery. *Theus & Marbury v. Jipson*, 3 Willson, Civ. Cas. Ct. App. (Tex.) § 190.

[2] Moreover, in the second instruction given the court again states the issues involved and the law applicable thereto with such clearness and particularity as to remove all possibility of the jury being misled as to the issues by the instruction complained of. The rule is that:

"While an instruction standing alone may be subjected to criticism as being indefinite and uncertain, yet if other instructions fairly submit the material issues to the jury, reversible error is not committed." *Casteel v. Brooks*, 46 Okl. 190, 148 Pac. 158.

Finding no reversible error in the record, the judgment of the court below is affirmed. All the Justices concur.

THOMPSON et al. v. RIDDLE et al.
(No. 7848.)

(Supreme Court of Oklahoma. Jan. 29, 1918.)

(Syllabus by the Court.)

CHAMPERTY AND MAINTENANCE § 7(3)—CONVEYANCE OF RESTRICTED INDIAN LANDS.

While the alienation of her allotted lands was restricted, a member of the Choctaw Tribe of Indians by warranty deed attempted to convey the same; the grantee obtaining and retaining possession thereof for more than one year. Subsequently restrictions upon alienation were removed, and the allottee conveyed the lands to another. In an action by the second grantee against the first to recover possession of the premises, held, that the validity of the second conveyance was not affected by the champerty statute (section 2260, Rev. Laws 1910), as the

alienation of such restricted lands is controlled by congressional enactment.

Commissioners' Opinion, Division No. 3. Error from District Court, Grady County; Cham Jones, Judge.

Action by W. J. Thompson and another against F. E. Riddle and others. Judgment for defendants, and plaintiffs bring error. Motion to dismiss denied, and judgment reversed, with directions to enter judgment for plaintiffs.

Thompson, Patterson & Farmer and Blanton & Andrews, all of Pauls Valley, for plaintiffs in error. Harry Hammerly, of Chickasha, for defendant in error.

PRYOR, C. This action was commenced in the district court of Grady county, Okl., by the plaintiffs in error W. J. Thompson and John P. McConahey, for the recovery of a certain tract of land lying in Grady county, Okl. The cause was submitted and final judgment rendered upon an agreed statement of facts.

In so far as material to the issues presented for determination on appeal, the facts are as follows: The lands involved in this action are a part of the surplus allotment of Emma Boxler; the said Emma Boxler is a member of the Choctaw Tribe of Indians by blood; the record disclosing that she is of one-fourth Indian blood. A certificate of allotment was issued to the said Emma Boxler in the year 1903. Patent for said land was issued to her on the 30th day of July, 1908. In the month of May or June, 1906, defendant F. E. Riddle went into the possession of said lands, claiming title to the same under a deed of conveyance executed by said allottee on said date, and under and by virtue of said deed of conveyance and a written contract of sale executed by the said Emma Boxler in April, 1907, F. E. Riddle, has been in the adverse, open, notorious, and actual possession of said premises ever since. On the 25th day of February, 1911, while the defendant F. E. Riddle was so in possession of said lands, the said Emma Boxler, executed and delivered to the said F. E. Riddle a warranty deed for said lands for an express consideration of \$1,000. On the 19th day of December, 1907, the Secretary of the Interior made an order removing the restrictions upon alienation of said land, effective 30 days from the date thereof. On the 18th day of January, 1908, the said Emma Boxler, allottee, executed for a valuable consideration a warranty deed to the said lands to the plaintiffs W. J. Thompson and John P. McConahey. On the 13th of March, 1908, the allottee executed a warranty deed to the same grantees to the said lands. It is agreed that whatever right or interest claimed in said lands by the other defendants is claimed through the said F. E. Riddle, and not otherwise. Upon this state-

ment of facts there was judgment for the defendants, and plaintiffs appeal.

The first question for consideration is the motion of the defendant F. E. Riddle to dismiss this, the appeal. The ground of the motion is that the Citizens' National Bank of Chickasha is a necessary party to the appeal, and it is not made a party, either defendant or plaintiff in error. The petition of the plaintiffs states that the defendant bank claims some right, title, or interest in and to the lands adverse to plaintiffs, and asks that it be summoned in said cause to appeal and set up whatever claim it had to said land.

The defendant bank in its answer alleges that it claims an interest in said premises by virtue of a mortgage given to the bank by the defendant F. E. Riddle; that if in fact the plaintiffs are entitled to recover against the defendant F. E. Riddle and the other defendants, then defendant bank has no further defense to make to plaintiffs' suit; that it disclaims any right or interest in said premises, except such as it might hold by virtue of mortgage, which depends upon the title and right to said lands of the defendant Riddle at the time of the execution of the mortgage, and asks that this defendant be not held for any costs in the action. In effect, the answer of the bank is a disclaimer in the event the issues are determined in favor of the plaintiffs and against the defendant Riddle. The answer of the defendant bank clearly submits whatever rights it claims to abide the result of the issue between the plaintiffs and the defendant Riddle, and its claim is conditioned upon the issues being determined in favor of the defendant Riddle. The record does not disclose that the defendant bank made any active defense to said action. However, the record does disclose that A. L. Herr and Harry Hammerly accepted service of the case-made as attorneys for all of the defendants, and waived the issuance and service of summons in error in said cause, and waived appearance at the time of the settling and signing of the case-made by the trial judge. Under these circumstances, clearly the motion of the defendant F. E. Riddle to dismiss the appeal in said cause should be denied.

The only question presented for determination on appeal on the merits is whether or not the deeds made to plaintiffs are champertous and void by reason of the champerty statute. It is the contention of the defendant that as the defendant had long been in the adverse possession of the premises and the grantor of the plaintiffs had not been in possession or received the rents and profits of said premises within a year next preceding the time of the making of the deed to the plaintiffs by the allottee, Emma Boxler, that said deed to them was champertous and void, and the only person to whom the allottee could make a valid deed was the defendant F. E. Riddle, who was in possession of said

premises, and that the deed of the allottee, Emma Boxler, to the defendant F. E. Riddle, made on the 25th day of February, 1911, was valid and conveyed perfect title to the defendant F. E. Riddle.

This presents the question of whether or not the champerty statute is applicable to restricted Indian lands, and whether or not this statute is in conflict with the acts of Congress governing the alienation of restricted Indian lands. This question has been passed on by this court in two recent cases, and it is held that the champerty statute has no application in cases of this character. *Morrow Indian Orphans' Home v. McClendon*, 166 Pac. 1101, not yet officially reported; *Miller v. Grayson*, 166 Pac. 1077, not yet officially reported.

The deed and contract under which the defendant Riddle entered into and held possession of the land were absolutely void, and, under the holdings in the above cases, the allottee, upon the removal of her restrictions by the Secretary of the Interior, had a right to convey to any other person, free, unincumbered, and unhampered by reason of any transactions she might have had with the defendant F. E. Riddle during the period of restrictions.

The purpose and intent of Congress is to make all conveyances and transactions in regard to these restricted lands in contravention of the acts of Congress an absolute nullity, and to protect the rights of the Indian and his lands to the end that when the disabilities of an Indian allottee and the restrictions upon alienation are removed, he might hold said lands himself or convey them to others, free, and unincumbered and in absolute disregard of any transaction he might have consummated during the period of restriction or disability. To hold that the champerty statute applied would diminish the rights of the Indian in the exercise of control and ownership over his lands after the restrictions had been removed. He would be limited to sell only to the person in adverse possession, or to go into court and by action oust the person in adverse possession before he could sell his lands to another. This the court held in the case of *Morrow Indian Orphans' Home v. McClendon*, supra, was not incumbent upon the Indian allottee.

To hold that the champerty statute is applicable and rendered conveyances void made to others than the one in adverse possession would leave the Indian, his restrictions on alienation being removed, only the alternative of selling his lands to the person in adverse possession or bring an action to dispossess such person. This would be giving force and effect to these attempted conveyances and transactions which the law denounced as absolute nullities. The law will not permit one to gain an advantageous position over the other purchasers through a void transaction with an Indian during the existence of the

restrictions on alienation. The law so safeguards the title to lands of this character that when the restrictions are removed the Indian is free to sell to the best advantage, and all purchasers are on equal footing, and any one may purchase without incurring any culpability on his part by reason of the champerty statute.

For these reasons it must be held that the court erred in holding that the deeds to the plaintiffs were champertous, void, and inoperative to convey title to the plaintiffs.

Therefore this cause should be reversed, with directions to the trial court to enter judgment for the plaintiffs.

PER CURIAM. Adopted in whole.

(68 Okl. 30)

HARRAH v. OLDFIELD, District Judge.
(No. 9540.)

(Supreme Court of Oklahoma. Feb. 26, 1918.)

(Syllabus by the Court.)

PROHIBITION \Leftrightarrow 3(2) — ERRONEOUS APPLICATION OF LAW—REMEDY BY APPEAL.

Where an inferior court has jurisdiction of the subject-matter and the parties to an action, and an appeal will lie to the Supreme Court from the order of said inferior court, prohibition will not issue, though the trial court may make an erroneous application of the law in the determination of the issues therein.

Original petition for writ of prohibition by Jessie Harrah against Edward Dewes Oldfield, Judge of the Thirteenth Judicial District of the State of Oklahoma, sitting in Oklahoma County, Okl. Dismissed.

John H. Myers, of Oklahoma City, for plaintiff. Wilson, Tomerlin & Buckholts, of Oklahoma City, for defendant.

HARDY, J. Jessie Harrah filed in this court an original petition wherein she prayed a writ of prohibition against Hon. Edward Dewes Oldfield, one of the judges of the district court of Oklahoma county. The parties will be referred to as plaintiff and defendant, respectively.

In an action pending in the district court entitled National Trust & Investment Company, a corporation, v. Frank Harrah, certain proceedings were had in aid of execution issued against defendant, Frank Harrah, upon a nulla bona return thereof. In that proceeding the district court made an order forbidding and restraining the sale or disposition in any manner of certain tax certificates sought to be impounded and appropriated to the satisfaction of the judgment. The cause was referred to Hon. Wm. R. Taylor as referee, who took testimony and reported his findings of fact and conclusions of law to the court. The report coming on for hearing on motion to confirm and motion for additional findings of fact and exceptions thereto, same was by

the court confirmed as to certain findings of fact, wherein it was found that said tax sale certificates were the property of Frank Harrah, and that they had been fraudulently transferred to his wife, Jessie Harrah, the plaintiff. The court made additional findings to the effect that certain other tax sale certificates were the property of the defendant, Frank Harrah, but had been fraudulently placed in the name of his son, C. S. Harrah, and transferred to plaintiff. Thereupon G. E. Johnson, sheriff of Oklahoma county, was appointed receiver of said property and directed to institute replevin or any other proper proceedings to recover possession of said tax sale certificates, which cause is now pending, and one of the objects of this proceeding is to prohibit defendant as judge of the district court of Oklahoma county from entertaining jurisdiction of said replevin suit and proceeding further therein. In the proceeding in aid of execution referred to after the institution of the replevin action by the receiver informations were filed advising the court that plaintiff, Jessie Harrah, her husband, Frank Harrah, and their son, C. S. Harrah, and John H. Myers, their attorney, had contemptuously violated the injunctive orders issued by the court in that said tax sale certificates had been sold and disposed of and were in the hands of third persons unknown and beyond the jurisdiction of the court, and it is also sought to restrain defendant from entertaining jurisdiction of this contempt proceeding.

The principal ground urged for the issuance of the writ is that in the judgment confirming the report of the referee it was expressly adjudged that said tax sale certificates were the property of the defendant, Frank Harrah, and had been wrongfully transferred to plaintiff, Jessie Harrah, and that by said findings and decree it was attempted to adjudicate the rights of plaintiff in an action to which she was not a party and by a judgment from which she had no right of appeal. The test as to whether the writ of prohibition should issue is whether the court wherein the proceeding is pending which is sought to be prohibited had jurisdiction thereof, for where an inferior court has jurisdiction of the subject-matter and the parties to an action, and an appeal lies from the orders and judgment of said court therein to the Supreme Court, prohibition will not issue, though said court may make an erroneous application of the law in the determination of the issues therein. *Spradling v. Hudson*, 45 Okl. 767, 146 Pac. 588; *State v. District Court of Marshall Co.*, 46 Okl. 654, 149 Pac. 240.

It is not contended that the district court of Oklahoma county is without jurisdiction to entertain the replevin action brought by the receiver, but, as stated, the claim is that

the judgment in the original proceeding purports to adjudicate matters that should be litigated in the replevin suit. This objection does not go to the jurisdiction of the court. We will not at this time undertake to pass upon the effect of the judgment upon the rights of plaintiff who alleges that she was not a party thereto, but will leave this question to be determined by the trial court when same is properly presented in the replevin action.

No contention is made that the district court is not possessed of the power and jurisdiction to hear and determine the contempt proceeding. The contention of plaintiff in reference to this branch of the case is that the order which is alleged to have been violated was issued without requiring a bond to be given, and was against the plaintiff who was not a party to that action. If this contention be true it may be urged as a defense in the trial court and should be called to the attention of that court in order that he may have an opportunity to investigate the truth of the allegations.

It is clear that the district court of Oklahoma county has jurisdiction both of the replevin action and of the contempt proceedings, and may lawfully hear and determine all the questions that are here urged, and the bare fear that the court may misapply the law in the determination of such questions will not authorize us to interfere, for the writ of prohibition cannot be made a substitute for appeal or writ of error.

The petition is therefore dismissed.

HOLMBOE v. NEALE. (No. 8272.)
(Supreme Court of Oklahoma. Feb. 26, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 1067—TRIAL \S 203(1) — INSTRUCTIONS — ISSUES—REVERSIBLE ERROR.

It is the duty of the court, when duly requested, to submit by instructions to the jury any material issue, theory, or defense which the evidence tends to support, and a failure to do so is reversible error when, in the opinion of the court, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice.

2. TRIAL \S 203(1)—SUBMISSION OF ISSUES—CONTRARY EVIDENCE.

The right to have the same submitted to the jury is not affected by the fact that there is evidence to the contrary.

3. MASTER AND SERVANT \S 300 — INJURY TO THIRD PERSON—LIABILITY.

Where the injury complained of is the result solely of a negligent act of a third person who does not stand in such relation to the defendant as to render the doctrine of respondeat superior applicable, no liability can attach to the defendant.

Commissioners' Opinion, Division No. 3. Error from District Court, Cleveland County; F. B. Swank, Judge.

Action by Mrs. E. J. Neale against J. A.

Holmboe, doing business as the Holmboe Company. Judgment for plaintiff, and defendant brings error. Reversed, and cause remanded for new trial.

Vaught & Brewer and John H. Halley, all of Oklahoma City, and Ralph C. Hardie, of Norman, for plaintiff in error. W. L. Eagleton and Roy V. Lewis, both of Norman, for defendant in error.

HOOKEE, C. The construction company contracted with the state of Oklahoma to erect a power plant at the university located at Norman, Okla., and on the day of the alleged injury involved here it was engaged in laying pipe lines from the power plant to the buildings located upon the campus of the university, and in order to do so it was necessary for it to excavate ditches over and across the campus of the university and the streets and sidewalk used in connection therewith. The negligence complained of here is that it had excavated a ditch across the street and sidewalk which had long and continuously been used by the general public, and that it had negligently failed to properly safeguard the same by means of barriers and lights to inform the general public, accustomed to use said street, that said ditch had been excavated, and thereby prevent injury to those using the same. And it is alleged that the plaintiff, on the night in question, in returning from one of the buildings on the campus where her duty called her to her home along the usual, customary, and natural route, passed down the sidewalk which she was accustomed to use, and that she encountered an obstruction across the sidewalk, and in attempting to pass the same, without fault on her part and without knowledge or warning of the danger, fell into the ditch which the construction company had excavated across said street and sidewalk, and was thereby injured, for which she seeks to recover damages here.

The answer consisted of a general denial, a plea of contributory negligence, and for a third and separate defense it is asserted by the construction company that it had left the street and the sidewalk in a safe condition, but that the owner of the property, without the knowledge or consent of the construction company, after it had placed the street and sidewalk in a safe condition for use by pedestrians accustomed to use the same, had altered and changed it, and if the same were rendered unsafe, that it was due to the act of the owner over which the construction company had no control.

The facts here disclose that the plaintiff below on the night in question was pursuing the usual route of travel from the engineering building located on the campus of the university east of the extension of Asp avenue to her home, that she crossed the extension of Asp avenue immediately west of the

engineering building to the west side of Asp avenue extended, and then started north upon the sidewalk located upon the west side of Asp avenue extended in the direction of her home, and that, when she had almost approached the boulevard running east and west through the campus, she encountered an obstruction across the sidewalk, and in endeavoring to go around this obstruction she fell into an open ditch and suffered the injuries complained of here. It is contended by her that there was no light placed at that point which would enable pedestrians to find their way, and that a plank placed across this ditch, by means of which pedestrians were intended to cross the same, was insufficient to safely protect the lives and limbs of those using it therefor.

The evidence on behalf of the construction company would tend to establish that it did not place the obstructions upon said sidewalk of which the plaintiff below complains, but left this sidewalk entirely open with guard rails upon the east and west side thereof, and with lights upon the north and south end of said guard rails, so that pedestrians using said sidewalk could not fall in the ditch, and could see that excavations had been made and pass over the same in safety, but that after these guard rails had been erected upon the east and west side of the sidewalk over said ditch, and the lights had been placed at the north and south end thereof, the superintendent of the university grounds had, without its knowledge or consent, torn up the sidewalk for a distance of 15 or 20 feet over and upon either side of said ditch, and made the same anew, and inasmuch as the same was fresh, the aforesaid superintendent placed barriers across the sidewalk so that the same could not be used until it had dried, and that the superintendent fixed a passageway at the side of the sidewalk by means of planks across the ditch, and had left certain lights to properly advise the public of this condition.

A trial was had, and a judgment rendered against the company, from which it has appealed here, only assigning as error the refusal of the court to submit to the jury its theory of the defense contended for by it; that is, that if the condition of this sidewalk was unsafe to the traveling public, and had been rendered so by the act of the owner over which the construction company had no control, it could not be held responsible therefor, and that it had upon this particular occasion placed this sidewalk in a safe condition to be used by the public, and had properly guarded the same by means of guard rails and lights so that injury could not come to those using the sidewalk, and that the superintendent of the university grounds, without its knowledge or consent, had thereafter altered this condition by tearing up the sidewalk, building new sidewalk, and erecting obstructions across the same

upon the north and south side of said ditch in order to avoid the use thereof by the public. And it is further asserted by the construction company that, if this sidewalk was rendered unsafe, the same was due to the act of the owner or the superintendent of the university grounds, and not to any act of its own.

[1-3] An examination of the evidence here is clearly sufficient to justify the submission of that question to the jury; for, if it be true, the same constitutes a perfect defense to the plaintiff's cause of action.

In 1 Thompson on Negligence, 590, it is said:

"If the negligence of the proprietor, and not that of the contractor, is the proximate cause of the injury, then the proprietor will be liable to the person injured."

In 29 Cyc. 477, the rule is laid down as follows:

"Where the injury is the result solely of the negligent act of a third person who does not stand in such a relation to defendant as to render the doctrine of respondent superior applicable, no liability attaches to the defendant. The fact that the negligent act which caused the injury was done on a person's land or property will not render him liable where he had no control over the person committing such act, and the act was not committed on his account, nor where the third person whose negligence caused the injury assumes control of the owner's property without authority."

This court in *Menten v. Richards et al.*, 153 Pac. 1177, said:

"Each party to a controversy is entitled to have his theory of the case presented to the jury by proper instruction, provided the same has been properly pleaded and he has introduced evidence tending to support such theory."

And in *Oklahoma Ry. Co. v. Christenson*, 47 Okl. 132, 148 Pac. 94, this court said:

"The instructions of the court should be based upon the issues as made by the pleadings and the evidence, and should present the respective theories of the parties in accordance with the testimony offered in support thereof."

And in *A. T. & S. F. Ry. Co. v. Jamison*, 149 Pac. 195, this court said:

"In a case tried to a jury, where the evidence tends to support the same, it is the duty of the court to submit by appropriate instructions the theories of defense; and failure so to do, at the request of the defendant, constitutes prejudicial error."

And in *Spurrier Lbr. Co. v. Dodson*, 30 Okl. 412, 120 Pac. 934, this court said:

"It is the duty of the court to submit to the jury, and give instructions thereon, any issue, theory, or defense which the evidence tends to support. This right is not affected by the fact that there is countervailing testimony."

The plaintiff in error requested the court to instruct the jury in accordance with the theory of its defense as stated above. The court refused to do so.

A careful examination of the pleadings and evidence conclusively leads one to the conclusion that it was prejudicial error for the court to refuse to give this instruction. For this the judgment of the lower court is

reversed, and this cause remanded for a new trial.

PER CURIAM. Adopted in whole.

(68 Okl. 32)

WATSON v. STONE et al. (No. 8477.)
(Supreme Court of Oklahoma. Feb. 26, 1918.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE §35—ANTENUPTIAL CONTRACT—ACTION TO QUIET TITLE.

The plaintiff and his deceased wife before their marriage entered into an antenuptial contract to the effect that neither by reason of their marriage should claim or acquire any right, title, or interest in or to the property then owned by the other, but that any real estate acquired after their marriage should be owned by them in common. After the death of the wife, the defendants herein, her children by a former marriage, claimed an interest in certain real estate owned by the plaintiff, on the ground that it was acquired after marriage, and also claimed that it was purchased with funds jointly owned by their mother and the plaintiff. The plaintiff, in a suit brought by himself to quiet title, testified that the real estate was purchased after his marriage to the defendant's mother, but that it was purchased with the proceeds of the sale of property owned by him before his marriage. The court sustained a demurrer to plaintiff's evidence. *Held*, this was error.

2. CONTRACTS §147(1)—CONSTRUCTION—INTENT OF PARTIES.

A contract must be given a fair and reasonable interpretation, and such effect as was reasonably contemplated by the parties at the time they entered into the contract.

Error from District Court, Woods County; W. C. Crow, Judge.

Action by R. M. Watson against J. N. Stone and others to quiet title. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

L. T. Wilson, H. A. Noah, and J. P. Grove, all of Alva, for plaintiff in error. E. W. Snoddy, of Alva, for defendants in error.

BRETT, J. This action was commenced in the district court of Woods county by the plaintiff in error, R. M. Watson, as plaintiff, against the defendants in error as defendants, to quiet title to the tract of land described in the petition.

It appears that the defendants are the stepchildren of the plaintiff, R. M. Watson; that in 1897 the plaintiff married Mrs. Missouri A. Stone, the mother of the defendants (now deceased), who was then a widow possessing certain property. The plaintiff also owned certain property, and before their marriage the said Mrs. Stone and the plaintiff entered into an antenuptial contract to the effect that neither should claim or acquire any right, title, or interest in or to the property owned by the other at the time of their marriage, but that any real estate acquired during coverture should be held in common. After the death of their mother, the defendants had this contract recorded. The plain-

tiff in his petition sets out the antenuptial contract, but pleads that the real estate involved in this controversy, while purchased after his marriage to his deceased wife, was purchased with the proceeds of the sale of real estate owned by him at the time of his marriage. The defendants answered, and by cross-petition asked for an undivided one-half interest in said real estate, alleging that the said real estate was acquired after the marriage of plaintiff and their mother, and also alleged that it was purchased with the joint funds of the plaintiff and the mother of the defendants.

The plaintiff testified in his own behalf at the trial that after his marriage to the mother of the defendants, he took his wife and her seven children, the defendants herein, to his homestead, where they resided for some time; that finally he sold this farm for \$1,600, and purchased another farm for \$1,800, upon which the family resided until plaintiff sold that for \$4,500, and he immediately purchased another farm, paying \$6,000 for that, upon which he and the family resided until he sold that for \$9,500, and immediately purchased the farm in controversy, paying \$8,200 for it. The plaintiff further testified that none of the wife's money or property went into this farm; but that when he sold his first homestead for \$1,600, and purchased another for \$1,800, that he paid the difference of \$200 in live stock and certain personal property that he had acquired and owned prior to his marriage to the mother of the defendants; that when he sold this farm for \$4,500, and purchased another for \$6,000, that he paid the difference out of the proceeds of the sale of certain real estate that he owned in Colorado at and before the time of his marriage to the mother of the defendants. This is substantially the evidence of the plaintiff, Watson. At the close of this evidence the defendants demurred to the evidence, and the demurrer was sustained by the court, and judgment entered awarding the defendants a one-half undivided interest in and to the farm in controversy.

[1, 2] The plaintiff, Watson, has appealed from this judgment and assigns a number of errors, but we think it is sufficient to say that the court erred in sustaining the demurrer to the plaintiff's evidence, for under the antenuptial contract the wife was not entitled to any part of the property that the plaintiff owned at the time of his marriage to her, and his testimony is that nothing but the proceeds of his separate property went into the farm, which is the subject of this litigation; and the mere fact that this farm was purchased after their marriage would not within itself give the wife any interest in it, for the contract was that only real estate acquired during coverture should be held in common, and this contract must be given a reasonable and fair interpretation and such

effect as was reasonably contemplated by the parties at the time it was entered into, and they certainly never intended that the plaintiff should forfeit all the benefits under this antenuptial contract if he should sell his homestead, and reinvested the proceeds of that sale in another farm. Such was never intended to be the effect of that clause in the contract, which provides that all real estate acquired during coverture should be held in common. But that clause simply means that if, by their joint efforts, they should be able to acquire additional real estate holdings, that they should share such holdings equally. But under the testimony of the plaintiff, this tract of land in controversy was not an additional holding, but was purchased directly with the proceeds of the farm he owned at the time he married the deceased, enhanced by advances in the price of real estate.

Under this state of the record, it was error for the court to sustain a demurrer to the evidence. The judgment is reversed, and the cause remanded for a new trial. All the Justices concur.

SCHAFER v. MIDLAND HOTEL CO. et al.
(No. 8338.)

(Supreme Court of Oklahoma. Jan. 8, 1918.
Rehearing Denied March 19, 1918.)

(Syllabus by the Court.)

JUDGMENT ~~190~~(3) — NEW TRIAL ~~68~~ —
JUDGMENT NOTWITHSTANDING VERDICT —
EVIDENCE.

Where there is no legal evidence reasonably tending to support the verdict of the jury, the same should be set aside. The evidence in this case examined, and held, that there is no legal evidence reasonably tending to support the judgment for the defendant, and that the court erred in overruling the motion of the plaintiff for judgment, notwithstanding the verdict.

Commissioners' Opinion, Division No. 3.
Error from District Court, Comanche County; Cham Jones, Judge.

Action by Henry Schafer against the Midland Hotel Company and G. H. Block. Judgment for defendants, and plaintiff brings error. Reversed, with directions to enter judgment for plaintiff.

Stuart, Cruce & Cruce, of Oklahoma City, and R. B. Forrest, of El Reno, for plaintiff in error. Johnson & Stevens and B. M. Parmenter, all of Lawton, for defendants in error.

PRYOR, C. This is an action commenced in the district court of Comanche county by Henry Schafer against the Midland Hotel Company, a corporation, and G. H. Block for the recovery on a note in the sum of \$5,000, and the recovery of \$2,228 as money advanced to the Midland Hotel Company by the plaintiff, Henry Schafer. The parties will be referred to as they appeared in the trial court.

The plaintiff alleges in his petition that on the 26th day of November, 1909, the Mid-

land Hotel Company made and executed its note for the sum of \$5,000, payable to the Third National Bank of St. Louis, and indorsed by the plaintiff, Henry Schafer, and the defendant Garret H. Block; that said note was made for the purpose of securing a loan of said amount for the use and benefit of the hotel company, and was used for the purpose of completing the Midland Hotel, which was owned by the said corporation; that the note was payable on the 25th day of January, 1910; that said note, at its maturity, was held by the City National Bank of Lawton; that when said note became due, the corporation did not have the funds with which to pay said note, and the plaintiff, as indorser of said note, paid the same; thereby the plaintiff became holder and owner of said note, and by reason thereof the said defendants are due to the plaintiff \$5,000, the principal sum and interest thereon from the 1st day of February, 1910.

For a second cause of action the plaintiff alleges that on the 31st day of December, 1910, he advanced \$500 in cash to the said hotel company, which is due and unpaid, and owing to him by said hotel company and said Garret H. Block, and thereafter on the 3d day of January, 1910, the plaintiff advanced the said hotel company \$1,728, which is due and unpaid and owing to the plaintiff by the defendant hotel company and Garret H. Block; that on the 13th day of April, 1910, the above amounts, aggregating \$7,228, with interest, were due and owing to the plaintiff from the defendants, and on that date the plaintiff sold his interest in the said hotel to the defendant G. H. Block, and on that date the plaintiff and defendant Block entered into an agreement whereby Block agreed to pay all outstanding obligations against the hotel company, and hold this plaintiff harmless by reason thereof.

The answer of the defendants in effect is: They admit the execution of the note by the Midland Hotel Company and the payment of the same by the plaintiff; they also admit that the plaintiff advanced in money the sum of \$2,228 to the Midland Hotel Company for its use and benefit, but allege in this connection that prior thereto the plaintiff, Henry Schafer, and Block, organized said corporation with a capital stock of \$100,000, and issued to the plaintiff and defendant Block 250 shares each at a par value of \$100; that there was an agreement between the plaintiff, Schafer, and the defendant Block that each should contribute an equal amount to the completion and furnishing of the hotel; that the plaintiff, Schafer, had contributed about \$18,000, of which the \$7,228 involved in this controversy was a part, and alleges that Block had contributed \$24,000 towards his pro rata share, and alleges that the \$5,000 note was given for the purpose to secure money for the plaintiff which was to be con-

tributed by him to the hotel company, and that the hotel company and the defendant Block were indorsers on said note for the said plaintiff, Schafer; and denies any liability of the hotel company or the defendant Block on said note, or on the amounts claimed to have been advanced by said plaintiff to the said defendant company. The plaintiff in reply denies all new matter set up by the defendants in their answer. On these issues there was a trial to a jury and a verdict in favor of the defendants. The plaintiff filed a motion for judgment non obstante veredicto, which was by the court overruled. Judgment was rendered upon the verdict, and the plaintiff appeals.

The only question raised and presented to the trial court was a challenge to the sufficiency of the evidence to sustain the verdict of the jury. This requires an examination of the record by this court to determine whether or not there is any legal evidence to support the verdict.

The real issues of fact in this case are whether or not there was an agreement between the plaintiff and the defendant Block that each should contribute an equal amount to the completion and furnishing of the hotel, and whether or not the amount sued for, the \$5,000 note, and the \$2,228 was contributed by the plaintiff as his pro rata share. There is no dispute, and it is admitted by the defendants that the plaintiff did advance to the hotel the said amounts. The plaintiff testifies that the \$5,000 was borrowed by the corporation, and the defendant Block and the plaintiff were indorsers on the note. He denies in his testimony any agreement or any understanding whereby such funds should be considered as his individual contribution to the hotel company. The evidence relied upon by the defendants to establish their defense is the testimony of the defendant Block.

On the main issue, the defendant Block testified in part as follows in regard to the execution of the note:

"Q. Did you and Schafer have any conversation about the matter, and if so, what was said? A. Schafer came down, and I told him we would have to have some money, and I told him I thought we could get it at the City National Bank, and we went to Mr. English, and he let us have the \$5,000. We indorsed it as the Midland Hotel Company, and in person. Q. When you got the money, whose money was it? A. It went to the hotel company."

As to payment:

"Q. Schafer did not pay out any money for the hotel company, did he? A. He paid out \$5,000. He paid the bank. Q. Is that this \$5,000 note? A. Yes, sir. Q. You mean to say that he went and paid off the \$5,000 note, and that was given by the hotel company? A. That was given by the hotel company. Q. And he paid that off? A. Yes, sir. Q. That is the note that is in controversy here? A. Yes, sir. Q. You asked him to go and do it, or you told him the bank wanted the money? A. Yes, sir; I told him the bank wanted the money. Q. You don't deny that that \$1,728 that Schafer turned over to you in cash which you put in

there was a charge and a proper charge against the Midland Hotel Company? A. From his standpoint it would be so; he kept track of what he put in. Q. You don't deny that that is a proper charge against the hotel company? A. Of course, it is a proper charge. Q. And so is the \$5,000? A. Yes, sir. Q. The \$500 item would be? A. Yes, sir; but I never saw anything about the note after he had taken it. I found out from the bank that he paid it. Q. The hotel owed it? A. Yes, sir. Q. If these items were properly chargeable against the Midland Hotel Company, why does not the Midland Hotel Company pay these amounts to Schafer? A. Because when I made the contract with him I told him 'for all his interest in the hotel what I would give him.' Q. What did you understand? A. I told him I would give \$18,000 at first for all his interest. This money had been paid by him, and of course he had that much interest in the hotel, and I told him what I would give for his interest, and he hemmed and hawed around, and finally took \$18,500 for his interest in the hotel. Q. You had that contract written down in black and white? A. Yes, sir. Q. And now you will not pay him the debt because you understood he was to turn over the note to you in connection with the payment of that stock? A. I made that offer for all his interest."

In this connection it is appropriate to observe that this case was in this court once before; and the original answer admitted the execution of the note by the Midland Hotel Company, and the company received and used the \$5,000; also admitted that Schafer had advanced to the hotel company, in cash, the \$2,228 involved here.

The contract between the plaintiff and the defendant Block, entered into at the time that Schafer sold his shares to Block, contained the following provision:

"And the said party of the second part [Block] hereby agrees that he will pay off and discharge all obligations against the Midland Hotel Company, and hold and save harmless the said party of the first part [Schafer] from any and all obligations which he may have entered into jointly with the party of the second part or in his own name for the use and benefit of the Midland Hotel Company."

The defense in this action then was:

"That as a part of the consideration of said transaction it was mutually agreed that the said plaintiff should and would release the said defendant Garret H. Block and said corporation from any and all obligations against them or either of them on account of any advances made by said plaintiff to said hotel company then claimed by said plaintiff to the amount of \$7,200. * * * That by mutual mistake of the parties and the scrivener who wrote the contract, said provisions were omitted from the contract."

And it was asked that the contract be reformed by the court to incorporate the above provision. This court held on appeal that the evidence of the defendant was not sufficient to justify a reformation of the contract incorporating said provision as having been omitted by mutual mistake.

It will be readily seen that the testimony of the defendant, as above set out, tends rather to support the plaintiff's claim than the defendants', or tends rather to establish the contention in his former answer that the plaintiff had agreed to release the defendant

Block and the corporation from any liability by reason of the amounts claimed than to establish his contention under his present answer that there was an agreement that this amount should and was contributed as the pro rata share of the plaintiff to the hotel company. The defendant Block further testifies that the hotel cost \$96,000, but when he attempts to disclose the actual expenditure, he cannot account for but \$46,000 that was actually put into the hotel; \$31,000 for the cost of completing the building, and about \$15,000 for furniture. When called upon to explain the \$50,000 difference between \$46,000 and \$96,000, he says that he and Schafer always held the original property as purchased by the Midland Hotel Company at a value of \$50,000 in case they should want to sell, and that the only way to make the hotel cost \$96,000 is to add this \$50,000 to the \$46,000. In a statement as to the cost and indebtedness of the hotel made by Block to Schafer, Block makes a statement that the hotel company owed him \$6,310.94; says that this advancement to the hotel was in material and in cash both; that this included all that the hotel owed him. In another statement and in his answer he claims that he had advanced \$24,226, but is unable to explain where, when, or in any manner whatever how he put this money into the hotel, having accounted practically for all of the \$46,000, which he says the hotel and furnishings thereof actually cost, to have been received from other sources. He had been served with notice by the plaintiff to produce all the books, he having had the books in charge, showing all of the record of the indebtedness of the hotel, including the advancements that he claimed to have made to the hotel. He produced the books of the hotel, and when questioned about the advancements he claimed to have made, the only response he was able to make was that the books would show, and when he would be unable to show by the books that he had made the advancements he would evade the questions by saying that his lumber yard books would show what he had advanced.

Taking the testimony of the defendant alone, and giving it all of the reasonable inferences and deductions that may be drawn from it, it is so inconsistent and contradictory within itself that it totally fails to establish the defense of the defendants that there was an agreement between Block and Schafer that they would contribute equal amounts necessary for the completion of the hotel, or that there was an agreement by Schafer that he would release Block and the hotel company, at the time Schafer sold to Block, from any liability by reason of any advancements or indebtedness which Schafer might claim against the hotel company, or against Block, or to show that

Block had contributed an appreciable amount to the completion of the hotel. And, further, giving the testimony of the defendant its reasonable force and effect, it is more favorable to the plaintiff than to the defendants, and tends more reasonably to support the plaintiff's claim than it does the defendants'. The evidence as a whole is not such that reasonable minds may arrive at a different conclusion. Taking it as a whole, there is but one conclusion to be reached, and that conclusion must be in favor of the plaintiff.

When the evidence of a party is so unsatisfactory, inconsistent, and contradictory that it has within itself no substantial worth, and in particular when it is more favorable to the other party than to the party in whose behalf it is introduced, the court or the jury is not justified in rendering judgment on such evidence, and the court or jury should refuse to follow it. *National Union v. Kelley*, 42 Okl. 98, 140 Pac. 1157. Therefore the trial judge should have sustained the motion of the plaintiff for judgment non obstante veredicto.

This cause should be reversed, with directions to the trial court to enter judgment for the plaintiff.

PER CURIAM. Adopted in whole.

(14 Okl. Cr. 367)

Ex parte SHIRLEY et al. (No. A-3280.)

(Criminal Court of Appeals of Oklahoma.
March 16, 1918.)

(Syllabus by Editorial Staff.)

HABEAS CORPUS ~~110~~—ADMISSION TO BAIL.

On habeas corpus to be let to bail, where it appeared that applicants were held on a charge of having been present at a quarrel in which deceased had been killed by another who had been admitted to bail in the sum of \$5,000, applicants would be granted bail in the same sum, and, on the giving and approval of a proper bond, discharged.

Application by Callis Shirley and Sam Stevenson for a writ of habeas corpus to be let to bail. Application granted, and, on giving and approval of proper bond, petitioners to be discharged.

Stanley & Osborn, of Pauls Valley, for petitioners. R. McMillan, Asst. Atty. Gen., opposed.

PER CURIAM. This is an application by Callis Shirley and Sam Stevenson for a writ of habeas corpus to be let to bail.

An examination of the record discloses the fact that Ollie Prince was killed on the 9th day of February, 1918, in the vicinity of Katie, in Garvin county. A number of negroes were in the party. There had been a gambling game and whisky drinking carousal in effect for considerable time on the day of the homicide. A brother-in-law of the deceased during the time the carousal was in

progress became engaged in a controversy with a negro named Stevenson. A fistic encounter ensued wherein both parties were knocked down. Immediately following this difficulty Simp Stevenson shot the deceased, Prince. A large number of shots were fired by various persons. Simp Stevenson admitted that he did the killing; that the others took part in the fight after he had fired the fatal shot.

The district court of Garvin county granted bail to Simp Stevenson and two others, but denied bail to these petitioners.

Without expressing any opinions upon the weight of the evidence or the culpability of the various parties accused of this homicide, it is our judgment that the petitioners herein should be granted bail.

In view of the showing made before this court and the fact that the district court of Garvin county fixed bail for Simp Stevenson and others in the sum of \$5,000, it is the order of this court that the petitioners herein be granted bail in like sums, formal recognizance to be entered into as provided by law and all conditions imposed thereby, the bond to be approved by the court clerk of Garvin county. When proper bail bond is given and approved by the court clerk of said county, the petitioners shall be discharged and allowed their freedom on the bail so furnished.

(14 Okl. Cr. 383)

HESTER v. STATE. (No. A-2837.)

(Criminal Court of Appeals of Oklahoma.
March 19, 1918.)

(Syllabus by the Court.)

CRIMINAL LAW §1159(2) — QUESTION OF FACT—REVIEW.

The determination of questions of fact are exclusively for the jury, and when the record discloses ample testimony to support the conclusion reached, the judgment will not be reversed in the absence of substantial error of law.

Appeal from County Court, Pottawatomie County; Hal Johnson, Judge.

John Hester was convicted of violating the prohibitory liquor law, and he appeals. Affirmed.

Mark Goode, of Shawnee, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, John Hester, was convicted in the county court of Pottawatomie county at the April, 1916, term on a charge of having the unlawful possession of intoxicating liquor with intent to sell the same, and his punishment fixed at a fine of \$50 and imprisonment in the county jail of Pottawatomie county for a period of 30 days.

The only propositions raised by the plaintiff in error and discussed in the brief involves questions which were exclusively for

the determination of the jury. These questions were determined adversely to the wishes and contentions of the plaintiff in error, but in our judgment, properly determined.

There are no errors sufficient to warrant a reversal of the judgment. It is therefore affirmed.

DOYLE, P. J., and MATSON, J., concur.

(14 Okl. Cr. 384)

HELMS v. STATE. (No. A-2843.)

(Criminal Court of Appeals of Oklahoma.
March 19, 1918.)

(Syllabus by the Court.)

1. CRIMINAL LAW §59(3)—"PRINCIPAL."

All persons concerned in the commission of crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals. Section 2104, Rev. Laws 1910.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Principal.]

2. INTOXICATING LIQUORS §236(11)—UNLAWFUL SALE—SUFFICIENCY OF EVIDENCE.

In a prosecution for selling intoxicating liquors, the evidence considered, and held sufficient to sustain the verdict, and that no material error was committed.

(Additional Syllabus by Editorial Staff.)

3. CRIMINAL LAW §1100 — CASE-MADE — COPY OF JUDGMENT.

Where the record of an informal judgment rendered in pursuance of the verdict shows when judgment was rendered, against whom, for what offense, and that sentence was pronounced in accordance with the verdict, it is sufficient against the objection that the case-made does not contain a copy of the judgment.

Appeal from County Court, Ottawa County; Vern E. Thompson, Judge.

George Helms was convicted of selling intoxicating liquors, and he appeals. Affirmed.

Mason & Church, of Miami, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. This appeal is prosecuted from a conviction had in the county court of Ottawa county on the 14th day of July, 1916, in which the defendant was found guilty of selling intoxicating liquors, to wit, beer and whisky, to W. A. Wagoner, Sam Sullivan, and Ed. Ballard, and his punishment assessed by a fine of \$300, and imprisonment in the county jail for a period of 60 days.

The testimony of Ed. Ballard and Sam Sullivan was to the effect that they bought beer in the defendant's joint in Cardin, said county; that a man known as "Cedar Red Bland" sold the beer, but the defendant was present at the time; that the defendant helped to ice the beer. Frank Staton testified that he owns the land that the building was on, and had rented the ground and received the rent from the defendant. The state also

introduced a certified copy of the United States internal revenue record, showing the payment of the special tax required from retail liquor dealers, issued November 8, 1915, to G. Helms; place, lots 1 and 2, block 1, Cardin, Okl. There was no testimony offered on the part of the defendant.

[1, 2] Considering the various errors assigned, we find that the information is sufficient. As to the sufficiency of the evidence to sustain the verdict, all persons who take part, participate, or engage in an offense are guilty as principals. The evidence showing that the party selling the intoxicating liquor was an employé of the defendant is uncontradicted.

[3] After a careful examination of the record, we are clearly of the opinion that the appeal is destitute of merit. The Attorney General has filed a motion to dismiss the appeal on the ground that the case-made does not contain a copy of the judgment rendered.

The record shows an informal judgment rendered in pursuance of the verdict. It shows that judgment was rendered by the court, when rendered, against whom, for what offense, and that sentence was pronounced in accordance with the verdict. This is all that is necessary. *Ex parte* Earl Howard, 2 Okl. Cr. 563, 103 Pac. 663.

The record does not disclose any reversible error. The judgment of conviction is therefore affirmed.

ARMSTRONG and MATSON, JJ., concur.

(14 Okl. Cr. 348)

SMITH v. STATE. (No. A-2235.)

(Criminal Court of Appeals of Oklahoma.
March 14, 1918.)

(Syllabus by the Court.)

1. CRIMINAL LAW §121, 1150—DISCRETION OF TRIAL COURT—CHANGE OF VENUE—REVIEW.

A petition for a change of venue is addressed to the sound discretion of the trial court, and, unless it clearly appears that there is an abuse of such discretion, this court will not reverse the judgment for the failure of the trial court to grant a change of venue.

2. CRIMINAL LAW §603(11)—APPLICATION FOR CONTINUANCE—ABSENCE OF WITNESS.

An application for continuance because of the absence of a witness should show due diligence.

3. CRIMINAL LAW §369(1)—EVIDENCE—OTHER OFFENSES.

Evidence of an offense other than the one charged is admissible only when it tends to prove the offense charged. To be competent and admissible, it must have some logical connection with the offense charged.

4. WITNESSES §305(2) — CONSTITUTIONAL PRIVILEGE — WAIVER—CROSS-EXAMINATION—IMPEACHMENT.

A defendant, by availing himself of the privilege of testifying in his own behalf, thus waives his constitutional privilege and has all the rights and is subject to the same rules of cross-examination and impeachment as other witnesses.

5. WITNESSES §359 — CREDIBILITY — PRIOR CONVICTION—STATUTE.

Section 5048, Rev. Laws, permits the proof of a prior conviction of a defendant in a criminal case for the purpose of affecting his credibility. This proof may be made either by the record or by the cross-examination of the defendant, and cross-examination as to other separate and distinct transactions and offenses is not permissible, unless such testimony tends to prove the commission of the offense charged, and should in general be limited to matters pertinent to the issue, or such as may be proved by other witnesses.

6. CRIMINAL LAW §785(1) — TRIAL — INSTRUCTION—IMPEACHMENT OF WITNESSES.

Where a conviction depends upon the testimony of an accomplice who is a confessed perjurer and a convict, and another witness was a convict, and several of the witnesses whose testimony was relied upon to corroborate the accomplice were confessed perjurers and who were impeached by testimony showing that their general reputation for truth and veracity was bad, it was error to refuse to instruct the jury on the law applicable to the impeachment of witnesses.

Appeal from District Court, Washita County; G. A. Brown, Judge.

James H. Smith was convicted of the theft of two mules, and he appeals. Reversed.

On July 11, 1913, the county attorney of Washita county filed an information in the district court of said county charging James Smith with the theft of two mules, the personal property of the Colony Mercantile Company, and alleging that said crime was committed about the 30th of November, 1910. Upon his trial he was found guilty and his punishment fixed at five years' imprisonment in the penitentiary. The evidence shows that the pair of mules were stolen from the Colony Mercantile Company on the night of the 30th of November, 1910; that the mules were found west of Mayfield, Kan., and the harness taken with the mules found at Alva, and also a buggy taken from Weatherford with the mules was found at Alva.

The evidence connecting and tending to connect the defendant Smith, briefly stated, was as follows:

John Samples testified: That at the time in question he lived in Weatherford, and had been in the livery business there with the defendant, but is now in the penitentiary at McAlester, serving a ten-year term for stealing the said mules. That on the night of November 30, 1910, he went south from Weatherford about three-quarters of a mile and waited until Smith came, and they went on to Colony; each riding a bay horse. They reached Colony about 8 o'clock. That they met two rigs on the way, one south of Weatherford at the jog, and the other about four miles north of Colony. That they first took the harness, and afterwards Smith led the mules out while witness held their horses. They then went west two or three miles and met some one driving an automobile, then went on to Weatherford, and witness stopped at the creamery while Smith fetched an old buggy

that had belonged to Pete Cates, and witness hitched the mules to it. That witness drove the mules to Alva and sold the mules, buggy, and harness to one Pruitt for \$330. That he kept \$30 and deposited \$300 in the bank there in the name of J. H. Smith. That a short time afterwards he drew out the money and bought a ticket for Geary, and from there went to El Reno, and then went to Hydro, and there telephoned to Smith, and he met him at Hydro and took him to Weatherford, and on the way he gave Smith \$100 of the money. That, when he was arrested for stealing the mules, Smith helped to frame a defense for him. That George Lama was to swear that he saw witness at El Reno, and that Smith was to get witness out of the penitentiary. That Smith wrote him several letters while he was in the penitentiary, which letters were produced and read in evidence. The tenor of the letters is that Smith was the friend of John Samples and was trying to help him by sending him money and trying to get a pardon for him. On cross-examination he testified that Smith that day had been driving Mr. Near; "that he got back before bedtime," and took Mr. Near to the hotel, and came back to the barn, and then they started on the trip to Colony; that a mile and a half out they met a wagon or buggy and spoke, and within three or four miles of Colony they met another rig; that witness went to one side and Smith to the other, and they spoke to the person driving; that no one went with him on his way to Alva. The transcript of his former testimony was read, contradicting his statements on this trial.

Eddy Keyes testified that, when John Samples was prosecuted for stealing the mules, he had a conversation with John Samples and Jim Smith about his testimony as a witness in Samples' trial, and they wanted him to swear that he saw John Samples in El Reno about the time the mules were stolen, and it was not true; that he heard Smith tell John Samples to stand pat and not to turn him, and he would help Samples; that after John Samples had gone to the penitentiary he was present when Jim Smith told Carl Samples to take a team of horses to apply on John's lawyer fee, and Carl Samples asked witness to go with him to the pasture to get the team, and they went out to the pasture and brought the horses in and put them in Samples' barn. His cross-examination shows that he had been a bootlegger, had been convicted of theft, and at the time in question was living with a prostitute.

Roy Hahn testified that he was cashier of a bank at Alva, and on December 3, 1910, cashed a check drawn on the First National Bank of Alva for \$300, payable to J. H. Smith, and signed by J. H. Pruitt; that John Samples was the man who presented the check.

W. M. Griggs testified that he lived north of Colony, and on the night of November 30, 1910, he was on his way home, and about four

miles out from Colony he met Mr. Smith and Mr. Samples, going south; that he was traveling in a hack and they were horseback; that as they passed they separated and one went on one side and the other on the other side; that he had known Samples and Smith for several years. On cross-examination he stated that Jess Illitt was with him; that he did his trading at Colony, and the next morning attended a sale near there and heard about the mules being stolen; knew that John Samples was arrested for stealing the mules, but never spoke about meeting him and Smith; never told anybody that he had seen Samples and Smith that night until today on the witness stand; that Samples and Smith as they passed him said, "How do you do?"

Leroy Griggs testified that he lived about three miles northwest of Colony; that on the night of November 30th he met two fellows on horseback about a mile north of Colony, and as they passed both of them said, "How do you do?" and that he recognized John Samples and Mr. Smith by their voices; that it was then between 8 and 9 o'clock. On cross-examination he stated that he attended a sale near Colony the next morning and heard that the mules were stolen and knew about John Samples' arrest and trial for stealing the mules, but had never said anything to anybody about seeing these men that night.

George Lama testified that he lived at El Reno on or about November 30, 1910, and had a conversation with John Samples and Jim Smith after Samples' arrest, and they wanted him to testify as a witness for Samples that he saw John Samples in El Reno on the 2d and 3d days of December, and that as a witness he did so testify, and that his testimony was false; that he had been convicted for gambling and carrying a six-shooter.

Carl Samples, a brother of John Samples, testified that he is now serving a three-year sentence in the penitentiary at McAlester for cattle theft in Caddo county; that after his brother John was convicted and sent to the penitentiary he had several "talks" with the defendant Smith; that he was sitting in Smith's barn office and heard Smith say to Norman Henry and others that John Samples ought to have been in the penitentiary ten years sooner, and he stepped up and Smith apologized to him; that Smith told him he paid part of the lawyer's fee, and he told Smith he was just as guilty as John was, and he said at first he was not, but finally admitted that he was in it; that another time Smith told him he just got \$20 out of the mule deal; that Smith told him he had a team that he would give to Connell; the lawyer and witness went with Eddie Keyes to the pasture and got the horses and turned them over to his father. On cross-examination he stated that on the night the mules were stolen he was down in Caddo

county; that he knew when his brother John took the trip to Alva; that the defendant Smith tried to hire him to testify as a witness for his brother John; that Ted Bailey is his brother-in-law and visited him two or three times while he was in jail at Arapaho; that he did not tell Ted Bailey that witness and George Lama were the fellows that took those mules away from Colony.

Pete Cates testified that a short time prior to November 30th he sold an old buggy with a tongue in it to John Samples.

B. E. Duvall testified that on the evening of November 30th he saw John Samples east of Weatherford riding a black horse.

A stipulation by the state and the defendant was filed that in 1910 the 30th of November was Wednesday, and the defendant waives his constitutional right to be confronted with witness Walter F. Dickens, agreeing that the questions and answers may be read as the evidence of said witness if he were present. The testimony of the witness is as follows: That he resides at Red Lake, Minn.; on November 30th lived at Colony, Okl., and was superintendent of Indian school there; was west of Colony on the night of the theft; met two men about 10 o'clock, each riding a small horse, and each was leading a mule with harness on; witness was in an automobile; had been acquainted with Jim Smith for a long time prior to that; saw Jim Smith the next morning in the vicinity of Colony in company with Mr. Near; witness told Smith and Near about the mules having been stolen.

For the defense, C. E. Near testified that he is a collector for the International Harvester Company; his territory includes Custer county; that he was in Weatherford on the 29th and 30th of November and made a drive in the afternoon with Jim Smith, and got back about 6 o'clock; went to the Smith barn between 8 and 9 o'clock that evening to outline a drive for the next day, and talked with Jim Smith; was at the barn until 10 o'clock or later; that John Samples was there at 9 o'clock, but witness did not see Samples after the train came in; walked to the Park Hotel with Jim Smith after 10 o'clock, and Smith went on in the direction of his home; left Weatherford with Jim Smith the next morning, and they drove towards Colony; met Mr. Dickens west of Colony, and Mr. Dickens spoke of the mules having been stolen the night before; about 8 o'clock that evening he and Smith got back to Weatherford, and witness stayed at the Park Hotel that night.

Charles C. Penn testified that in 1910 he was in the hotel business at Weatherford; was acquainted with C. E. Near; produced his hotel register showing that Mr. Near registered there on the 29th of November, 1910, and identified the signature; that he knows the general reputation of George Lama for truth and veracity; and that it was bad.

Ed Austin testified that he bought out

John Samples' interest in the livery business with Smith in July, 1910; that Jim Smith was driving with Mr. Near on the 30th of November and John Samples was around the barn that evening; that he slept at the barn and heard a rig come in during the night; that John Samples was there the next morning in bed with a man by the name of Wright; that there was a rig taken out of the barn that night, and the barn account showed a charge against George Casey. The charge against George Casey was submitted to the jury, and defendant's attorney, knowing that the county attorney had a magnifying glass, called for it, and turned it and the book over to the jury with the request that they examine a particular item, the one that Mr. Smith, special counsel for the state, said had been erased, and the jury examined the book with the glass.

George Casey testified that he had been acquainted with Jim Smith and John Samples for years; that he is a farmer and lives out from Weatherford; in the early winter of 1910 he made a drive from Weatherford to his home; he had been to Clinton and arrived at Weatherford at 9 o'clock or later in the night; got the rig at Smith's stable, and John Samples did the driving; it was six miles out; after John Samples was arrested, he came to witness' place and asked him if he remembered him driving him home on the night of the 30th of November, and witness said he did not know the date of that drive.

Barney Davis, ex-sheriff of Custer county, testified that he was acquainted with the general reputation of George Lama, Carl Samples, and John Samples for truth and veracity, and their reputations were bad.

Tom Hudgins testified that he was acquainted with Jim Smith and C. E. Near, and on the 1st day of December, 1910, he met them at a sale near Colony.

H. W. Morrison testified that he knows the reputation of George Lama, Carl Samples, and John Samples for truth and veracity, and their reputations were bad.

To the same effect was the testimony of George E. Lindley and Walker Moore.

Mack W. Litzman testified that he had a talk with George Lama after Jim Smith was arrested, and Lama said:

"We have got to drag him in if we want to clear John Samples." "No, Jim is not guilty of the charge any more than you are." And, "Jim is not guilty. John Samples never got them, because Carl and I led them away."

C. L. Gasseway testified that he talked with Eddie Keyes about the Smith case, and Keyes said:

"We had to turn against Smith." "Old man Samples offered me \$100 to swear against him, and I called Jim up and told him that if he would furnish me enough money I would get out of the country, and that Samples had offered him \$100, and that in Smith's preliminary he (Keyes) had sworn to lies against Smith."

Ed Davies testified that he was city marshal at Weatherford; was acquainted with the general reputation of George Lama, John Samples, Carl Samples, and Eddie Keyes for truth and veracity, and their reputations are all bad.

Tim Murphy testified that he was in Weatherford on the day that the mules were stolen that night; that he saw Carl Samples, John Samples, and Near together; that they were on horseback and were going south.

Edna Crume testified that she was court reporter for the county court, and as such took the testimony at the preliminary trial of Jim Smith, and afterwards correctly transcribed the same; that George Lama as a witness testified in part as follows:

"Q. State whether or not you had any conversation with Jim Smith or John Samples regarding John's case, wherein he was convicted for stealing the mules from the Colony Mercantile Company. A. I don't know that I did. Q. State whether you ever heard them talk about it? A. Yes, sir; I heard them talk about it, but I don't remember what they said about it."

James H. Smith, as a witness in his own behalf, testified that he had been a resident of Custer county for about 14 years, the last 4 a resident of Weatherford; that his age was 43 years; lived with his family, consisting of a wife and three children; that John Samples was his partner in the livery business for about five months; that Samples sold his interest to Ed Austin in July, 1910, but after that was about the barn often; that on the afternoon of November 30th he made a drive with C. E. Near, the International Harvester man, getting back about 6 o'clock; that after supper he went back to the barn, and Mr. Near came in about 8 o'clock and arranged his route for a drive the next day; that Mr. Near remained there until about 10 o'clock; that he walked with him to the Park Hotel, and then went on home; that evening Mr. Casey came in and hired a team to take him home; John Samples was there and drove Mr. Casey home; that Mr. Casey did not pay, and he charged the same to him on the book that evening; that the next morning he found the man working at the barn and John Samples there; that he drove Mr. Near south; about four miles west of Colony they met Mr. Dickens, and he told about the mules having been stolen; that he was not acquainted with W. M. Griggs or Leroy Griggs, witnesses who testified for the state, and that he was interested in John Samples' defense because he thought he was innocent, but did not know until Samples' trial that Samples had anything to do with getting the mules out of the country.

The transcript of the testimony contains about 600 pages, but the foregoing statement is sufficient for the purpose of this opinion.

Jones & Bashore, of Cordell, and Geo. T. Webster and James Shackelford, both of Clin-

ton, for plaintiff in error. The Attorney General and R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. (after stating the facts as above). The plaintiff in error has assigned a large number of errors on the record, but the view we are constrained to take of this case will render it unnecessary for us to pass upon all the questions presented.

[1] The first contention is that the court erred in refusing to grant a change of venue.

The petition was verified by the defendant. It was alleged in the petition that the minds of the inhabitants of Washita county are so prejudiced against the defendant that he cannot obtain a fair and impartial trial in said county; that John Samples, the principal witness for the state, was convicted in Washita county in 1910, and that on his trial this defendant was a witness for John Samples, and the people of the county had become greatly biased against this defendant on that account; that the Anti-Horse Thief Association of Washita county took an active part in the prosecution of John Samples; that its members at the time formed a great dislike to this defendant, and said organization has employed J. W. Smith, of Cordell, ex county attorney of Washita county, to prosecute him and has paid a large fee to him in the case; that the organization has 175 members scattered over the county; that they are men of high standing and the case has been widely discussed, and it has had the effect to prejudice the minds of the inhabitants to such a degree that he cannot obtain a fair and impartial trial in said county, and in support of the petition he filed the affidavits of 27 other citizens of the county. The state called 10 witnesses in resisting the application.

It has been the uniform holding of this court that the granting of a change of venue is, under the statute, a matter resting within the sound discretion of the trial court, and, unless it clearly appears that there is an abuse of such discretion, this court will not reverse the judgment for a failure of the trial court to grant a change of venue. Considering all of the facts and circumstances disclosed by the record in the present case, we cannot say that the court erred in refusing to grant the change.

[2] The next assignment is that the court erred in overruling the defendant's notice for a continuance.

The case was called for trial October 13, 1913. Thereupon the defendant filed his motion for a continuance upon the ground of the absence of Ted Bailey, a material witness, and in support thereof relied upon his affidavit setting forth that on the 6th day of October, the time the case was set for trial he caused a subpoena to issue which is herewith exhibited; that said witness lives at Weatherford, and the judge of the district court ordered a subpoena to issue for said

witness, with others directed to the sheriff of Custer county; that the return of the officer shows that Ted Bailey has not been served; that the defendant has exercised all due diligence to find said witness who is temporarily absent from Weatherford as affiant verily believes; that the defendant expects to prove by the said witness "that Carl Samples, a witness for the state, told him six or seven weeks ago, while he (Carl Samples) was in jail at Arapaho, that he (Carl Samples) and George Lama were the ones who stole the Colony Mercantile Company's mules, and that it was not John Samples and James Smith who stole them, and that this case is a put up job on James Smith, and affiant further says that the said witness, Carl Samples, will deny that he so stated to Ted Bailey, as he verily believes."

It has been the uniform holding of this court that the granting or the refusal of a continuance is largely a matter within the discretion of the trial court, and no rule is more firmly established than that this court will not reverse a judgment of the trial court upon the ground that it refused to grant a continuance, unless it appears that such court has manifestly abused its discretion in refusing it.

The evidence upon the trial shows that said absent witness was at the time in the adjoining county of Caddo. The defendant's affidavit does not disclose such diligence on his part to procure the attendance of this witness as the law required, or such as made it the duty of the court to grant a continuance. It follows that the motion was properly overruled.

[3] Numerous errors are assigned on the rulings of the court in the admission of certain testimony over the defendant's objections. The court permitted the witness John Samples to testify as follows:

"Q. Was Jim Smith on your bond? A. Yes, sir. Q. Now, John, in the trial of that case, you may state whether or not there was any testimony produced by you and Jim Smith in your defense that was perjury testimony, and known to be so by you and Jim? A. Yes, sir. Q. You may state to the jury just how you and Mr. Smith arranged the defense of your case; state all about it. A. Well, he come and told me what all he could prove and who he could prove all this by. He told me he would get Mr. —, an attorney of Oklahoma City, to beat the case; Mr. — drew a draft for \$50 on Mr. Smith, and he turned it down. Smith said that he would get George Lama and Eddie Keyes as witnesses for me, and we got George Lama and Eddie Keyes, and we took turns about drilling and coaching them what to swear to."

Eddie Keyes, over the defendant's objections, was permitted to testify to conversations with the defendant Smith and John Samples about what his testimony would be by way of establishing an alibi for Samples in his case.

George Lama, over the defendant's objections, was permitted to testify that John Samples and the defendant Smith wanted

him to swear that he was at El Reno with Samples so as to establish an alibi for Samples.

Carl Samples over the defendant's objections, was permitted to testify that the defendant Smith tried to hire him to testify as a witness for his brother John Samples. The testimony of this character and kind takes up many pages of the record.

Counsel for the defendant moved the court "to withdraw from the consideration of the jury all of the testimony of John Samples, Eddie Keyes, George Lama, and Carl Samples with reference to the matter of framing up a defense for John Samples in his case, for the reason that the same is incompetent, irrelevant, and immaterial, not a part of the res gestæ, and tending in no way to corroborate the witness John Samples as an accomplice." Which motion was overruled, and exceptions allowed.

We are of the opinion that this testimony was inadmissible, because, if true, it had reference to a separate and distinct crime, that of subornation of perjury on the trial of John Samples, and its admission could not have been otherwise than prejudicial to the defendant.

Evidence of an offense other than the one charged is admissible only when it tends to prove the offense charged. To be competent and admissible, it must have some logical connection with the offense charged. The case was tried by the state upon the theory that the defendant Smith had personally assisted John Samples in taking the mules. That is the testimony of John Samples. The defendant made his defense against that theory. John Samples, a confessed accomplice, had to be corroborated. Apparently, this testimony was admitted by the court under the theory that it tended to corroborate John Samples. Under the state's theory, the defendant Smith was either in Colony on the night of the theft assisting John Samples, or he was not guilty. The efforts of the defendant to help John Samples make his defense about a year after the theft in no way tends to prove that he was with Samples at Colony when the mules were stolen. The testimony of John Samples, Eddie Keyes, and George Lama in this regard raised a collateral issue for the jury. Before the jury could consider this testimony even in corroboration of John Samples, they must in effect find the defendant Smith guilty of subornation of perjury; but, if the defendant had been on trial for this grave offense, it would have been the duty of the court to instruct the jury that they could not convict the defendant upon the uncorroborated evidence of said witnesses, for by their own testimony they were accomplices of Smith in the commission of the crime of subornation of perjury. We are also of the opinion that the letters written by the defendant to John Samples were inadmissible; they contained no admission against interest, nor

any statement that could in any way be construed as an admission of guilt.

[4] The next assignment is misconduct of the attorney for the state in asking certain questions upon the cross-examination of the defendant, and error of the court in permitting the same.

It appears from the record that upon his cross-examination he was asked the following questions and was forced to answer them over his objections:

"Q. State whether or not you stopped at Parsons with a woman whose reputation for chastity was bad and not related to you? A. No, sir. Q. Did you take with you any woman of unchaste character when you went to Kansas City? A. No, sir. Q. Did you sleep with any woman while you were there other than your wife? A. I did. Q. At that time you had a wife and two or three children. A. I had a wife and two babies; yes, sir. Q. Now, I will ask you if it is not true that these boys and you and others kept women there at your livery stable and in the hotels at Weatherford and slept with them various and sundry nights? A. No, sir. Q. Did you and these boys ever keep girls around your livery stable and in the hotels? A. No, sir; I didn't. Q. Did you know anything about having performed an operation on any of these girls? The Court: Objection sustained. Gentlemen of the jury, with reference to the operation you will disregard that question."

The general rule is that, when the defendant in a criminal case voluntarily takes the stand as a witness in his own behalf, he has all the rights of other witnesses and is subject to the same rules of cross-examination and impeachment as other witnesses. *People v. Dupounce*, 133 Mich. 1, 94 N. W. 388, 103 Am. St. Rep. 435, 2 Ann. Cas. 246; *Harrold v. Territory*, 18 Okl. 395, 11 Ann. Cas. 818; *Buxton v. State*, 11 Okl. Cr. 85, 143 Pac. 58.

In the case of *Hopkins v. State*, 9 Okl. Cr. 104, 130 Pac. 1101, Ann. Cas. 1915B, 736, this court said:

"As to what is the proper practice on cross-examination of witnesses, the general rule is that the party cross-examined should be confined to the matters concerning which the witness has been examined in chief; but this rule should be liberally construed so as to permit any question to be asked on cross-examination which reasonably tends to explain, contradict, or discredit any testimony given by the witness in chief, or to test his accuracy, memory, veracity, character, or credibility. This must necessarily include impeaching questions, although they may relate to matters independent of the questions testified to in chief.

"When the cross-examination is directed to matters not inquired about in the principal examination, its course and extent are very largely subject to the control of the court in the exercise of a sound discretion; and, unless it affirmatively appears that this discretion was abused, the rulings of the trial court will not be reviewed on appeal."

And see *Castleberry v. State*, 10 Okl. Cr. 504, 139 Pac. 132.

Discussing the scope of cross-examination, Mr. Greenleaf says:

"There may, secondly, be a limitation based on the general impropriety of allowing an unrestrained raking-up of the witness' misdeeds

and of thus making the witness box a source of annoyance and terror both to reputable and disreputable persons alike. The utility of such exposures is comparatively so small, and the abuse of such cross-examination by unscrupulous counsel is so common, that some measures of restriction are highly desirable, and this attitude of the courts may well be emphasized as the only proper one. The object is attained, in most jurisdictions, by declaring the trial court to have discretion to set limits to such an examination (irrespective of its relevancy), and to forbid it whenever it seems to be unnecessary or profitless or undesirable; and such is the rule now in vogue in the majority of jurisdictions. A few courts, with courage and wisdom, have taken the step of forbidding entirely such cross-examination as to character." *Greenleaf on Ev.* vol. 1 (16th Ed.) par. 461b.

[5] Our statute permits the proof of a prior conviction of a defendant in a criminal case for the purpose of affecting his credibility. Section 5046, Rev. Laws. This proof may be made either by the record or by the cross-examination of the defendant, and cross-examination as to other separate and distinct transactions and offenses is not permissible, unless such testimony tends to prove the commission of the offense charged, and should in general be limited to matters pertinent to the issue, or such as may be proved by other witnesses.

We are of the opinion that the cross-examination objected to was improper and highly prejudicial to the defendant, and the action of the special prosecutor in asking such questions constituted misconduct on his part. The obvious purpose and the undoubted effect of such course of cross-examination was to degrade the defendant and prejudice the minds of the jury against him, and the rulings of the trial court in permitting the same and compelling the defendant to answer such questions constitutes prejudicial error.

Several errors are based upon the exceptions taken to the instructions given and the refusal of the court to give certain requested instructions. Among others, the defendant requested four instructions based upon the law applicable to the impeachment of witnesses, including an instruction approved by this court in the case of *Nelson v. State*, 3 Okl. Cr. 468, 106 Pac. 647. The charge of the court did not include any instruction covering the law of impeachment.

[6] In view of the fact that two of the state's witnesses were convicts, serving their terms, and that several of the state's witnesses were confessed perjurers, and were impeached by testimony showing that their general reputation for truth and veracity was bad, and that no attempt was made to contradict these character witnesses in any way, we think the court should have instructed the jury on the law applicable to the impeachment of witnesses, especially in a case of this kind where the testimony relied upon to secure a conviction was, at most, only technically sufficient to support a verdict of guilty.

For the reasons stated, we think the de-

fendant has not had a fair and impartial trial.

The judgment of the lower court is therefore reversed.

ARMSTRONG and MATSON, JJ., concur.

(14 Okl. Cr. 386)

LUPPY et al. v. STATE. (No. A-2881.)
(Criminal Court of Appeals of Oklahoma.
March 19, 1918.)

(Syllabus by Editorial Staff.)

1. CRIMINAL LAW §939(2) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE — DILIGENCE.

An application for a new trial on the ground of newly discovered evidence will be denied where the record shows that defendants knew of the absent witness long before trial, and did not exercise due diligence to obtain his presence at the trial or to take his deposition.

2. CRIMINAL LAW §938(1) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE — SELF-INCRIMINATING TESTIMONY.

An application for a new trial on the ground of newly discovered evidence should be denied where it appeared that the testimony sought would criminate the absent witness himself, since he could not be compelled to testify.

Appeal from County Court, Washington County; Robert D. Waddill, Judge.

Charles Luppy and William E. Rogers were convicted of unlawfully transporting intoxicating liquors in Washington county, Okl., and sentenced to pay a fine of \$150, and to serve 30 days in the county jail, and they appeal. Affirmed.

Charlton & Farrell, of Bartlesville, for plaintiffs in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. No brief has been filed nor oral argument made in behalf of plaintiffs in error. This case is submitted on the record. We find the information sufficient to support a charge of unlawfully transporting intoxicating liquors. While the evidence is conflicting, that upon the part of the state sufficiently supports the allegations of the information. No exceptions were taken to any of the instructions given by the court. After an examination of same, we find that they correctly state the law, and are as favorable to the defendants as their defense would warrant.

[1, 2] The application for a new trial on the ground of newly discovered evidence is without merit, because it is apparent from this record that the defendants knew of the absent witness long before they were tried, and did not exercise due diligence either to obtain his presence at the trial or to take his deposition, and also that, if such person was produced as a witness, he could not be made to testify to facts or circumstances which would tend solely to incriminate himself, and the affidavit shows that the facts which were

expected to be proved by said witness were such as would fasten the guilt for the alleged crime upon him.

After a careful examination of the record, we find no error sufficient to justify a reversal of this judgment, and said judgment of conviction is therefore affirmed.

(14 Okl. Cr. 379)

HALL et al. v. STATE. (No. A-2835.)
(Criminal Court of Appeals of Oklahoma.
March 19, 1918.)

(Syllabus by the Court.)

CRIMINAL LAW §1159(1) — REVIEW — QUESTION OF FACT.

This court will not reverse a judgment of the trial court for lack of evidence where there is evidence in the record reasonably tending to sustain the judgment.

Appeal from County Court, Ottawa County; Vern E. Thompson, Judge.

C. H. Hall and O. W. Davis were convicted of violating the prohibitory law, and they appeal. Affirmed.

Don M. Crump, M. G. Bailey, and W. J. Crump, all of Muskogee, for plaintiffs in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiffs in error, C. H. Hall and O. W. Davis, were jointly charged, tried, and convicted in the county court of Ottawa county upon an information charging that in said county on or about the 21st day of March, 1916, they did have in their possession "150 quarts of whisky with the wrongful and unlawful intent to dispose of the same in violation of the prohibitory liquor law of the state of Oklahoma." The jury failed to fix the punishment. July 20, 1916, the court rendered judgment and sentenced the defendant Hall to be confined for 30 days in the county jail and to pay a fine of \$350, and sentenced the defendant Davis to be confined in the county jail for 30 days and to pay a fine of \$500. From the judgments the defendants appeal.

The errors assigned are based upon the alleged insufficiency of the information, on the rulings of the court on the evidence, and the alleged insufficiency of the evidence to sustain the verdict.

To a correct understanding of the case so far as it involves the sufficiency of the evidence, the following is a brief statement of the same:

W. P. Kimball, night policeman in the city of Miami, and Guy Parker, a police officer, received a phone message, and in response thereto went to a certain place in the city of Miami and found an automobile loaded with 150 quarts of whisky.

Kimball testified that he knew the defendants, and on the 21st of March, 1916, he received a message that there was an auto

coming from the north traveling at a high rate of speed, and, with Policeman Parker, went to meet it; after going several blocks they found a car stalled at the foot of the hill, and the defendant Hall was standing behind a stump near by, and shortly afterwards the defendant Davis and one Dave Pounds appeared with a team, and they arrested Davis; he had a rope with him; the car was a five-passenger Ford; that they searched Hall behind the stump, and found on his person a number of 38 cartridges and a scabbard in the lap robe, and also found a 38 Smith & Wesson pistol near where he was standing; Kimball asked him if he was in the habit of coming through there with booze, and he said this was his third trip; that he was not in the habit of hauling whisky, but he was in Joplin and thought he might as well pick up a few easy dollars as not; that the defendant Davis also had a pistol on him.

Guy Parker testified that it was about two o'clock in the morning when he, with Mr. Kimball, reached the car; that there were 148 quarts of whisky in the car; that when Davis and Pounds came they dropped a doubletree, and Davis had a rope in his hand; that later he found a tag on the inner tube of the car that had the name of "Davis" on it.

Pounds testified that he was a transfer man in Miami; about 2 o'clock in the morning the defendant Davis came to his barn and wanted him to come and get his machine out; that he took a team, rope, and doubletree, and went with him; that the car was down in a hollow, and when they reached there Policeman Kimball pulled a gun and ordered them to hold up their hands.

For the defense Earl Jackson testified that he saw two men driving a car going south in the direction of where the car stopped; that it was a moonlight night, and the two men he saw in the car were not the defendants, Davis and Hall.

Earnest McLemore testified that he lived at Haskell, and the defendants, Davis and Hall, lived at Haskell; that Hall never owned a car, and Davis owned a five-passenger Ford, but sold it about two weeks before to a man that worked for an oil company.

It is a sufficient answer to the contentions made in the defendants' brief that no demurrer was filed to the information. However, we find that the information is sufficient in every way. In fact, we find nothing in the record of which the defendants have any just complaint. Counsel urge that the allegation in the information is possession with the "unlawful intent to dispose of the same," and that there was no evidence showing such intent. The evidence shows possession of 148 quarts of whisky. That in itself was sufficient to submit the issue to the jury.

Various criticisms are made in the defend-

ants' brief upon the instructions given. We find that the charge of the court fully and fairly covered the law of the case, and the criticisms made are not well founded.

It is apparent that justice has been done, and the judgment of conviction ought not be reversed, except for some plain error in the proceedings which was or might be prejudicial to the defendants. We find no such error in the record.

The judgment appealed from is therefore affirmed.

ARMSTRONG and MATSON, JJ., concur.

(102 Kan. 173)

STATE ex rel. McCORMICK v. FISHBACK,
Clerk of City Court. (No. 21602.)

(Supreme Court of Kansas. Dec. 8, 1917. Rehearing Denied Dec. 28, 1917.)

(Syllabus by the Court.)

1. CLERKS OF COURTS \S 8—REMOVAL—SUFFICIENCY OF PETITION—STATUTE.

A petition which alleges facts sufficient to show that, under section 3310 of the General Statutes of 1915, it was the legal duty of the clerk of the city court of Wichita to pay into the county treasury certain costs that had been collected by him, and which alleges a willful failure to perform that duty, states a cause of action under section 7603 of the General Statutes of 1915 (Code Civ. Proc. \S 686a).

2. CLERKS OF COURTS \S 70—PAYMENT OF COSTS—EXCUSE FOR FAILURE—STATUTE.

A misunderstanding of the operation of section 3310 of the General Statutes of 1915 and of chapter 133 of the Laws of 1917, when neither statute is complied with, is not a sufficient excuse, on the part of the clerk of the city court of Wichita, for his failure to pay to the county treasurer costs that should have been so paid on the first Monday of August, 1917.

3. OFFICERS \S 74—REMOVAL—JUDGMENT—BAR—EXTENT.

A judgment rendered in favor of an officer in an action prosecuted under section 7603 of the General Statutes of 1915 (Code Civ. Proc. \S 686a) is a bar to any further prosecution under that statute as to all acts that were included in the petition at the time it was filed, but it is not a bar to a prosecution for acts which occurred after the petition was filed, which were not included therein, and which were not passed on in the action.

Original quo warranto by the State of Kansas, on the relation of Ross McCormick, against J. B. Fishback, Clerk of the City Court of Wichita City, in Wichita City Township, in Sedgwick County. Defendant removed from office.

Ross C. McCormick, Glenn Porter, and Thomas E. Elcock, all of Wichita, for plaintiff. O. H. Bentley and E. L. Foulke, both of Wichita, for defendant.

MARSHALL, J. This is an original proceeding in this court, brought under section 7603 of the General Statutes of 1915 (Code Civ. Proc. \S 686a), to remove the defendant from the office of clerk of the city court of Wichita in Wichita City township in Sedg-

wick county, for failure to pay over to the county treasurer of Sedgwick county, on the first Monday in August, 1917, the sum of \$401.70, costs that should have been paid to the county treasurer on that day, as directed by section 3310 of the General Statutes of 1915.

[1] 1. The petition, among other things, alleges:

"That on the 6th day of August, the same being the first Monday in the month of August, 1917, said J. B. Fishback, as clerk of the city court as aforesaid, had in his possession and under his control, or should have had in his possession and under his control, the sum of \$401.70, the same being fees and costs collected by the said J. B. Fishback during the month of July, 1917, and prior thereto in civil and criminal cases in the office of the clerk of the city court as aforesaid, and that the same was not fees due witnesses or jurors in said cases. That on the said 6th day of August, the same being the first Monday in August, 1917, the said J. B. Fishback had willfully failed, neglected and refused to pay over to the county treasurer of Sedgwick county, Kan., the said sum of \$401.70, fees and costs collected by said J. B. Fishback, as aforesaid. That said sum of money was collected by the said defendant, J. B. Fishback, during the month of July, 1917, and prior thereto, and that on the said 6th day of August, 1917, it thereupon became the duty enjoined by law on the said J. B. Fishback, to pay over such sum of \$401.70, then in his hands, and held by him as aforesaid, into the county treasury of Sedgwick county, Kan."

The defendant demurs to the petition and moves to quash it, to set it aside, and to hold it for naught on the ground that the petition does not state facts sufficient to constitute a cause of action.

Section 3310 of the General Statutes of 1915 reads:

"In all causes, civil or criminal, brought in said court [the city court of Wichita], there shall be taxed therein the same fees as are allowed by law in such cases before justices of the peace in this state, and when the same are collected they shall be paid by the clerk of said court, on the first Monday in each month, to the county treasurer of Sedgwick county, Kan., and all such costs and fees shall be collected as is provided by law for the collection of costs in justice courts of this state, and said county treasurer shall credit the same to the county funds, and give duplicate receipts for the same, one of which shall on the same day be deposited with the county clerk by the clerk of said court, together with a detailed statement of the items of costs, the title of the case in which they were paid, and the name of the parties paying the same: Providing, that no fees of witnesses or jurors shall be so deposited, but shall be paid by the clerk of said court to the parties to whom they are due."

Section 7603 of the General Statutes of 1915 (Code Civ. Proc. § 686a) reads, in part, as follows:

"Every person holding any office of trust or profit, under and by virtue of any of the laws of the state of Kansas, either state, district, county, township or city office, who shall willfully misconduct himself in office, or who shall willfully neglect to perform any duty enjoined upon such officer by any of the laws of the state of Kansas, * * * shall forfeit his office and shall be ousted from such office in the manner hereinafter provided."

The petition alleges facts sufficient to show a legal duty on the part of the defendant to pay to the county treasurer the money in his hands belonging to Sedgwick county, and also alleges the willful failure of the defendant to perform that duty. The petition states a cause of action. The demurrer is overruled, and the motion to quash is denied.

[2] 2. As an excuse for his failure to pay the money to the county treasurer on the 6th day of August, the defendant, in substance, alleges that, because of a misunderstanding of section 3310 of the General Statutes of 1915 and of chapter 133 of the Laws of 1917, confusion arose concerning the times of making payments to the county treasurer, and, in substance, further alleges that the matters and things of which complaint is made in the petition arose out of that confusion.

Section 3310 of the General Statutes of 1915 requires that the money shall be paid to the county treasurer on the first Monday of each month. Chapter 133 of the Laws of 1917 requires that all money received shall be deposited with the county treasurer daily, and that all disbursements shall be made by check on the county treasurer. The evidence discloses that the defendant did not comply with either of these statutes. If all money received had been deposited daily with the county treasurer, when the first Monday of the month came, all the money then due the county would be in the hands of the county treasurer, and no shortage could arise. Confusion arising out of a misunderstanding of the operation of these statutes is not an excuse for failure to pay the amount that was due the county on the 6th day of August, 1917.

[3] 3. The defendant, in his answer, sets up, as a bar to the prosecution of this action, a judgment rendered in his favor on July 21, 1917, in an action in the district court of Sedgwick county, which action had been commenced on July 2, 1917, and in which the state of Kansas, on the relation of Ross McCormick, county attorney of Sedgwick county, sought to oust the defendant from the office of clerk of the city court of Wichita. The first petition, filed in that action on July 2, 1917, alleged that there was \$4,080.65 in the hands of the defendant on June 30, 1917, and that the defendant failed to pay that amount to the county treasurer of Sedgwick county as directed by law. The defendant filed a motion to quash that petition, and the plaintiff, on July 13, 1917, filed an amended petition, and on July 20, 1917, filed another amended petition. In the last amended petition, the plaintiff alleged that on June 30, 1917, there was \$4,080.65 in the defendant's hands which had been received and collected from various sources prior to June 30, 1916, and which he failed to pay into the county treasury. The court sustained a motion to quash that amended petition. The plaintiff stood on the

petition, and judgment was rendered in favor of the defendant for costs.

The evidence, taken by a commissioner appointed by this court, shows the following facts: On the first Monday in August, 1917, \$650.85 was due from the defendant to the county, for costs that had been paid in cases that had been closed before that day. Nothing was then paid by the defendant to the county treasurer. On August 8, 1917, J. H. McPherson, county auditor of Sedgwick county, presented a bill to the defendant for the amount then due the county and asked the defendant for immediate payment. Nothing was paid until August 15th when \$249.15 was paid. In September, \$900.88 additional was paid. Those amounts covered all that was due the county at the time the last payment was made. After the judgment was rendered in the district court, a large number of persons, witnesses and jurors, who had fees in the hands of the defendant, demanded and received payment of the amounts due them. On August 6, 1917, the defendant did not have in his hands enough money to pay the amount then due the county and to pay those to whom fees were due. He obtained from outside sources a part of the money necessary to pay these amounts. The defendant had, to some extent, commingled the funds in his hands as clerk of the city court with his individual money.

There is nothing in the evidence to show that the defendant intended to embezzle any of the money in his hands, but the only conclusion that can be drawn from the evidence is that he did not have sufficient money to pay what was due to the county treasurer and to individuals. Agents, trustees, receivers, guardians, executors and administrators, and public officers must keep the trust money and property in their hands separate and apart from their individual money and property, or abide the consequences.

The judgment in the district court of Sedg-

wick county is a bar to all matters that were included in the petition in that action, but nothing that occurred after June 30, 1917, was included in that petition or passed on in that action; therefore that judgment is not a bar to anything that occurred after June 30, 1917.

In the city court, in cases that were closed between June 30 and August 1, 1917, the defendant received more than \$100 that he should have paid into the county treasury on the 6th day of August. In cases that were closed between July 21, 1917, the day the judgment was rendered in the district court, and August 1, 1917, the defendant had received more than \$45 that should have been paid into the county treasury on the 6th day of August. These amounts were included in the \$401.70, which is made the basis of this action, and which the defendant admits was due on the 6th day of August. These several amounts were included in the demand made on the defendant by the county auditor. The defendant's failure to make payment on the 6th day of August was not caused by any mistake or confusion brought about by a misunderstanding of the law. From the evidence, the conclusion must be drawn that the failure to make payment was intentional, made so by the fact that the defendant did not have the money with which to make payment; but, whether he had the money or not, payment was enjoined on him by law, and his failure to make that payment subjects him to this proceeding.

When the defendant, at the time fixed by law, failed to pay the amounts that had been received by him, he was guilty of willful neglect to perform the duty enjoined on him by section 3310 of the General Statutes of 1915.

Under the law, the conclusion is inevitable that the defendant must be removed from the office of the clerk of the city court of Wichita City township in Sedgwick county, and it is so ordered. All the Justices concurring.

(102 Kan. 170)

RICARDO et al. v. CENTRAL COAL & COKE CO. et al. (No. 21472.)

(Supreme Court of Kansas. Dec. 8, 1917. Rehearing Denied Dec. 28, 1917.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT — 192(2) — LIEN — APPLICATION FOR DISTRIBUTION OF FUNDS — AFFIDAVITS — "MOTION."

An application for the distribution of a fund against which several attorneys' liens are claimed is a motion, and the Code permits the use of affidavits at the hearing thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Motion.]

2. WITNESSES — 26G — RIGHT OF CROSS-EXAMINATION — ATTORNEY'S LIENS — DISTRIBUTION OF FUNDS.

An attorney, whose claim of lien is denied at such a hearing because the court is convinced from his own testimony that he has performed no services entitling him thereto, has no standing to complain of the refusal to allow him to cross-examine the makers of affidavits used in behalf of other claimants.

Appeal from District Court, Cherokee County.

Suit by Remigi Ricardo against the Central Coal & Coke Company and others. Judgment for plaintiff was reversed on appeal, and a new trial ordered, and after a settlement, F. B. Wheeler, C. A. McNeill, and Maurice McNeill, attorneys for plaintiff, and D. G. Smith, filed claims for attorney's fees. From an order allowing the claim of Wheeler and the McNeills, and denying that of Smith, Smith appeals. Affirmed.

S. L. Walker, of Columbus, and D. G. Smith, of Girard, for appellant. F. B. Wheeler, of Pittsburg, and C. A. McNeill, of Columbus, for appellees.

MASON, J. Remigi Ricardo sued the Central Coal & Coke Company on account of injuries received while in its employ. He recovered a judgment, which was reversed upon appeal by reason of the instructions given and refused, a new trial being ordered. *Ricardo v. Coal & Coke Co.*, 100 Kan. 95, 163 Pac. 641. Up to this point in the litigation he was represented by F. B. Wheeler, C. A. McNeill, and Maurice McNeill. After the reversal the case was settled for \$2,500, which the defendant paid into court. Claims of attorneys' liens were made by the attorneys named, and also by D. G. Smith. A hearing was had upon motions for the distribution of the fund. The court allowed the claim of Wheeler and the McNeills, and denied that of Smith, who appeals.

Smith contends that he had an oral contract with the plaintiff for the handling of the case before the other attorneys had had any communication with him; that while he took no part in the litigation prior to the reversal of the judgment, the settlement was brought about by his efforts. His contentions are disputed by the plaintiff and the other attorneys. The grounds upon which a re-

versal is asked are that the court (1) permitted the appellees to introduce affidavits in evidence, the makers of which were present at the time, and (2) refused to allow the appellant to call the affiants for cross-examination.

[1] 1. The statute provides that where a judgment upon which an attorney's lien is claimed is paid to the clerk, the court or judge may, "on application of any party interested," determine the amount due on the lien, if any, and "make an order for the distribution of said moneys according to the respective rights of the parties." Gen. Stat. 1915, § 485. The application referred to conforms to the statutory definition of a motion, being "an application for an order, addressed to the court, or a judge in vacation, by any party to a suit or proceeding, or one interested therein or affected thereby." Gen. Stat. 1915, § 7460 (Code Civ. Proc. § 556). The Code specifically authorizes affidavits to be used "upon a motion." Gen. Stat. 1915, § 7254 (Code Civ. Proc. § 350). It is therefore manifest that no error was permitted in allowing affidavits to be introduced.

[2] 2. Where the maker of an affidavit relating to a controverted question of fact material to the decision of a case is present at the hearing, the refusal of the court to allow him to be cross-examined by the opposing counsel might in some cases be regarded as an abuse of discretion, because of its amounting to a rejection of a convenient, effective, and usual means of testing the truth of testimony upon which the investigation may turn. But here the trial court expressly stated the reason for disallowing the claim of the appellant to be that it was convinced by his own testimony that he had done nothing to entitle him to a lien. A cross-examination of the witnesses for the appellees might have tended to impair the claim of the other attorneys to a lien, but if the appellant had no lien of his own he had no standing to challenge theirs, and as the court found from his own statements that he was not entitled to a lien, he manifestly suffered no prejudice from being denied an opportunity to cross-examine the witnesses, or to go more fully into any other question.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 287, 562)

BURZIO v. JOPLIN & P. RY. CO.
(No. 21224.)

(Supreme Court of Kansas. Jan. 12, 1918.
On Rehearing, March 9, 1918.)

(Syllabus by the Court.)

1. TRIAL — 365(1) — ANSWERS TO SPECIAL QUESTIONS — FACTS OR CONCLUSIONS.

Where a jury has been properly instructed concerning negligence and reasonable and ordinary care and diligence, the answers to special questions which depend for their interpretation

on the definition of those terms state facts and not conclusions of law.

2. NEGLIGENCE \S 95(1) — IMPUTED NEGLIGENCE—PARENT AND CHILD.

The negligence of a father in driving an automobile across a railroad track without stopping, looking, or listening cannot be imputed to his ten year old son who is riding with him.

3. RAILROADS \S 314 — PERSONAL INJURY — NEGLIGENCE — OBSTRUCTION OF RIGHT OF WAY.

Liability of a railway company for injuries to those riding in an automobile, sustained in a collision with a train at a highway crossing, may be founded on the company's negligence in allowing weeds, grass, and brush to grow on its right of way so as to obstruct the vision of those riding in the automobile while they are approaching the railway track.

4. TRIAL \S 359(1) — GENERAL VERDICT — SPECIAL VERDICT—CONSISTENCY.

The general verdict must stand where the answers to special questions, when properly interpreted so as to support that verdict, are consistent therewith and do not contradict each other.

Appeal from District Court, Cherokee County.

Action by August Burzio, by his next friend, Pauline Burzio, against the Joplin & Pittsburg Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John P. Curran, of Pittsburg, for appellant. C. A. McNeill, of Columbus, and Maurice McNeill, of Kansas City, Mo., for appellee.

MARSHALL, J. The defendant appeals from a judgment rendered in favor of the plaintiff for injuries sustained by him in a railroad crossing accident.

The plaintiff, a boy ten years old, was riding with his mother in the rear seat of an automobile driven by his father. The father attempted to drive the automobile across the railway track in front of an approaching electric car. At the place of the accident, the track ran in a straight line for some distance north and south, and ran parallel with a public road near the railroad right of way. John Burzio, the plaintiff's father, with the plaintiff and the plaintiff's mother, left his home to go to Pittsburg, and for some distance, going north, traveled along the side of the defendant's railroad and saw the car, with which the automobile collided, going north. The electric car and the automobile passed each other once or twice during the trip. At the place of the accident, a road running east and west, crossed the railroad track. About 5½ feet west of the track and for 200 feet south of the east and west road, there was a hedge which prevented a view of the railroad, and between the hedge and the railroad there was a growth of brush, weeds and grass which, for a portion of the distance, prevented a view of the railroad from the public road running east and west. After turning east from the road running north and south, to cross the railroad track and for about 15 feet from the railroad

track, there was an unobstructed view of the track to the south for 200 feet or more. John Burzio turned east and attempted to cross the railroad. He did not see the car coming until he was on the track. He slowed down his car before he crossed the track. The electric car struck the automobile and injured the plaintiff. To recover for that injury, he brought this action.

The plaintiff alleged that the defendant negligently permitted the growth of vegetation, hedge, weeds, and underbrush; that the defendant, on the occasion of the accident, did not give any warning of the approach of the electric car; and that the defendant failed to provide the electric car with good and sufficient brakes so that it could be quickly stopped, and failed to provide the electric car with a good and sufficient whistle or other signal with which to warn persons of danger. The jury, on questions requested by the plaintiff, made special findings of fact as follows:

"No. 1. Was there a growth of hedge or grass or weeds or underbrush on defendant's right of way, that obstructed the view to the south of one traveling past in an automobile on the road plaintiff was injured on, if injured, to that extent that an occupant of the automobile could not, with reasonable and ordinary care and diligence, have seen the approaching car until too near the crossing to avoid injury? Answer: Yes.

"No. 2. Was the defendant negligent in failing to keep its right of way and the approach to the track reasonably free from weeds, grass, and underbrush, thereby obstructing the view of cars coming from the south by persons going east in an automobile, until practically upon the track? Answer: Yes.

"No. 3. If you answer questions Nos. 1 and 2 in the affirmative, state whether or not such conditions contributed to plaintiff's injury, if any. Answer: Yes.

"No. 4. Was the defendant negligent in failing to give reasonable notice, alarm, and warning of the approach of its line car to the crossing in question? Answer: Yes.

"No. 5. Did the defendant's agents and employees in charge of the line car have notice and knowledge of the fact that an automobile with occupants was approaching the crossing in question? Answer: No.

"No. 6. Was the line car of the defendant equipped with a whistle for giving warning or alarm? Answer: No.

"No. 7. Was the line car equipped with air brakes? Answer: No.

"No. 8. Did the plaintiff, August Burzio, do anything that was careless or negligent at or prior to the time of his injury which contributed thereto? Answer: No."

On questions requested by the defendant, the jury answered as follows:

"Question 1. How fast was the automobile going [miles per hour] as it turned east and approached the railroad track? Answer: Eight miles per hour.

"Question 2. How many feet west of the west line of the railway right of way was the hedge-row which plaintiff claims obstructed the view of the driver of the automobile? Answer: Five feet 5 inches.

"Question 3. How far south down the railroad track could the driver of the automobile have seen the approaching electric car after he turned the corner and just before he drove from a

place of safety onto the railroad track, had he stopped the automobile and looked or listened for a car? Answer: Fifteen feet west of track. See 200 feet.

"Question 4. Was the bell or gong on the electric car rung or sounded as the car approached the road crossing? Answer: Yes.

"Question 5. How fast was the electric car going [miles per hour] when the motorman saw that the driver of the automobile intended to try to cross the railroad track in front of the electric car? Answer: Twenty miles.

"Question 6. What caution, if any, did the driver of the automobile exercise after the turn east was made and as he approached the railroad crossing to avoid a collision with the electric car? Answer: Slowed down.

"Question 7. What notice or warning, if any, did the motorman on the electric car have that the automobile was going to be turned at the corner and go east across the railroad before the automobile went around the corner and onto the railroad track in front of the electric car? Answer: Didn't have any.

"Question 8. What was the negligence, if any, that caused the plaintiff's injuries? Answer: Not properly equipped.

"Question 9. How far south was the railroad car from the road crossing and point of collision when the motorman saw and realized that the driver of the automobile was attempting to cross the railroad in front of the electric car? Answer: Forty feet.

"Question 10. What did the defendant fail to do that it should have done that caused plaintiff's injuries? Answer: Didn't have car properly equipped with air brakes and whistle."

[1] 1. The defendant argues that the special findings of the jury show that the verdict should have been for the defendant, and that the plaintiff was not entitled to judgment, and further argues that the answers to questions numbered 1, 2, 3, and 4 of those requested by the plaintiff are conclusions of law. This argument is not good. The instructions of the court are not set out in the abstract. In the absence of the instructions, it is presumed that they properly covered the legal propositions embraced in each of these questions, and it is further presumed that the jury followed the instructions in answering these questions. Under proper instructions, these answers state facts and not conclusions of law.

[2] 2. Under the evidence and under the findings of the jury, John Burzio was guilty of such contributory negligence as would prevent him from recovering any damages sustained by him in the accident, for the reason that he attempted to cross a railroad track without stopping, looking, or listening, although there was a place of safety from which his view of the track was unobstructed, and from which he could see the approaching car for a distance of 200 feet. *Jacobs v. Railway Co.*, 97 Kan. 247, 154 Pac. 1023, L. R. A. 1916D, 783; *Wehe v. Railway Co.*, 97 Kan. 794, 156 Pac. 742, L. R. A. 1916E, 455; *Bunton v. Railway Co.*, 100 Kan. 165, 163 Pac. 801; *Williams v. Railway Co.*, 100 Kan. 336, 164 Pac. 260; *Moler v. Railway Co.*, 101 Kan. 280, 166 Pac. 488.

But, can the negligence of John Burzio be imputed to the plaintiff? The evidence does not show that the plaintiff exercised or at-

tempted to exercise any control over his father while he was driving the automobile. A clear statement of the rule of law governing the recovery of damages under such circumstances is found in *Corley v. Railway Co.*, 90 Kan. 70, 133 Pac. 555, Ann. Cas. 1915B, 764, as follows:

"The question presented is whether he is to be deemed chargeable with the negligence of the driver. The doctrine that one who voluntarily becomes a passenger in a conveyance thereby so far identifies himself with the driver that he cannot recover for an injury negligently inflicted by a third person, if the driver's negligence was a contributing cause, never gained much of a foothold in this country, and is now repudiated in England, where it originated. The history of its rise and decline is traced in a note in 8 L. R. A. (N. S.) 597, where cases are gathered illustrating all phases of the subject. Save in a few jurisdictions the negligence of a driver cannot be imputed to a passenger who in fact has no control over him. Note, 9 A. & E. Ann. Cas. 408; note, 19 A. & E. Ann. Cas. 1225; note, Ann. Cas. 1913B, 684. See, also, *Denton v. Railway Co.*, ante [90 Kan.] 51 [133 Pac. 558, 47 L. R. A. (N. S.) 820, Ann. Cas. 1915B, 639]. This rule applies in the case of a guest who is riding with the driver for their mutual pleasure. 29 Cyc. 548-550; note, 8 L. R. A. (N. S.) 648; 7 A. & E. Encycl. of L. 447, 448. Where two persons are engaged in a common enterprise, using a conveyance for their purpose, each is said to be responsible for the acts of the other, but for this situation to arise each must have an equal right of control. 29 Cyc. 543; note, 8 L. R. A. (N. S.) 628. In the present case the jury found that the deceased was riding with the owner of the automobile as an invited guest on a pleasure trip. The defendant therefore cannot successfully invoke the doctrine of imputed negligence." 90 Kan. 73, 74, 133 Pac. 556 (Ann. Cas. 1915B, 764).

In the *Corley Case* an automobile was negligently driven onto a railroad track and was struck by a passing train. In that case the plaintiff's husband was a guest of the driver of the automobile, and was killed in the accident. See, also, *City of Leavenworth v. Hatch*, 57 Kan. 57, 45 Pac. 65, 57 Am. St. Rep. 309; *Reading Township v. Telfer*, 57 Kan. 798, 48 Pac. 134, 57 Am. St. Rep. 355; *Williams v. Withington*, 88 Kan. 809, 129 Pac. 1148; *Denton v. Railway Co.*, 90 Kan. 51, 133 Pac. 558, 47 L. R. A. (N. S.) 820, Ann. Cas. 1915B, 639; *Anthony v. Kiefner*, 96 Kan. 194, 198, 150 Pac. 524, L. R. A. 1915F, 876, Ann. Cas. 1916E, 264; *Denton v. Railway Co.*, 97 Kan. 498, 155 Pac. 812; *Angell v. Railway Co.*, 97 Kan. 688, 156 Pac. 763.

The negligence of John Burzio cannot be imputed to the plaintiff.

[3] 3. The defendant contends that it was not negligent, and that, therefore, it is not liable to the plaintiff for the damages sustained by him. This contention is good if the defendant was not negligent, but the contention is not good if the defendant was negligent. The petition charged that the defendant was negligent in permitting vegetation, hedge, weeds, and underbrush to grow on its right of way so as to obstruct the view of the railroad track from any one traveling on the road running east and west. The jury found that the defendant was negligent in

failing to keep its right of way free from weeds, grass, and underbrush. In *Corley v. Railway Co.*, 90 Kan. 70, 133 Pac. 555, Ann. Cas. 1915B, 764, this court said:

"Liability of a railway company for injuries occasioned by a collision at a highway crossing may be founded upon its negligence in allowing unnecessary obstructions to vision to exist upon the right of way." Syl. par. 1.

In the *Corley Case*, this court carefully examined the question now under discussion and reached the conclusion just stated.

[4] 4. It is urged that the findings of the jury were contradictory to each other and to the general verdict, and it is also urged that judgment should have been for the defendant. The special questions should be interpreted so as to support the general verdict rather than so as to overturn and destroy it. *Solomon R. Co. v. Jones*, 34 Kan. 443, 8 Pac. 730; *U. P. Ry. Co. v. Fray*, 43 Kan. 750, 23 Pac. 1039; *Jackson v. Linnington*, 47 Kan. 396, 28 Pac. 173, 27 Am. St. Rep. 300; *Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. 706; *Railroad Co. v. Swarts*, 58 Kan. 235, 244, 48 Pac. 953; *MacElree v. Wolfersberger*, 59 Kan. 105, 52 Pac. 69; *Osburn v. Railway Co.*, 75 Kan. 746, 90 Pac. 289; *Lewellen v. Gas Co.*, 85 Kan. 117, 121, 116 Pac. 221; *McClain v. Railway Co.*, 89 Kan. 24, 28, 130 Pac. 646, Ann. Cas. 1914E, 699; *Orr v. Railway Co.*, 98 Kan. 120, 123, 157 Pac. 421; *Tarin v. Railway Co.*, 98 Kan. 605, 608, 158 Pac. 874.

None of the special findings contradicts, but all are consistent with, the finding that the defendant was negligent in allowing weeds, grass, and brush to grow on its right of way. That finding supports the verdict.

The judgment is affirmed. All the Justices concurring.

On Rehearing.

In a petition for a rehearing, the defendant challenges the correctness of a statement made in the opinion found in *Burzio v. Railway Co.*, 102 Kan. 287, 171 Pac. 351. That statement is as follows: "It is urged that the findings of the jury are contradictory to each other." The defendant contends that this matter was not presented. An examination of the defendant's brief discloses that the contention is correct. This matter was not urged as a ground for reversing the judgment of the trial court. The opinion that has been rendered is modified, by striking out all reference to the findings of the jury being contradictory to each other. With this modification, the opinion is adhered to.

(101 Kan. 215)

HARWOOD v. CHICAGO, R. I. & P. RY. CO.
(No. 21204.)

(Supreme Court of Kansas. June 9, 1917.
Rehearing Denied Dec. 8, 1917.)

(Syllabus by the Court.)

1. DEATH ~~§~~ 38—REPEAL OF STATUTE—LIMITATION OF ACTION.

The statute authorizing the maintenance of an action to recover damages where the death of another, and which provides a limitation as to the time an action must be brought and as to the amount of recovery (Civ. Code, § 419 [Gen. St. 1915, § 7323]), was not repealed by the Employers' Liability Act (Laws 1911, c. 239), and

as the latter act contains no provisions limiting the time within which actions shall be brought under it to recover damages for death negligently and wrongfully caused, the limitation prescribed in the death statute governs; and where the action is not brought within two years after the cause of action accrues, it is barred.

2. DEATH ~~§~~ 38—ACTION FOR WRONGFUL DEATH—LIMITATION—EFFECT.

As the provision of the death statute referred to is a limitation not only upon the remedy, but also upon the right, and as the right is lost if the action is not brought within the prescribed time, any representation or agreement of an agent of the defendant which may have induced delay will not estop the defendant from claiming the benefit of the limitation.

Appeal from District Court, Jewell County.

Action by W. J. Harwood, as administrator of the estate of Otis E. Harwood, deceased, against the Chicago, Rock Island & Pacific Railway Company. From a judgment overruling its demurrer to the petition, defendant appeals. Reversed, and cause remanded, with directions to sustain the demurrer and to enter judgment for defendant.

Paul E. Walker and Luther Burns, both of Topeka, and R. W. Turner, of Mankato, for appellant. W. R. Mitchell and White, Mahin & Mahin, all of Mankato, for appellee.

JOHNSTON, C. J. W. J. Harwood, the father of Otis E. Harwood, as administrator of the latter's estate, brought this action against the Chicago, Rock Island & Pacific Railway Company to recover damages for negligently causing the death of the decedent while the latter was in defendant's employ. From the judgment of the district court overruling the defendant's demurrer to the petition, the latter appeals.

The petition was filed September 13, 1916, and the substance of its allegations was as follows: On January 14, 1914, the deceased, a boy 15 years old and inexperienced in relation to the dangers of electricity, was working under the direction of defendant's foreman in measuring the height of certain high-power electric light wires crossing the defendant's right of way. Through the negligence of defendant in using for that purpose a tapeline which contained metal strands, the boy, who was instructed to hold one end of the tape line while the other was thrown over the electric wires, was instantly killed by a heavy charge of electricity conducted to his body from the wires above. It was also alleged that a former action for the same cause was brought on May 7, 1915, by W. J. Harwood and Mary Harwood, the parents of the deceased, against the defendant herein, and also the Concordia Electric Light Company, and that before that action was commenced the defendant railway company had represented to the Harwoods that, if they would join the electric light company as a defendant in that action, then in the event that a prima facie showing was made of the liability of the railway company the latter would pay to the Harwoods the sum of \$2,500 as damages for the death of their son. It was further alleged that the long delay in bringing the present action was due to the fact that the Harwoods believed, re-

lied upon, and acted upon the representations made by the railway company, and that there was no laches upon the part of the Harwoods, their attorney, or the plaintiff herein, and that the former action was on March 8, 1916, upon a demurrer filed by the railway company, dismissed as to it otherwise than upon the merits and without a trial of the issues.

The abstract contains part of the record of the former action and from the journal entry of judgment it appears that at the close of plaintiffs' evidence a demurrer thereto by the railway company was sustained upon the sole ground that the plaintiffs did not have the legal capacity to sue, and that a demurrer by the Concordia Electric Light Company was overruled, and the cause proceeded against the latter, with a resulting verdict in its favor. No appeal was taken by the plaintiffs in that action from the orders or judgment rendered.

[1] The ground of the defendant's demurrer to the petition was that the petition did not state sufficient facts to constitute a cause of action, or rather that the cause of action was barred by the statute of limitations. The main question upon which the parties divide is whether or not the limitation in the death statute (Civ. Code, § 419 [Gen. St. 1915, § 7323]) applies. Plaintiff contends that the action was brought under the Employers' Liability Act (Laws 1911, c. 239 [Gen. Stat. 1915, § 8480]), and that, as no limitation is prescribed in the act itself, and as the action is upon a liability created by statute, the general limitation which gives three years after a cause of action accrues in which to commence the action is the one which governs. Plaintiff argues that, if the Legislature had intended to place a limitation upon the liability created by the act, it would have been expressed in the act, as was done in the death statute, and, as no limitation is attached to the right to sue, the action may be brought within the time prescribed in the general statutes of limitations.

The Employers' Liability Act, under which the action was brought, is the later act, and it provides that all previous acts and parts of acts so far as they conflict with any of the provisions in this act are repealed. Being the latest expression of the legislative will, all repugnant provisions in former statutes must be deemed to be inoperative. The death statute and the Employers' Liability Act both provide that a recovery may be had where death has been caused by the wrong or neglect of another. Under both statutes actions may be brought by the personal representatives of the deceased, but under the death statute the widow or next of kin may bring the action if the deceased was a non-resident, or if, being a resident, no personal representative has been appointed. By the death statute the damage inures to the exclusive benefit of the widow and children or the next of kin of the deceased, while in the later act the damages are for the benefit of widow and children, husband and children,

or children or mother or father of the deceased, and, if none, then to the next of kin dependent upon the employé. In an action brought under the death statute the common-law defenses of contributory negligence of and assumption of risk by the deceased are available to the defendant, while under the later act neither is a defense, but the damages may be mitigated by the contributory negligence of the deceased to the extent of the negligence attributable to him. The earlier statute covers only liabilities for death which result from a wrongful act or omission, while the later one makes a railroad company liable for injuries to its employés who survive, and also in case of the death of an employé resulting in whole or in part from the negligence of any officer, agent, or employé of the railroad company; and it also enumerates a great number of insufficiencies and defects in the railroad, its equipment, machinery, and appliances, upon which a liability will arise. Under the death statute no provision is made for setting off indemnity or insurance that may have been paid to the injured employé, while under the employers' liability statute the railroad company may set off any sum contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to the injured employé on account of the death for which the action is brought. In the death statute there is a provision limiting the amount of damages that may be recovered for death to \$10,000, but the Employers' Liability Act does not place any limitation upon the amount of recovery, nor does it refer to the question of limitation of amount. The death statute has the express limitation which is brought directly in question in this action that the action for death must be brought within two years, while the Employers' Liability Act makes no reference whatever to the time in which an action may be brought. While the later act is much broader in its scope than the earlier one, and while both cover some of the same subject-matter, there are important provisions of the earlier one not covered by the later one, and manifestly such provisions have not been repealed. There was no express repeal of the old statute, and to otherwise effect a repeal the legislative purpose must be clearly indicated.

In *Stephens v. Ballou*, 27 Kan. 594, it was said:

"If the provisions of the old act and of the new can be reconciled by any possible mode of interpretation or construction, if the old act and the new can both be given force and effect, according to their terms and under any circumstances, then it should never be held that one overturns and destroys the other, but both should be given full force and effect." 27 Kan. 601.

The general rule is that, if there is a plain and irreconcilable repugnancy between some of the provisions of the old statute and of the new, and as to others there is no conflict, the repugnant provisions of the old must be deemed to be repealed, but the other provisions will be given effect. The old is re-

pealed only to the extent of the repugnancy *Hornaday v. State*, 63 Kan. 499, 65 Pac. 656; *Newman v. Lake*, 70 Kan. 848, 79 Pac. 675; *State v. Hoover*, 78 Kan. 863, 98 Pac. 276; 36 Cyc. 1073.

As we have seen, there are important general provisions of the old statute not in the new, and there is scope for the operation of these in an action to recover damages for death occasioned by wrong and neglect. The limitations upon the amount of recovery and in the time within which actions shall be brought in death cases are general Code provisions which have been in force for many years and appear to be as applicable to death cases under the new statute as under any of the preceding ones.

The question can hardly be regarded as open to further inquiry or interpretation since the decision in *Cheek v. Railway Co.*, 89 Kan. 247, 131 Pac. 617. There a recent statute was under consideration which provided, among other things, that an owner, lessee, or operator of a coal mine should be liable to the widow and heirs of a miner who lost his life through the willful failure of such owner, lessee, or operator to provide for the safety and protection of miners in the way the statute requires. Gen. Stat. 1915, § 6280. The act did not prescribe the procedure nor fix any limitation as to when an action should be brought under it nor yet as to the amount of recovery, and it was held that actions under it took the same form and course as if conducted under the general Code provisions relating to death by wrongful act. It was said:

"No procedure is prescribed for the enforcement of the right, and whenever the Legislature gives an action, but does not designate the kind of action or prescribe the mode of procedure therein, such action shall be held to be the civil action of the Code of Civil Procedure and shall be proceeded in accordingly. Civ. Code, § 752. The result is that the mining statute takes its place among the provisions of the Code of Civil Procedure relating to death by wrongful act, and becomes subject to those provisions in all respects not differentiated by the mining statute itself. The action must be brought within two years; the damages cannot exceed \$10,000; and they are to be distributed in the same manner as personal property of the deceased." 89 Kan. 254, 131 Pac. 620.

There is a close similarity between that case and this one, and the rule there adopted is a governing precedent as to the application of the statute of limitations in the present case. The Employers' Liability Act takes its place in the statutes of the state and is subject to the general provisions of the Code applicable to the different provisions of that act, and an action brought under it for recovery of damages for the death of an employé is subject to and must be tried under the rules of civil procedure not inconsistent with the provisions in the act itself. There being no limitation in the new act, the one prescribed by the Code in death cases is ap-

plicable, and, as the case was not brought within that time, the plaintiff's cause of action was effectually barred.

[2] The view taken makes it unnecessary to pass upon the question so much argued whether the decision in the case brought by the parents of the deceased to recover damages for the death of their son in which the court, upon a demurrer to the evidence, decided that they were not entitled to a recovery, and from which it appears no appeal was taken, constituted a bar to the action subsequently brought by the administrator. It was alleged that one reason for the delay in bringing the present action was that the claim agent of the defendant told the parents of the deceased and their attorney that, if a suit was brought against the defendant, and also the electric light company, and a prima facie showing of liability was made, the railway company would pay them \$2,500 as damages, and that they brought such an action, which was not decided until March 8, 1916, more than two years after the death of the son. It would seem from the result in that case that a prima facie showing of liability was not made as a demurrer to their evidence was sustained by the trial court. Besides, the limitation in question is not only a limitation upon the remedy, but also upon the right, and the right is lost if the action is not brought within the prescribed time. *Hamilton v. H. & St. J. Rld. Co.*, 39 Kan. 56, 18 Pac. 57; *Rodman v. Railway Co.*, 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704.

In *Bement v. Grand Rapids & I. Ry. Co.* (Mich.) 160 N. W. 424, it was held that, where a statute creates a liability where none existed, and the limitation of the remedy is a limitation of the right, the fact that an agreement or fraudulent representations have been made by the defendant will not estop him from claiming the benefit of the statute.

The theory is that, a condition being attached to the right, it must be enforced within the time fixed. In such case the condition really becomes a part of the right, and the right is lost if the time is disregarded. It follows that the decision of the trial court overruling the demurrer to the petition must be reversed, and the cause remanded, with directions to sustain the demurrer and enter judgment for the defendant. All the Justices concurring.

(64 Colo. 406)

DENVER & R. G. R. CO. v. DUFFY.
(No. 9343.)

(Supreme Court of Colorado. March 4, 1918.)

JUSTICES OF THE PEACE §—159(12)—APPEAL—BOND.

Rev. St. 1908, § 3853, providing that a party appealing from a justice court judgment shall not be prejudiced by the informality or insufficiency of the bond if he give a good bond within a reasonable time, applies, although the original bond was signed only by the surety and not by the appealing party.

Error to Lake County Court; Thomas F. O'Mahoney, Judge.

Action by Mike Duffy against the Denver & Rio Grande Railroad Company before a justice of the peace. Defendant's appeal to the county court was dismissed, and it brings error. Reversed and remanded, with directions.

E. N. Clark and G. A. Luxford, both of Denver, and J. W. Clarke, of Leadville, for plaintiff in error. James T. Hogan, of Leadville, for defendant in error.

HILL, C. J. This action was instituted by the defendant in error before a justice of the peace. Upon appeal to the county court, he moved to dismiss the appeal for the reason that no appeal bond had been given; the purported bond, filed and approved, not being signed by the defendant, but by its surety only. This motion was granted, and the action dismissed, without giving the defendant an opportunity to furnish a good bond. In this the trial court erred. In such cases, section 3853, Rev. Stats. 1908, gives to the defendant a reasonable time within which to file a good and sufficient bond. *Schofield v. Felt*, 10 Colo. 146, 14 Pac. 128. The contention, because the bond was not signed by the defendant, that it was no bond, hence section 3853, supra, does not apply, is not well taken. *Wheeler v. Kuhn*, 9 Colo. 196, 11 Pac. 97.

While this case is now being presented on application for supersedeas only, it is controlled by former cases, involving the same points, which are not now debatable in this jurisdiction; for this reason we are of opinion that it should be finally disposed of at this time. The judgment will be reversed, and the cause remanded, with directions to vacate the order of dismissal, and give to the defendant a reasonable time within which to execute and have approved an appeal bond.

Reversed and remanded, with directions.

WHITE and TELLER, JJ., concur.

(64 Colo. 316)

POOR v. WILSON, County Treasurer.
(No. 8858.)

(Supreme Court of Colorado. March 4, 1918.)
WATERS AND WATER COURSES—§231—IRRIGATION DISTRICT—TAXES—BONDS—PAYMENT OF INTEREST.

Where an irrigation district had five issues of bonds outstanding and the tax for one year covered interest on all of such issues, a property owner within the district could not use interest coupons clipped from one issue of bonds to pay that portion of his tax on other issues, so that a tender of coupons of one issue to pay such a tax covering all the issues was insufficient.

Error to District Court, Otero County; J. E. Rizer, Judge.

Mandamus by George E. Poor against Benjamin G. Wilson, as County Treasurer of Otero County and ex-officio Treasurer of the

Otero Irrigation District, a corporation. To review a judgment for defendant dismissing the action, the plaintiff brings error. Affirmed.

H. E. Popham and Pershing, Titsworth & Fry, all of Denver, for plaintiff in error. Thomas K. Skinker, of St. Louis, Mo., and Charles E. Sabin, of La Junta, for defendant in error.

HILL, C. J. The plaintiff in error, as the owner of land in the Otero Irrigation District, instituted this action in mandamus to compel the defendant Wilson, as county treasurer of Otero county, to accept in payment of the tax levied to pay interest on irrigation district bonds included in the first half of taxes due in 1915, interest coupons clipped from certain bonds of the district; also, to accept a district warrant and a certain amount of money in payment of the first half of the tax levied for maintenance of said district payable in the year 1915. The judgment was for the defendant, and the action dismissed.

The record discloses: That the Otero Irrigation District has outstanding five different issues of bonds. The first were issued in 1902, the second in 1906, the third in 1909, the fourth in February, 1910, and the fifth in September following. That the coupons tendered by plaintiff were clipped from the fifth issue of bonds and were due June 1, 1915. That the plaintiff was the owner of certain lands in the district. That his taxes payable thereon in 1915 were as follows: Interest on the five issues of district bonds, \$243.71, principal due on bonds \$113.02, for maintenance and operating expenses of the district \$123.62, for state, county, and school taxes \$41.58. That on March 16, 1915, the plaintiff tendered to defendant in payment of the first half of all of said taxes eight interest coupons for \$15 each, clipped from the fifth issue of bonds as aforesaid, a warrant of the district payable in 1915 out of the maintenance fund for \$60 and \$80.97 in cash. It is agreed that the coupons, warrant, and moneys tendered are sufficient in amount to pay the first half of said taxes if proper to be used at the time and for the purposes tendered.

The treasurer urges several reasons to justify his actions. It is unnecessary to consider more than one. The tender was as a whole. This action was to compel its acceptance as a whole. It is agreed that the levy for interest was made upon all of the lands in the district, and was in the amount required to pay all the interest upon all the issues for the year 1915, with 15 per cent. added for delinquencies. When applied to this case, the ruling in *Thomas v. Patterson*, 61 Colo. 547, 159 Pac. 34, makes it the duty of the treasurer to apportion the moneys received for any tract of land in payment of

this levy for interest to the credit of the interest account of each of the five issues of bonds in proportion that the amount of each bears to the whole. Somewhat similar conclusions pertaining to our Irrigation District Act were reached in *Eberhart v. Canon et al.*, 61 Colo. 340, 157 Pac. 189, and *Orchard Mesa Farm Co. v. Canon et al.*, 61 Colo. 347, 157 Pac. 192. It follows that the plaintiff cannot use coupons clipped from one issue of bonds to pay that portion of his taxes which were levied for the payment of interest upon other issues of bonds. For this reason the treasurer was justified in refusing the tender made.

The judgment is affirmed.

Affirmed.

BAILLEY and ALLEN, JJ., concur.

(64 Colo. 342)

WESTERN INS. CO. OF PITTSBURGH,
PA., v. SKASS et al. (No. 8972.)

(Supreme Court of Colorado. March 4, 1918.)

INSURANCE — 422 — FIRE POLICY — EXPLOSIONS.

A fire policy provision against liability from explosions, unless fire ensues, and in such event for the fire damage only, does not exempt from liability for loss where the fire preceded and proximately caused the explosion.

Error to District Court, City and County of Denver; John A. Perry, Judge.

Action by Rebecka Skass and Milton L. Anfenger against the Western Insurance Company of Pittsburgh, Pa. Judgment for plaintiffs, and defendant brings error. Affirmed.

Sylvester G. Williams, of Denver, for plaintiff in error. Philip Hornbein and Milton L. Anfenger, both of Denver, for defendants in error.

ALLEN, J. This is an action upon a fire insurance policy to recover indemnity for loss occasioned by fire upon premises insured by the plaintiff in error.

The plaintiffs below, the insured, alleged, and the evidence shows, that a fire occurred at the dwelling house described and protected by the policy; that after the fire had been in progress for some little time an explosion occurred causing a portion of the building to collapse; that the fire preceded and was the direct and proximate cause of the explosion and of the injury to the building; and that the explosion was an incident to the fire. It is admitted that the total loss occasioned by both the fire and the explosion amounted to \$661.43, and that the loss occasioned by the fire alone, when considered as if no explosion had occurred, amounted to \$58. The plaintiffs sued for, and recovered, a judgment for the loss occasioned by the fire itself, and also for the loss caused by the explosion.

The main contention of the plaintiff in error, the insuring company, and the only contention discussed in its brief, is that by the terms of the policy the company is not liable for the explosion damage in this case. The policy sued on was admitted in evidence, and it is therein provided and agreed that:

"The Western Insurance Company, in consideration of the stipulations herein named [etc.] does insure Rebecka Skass, * * * against all direct loss or damage by fire, except as herein-after provided * * * to the following described property."

Under the heading, "Conditions Referred to in the Body of Contract" are various provisions, including the following:

"This company shall not be liable for loss caused directly or indirectly by invasion * * * or (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind."

The explosion clause above quoted is the only basis for the contention of plaintiff in error, and the sole question for determination is whether such clause relieves the insurer from any liability for the loss resulting from the explosion, under the facts and circumstances disclosed by the evidence in the case at bar. In the case of *German-American Insurance Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77, this court having before it a fire insurance policy containing an explosion clause in the same language as is the clause in question in the instant case, used the following language in determining the liability of the insurer:

"If the fire preceded the explosion and the explosion was an incident thereto, the fire was the direct or proximate cause of the injury by the explosion, and plaintiff was entitled to recover for his entire loss."

The plaintiff in error contends that the language above quoted is obiter dictum, and that therefore the *Hyman* Case is not decisive of the instant case under the doctrine of stare decisis. We do not concede that the point thus raised is well taken, but even if the language quoted should be regarded as obiter dictum the result, nevertheless, would be the same. The rule stated in the opinion in the *Hyman* Case is in accord with most, if not all, of the decisions of various courts that have determined the liability of an insurer under a fire insurance policy containing this usual explosion clause, where, as in the case at bar, a hostile fire preceded and caused the explosion and the explosion was an incident to such fire. Supporting the view taken in the *Hyman* Case, to the effect that in such cases the insured is entitled to recover his entire loss, are the following authorities: *Transatlantic Fire Ins. Co. v. Dorsey*, 56 Md. 70, 40 Am. Rep. 403; *Washburn v. Miami Valley Ins. Co.* (C. C.) 2 Flap. 664, 2 Fed. 633; *Hall v. National Fire Ins. Co.*, 115 Tenn. 513, 92 S. W. 402, 112 Am. St. Rep. 870, 5 Ann. Cas. 777, and note; *Wheeler v.*

Phenix Ins. Co., 203 N. Y. 283, 96 N. E. 452, Ann. Cas. 1913A, 1297, and note, 38 L. R. A. (N. S.) 474 and note; Mitchell v. Potomac Ins. Co., 183 U. S. 42, 22 Sup. Ct. 22, 46 L. Ed. 74; Fire Ass'n of Philadelphia v. Evansville Brewing Ass'n (Fla.) 75 South. 197. In Transatlantic Fire Ins. Co. v. Dorsey, supra, it is said:

"In this case, the exception of liability for explosions of any kind is certainly very broad and comprehensive; but that exception must not be so construed as to defeat the main and principal object of the insurance. * * * But where a fire has occurred, and is in progress, the effects of which are covered by the policy, and an explosion takes place as an incident or result thereof, so as to increase the loss, whether the whole of the damage or loss thus produced can be regarded as within the protection of the insurance, in a case where the policy contains the exemption from liability for explosions, has been the subject of some diversity of judicial opinion. We think, however, both upon reason and the established rules of construction, that such loss should be regarded as within the risk assumed by the insurers. In such case, the fire is the direct and efficient cause of the loss, and the explosion but the incident, and if the insurers intend to exclude such liability, they must do so by plain and unambiguous terms."

In 14 R. C. L. 1218, § 398, the text referring to clauses in fire insurance policies exempting the insurer from liability in case of explosion, it is said:

"Under a provision of the latter character, if the fire precedes the explosion, and the explosion is an incident thereto, the fire is the direct or proximate cause of the injury by the explosion, and the insured is entitled to recover for his entire loss."

In view of the authorities above cited, we are of the opinion that the rule announced in the Hyman Case correctly states the law applicable in the instant case, and that under the facts disclosed by the evidence in this case, the plaintiffs below are entitled to recover, under the terms of the policy sued on, the total loss occasioned by both the fire and the explosion.

For the reasons above given, and adopting the rule announced in the Hyman Case, the judgment is affirmed.

Affirmed.

HILL, C. J., and BAILEY, J., concur.

(64 Colo. 332)

DE ROSE v. PEOPLE. (No. 8965.)

(Supreme Court of Colorado. March 4, 1918.)

1. FORGERY — WHAT CONSTITUTES — "FORGE"—"COUNTERFEIT."

To forge or counterfeit an instrument is to falsely make it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Counterfeit; Forge.]

2. FORGERY — WHAT CONSTITUTES — "FALSELY MAKE."

Rev. St. 1908, § 1704, declaring persons guilty of forgery who should "falsely make," alter, forge, or counterfeit a request for a payment of money, etc., is inapplicable to a padded railroad time roll from which the pay roll was

made, since the time roll itself was genuine, although containing false entries.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Forgery.]

En Banc. Error to District Court, Lake County; Charles Cavender, Judge.

Charles De Rose was convicted of forgery, and brings error. Reversed.

Hogan & Bonner, of Leadville, for plaintiff in error. Fred Farrar, Atty. Gen., and Ralph E. C. Kerwin, Asst. Atty. Gen., for the People.

GARRIGUES, J. Charles De Rose was convicted of forgery in the court below, and sentenced to a term in the penitentiary.

The information charged that he feloniously and falsely made and forged a certain order, warrant, and request for the payment of money by the Denver & Rio Grande Railroad Company, to wit, a certain railway time roll, and did feloniously utter, publish, pass, and attempt to pass as true and genuine, a certain false order, warrant, and request for the payment of money by the Denver & Rio Grande Railroad Company, to wit, a roadway time roll, with intent to damage and defraud the company.

On motion for a bill of particulars, the prosecution furnished defendant with a copy of the instrument alleged to have been forged and uttered, which is a time sheet or railroad time roll containing the names of men who worked on the Tennessee Pass section; the time they worked and rate and amount of compensation due each for the month of December, 1915, which defendant, as section foreman, made and certified as correct and sent in to the roadmaster.

The evidence shows that defendant was section boss or foreman on the Tennessee Pass section; that a part of his duties was to make out and send in the time roll of the men who were working for him on the section at the end of the month; that he "padded" the time roll for the month of December, 1915, by crediting Albert De Rose with more days than he had worked during that month. The customary method of paying section men was for the foreman to make out the time roll at the end of the month, certify it as correct, and send it to the office of the roadmaster, where it was checked over, countersigned, and sent to the superintendent's office as the basis of the pay roll. The time roll remains in the superintendent's office, and the pay roll is made up from it and sent to the treasurer's office in Denver, from which office the pay checks, when written, are sent to the men whose names appear on the roll. In this instance the fraud was discovered in the roadmaster's office before the pay roll was made up.

The court instructed the jury:

"(3) Under the statutes of Colorado, the fabrication of any false instrument with intent to defraud, or the attempt to pass such instrument with like intent, is forgery, even though there is no forged indorsement by the payee. The crime does not consist in accomplishing the fraud, but in attempting it by prohibited means, and, if you should find from the evidence that Charles De Rose placed the name of Albert De Rose upon the pay roll with intent to defraud the Denver & Rio Grande Railroad Company out of pay for any number of days, you will find him guilty of forgery."

The statute provides:

"Every person who shall falsely make, alter, forge or counterfeit * * * any order or warrant or request for the payment of money * * * with intent to damage or defraud any person or persons, body politic or corporate * * *; or shall utter, publish, pass, or attempt to pass as true and genuine, or cause to be uttered, published, passed, or attempted to be passed, as true and genuine, any of the above named false, altered, forged or counterfeited matters as above specified and described, knowing the same to be false, altered, forged or counterfeited, with intent to prejudice, damage or defraud any person or persons, body politic or corporate * * *; every person so offending, shall be deemed guilty of forgery." (Rev. St. 1908, § 1704).

[1, 2] 1. This writing is what it purports to be—a true and genuine instrument, although it contains false statements. It is not a false paper, and the execution of such a document does not constitute forgery. The prosecution failed to distinguish between falsely making an instrument and making a false instrument, and this paper was not falsely made or forged. To forge or counterfeit an instrument is to falsely make it. The term "falsely make" as used in the statute refers to the paper itself as being false, and not to the truth or falsity of its statements. The statute refers to the false making or altering, and not to the tenor of the writing or the facts stated therein. A false statement of fact in an instrument which is itself genuine, by which another person is deceived and defrauded, is not forgery. *State v. Young*, 46 N. H. 266, 88 Am. Dec. 212; *Territory v. Gutierrez*, 13 N. M. 312, 84 Pac. 525, 5 L. R. A. (N. S.) 375; *U. S. v. Glasener* (D. C.) 81 Fed. 566. So in this case defendant, when he made up and signed the time roll, did not make a false writing. The document itself is genuine, and the fact that he made a false statement in the writing does not constitute the crime of forgery.

The judgment of the lower court is reversed.

Reversed.

SCOTT, J., not participating.

(64 Colo. 322)

ROTGE v. ROTGE. (No. 8922.)
(Supreme Court of Colorado. March 4, 1918.)
1. DIVORCE — 217 — TEMPORARY ALIMONY — INCREASE.

The amount ordered to be paid as temporary alimony may be increased to meet the wife's

needs from changed circumstances because of a necessary surgical operation with its expenses.

2. DIVORCE — 287 — ALIMONY — APPEAL — MODIFICATION OF JUDGMENT — TECHNICAL ERROR.

For technical error in ordering, by way of increase of temporary alimony, a husband to pay others their claims against the wife for surgical operation, instead of into court to be applied by her, the appellate court will not reverse, but modify.

En Banc. Error to District Court, El Paso County; W. S. Morris, Judge.

Suit by Grace F. Rotge against John F. Rotge. There was an order for payment by defendant by way of temporary alimony, and he brings error. Modified and affirmed.

M. M. Burns and Ira Harris, both of Colorado Springs, and Edward C. Stimson and Page M. Brereton, both of Denver, for plaintiff in error. W. D. Lombard and James A. Orr, both of Colorado Springs, for defendant in error.

WHITE, J. The question involved grows out of a divorce proceeding, wherein the defendant in error here was plaintiff and the plaintiff in error was defendant. Upon application for temporary alimony, etc., the court entered an order requiring the defendant to pay plaintiff \$125 per month, \$100 as attorney fees, and the further sum of \$25 as court costs, "until the further order of the court." Thereafter an answer was filed to the complaint for divorce. While the matter was thus pending, and approximately six months after the date of the filing of the answer, plaintiff filed a petition in the case, wherein she recited the order aforesaid, relating to temporary alimony, etc., and alleged "that at the time of the granting of said order it was understood by all parties to this cause, and so stated upon the hearing for such order, by the said judge of this court, that such sum was allowed with the understanding that it was not to cover, or intended by the court to cover, unforeseen conditions or contingencies that might arise whereby the plaintiff might undergo other expense necessary and required to be paid, prior to the trial of this cause and final determination thereof in this court." She further alleged that subsequent to such order, and prior to the filing of the instant petition, it became necessary for plaintiff to undergo an operation, "and for that purpose [she] was taken" to a hospital where she was operated on; that the necessary expenses incurred in such operation were \$28.90 for hospital fee and \$160 fee of the surgeon, which she had incurred, was unable to pay, and now owed; that the aforesaid temporary alimony required by order of the court to be paid by defendant to plaintiff per month was and is "inadequate and insufficient with which to take care of the extra expense." The petition was sworn to, and ended with a prayer

that the court require the defendant to forthwith pay to plaintiff, or to the hospital and the surgeon, the aforesaid sums. No answer or affidavits denying the facts alleged in the petition were filed. Upon the hearing of the petition, it was conceded by counsel on either side that the surgeon who performed the operation had sued the parties to this suit before a justice of the peace and recovered judgment against both for the amount of his fee, but nothing had been recovered upon the judgment, though plaintiff in error had been garnished as being indebted to defendant in error, and had answered thereto, admitting his indebtedness for the monthly alimony due. The court thereupon found the issues upon the petition in favor of plaintiff, and that the expenses of the operation and hospital bill incurred were an unforeseen contingency, for which no provision had been made by the court and that the bills were just, and that judgment for the surgeon's bill had been rendered in the justice court against both the parties to this suit, and ordered that plaintiff in error herein pay the hospital bill and said judgment, and that the payment of said amounts should in no wise be deducted from or in any way affect the temporary alimony required by prior order of the court to be paid by defendant to plaintiff each month.

[1] The ordinary rule that, where in a divorce suit temporary alimony has been awarded the wife and the husband duly pays the same, he will not be liable thereafter for necessities subsequently furnished her has no application to the facts of this case. It may be that the husband, in the instant case, might have avoided the judgment against himself in the justice court by making the defense now suggested. This he did not do, and the finding is that a judgment was rendered therein against both the parties hereto and stands unpaid. While it is the debt of the husband, it is likewise the debt of the wife, and the substantial effect of the order is that the husband furnish her with money to pay her debt. If compliance with the order incidentally satisfies a judgment against the husband, it in no wise affects this controversy. The question here relates to the power of the district court, where the divorce suit is pending, to increase the payments, required to be made by the husband during the pendency of the suit, to meet the needs of the wife which have arisen because of changed conditions, and has nothing to do with the rights of third parties as against the husband.

[2] Defendant further contends that the order is invalid, for the reason that it requires him to make payments to persons not parties to the suit. It is true that it directs defendant to pay the hospital bill incurred by plaintiff, and the judgment in favor of the surgeon for his services. The purpose of the

proceeding was to relieve plaintiff of the obligations in question, and, if it was technically an error to order defendant to pay the same directly, instead of requiring him to pay the necessary amount into the court to be used by plaintiff in the discharge of such indebtedness, it may be corrected here, and a reversal of the judgment is unnecessary. The judgment is accordingly so modified, and, as modified, affirmed.

Judgment affirmed.

SCOTT, J., not participating.

(64 Colo. 325)

FORKER v. HOPKINS et al. (No. 8942.)

(Supreme Court of Colorado. March 4, 1918.)

1. JUDGMENT \S 720—RES JUDICATA—WATER RIGHTS.

A decree settling the appropriations and priorities of the respective ditches to the use of water of a stream for irrigation, rendered in an appropriate proceeding in which a prior agreement of the ditch owners settling their rights to the waters was introduced in evidence, is res judicata of their rights in suit by one of the ditch owners against the others to enjoin violation of the agreement.

2. JUDGMENT \S 287 — ENTRY — EFFECT — MISTAKE.

A decree as entered, even if different from that pronounced, is binding till corrected by appropriate proceeding.

3. CONTRACTS \S 103—VALIDITY—CONTRAVENTION OF LAWS.

Any private contract, the effect of which is to abrogate the water laws and deprive the water officials of their legal powers and duties to enforce the judicial water decrees, is void.

4. JUDGMENT \S 501—COLLATERAL ATTACK.

If a decree as entered be contrary to the evidence and the findings of the referee confirmed and accepted by the court, the remedy is by appropriate objections at the time, and if these be overruled, by appeal.

En Banc. Error to District Court, Garfield County; John T. Shumate, Judge.

Suit by Tillie Forker against J. W. Hopkins and others. Decree for defendants, and plaintiff brings error. Affirmed.

Thomas A. Rucker, of Aspen, and J. W. Dollison, of Glenwood Springs, for plaintiff in error. Ed. T. Taylor and Chas. W. Taylor, both of Glenwood Springs, for defendants in error Hopkins. C. W. Darrow, of Glenwood Springs, for defendants in error Schleischer.

GARRIGUES, J. Tillie Forker, owner of the Forker & Gibson ditch, brought this suit against defendants in error, owners of the Landis ditches Nos. 1 and 2, the O. K. ditch, and the Chapman ditch. From the complaint, to which a demurrer was sustained, it appears that in 1888 there were five constructed ditches diverting water for irrigation from Landis creek, a stream in Garfield county furnishing but a small quantity of water, to wit: Landis ditches Nos. 1 and 2, owned by Dollie Landis; O. K. ditch, owned

by C. A. Kendall; Forker & Gibson ditch, owned by William Forker and one Gibson; and the Chapman ditch, owned by Frank Chapman. These are the only ditches on the stream, and they are alleged to have appropriated all the water. May 12, 1888, the owners of the several ditches entered into the following agreement in writing, by which Kendall was to have one-fifth of the water of the creek for the O. K. ditch, and the other ditches the remainder:

"The undersigned, Wm. Forker, Frank Chapman, Mrs. Dollie Landis, Mrs. Tillie Gibson, and C. A. Kendall, parties of the first part, and C. A. Kendall, party of the second part, all of Spring Valley, Garfield county, Colo., have this the 12th day of May, A. D. 1888, agreed upon and made the following settlement of their conflicting water rights and priorities, in and by these presents make, acknowledge, and confirm the following conveyances in the premises: The said parties of the first part relinquish and convey unto the party of the second part, his heirs and assigns, one-fifth of the entire waters running in the natural water course of what is known as Landis creek, said one-fifth to be taken for agricultural or other purposes, but only to be taken by the party of the second part between the first day of April and the last day of September of each and every year, and none of said waters to be taken by party of the second part at any other than the last-mentioned time or period of time. The party of the second part relinquishes and conveys unto the parties of the first part, their heirs and assigns, four-fifths of the waters of said creek during the period last mentioned, and all the waters of said creek during the balance of any and every year; that is to say, between the first day of October of each year and the last day of March of the succeeding year; the said waters to be used for agricultural or other purposes. Whereas, the several parties or their grantors or privies in estate have heretofore filed in the office of the clerk of said county their several statements and plats of ditch or water claims, claiming the waters of said creek for the purposes aforesaid, now the intent and object of this conveyance and grant is to convey to the several parties all interests acquired by virtue of the said several statements according to the proportions and for the purposes herein stated. As a part of this contract it is hereby stipulated that a disinterested person shall act as water commissioner, whenever his services are required by either party, who shall superintend the making and maintaining the headgates that may be required by any one of the several parties, and shall control the flow of water therein with the view or for the purpose of carrying out the intent of this instrument. If the parties cannot agree upon the person who shall act as such commissioner, he shall be selected by arbitration, as provided by law or the agreement of the parties. This covenant shall run with the lands of the several parties hereto. It is agreed that the said commissioner shall, without a day's delay, in order that the crops for the present year may be saved, proceed to put in the several headgates mentioned and perform the other duties herein prescribed."

After this and prior to October 9, 1889, William Forker sold to one Graham, and Frank Chapman sold to Fred Chapman, and on this date Landis, Kendall, Graham, Gibson, and Fred Chapman, as owners of the various ditches, each filed a separate petition in the district court asking for a statutory adjudication settling the appropriation and priority of the respective ditches to the use

of water for irrigation, none of which, however, made any reference to the agreement. The court referred the matter to a referee to take testimony and submit draft of findings and a decree. The agreement hereinbefore mentioned was introduced in evidence and the claimants each testified before the referee that they were willing to abide by the agreement and desired that a decree be entered in accordance therewith. The findings of the referee, among other things, stated that by the written agreement of the claimants the priorities of the ditches are equal, and in the distribution of the water the water commissioner should divide the water of the creek to the ditches accordingly. The findings were approved and confirmed in all respects by the court and filed in the clerk's office with the evidence. Notwithstanding the court adopted the findings, it signed a decree which was entered of record, giving to each ditch the appropriation and priority to which it was entitled under the rule of priority, irrespective of the contract, as follows:

Ditch No. 32A—claimant, Dollie Landis; name, Landis ditch No. 1; priority No. 36A; date, June 1, 1882; amount, 1.6 cubic feet per second.

Ditch No. 32B—claimant, Dollie Landis; name, Landis ditch No. 2; priority No. 36B; date, June 1, 1882; amount, 1.6 cubic feet per second.

Ditch No. 72A—claimant, Clark A. Kendall; name, O. K. ditch; priority No. 91A; date, May 15, 1884; amount, 1.2 cubic feet per second.

Ditch No. 85A—claimants, Forker and Gibson; name, Forker & Gibson ditch; priority No. 117A; date, April 30, 1885; amount, 1.5 cubic feet per second.

Ditch No. 103A—claimant, Fred Chapman; name, Chapman ditch; priority No. 143; date, April 25, 1886; amount, 2 cubic feet per second.

After the decree was entered, Tillie Forker became the sole owner of the Forker & Gibson ditch, water rights, and lands thereunder, and defendants in error acquired by purchase the other ditches, water rights, and lands thereunder. The complaint alleges that each and all of said defendants had, at the time they acquired title to their lands and their ditches and their right to the use of water from Landis creek, complete notice and knowledge of the existence of said contract, and the terms and conditions thereof, and that their grantors had at all times acquiesced therein, and divided the waters of the creek in accordance with the terms of the contract; that in 1914 defendants violated the agreement and took all the waters of the stream in times of scarcity; but nowhere is it alleged that they violated the terms of the decree. The complaint prays for an injunction restraining defendants from interfering with plaintiff's use of the water of the creek as provided by the contract; that the contract be declared in full force and binding upon the parties to the action; and for damages and costs.

[1, 2] 1. The position of plaintiff seems to be that the validity of the contract and not the validity of the decree is involved; that it was the duty of the court in the adjudication proceeding to enter a decree settling the appropriations of the ditches according to the priorities, just as was done, and leave the parties to adjust their rights among themselves under the prior agreement, and, if they could not do so, that an action might be brought to enforce the agreement, notwithstanding the decree.

No doubt there is a conflict between the agreement, the findings, and the decree, and the question in this suit is, Which shall prevail? Which shall the water commissioner recognize in the distribution of the water to the ditches, the agreement and findings or the decree? While it is true the adjudication conferred or created no new rights upon the parties, still the decree is the final judgment pronounced by the court in the system of procedure enacted for the express purpose of determining and settling the appropriations and priorities of the various ditches on the stream, and it is res judicata as to the matters therein adjudicated and settled. It is doubtful whether the files in the clerk's office containing the evidence and findings of the referee could be admitted in evidence in this case for the purpose of impeaching, varying, or availing the force and effect of the decree. If the decree entered is different from the decree pronounced, there is an appropriate way by which it may be made to speak the truth; in this proceeding we are bound by the decree as entered.

In *Bates v. Hall*, 44 Colo. at page 367, 98 Pac. 6, it is said:

"The general statutory decree was required to be entered in the judgment book of the court. As thus spread on the records it is the best evidence of what was adjudicated in that proceeding. If it is different from the decree as reported by the referee, the presumption is the latter was modified by the court after the report was filed and before the entry was made. Upon the showing in this record, it is doubtful if Exhibit A was sufficiently identified to justify its admission as evidence at all. If, as claimed by respondents, it had been altered, the court should not have admitted it. If the decree as entered is different from the decree as actually pronounced, those making such contention should make the entry speak the truth. Until it is so corrected, it is binding on all the parties and prevails over the exhibit, even though the latter contains what the court decided."

[3, 4] Our Constitution provides that the water of every natural stream within the state is the property of the public, that is, of the people of the state, and it is dedicated to their use in that instrument. The state, through the Legislature, has established a system of procedure by which the volume and priority of ditches on the streams may be judicially determined and decrees entered accordingly. It also provides for the policing of the streams and the distribution of the water to the ditches entitled thereto by statutory officers appointed by the Governor for that purpose, who must distribute the water according to the decrees. Any private contract, the effect of which is to abrogate these laws and deprive the water officials of their legal powers and duties to enforce the judicial water decrees, must of necessity be void. These irrigation decrees define the rights of the ditches to divert water from the streams and become the law of distribution to be followed by the police officers in times of scarcity, when it is necessary to police the stream. In the case at bar, the decree is pleaded and an attempt made to avoid its enforcement by showing that its terms are not in accordance with the evidence and the findings of the referee which were adopted by the court. If it be true that the decree entered by the court is contrary to the evidence and the findings of the referee confirmed and accepted by the court, the time to correct such error was then and there, and in the manner provided by law. Appropriate objections should have been made to the proposed decree, and, if overruled, the complaining parties had their remedy by appeal to this court, where any alleged wrong, mistake, or error could have been reviewed. The decree was signed and entered in 1890, and has since been a matter of public record. Any interested party could ask, and the water officials would be bound to distribute, the water in accordance with its terms, regardless of the contract or agreement entered into by the parties prior thereto concerning the distribution of the water.

The judgment of the lower court is right and will be affirmed.

Affirmed.

SCOTT, J., not participating.

(64 Colo. 301)

PAINESVILLE NAT. BANK OF PAINESVILLE, OHIO, v. HANNAN et al.
(No. 8721.)

(Supreme Court of Colorado. March 4, 1918.)

1. CARRIERS — PLEDGE OF BILL OF LADING—TITLE.

When a bank in good faith makes advances, whether as a purchaser or lender, and receives a bill of lading as security, it has a claim upon the property covered by the bill of lading, which is good as against the claim of a creditor of the shipper.

2. APPEAL AND ERROR — 173(6) — QUESTION NOT RAISED BELOW.

Where defendants did not plead the statute of frauds as a defense in the lower court, it could not be invoked for the first time in the Supreme Court.

3. ATTACHMENT — 377—WRONGFUL ATTACHMENT—EXEMPLARY DAMAGES.

In action for damages for sale of plaintiff's property under attachment against another, exemplary damages are not recoverable.

En Banc. Error to District Court, City and County of Denver; H. P. Burke, Judge.

Action by the Painesville National Bank of Painesville, Ohio, against George E. Hannan and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Dana & Blount and Richard A. Smith, all of Denver, for plaintiff in error. Grant L. Hudson, of Denver, for defendants in error.

BAILEY, J. This suit is to recover damages on account of the sale by Nisbet, as sheriff, of an automobile and equipment pursuant to a levy of a writ of attachment issued in a suit wherein Hannan, the other defendant herein, was plaintiff, against the Vulcan Manufacturing Company, of Ohio. At the conclusion of testimony of plaintiff, defendants moved a non-suit. The motion was allowed and the cause dismissed. Plaintiff brings the proceedings here for review on error. In the opinion the parties will be designated as in the trial court.

The essential facts are that Hannan, a dealer in automobiles in Denver, was a creditor of the Vulcan Manufacturing Company of Painesville, Ohio, in the sum of \$250, and while that company was so indebted to him he placed an order with it for the machine which he later seized under attachment. Prior to the receipt of his order that company had shipped the car in dispute to Chicago, consigned to the plaintiff bank, subject to the order of an automobile company of that city. A draft, payable to the bank, was attached to the bill of lading, but the Chicago firm neither paid the draft nor accepted the car. Upon receipt of the order from defendant Hannan the car was re-consigned to the plaintiff bank, at Denver, subject to the order of Hannan, with draft against him payable to the order of the bank. When the automobile reached Denver Hannan attached it, as the property of the

Vulcan company, in a suit wherein he was plaintiff and that company defendant. It was later sold by defendant Nisbet, as sheriff, despite the protest and claim of plaintiff, asserted from the time of the attachment levy, upon a judgment obtained in the attachment suit.

There is nothing in the record before us to overcome the proofs that the bank received the bill of lading either as security for money advanced to the Vulcan company, or in an outright purchase of the automobile. The only question is whether the bank may be regarded as the owner of the property covered by the bill of lading at the time it was seized under attachment. The method followed by the Vulcan company and the bank is of common use in transactions of this character. The status of parties who advance money upon bills of lading as security, or for the purchase of the property, has been frequently before the courts. In *Schmidt v. Bank*, 10 Colo. App. 261, 50 Pac. 733, in speaking of the rights of the holders of bills of lading as collateral, as against a creditor who attempts to stop the goods in transitu, the court at page 262 (50 Pac. 734) said:

"It is therefore true that as between a bona fide transferee for value of a bill of lading and a creditor who seeks to stop the goods in transit, the equity of the transferee must prevail."

One of the authorities cited in that opinion is *Means v. Bank of Randall*, 146 U. S. 620, 13 Sup. Ct. 186, 36 L. Ed. 1107. In that case the bank advanced money to buy cattle, which were shipped to defendants. The bill of lading was given to the bank as security. Defendants sold the cattle and applied the proceeds upon an old account between themselves and the shippers of the cattle. In discussing the rights of the bank under such circumstances it was said at page 627 (13 Sup. Ct. 189):

"When the bill of lading was transferred and delivered as collateral security, the rights of the pledgee under it were the same as those of an actual purchaser, so far as the exercise of those rights was necessary to protect the holder. * * * A bank which makes advances on a bill of lading has a lien to the extent of the advances, on the property in the hands of the consignee, and can recover from him the proceeds of the property consigned, even though the consignor be indebted to the consignee on general account; and the consignee cannot appropriate the property or its proceeds to his own use in payment of a prior debt."

That the delivery of a bill of lading is a symbolic delivery of the goods was affirmed in *Merchants' Exchange Bank v. McGraw*, 76 Fed. 930, where, at page 933, 22 C. C. A. 622, at page 625, numerous authorities are cited in support of the following:

"There are numerous authorities which, in substance, declare that the delivery, by an owner of goods, of a common carrier's receipt for them, as security for an advance of money with the intention to transfer the property in the goods, is a symbolic delivery of them, and vests in the person making the advance a special property in the goods, sufficient to enable him to maintain

replevin or trover, or other action at law, against another who attaches them upon a writ against the general owner."

In *First National Bank v. Mt. Pleasant Milling Co.*, 103 Iowa, 518, 72 N. W. 689, the bank claimed an interest in two cars of wheat by virtue of a bill of lading. Defendant claimed the wheat under a writ of attachment. The court held:

"Bills of lading represent property, and, when indorsed or assigned, operate as a symbolical delivery to the indorsee or assignee of the property covered thereby. * * * The question here presented is not whether the indorsee takes the bill of lading free from equities or defenses in the hands of the original holder, but whether he has a better title to the grain than an attaching creditor of the indorser. If A. should purchase a horse from B. and secure the delivery thereof upon a promise to pay for the same at some future time, he certainly has better title than C., who attaches the horse as the property of B. after the delivery to A. So when the plaintiff in this case cashed the draft, and took the assignment of the bill of lading from the Commission Company, it secured a better title than the Milling Company, which attached the grain while in transit; and the fact that, when the grain was attached, it had not been called upon to make any direct advances to the Commission Company, is not, in itself, of controlling importance. * * * If the bank had simply undertaken the collection of the purchase price as agent of the Commission Company, then the title to the grain remained in the latter company, and it was subject to attachment until delivered to and paid for by the Roller Mills. But if the bank purchased the draft, and accepted the bills of lading as collateral security, or if it purchased the grain outright, and accepted the bills of lading as evidence of this purchase, or if, in consideration of the indorsement and delivery of the bills of lading, it made or agreed to make certain definite future advances, it acquired a title to the grain which could not be defeated by a subsequent attachment."

[1] When a bank in good faith makes advances, whether as a purchaser or lender, and receives a bill of lading as security, it has a claim upon the property covered by the bill of lading which is good as against the claim of a creditor of the shipper. No authorities have been, or can be, cited which controvert this proposition.

[2] Defendants, however, rely upon section 2668, R. S. 1908, of the statute of frauds of this state, and insist that under it the sale of the automobile to the bank was void, for the reason that it was not followed by an immediate delivery and an actual and continuous change of possession. Defendants did not plead the statute in the lower court, and even if properly pleaded it would have been a good defense, a question we do not decide, it cannot be invoked for the first time in this court on review. *Benjamin v. Mattier*, 3 Colo. App. 234, 32 Pac. 837; *Tynon v. Despain*, 22 Colo. 240, 43 Pac. 1039; *Hamill v. Hall*, 4 Colo. App. 290, 35 Pac. 927; *Hunt v. Hayt*, 10 Colo. 281, 15 Pac. 410. Upon the question of the statute of frauds as a defense in cases of this character, see *Cary v. Williams*, 47 Colo. 256, 107 Pac. 219, 135 Am. St. Rep. 219.

[3] Neither the pleadings nor the facts warranted the introduction of testimony as to the expenses plaintiff incurred in the prosecution of this suit. Such expense is not a proper element of damage under the facts of this case. The action is not one in which exemplary damages are recoverable.

The judgment of the lower court is reversed and the cause remanded, with leave to the parties to amend their pleadings if so advised and for further proceedings in conformity with the views herein expressed.

SCOTT, J., not participating.

(64 Colo. 315)

BUNNELL v. HOLMES et al. (No. 8992.)

(Supreme Court of Colorado. March 4, 1918.)

1. JUDGMENT \Leftarrow 139 — VACATING — DISCRETION.

Setting aside a judgment and allowing an answer to the merits under Code Civ. Proc. § 81, authorizing such action within a year where the summons has not been personally served, rests within the trial court's sound discretion.

2. APPEAL AND ERROR \Leftarrow 957(1) — REVIEW — DISCRETION OF COURT — VACATING JUDGMENT.

The trial court's action on a motion to set aside a judgment and allow an answer to the merits under Code Civ. Proc. § 81, is conclusive upon appeal, where the trial court has not abused its discretion.

3. JUDGMENT \Leftarrow 162(2) — VACATING — BURDEN OF PROOF.

A defendant seeking to have a judgment set aside and to be allowed to answer under Code Civ. Proc. § 81, has the burden of establishing his right to such relief.

4. ATTORNEY AND CLIENT \Leftarrow 104 — ATTORNEY'S KNOWLEDGE — IMPUTING TO CLIENT.

Where attorneys were employed to ascertain whether there were suits pending affecting title to certain land, information acquired by such attorneys through examining the court records is imputed to the client.

5. JUDGMENT \Leftarrow 138(2) — VACATING — DISCRETION.

Refusal to vacate a judgment quieting title and allow an answer to the merits under Code Civ. Proc. § 81, authorizing such action within a year where personal service has not been made, held not an abuse of the discretion, where there was evidence indicating that defendant both personally and through his attorneys had notice of the proceeding prior to judgment.

Error to District Court, Yuma County; H. P. Burke, Judge.

Action to quiet title by Sadie I. Holmes and W. D. McGinnis against George B. Bunnell. From an order denying a motion to set aside a default judgment, the defendant brings error. Affirmed.

M. M. Bulkeley, of Wray, and Mahin & Mahin, of Smith Center, Kan., for plaintiff in error. John F. Mail, of Denver, for defendants in error.

ALLEN, J. On March 5, 1915, Holmes and McGinnis, plaintiffs below, commenced an action against Bunnell, defendant below, to quiet title to certain real estate. Bunnell was

a nonresident, and service was had upon him by publication. The last publication of summons was upon May 27, 1915. The default of the defendant was entered on October 16, 1915, which was over three months after it could have been entered. On the same day a hearing was had, and judgment given for plaintiffs. On November 1, 1915, the defendant filed a motion to set aside the default judgment. On April 27, 1916, upon a hearing at which both parties appeared, the motion was overruled. Defendant brings the case here for review.

[1, 2] The granting or denying of a motion to set aside a judgment and to allow answer to the merits under section 81, Revised Code 1908, relied on by defendant, is discretionary with the trial court. *Fullen v. Wunderlich*, 54 Colo. 349, 351, 130 Pac. 1007. The trial court's conclusion on such motion, in the absence of an abuse of discretion, is conclusive upon this court. *Wallace v. Heitler*, 52 Colo. 620, 622, 123 Pac. 954.

The question presented upon this review is whether the trial court abused its discretion in refusing to vacate the default judgment, upon the showing made by the affidavits attached to the defendant's motion and the testimony taken at the last-mentioned hearing.

[3-5] The burden was on the defendant to show everything that would entitle him to a vacation of the judgment in the exercise of sound discretion by the court. *Fullen v. Wunderlich*, supra. The defendant states in his affidavit that he had no knowledge or notice of the pendency of this action until October 20, 1915. The plaintiffs, on the other hand, introduced evidence tending to show that the defendant had actual notice of the pendency of this action for more than three months prior to the time his default was entered. The question whether the defendant had actual knowledge of the pendency of the action in time to have appeared and answered before default was entered was one of fact to be determined by the court upon the evidence. *Parker v. Maslin*, 85 Kan. 130, 116 Pac. 227. If the trial court was warranted in finding that the defendant did have such notice, it would be a circumstance strongly tending to justify the court in denying a motion to vacate the judgment. As said in the *Fullen Case*, supra:

"The defendant could have known all about the suit and might be attempting to take advantage of his being a nonresident in order to delay its ultimate termination."

See, also, *Smith v. Collis*, 42 Mont. 350, 112 Pac. 1070, Ann. Cas. 1912A, 1158.

The defendant in his affidavit states that about the 1st of June, 1915, he employed Mahin & Mahin, attorneys, to ascertain whether there was any suit affecting the title to the land involved in this action. The evidence discloses that F. W. Mahin, of the firm of Mahin & Mahin, came to Wray, Yuma county, about June 30, 1915, and while there asked for and examined the files in this

case in the office of the clerk of the district court. Mahin must have known at that time that the suit was pending, and he gained this knowledge in the course of the particular transaction in which he was employed by the defendant. Under these circumstances the knowledge of the attorney is imputed to the client, in this case the defendant. 6 C. J. 638, § 144.

The clerk of the court testified that the order of publication and affidavit set forth the post office address of the defendant as Smith Center, Kan. It is admitted that this address is correct. The clerk testified that he sent a copy of the summons and a copy of the complaint by mail to the defendant at Smith Center, Kan.; that he made an affidavit to that effect; and that he personally remembers that he did so mail the copy of summons and complaint; also that it was mailed in a envelope bearing his official return card, and that it never came back. The clerk further testified that he received a letter from the defendant's attorneys on May 8, 1915, and in answer thereto sent them a copy of the complaint in this case. These are additional facts tending to show that both the defendant and his attorneys had actual notice of the pendency of the action. The testimony of the clerk is not contradicted. The clerk's affidavit, to which he refers in his testimony, is in the record, and recites that he mailed a copy of the summons to the defendant at Smith Center, Kan., on April 28, 1915. The defendant did not allege in his affidavit that he did not receive a copy of the summons or copy of the complaint mailed to him.

The defendant attempted to meet the foregoing facts by showing that Mahin by mistake informed him that no suit was pending, and that the mistake was due to Mahin's confusing the instant case with another case that had also been pending. The trial court was not bound to relieve the defendant from the consequences of negligence, if any, there was in this connection, on the part of his attorneys. 15 R. C. L. 711, § 161. Mahin, on behalf of the defendant, also testified that he had never received any response to a letter that his firm wrote to the clerk of the court in May, 1915. This is not very material, since Mahin came to the clerk's office within two months thereafter. Mahin also testified that he wrote to the clerk on July 29, 1915, asking if any suit had been filed, and that no reply was received. The clerk, however, testified that he has no recollection of having received the letter. As said in *Wallace v. Heitler*, supra:

"All of the facts were before the trial court, and it is not the province of a review court to overturn the findings of a trial court upon such matters, unless it clearly appears that an arbitrary and unjustifiable discretion has been exercised."

Upon a full consideration of all the facts that were in evidence before the trial court,

we cannot justly find that the court abused its discretion in overruling the motion. We are of opinion that no sufficient reason is shown why the judgment should be set aside, and it is therefore affirmed.

Affirmed.

HILL, C. J., and BAILEY, J., concur.

(64 Colo. 334)

RIO GRANDE JUNCTION RY. CO. v. ORCHARD MESA IRR. DIST.

(No. 8970.)

(Supreme Court of Colorado. March 4, 1918.)

1. MANDAMUS \S 114—WARRANTS OF IRRIGATION DISTRICT—REMEDY OF HOLDER.

Where warrant of an irrigation district is accepted in payment of its debt, the warrant holder's remedy, if there are no funds to pay the warrant and the proper officers fail to certify an amount sufficient to include the warrant and make levy therefor, is exclusively by mandamus to compel such action; and the warrant holder cannot sue to recover a money judgment on the warrant.

2. MANDAMUS \S 114—IRRIGATION DISTRICTS—WARRANTS—COLLECTION.

An irrigation district warrant chargeable to general funds for maintenance, etc., is upon a special fund for the year's maintenance, etc., within the rule making mandamus the exclusive remedy for collection of a warrant drawn upon a special fund.

3. APPEAL AND ERROR \S 843(4)—REVIEW—UNNECESSARY MATTERS—RULING ON DEMURRER.

Under Rev. St. 1908, \S 55, requiring complaint to concisely state the cause of action without unnecessary repetition, and section 84, requiring technical defects in pleading to be disregarded, where by the third count of the complaint, merely continuing the allegations of the first two counts, plaintiff disclosed it had no cause of action, correctness of the lower court's ruling in sustaining demurrer to the first and second alleged causes of action would not be considered.

Error to District Court, Mesa County; Thomas J. Black, Judge.

Action by the Rio Grande Junction Railway Company against the Orchard Mesa Irrigation District. Judgment for defendant, and plaintiff brings error. Affirmed.

E. N. Clark and G. A. Luxford, both of Denver, for plaintiff in error. Benjamin Griffith, of Denver, for defendant in error.

HILL, C. J. The plaintiff in error, hereafter called the plaintiff, elected to stand upon its second amended complaint after a demurrer had been sustained thereto. It contained three alleged causes of action growing out of the same transaction, and which entitled it, if at all, to but one judgment. The first count, in substance, alleges that the defendant is an irrigation district; that in November, 1909, it entered into a written contract with the plaintiff, ratified by its electors at an election held for that purpose, etc., whereby the plaintiff agreed to raise its tracks on the north bank of Grand river so as to protect them from damage by

reason of water to be impounded in a dam which the district was then constructing; that the district agreed to pay plaintiff the cost of this work, and was to deposit with it \$35,000 to be applied in such payment, if that amount was required; that if it cost more it would pay the additional amount, etc.; that the district deposited the \$35,000; that the work was done as agreed; that its total cost was \$43,733.77; that after crediting the \$35,000, there was a balance due of \$8,733.77; that plaintiff made out an itemized account of said balance due, verified and filed it with the secretary of the defendant; that said claim was disallowed by the board of directors of said district, and that there is due the plaintiff said sum with interest from the 25th of November, 1911; that defendant has at all times neglected, and does now neglect, to make the necessary levy to pay or provide for the payment of said sum, and that defendant does not intend to provide any funds to pay the balance due. Judgment is prayed for the amount alleged to be due, with interest.

The second count alleges the same facts as the first up to the amount due it; then alleges that the defendant disputed the balance due and entered into negotiations for an adjustment of the sum to be paid, etc.; that in consequence of said negotiations, and on or about November 27, 1911, the parties then and there agreed that the plaintiff would accept \$8,104.85 in full settlement of all that was due under said contract; that the defendant promised to pay said amount, and by its board of directors did audit and allow said bill for the sum of \$8,104.85, but that defendant has neglected and does neglect to make the necessary levy to pay or provide for the payment of said sum; that there is no money in the treasury of said district with which to pay any part of said sum; and that defendant does not intend to provide any funds to pay the balance due, etc. The prayer is for judgment for the amount last named, etc.

The third count is practically the same as the first and second up to and including the performance of the contract. It then alleges: That plaintiff filed its claim in due form with the secretary. That thereafter, and in November, 1911, the claim was duly audited and allowed by the board of directors of the defendant district in the sum of \$8,104.85, and that on January 2, 1912, the board of directors ordered a warrant drawn for the payment of same; that on January 4th following the defendant issued and delivered to plaintiff its warrant therefor, the material portion of which reads:

"Pay to the Rio Grande Junction Railway Company or bearer, \$8,104.85, * * *. For services or material for maintenance, operation and current expense of said district. Charge same to general fund for maintenance," etc.

That on January 5th following the plaintiff presented said warrant to the treasurer of

the district for payment. That there were no funds to pay said warrant. That its payment was refused, and it was registered as follows:

"Registered. Presented. No funds. Jan. 5, 1912. This warrant draws interest from this date at 6 per cent per annum.

"Benton Canon, Co. Treas."

That this warrant has never been paid, and is still due. That under and by virtue of the laws pertaining to irrigation districts, the board of directors is required to make a levy upon the land included within said district at a certain rate per acre sufficient to pay off delinquent and outstanding warrants. That the board of directors of defendant has failed and neglected to make any such levy, for the purpose of paying this warrant, and does now neglect and refuse to make any levy to pay said warrant or any part thereof. That there is now due the plaintiff thereon \$8,104.85 with interest. The prayer is for judgment for this amount.

[1] As the third alleged cause of action covers the entire transaction, it should be considered first. Were we disposed to be technical, we could affirm the court's ruling thereon by calling attention to the fact that the irrigation district act does not require or authorize the board of directors of a district to make a levy to pay outstanding warrants or any levy for any purpose. The power to make levies for the district is vested in the board of county commissioners; hence the neglect or refusal of the district board to do something which it has no right to do fails to state any neglect of duty on its part. We do not care, however, to dispose of this count in this manner. In order to consider it on the real point involved, we will assume that the allegation is sufficient to charge neglect upon the part of those whose duty it was to certify an amount sufficient to include this warrant, as well as a failure upon the part of those whose duty it was to make the levy therefor. With these assumptions included, are the facts sufficient to allow the plaintiff, after accepting a warrant in payment of its debt, to thereafter secure a money judgment upon the warrant? When contested, it has never been permitted upon such a showing as to county, city, or town warrants in this jurisdiction, but, to the contrary, when nothing more is presented than alleged in this count, mandamus is held to be the exclusive remedy. *Forbes v. Grand County*, 23 Colo. 344, 47 Pac. 388; *Gunnison County v. Sims*, 31 Colo. 483, 74 Pac. 457; *City of Denver v. National Exchange Bank*, 34 Colo. 387, 82 Pac. 448; *City of Denver v. Bottom et al.*, 44 Colo. 308, 98 Pac. 13; *Berkey v. County Commissioners*, 48 Colo. 104, 110 Pac. 197, 20 Ann. Cas. 1109; *Beeney v. Irwin*, 6 Colo. App. 66, 39 Pac. 900; *Grand County v. People*, 16 Colo. App. 215, 64 Pac. 675.

While the cases cited apply to warrants of counties, cities, and towns, the reasons giv-

en for the rule make it applicable to warrants of irrigation districts. In *Forbes v. Grand County*, supra, this court, speaking through Mr. Justice Goddard, points out the legislation pertaining to claims against a county, their allowance, payment in warrants, registration thereof, the levying and collection of taxes for their payment, the paying of same in the order of their registration, etc., followed with the conclusion that the holder has the right to a writ of mandamus to compel their payment out of the funds levied for that purpose, and in certain cases to compel a levy in order to create a fund out of which they can be paid. The irrigation district act contains somewhat similar provisions, including a clause that the revenue laws of the state for the assessment, levying, and collection of taxes on real estate for county purposes, except as modified in the act, shall be applicable. This act makes it the duty of a district board of directors, on or before September 1st of each year, to determine the amount of money required to meet the maintenance, operating and current expenses for the ensuing year, and to certify to the county commissioners said amount, together with such an additional amount as may be necessary to meet any deficiency in the payment of said expenses theretofore incurred. Upon the receipt of this certificate, the county commissioners are required to make a levy sufficient not only to raise the amount thus certified, but 15 per cent. additional to cover delinquency. It will thus be seen that a complete method is provided to take care of the current expenses of the district by making a levy sufficient therefor, and 15 per cent. additional; if this proves inadequate, the act provides that the board at its next annual meeting for this purpose shall include such additional amount as may be necessary to meet any deficiency, in the payment of said expenses theretofore incurred. To put it in the language of Chief Justice Campbell, in *Gunnison County v. Sims*, supra:

"This method of payment and enforcement of the same is exclusive except, as in case of county warrants, when for some exceptional reason, such as a diversion of the fund, a different procedure may be resorted to."

In the case at bar no such exception is pleaded, but to the contrary the neglect of duty presented in plaintiff's brief consists in the district board's failure to certify an amount sufficient to cover this warrant and the county commissioner's failure to make the necessary levy therefor. There is no allegation in the complaint except by inference that the district board neglected its duty in this respect, but if either board has, the ruling in the cases above cited is to the effect that plaintiff's remedy was by mandamus to compel them to perform it.

[2] The contention that the warrant was upon the general fund of the district and for that reason the cases cited are not applica-

ble, is not well taken. The warrant is not upon funds not otherwise appropriated, but reads chargeable to general funds for maintenance, etc. In *Eberhart v. Canon*, as treasurer of this irrigation district, 61 Colo. 340, 157 Pac. 189, this court held that the moneys derived from the levy for one year for maintenance, operating, and current expenses could not be used for other purposes, or for the payment of the same kind of expenses for some other year until all of those for the year for which it had been levied were paid; also that the levy made to meet the deficiency in the payment of expenses theretofore incurred could not be used for other purposes until the deficiency for which it was created had been paid. This ruling, in a sense, is to the effect that each of these funds is a special fund, to the extent at least that each must be used for the purpose for which it was created, until that purpose is accomplished, and that as to this general fund, so-called, it must be applied to the payment of the maintenance, operating and current expenses for the ensuing year, and none other, at least until such expenses for that year had been satisfied. An irrigation district is but a quasi municipal corporation, created for a specific purpose. It is likewise only authorized to procure funds by taxation for certain purposes. The fund upon which this warrant was drawn was of that class, and brings it within the rule recognized by our former cases.

[3] By a supplemental brief, plaintiff urges a reversal under the rule that, when tested by a demurrer, each count or separate alleged cause of action in a complaint stands alone, as if it were a separate complaint. For this reason it urges that if the first or second count states a cause of action, although omitting to state all of the facts as contained in the third count and by stating some that are in apparent conflict with it, the demurrer should have been overruled as to them. We appreciate the force of this rule where applicable, but the cases cited do not cover a state of facts as presented here, which disclose that if the allegations in plaintiff's third count are true, it could not maintain this action on either of the three counts. The third count contains the allegation that it accepted and had registered a warrant for the debt sued on. This is not disputed in either the first or the second count. It is but a continuation of the history of the transaction between the parties, and by alleging it the plaintiff has pleaded itself out of court, but regardless of this it now asks us to ignore this allegation for the purpose of passing upon the demurrer to its first and second counts concerning the same transaction. Section 55, Revised Code 1908, says:

"The complaint shall contain: * * * A statement of the facts constituting the cause of

action, in ordinary and concise language, without unnecessary repetition."

In *Cripple Creek M. Co. v. Brabant*, 37 Colo. 423, 425, 87 Pac. 794, it is said:

"As stated in *Spaulding v. Satiel*, 18 Colo. 86, 88 [31 Pac. 486], the practice of pleading a double statement of the case so as to meet the exigencies of the proofs is not, as a general rule, permitted under the Code. The rule, however, is not absolutely inflexible."

The foregoing states the practice in this jurisdiction. It is questionable if the facts disclosed justify the attempted effort to plead three causes of action when all the facts could have been included in one simple statement without unnecessary repetition, but in any event, when the record is considered as a whole, it does not justify a reversal.

Section 84, Revised Code 1908, provides that:

"The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

The plaintiff having disclosed by its pleadings that in no event would it be entitled to maintain this action, it would be but a waste of time to pass upon its contentions concerning the correctness of the ruling in sustaining the demurrer to its first and second alleged causes of action.

The judgment is affirmed.

Affirmed.

BAILEY and ALLEN, JJ., concur.

(64 Colo. 349)

PASSINI v. INDUSTRIAL COMMISSION OF COLORADO et al. (No. 9294.)

(Supreme Court of Colorado. March 4, 1918.)

1. MASTER AND SERVANT \S 417(7) — WORKMEN'S COMPENSATION—CONCLUSIVENESS OF AWARD.

Under Laws 1915, c. 179, \S 83, making workmen's compensation awards reviewable only as to questions of law, an award is conclusive upon all matters of fact properly in dispute before the commission, where supported by evidence or reasonable inferences to be drawn therefrom.

2. MASTER AND SERVANT \S 417(1) — WORKMEN'S COMPENSATION—APPEAL.

A workmen's compensation hearing, held pursuant to the claimant's application for a rehearing, at which the commission considered new, as well as old, issues, was equivalent to a new trial, so as to preclude an appeal to the district court prior to a rehearing application, in view of Workmen's Compensation Act, \S 77, prohibiting actions to set aside awards until after a rehearing application to the commission.

En Banc. Error to District Court, City and County of Denver; John I. Mullins, Judge.

Workmen's compensation proceedings by Pietro Passini against the American Smelting & Refining Company. From an award by the Industrial Commission, the claimant ap-

pealed to the district court, and from a judgment sustaining a demurrer to his complaint, he brings error. Affirmed.

George Allan Smith, of Denver, for plaintiff in error. Henry A. Dubbs and Henry C. Vidal, both of Denver, for defendant in error American Smelting & Refining Co. Leslie E. Hubbard, Atty. Gen., and John L. Schweigert, Asst. Atty. Gen., for defendant in error Industrial Commission.

BAILEY, J. This case is here on writ of error to review a judgment of the district court sustaining a demurrer to the complaint in an appeal from the findings of the State Industrial Commission.

The claimant was injured in May, 1916, by falling from a platform. From the time of the injury until the hearing before the Commission he had received compensation from, and had been cared for and received medical attention through the defendant, the American Smelting & Refining Company, in whose employment he was when injured. On December 8th, 1916, he was awarded compensation to January 5th, 1917, by the Commission. At that time his injuries were found to consist of a bruised shoulder, and traumatic neurosis, which latter was held to be the proximate result of the accident. On February 16th, 1917, the case was reopened by the Commission, for the purpose of determining the extent of other alleged disabilities. The defendant company denied further liability, but expressed willingness to provide additional treatment. It was thereupon ordered by the Commission that if claimant would subject himself to medical and hospital treatment he should be awarded compensation from and after January 5th, 1917. But should he fail and refuse to avail himself of the proposed treatment, that the original order, denying compensation after such date, should stand.

On April 7th, 1917, he filed a petition for rehearing, which was denied. On May 19th he filed another petition for rehearing, which was granted, and on June 11th, after what was to all intents and purposes a primary or original trial, the Commission set aside the February award and affirmed the award of December 8th. Without applying for a new trial he brought action in the district court, where his complaint was dismissed on demurrer, and the findings and award of the Commission sustained.

[1] In considering questions arising out of the sufficiency of the evidence which supports the award, it must be borne in mind that the court is expressly bound by statute. Section 83, chapter 179, Laws 1915, is as follows:

"The Commission or any party who may consider himself aggrieved by a judgment entered upon a review of any such finding, order or award, may have questions of law only reviewed * * * by the supreme court."

This court may consider only the legal question of whether there is evidence to sup-

port the findings, and not whether the Commission has misconstrued its probative effect. The award is conclusive upon all matters of fact properly in dispute before the Commission, where supported by evidence, or reasonable inference to be drawn therefrom. *Papinaw v. Grand Trunk Ry. Co.*, 189 Mich. 441, 155 N. W. 545; *Redfield v. Michigan Ins. Co.*, 183 Mich. 633, 150 N. W. 362; *William Rahr Co. v. Industrial Com. (Wis.)* 163 N. W. 646; *In re Von Ette*, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641; *Oniji v. Studebaker Corp. (Mich.)* 163 N. W. 23; *Honnold on Workmen's Compensation*, § 242.

[2] So far as the merits of the case are concerned, there is nothing in the record upon which the findings of the Commission may be properly set aside. It appears, however, that the district court sustained the demurrer to the complaint on the ground that claimant failed to follow the statute in perfecting his appeal. The first finding and award, that of December 8th, 1916, provided for compensation to January 5th, 1917, and by it the Commission in effect found that claimant was disabled and that he probably would remain so until that date. It is urged that the Commission had no power thus arbitrarily to fix the date of the recovery of the claimant, but we are not called upon to pass upon this question, for the reason that the case was reopened, presumably for the very purpose of ascertaining whether there was a change in claimant's condition. After the hearing of February 16th it was ordered that claimant receive hospital treatment tendered by the defendant company, and "if not accepted by the claimant shall be in full discharge of all liability of the respondent." On June 11th a new finding and award was made and entered, setting aside the February award and affirming that of December 8th.

At the hearing upon which the award of June 11th is based, entirely new issues as well as the old ones were before the Commission, and full consideration was given to both. That hearing can in no sense be considered a mere review of former findings. More testimony was then taken than at any previous hearing, some of which related to an entirely new malady, alleged to have recently developed as a result of the accident, and the proceedings were, as stated above, practically a new trial. Upon all of the issues new and old the findings were adverse to the claimant. The district court was therefore without jurisdiction to review the actions of the Commission until the claimant had first petitioned it for a rehearing, as provided by section 69 of the Act. Failure to petition for a rehearing brings the claimant within section 77, which provides:

"No action * * * to set aside" and "finding, order or award of the Commission, * * * shall be brought unless the plaintiff shall have first applied to the Commission for a rehearing thereon as provided by this Act."

The purpose of the Act is to confine the settlement of compensation cases to the Commission itself, so far as is consistent with justice. It is clear that the legislative intent was that the Commission should be given an opportunity to review its own findings, before permitting claimants, or other dissatisfied persons, to resort to the courts.

In the case at bar the claimant failed to avail himself of his right to petition for a rehearing before he appealed to the district court, and for this reason the appeal was incompetent and futile. The judgment of the district court must therefore be affirmed.

Judgment affirmed.

SCOTT, J., not participating.

(64 Colo. 318)

HOOD et al. v. BURLINGTON DITCH, RESERVOIR & LAND CO. (No. 8903.)

(Supreme Court of Colorado. March 4, 1918.)

WATERS AND WATER COURSES — 260 — IRRIGATION COMPANIES — AGENCY.

That companies carrying water by canals from reservoir irrigation company were agents of the irrigation company and not of its customers using the water so carried was not established by the fact that some of the officers of the irrigation company and carrying companies were the same, or that the irrigation company occasionally allowed an employé of a carrying company to turn the water into the extension ditches from the reservoir; and therefore the irrigation company was not liable to such customers for the negligent distribution of water by the carrying companies.

Error to District Court, Adams County; H. S. Class, Judge.

Action by W. C. Hood and others against the Burlington Ditch, Reservoir & Land Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

W. C. Hood, Jr., of Brighton, for plaintiffs in error. Smith, Brock & Ferguson, of Denver, for defendant in error.

HILL, C. J. The plaintiffs in error, hereafter called the plaintiffs, instituted this action to recover damages to crops caused from lack of water during the year 1910, which they allege the defendant had contracted to furnish them, and their assignors, through its ditch and reservoir system. A motion for nonsuit was sustained and the action dismissed. This is the error complained of. The evidence discloses that the defendant is the owner of what is called the Burlington ditch, which secures its water from the Platte river near Denver, running thence in a northeasterly direction to near the town of Barr, where it owns a system of reservoirs called Barr Lake; that it is what is commonly known as a mutual ditch and reservoir company, and as such has priorities for its ditch and reservoir; that a large number of its stockholders are supplied from its ditch before it gets to the reservoir, the remainder

out of the reservoir; that only stockholders are entitled to water; that in order for them to get it, in addition to paying annual assessments on their stock, they must sign an application or contract for the amount of water they wish for any year, and pay an additional amount therefor; that the defendant's properties terminate at the reservoir; that in order to have the water carried from the reservoir to the lands involved as well as other tracts, two carrying companies were incorporated known as the Extension and Hudson Companies, each of which constructed two laterals or carrying canals starting near the main dam of the reservoir (Barr Lake), thence running in northerly directions; that in order to derive any benefit from stock in these carrying companies its owners must likewise be stockholders in the defendant company. In other words, it requires stock in both to give the privilege of carriage from the river to the lands north of the reservoir; that the practice has been for the defendant company to secure the water from the river, carry it through its ditch, store it in the reservoir, then turn it out or into these Extension ditches when called for by the person in charge of them, to be by them carried to their respective stockholders entitled thereto, and in proportion to the amount that each is entitled from the defendant company.

The complaint, among other things, charges the defendant with negligence in not securing sufficient water in the reservoir during the winter of 1909 and 1910. It is agreed, however, that this allegation was not sustained by any proof, but to the contrary that the reservoir was reasonably supplied in the spring of 1910, and that the negligence proven, if any, was in the conservation and distribution of the water in and from the reservoir during the irrigation season of the year last named. When sustaining the motion for nonsuit and holding the defendant guiltless in these respects, the court said:

"The main question now, and it seems to me at all times has been, the wrongful distribution. * * * I think the Burlington Company, the defendant, is not charged with the distribution of the water after it is turned out of the headgates at Barr Lake. Counsel now has met that contention by relying upon the terms of the contract, which says that, in effect, the Burlington Ditch, Reservoir & Land Company had agreed to deliver the water to lands of the plaintiffs. I was very much interested in that theory of construction of the contract, but I find that I am not in accord with his views in that regard. The testimony shows that the purpose of the Extension Company was to carry the water and charge for the same. * * * So in this case if the water was wrongfully distributed, it was the wrongful act of the Extension Ditch Company and not of the Burlington Ditch, Reservoir & Land Company."

We are in accord with this conclusion. The record discloses that the Extension Companies were organized by the consumers of water below the reservoir for the purpose of receiving from the reservoir the waters to which the plaintiffs as stockholders of the

defendant were entitled. The Extension Companies were the agents of the plaintiffs for this purpose, and when the defendant delivered the water to them for the plaintiffs, its duties concerning it ceased, the responsibility for its proper distribution rested upon the Extension Companies, of which plaintiffs were stockholders. The fact that some of the officers of the defendant were also owners of the Extension Company did not make any difference in this respect. The fact that the defendant at times allowed an employé of the Extension Company's to turn the water into the Extension ditches from the reservoir did not change this status, as he was only doing what he would have had a right to call upon the defendant to do for him. According to the evidence, it was the duty of the defendant company to turn the water into the Extension ditches when called for by those in charge of them; when this was done, as before stated, its responsibility ceased; the handling of it thereafter, including its distribution, was the act of the Extension Companies. The fact that the defendant company permitted these employés to do certain acts for it which were proper, viz. turn the water from the reservoir into the Extension ditches, would not make it liable for its wrongful distribution by the same persons as employés of the Extension Companies.

The claim that the Extension Companies were the agents of the defendant company in delivering the water is not sustained by any proof. 'Tis true, the contract says, that the water is to be used for irrigation and domestic purposes upon certain land, describing it, but there is nothing in the contract which says that the defendant company shall deliver it to these lands. The evident object of the company in placing this limitation in the contract was to limit the amount of land that could be irrigated by any stockholder with a certain amount of water, also probably to prevent the consumer from selling, leasing, or delivering any portion of it to another for other lands. Whether this limitation is valid need not be determined, but it is incapable of being construed into a contract of carriage to the lands of the consumer. As heretofore stated, the Extension Companies were expressly organized for this purpose. This fact, together with the practice followed, tends to disclose that the parties had never placed such a construction upon the contract.

The authorities cited which recognize certain principles pertaining to connecting lines of railroads where the initial carrier receives the commodity for transportation to a station upon another line has no application to a case of this kind.

The judgment is affirmed.

Affirmed.

GARRIGUES and SCOTT, JJ., concur.

(64 Colo. 296)

HALLIWILL v. WEIBLE et al. (No. 8718.)
(Supreme Court of Colorado. March 4, 1918.)

1. DEEDS \S 32—FILLING IN BLANKS.

As a deed becomes effective only upon delivery, and an agent may perform that function, a deed, executed with blanks for the insertion of the name of the grantee, given to an agent, and subsequently filled and delivered by the agent of the grantor, is valid.

2. PRINCIPAL AND AGENT \S 117(1)—FILLING IN BLANKS IN DEED—AUTHORITY.

Authority to an agent to fill in blanks left in an executed deed for insertion of grantee's name may be conferred orally, or may be implied from facts which fairly justify the inference.

En Banc. Error to District Court, Prowers County; A. Watson McHendrie, Judge.

Action by Martha J. Halliwill against Charles J. Weible and another. Judgment for defendants, and plaintiff brings error. Affirmed.

W. A. Merrill and Allyn Cole, both of Lamar, for plaintiff in error. Hilliard, Lillard & Finnicum, of Denver, and J. K. Doughty, of Lamar, for defendants in error.

WHITE, J. The cause of action is the partition of certain real estate in the town of Granada. It was brought by plaintiff in error against Charles H. Weible, who disclaimed any interest in the premises, and thereupon, by proper pleadings, Wilson became the real defendant in the case; and, upon trial, judgment was entered in his favor. Wilson claimed to be the owner in fee and entitled to possession of the premises under and by virtue of a certain warranty deed made, executed, and delivered to him for a valuable consideration by the plaintiff and Charles H. Weible, who was then her husband, on or about the 10th day of November, 1913. Plaintiff denied that the instrument was her deed; admitted that on or about the date designated she signed and acknowledged a deed purporting to convey the premises, but alleged that no grantee was named therein, and that there was no consideration therefor. She further alleged that her husband had "represented to her that if she would sign and acknowledge a deed in blank, he could and would sell the property for enough to enable him to pay her one thousand dollars for her interest in the premises," and that she had received no compensation whatever for her interest therein, and had never authorized the insertion of the name of defendant Wilson as the grantee in said deed. The pleadings on the part of Wilson set forth the deed in *hæc verba*, prayed that the title to the premises be quieted in him, and for possession thereof, and alleged that in consideration of the delivery of the deed conveying to him the premises, subject to an incumbrance of \$750, which he assumed and agreed to pay, he, under the direction of the plaintiff's hus-

band, executed and acknowledged a deed to certain lands owned by him in Las Animas county, and gave such instrument of conveyance to plaintiff's husband upon receipt of the aforesaid instrument of conveyance of the premises in controversy, and that plaintiff should not be permitted, in good conscience and equity, to deny that she had executed and delivered the deed under which he claimed the premises.

The undisputed facts are that plaintiff, until a few days before the institution of this suit, was the wife of defendant Charles H. Weible; that on November 10, 1913, and for some time prior thereto, each owned an undivided one-half interest in the premises in question. Plaintiff considered the property, subject to the mortgage indebtedness thereon, worth \$2,000, and desired to sell her interest therein for \$1,000. Her husband was negotiating for its purchase, and wrote her that he could make the deal through trading the premises for two houses in Denver; and that if she would sign a deed without designating a grantee therein, and send the same to him in Denver, he would close such trade, borrow \$1,000 on the property he received in exchange, and send the same to her in payment of her one-half interest in the premises. Plaintiff thereupon signed and acknowledged a warranty deed, in which there was no grantee named, purporting to convey her interest in the premises, and transmitted the same to her husband as requested. Plaintiff testified that her husband did not tell her the name of the person who owned the property for which he intended to trade; that she intended that the person to whom he delivered the deed should get the property therein described, and did not question that her husband would give her the money, and did not care in particular what trade was made, if she got her money. Wilson was 83 years old, had been a farmer all his life, and the transaction between him and plaintiff's husband was carried on through a real estate agent by the name of Waterman, who brought the deed to Wilson with the name "John Wilson" therein written as grantee; and, upon Wilson's calling attention to the fact that his name was "John A. Wilson," Waterman inserted the initial "A." Shortly after the transaction, Waterman, in his office, introduced the plaintiff to Wilson, when the former said to the latter, "You are the new owner of the hotel" (the property in controversy here), to which Wilson replied that he was. It was some 60 days thereafter that plaintiff first complained to Wilson of lack of authority in her husband to consummate the transaction.

Upon this state of facts the question arises: Is the instrument under which Wilson claims title the valid deed of plaintiff? In many, if not in most of the early decisions, and in some of the later, the courts have adopted the strict view, and held that blanks

in a deed of conveyance may not be filled, except by authority under seal, yet the more modern view in the United States "and that now supported by the weight of authority, at least of modern authority, is that parol authority is sufficient to authorize the filling of blanks left in sealed instruments." 1 R. C. L. § 41, pp. 1009, 1010. In fact, in those jurisdictions that have by statute abolished seals, which is the case in this state (section 682, R. S. 1908) it seems that the decisions are harmonious in holding that where a party executes a deed, bond, or other instrument with a blank to be filled, like grantee, obligee or payee to make it complete he may, by parol, authorize another to fill the same, and when so perfected and delivered to the grantee, it is a valid instrument. Authority under seal being no longer necessary to give validity to such instruments, they are on the same footing as simple contracts, and the same rule should be applied to all. *Montgomery v. Drescher*, 90 Neb. 633, 134 N. W. 251, 38 L. R. A. (N. S.) 423. Such, also, is the substantial effect of *Palacios v. Brasher*, 18 Colo. 593, 596, 597, 34 Pac. 251, 36 Am. St. Rep. 305.

[1] It is true that authority to make a deed must be given by deed; nevertheless the insertion of the name of the grantee in a blank left in such instrument does not properly fall within the inhibition of that rule. Such insertion merely completes the writing of the instrument and does not change its legal effect. The principle is stated as follows:

"The rule that the signing, sealing, and delivery of a blank which is to be filled as a deed can give no authority to make the paper a deed was never intended to prescribe to the grantor the order of time in which the several parts of a deed should be written. The whole act of execution is finally consummated by delivery, and if the grantor should think proper to reverse the usual order in the manner of executing the instrument, but in the end perfect it by delivery, it is a good deed." 2 C. J. § 123, p. 1248.

As a deed becomes effective only upon delivery, and an agent may perform that function, a deed, executed with blanks for the insertion of the name of the grantee, given to an agent, and subsequently filled and delivered by the agent of the grantor, is valid. *Farmers' Bank v. Worthington*, 145 Mo. 91, 46 S. W. 745; 2 C. J. § 129, p. 1248; *Id.* § 133, p. 1249; *Cribben v. Deal*, 21 Or. 211, 27 Pac. 1046, 28 Am. St. Rep. 746; *Friend v. Yahr*, 126 Wis. 291, 298, 104 N. W. 997, 1 L. R. A. (N. S.) 891, 110 Am. St. Rep. 924; *Lafferty v. Lafferty*, 42 W. Va. 783, 787, 789, 26 S. E. 262.

[2] In *South Berwick v. Huntress*, 53 Me. 89, 96, 87 Am. Dec. 535, it is said:

"When the instrument is a sealed instrument, when signed by the party, the filling in of the blanks afterwards by another is not, strictly speaking, the execution of a sealed instrument. That has already been done by the party himself. The third party does not make it a specialty by his act. It was one before. The filling

up merely perfects an imperfect sealed deed or bond."

Moreover, the authority to fill such blanks may be conferred orally, or it may be implied from facts which fairly justify the inference. *Hall v. Kary*, 133 Iowa, 465, 468, 110 N. W. 930, 119 Am. St. Rep. 639; *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470; *Forster v. Moore*, 156 N. Y. 666, 50 N. E. 1117, affirming the decision in 79 Hun, 472, 29 N. Y. Supp. 1032. It has been held that where a party executes a deed having a blank, instead of the name of the grantee, and delivers the same to another in such imperfect state, he intends thereby to confer on such other authority to complete the instrument and make it effective by delivery to the grantee whose name is inserted. *Friend v. Yahr*, supra; *South Berwick v. Huntress*, supra. So it has been declared that where a note and mortgage fully executed, except a blank in each for the name of the payee and mortgagee, were delivered to an agent, who was to procure from whomsoever he could a loan of money thereon for the maker, it shows an intent that the agent should fill the blanks, and when so filled the instruments were valid, without a new execution and delivery. *Van Etta v. Evenson*, 28 Wis. 33, 9 Am. Rep. 486. In *Swartz v. Ballou*, supra, where the owner of land executed a deed without designating a grantee therein, and placed it in the hands of another party under circumstances which raised an implied authority in the latter to insert the name of the grantee, it was held that the insertion of the grantee's name, either by the party receiving the deed or by some one authorized by him, made the instrument effective as a conveyance.

So the facts here warrant the conclusion that plaintiff intended that there should be inserted in her deed as grantee the name of any person with whom her husband might consummate a trade or sale of the property in question. Furthermore, in the instant case the deed came to the defendant Wilson for a valuable consideration, with his full name written therein as the grantee. It had been signed, acknowledged, and sent out by the plaintiff with the intent that it should convey title to the person whose name was inserted therein as grantee by or through the authority of her husband. There is ample evidence to warrant the conclusion that Wilson's name, including the initial "A." was so inserted; and the plaintiff is therefore estopped from denying the validity of the deed. When a grantor signs and seals a deed, leaving unfilled blanks of the character of those here involved, and gives it to an agent with authority to fill the same and deliver the instrument, and the agent fills the blanks and delivers the deed to the grantee, the maker is estopped to deny that the instrument, as delivered, is his deed. *Phelps v. Sullivan*, 140 Mass. 36, 2 N. E. 121, 54 Am. Rep. 442. If

plaintiff was deceived by her husband to her financial injury, it would be unjust and inequitable to relieve her by placing the burden upon defendant Wilson. *Wyman v. Bank*, 5 Colo. 30, 36, 40 Am. Rep. 133.

We find no substantial error in the proceedings and the judgment is therefore affirmed.

SCOTT, J., not participating.

(41 Nev. 431)

McKIBBIN v. DISTRICT COURT OF SECOND JUDICIAL DIST. OF NEVADA IN AND FOR WASHOE COUNTY et al. (No. 2325.)

(Supreme Court of Nevada. March 15, 1918.)

1. **INSANE PERSONS** ~~§ 4992~~(1)—**ACTIONS—APPOINTMENT OF GUARDIAN AD LITEM.**

Under Rev. Laws, § 4992, as to appointment of guardian ad litem, such appointment may be made for an insane defendant in any case where jurisdiction of the subject-matter has been acquired.

2. **INSANE PERSONS** ~~§ 4992~~(1) — **ACTIONS — GUARDIAN AD LITEM—INSANE NONRESIDENT DEFENDANT—DIVORCE SUIT.**

Under Rev. Laws, § 4992, the court may appoint a guardian ad litem for a nonresident insane defendant in a divorce suit; the action being substantially in rem.

Original proceeding in certiorari by L. H. McKibbin against the District Court of the Second Judicial District of the State of Nevada in and for Washoe County, and Thomas J. Moran, Judge thereof. Dismissed.

H. V. Morehouse, of Reno, for petitioner. Hoyt, Gibbons, French & Springmeyer, of Reno, for respondents.

COLEMAN, J. This is an original proceeding in certiorari to review an order of the Second Judicial district court of the state of Nevada, made sua sponte, appointing a guardian ad litem for an insane defendant in a divorce suit, it being the contention of the petitioner that in making the appointment the court exceeded its jurisdiction.

The statute under which the court acted in making the appointment of a guardian ad litem is section 4992, Revised Laws, which reads:

"When an infant, or an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending, in each case. A guardian ad litem may be appointed in any case, when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant, insane, or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him."

It is the contention of petitioner that the district court has no jurisdiction to appoint a guardian ad litem for an infant or insane defendant, unless such defendant is: (1) A ward of the court, or (2) owns or has some property right in the state which is involved in the litigation; and it is contended that

since defendant is a nonresident of Nevada she cannot be a ward of the court, and as no property rights are involved in the divorce action, the order appointing a guardian ad litem was in excess of the jurisdiction of the court.

It is insisted that the Legislature, in enacting the section of the statute quoted, meant to legislate in behalf only of such infants and insane persons as were residents of the state, or who had property rights within the state. For the purpose of presenting an argument in support of his contention, counsel for petitioner rears a straw man and then proceeds to demolish it. He says in his brief:

"To illustrate, no action in personam will lie against a nonresident. Now section 4992, R. L., says nothing about actions in personam or in rem or quasi in rem or as to the procedure or process of serving defendants, whether sane or insane or infants or adults. Suppose, then, A. should sue B. upon a promissory note for \$5,000 made by B. in Nevada when sane, and after making the note B. should go to Alabama and become a resident of Alabama, and there goes insane and is sent to an asylum. Could the court appoint a guardian ad litem for B. as such defendant, and by appearance through such guardian ad litem proceed to judgment and render a judgment in personam? No. But if the court's construction of section 4992, R. L., is correct, then the court could confer upon itself jurisdiction, and enter a judgment in personam, by appointing a guardian ad litem, because the defendant was an insane defendant. The guardian ad litem represents the defendant. His appearance by demurrer or answer is the appearance of the defendant."

There is no parallel between the case presented to the district court and the hypothetical case presented by counsel. In the imaginary case the court would be powerless to enter any kind of an order, for the reason that no jurisdiction could be obtained to put the machinery of the court in motion, while in the case presented in the petition herein the machinery of the court was set in motion by the constructive service of summons upon the defendant, and the court thereby acquired jurisdiction to hear and determine.

[1] We cannot agree with counsel for petitioner that the appointment and appearance of a guardian ad litem would constitute such an appearance on the part of the defendant as would be equivalent in legal effect to a personal appearance by a sane defendant. *Rhoads v. Rhoads*, 43 Ill. 239. There is only one question involved under the allegations of the complaint filed in the divorce action, and that pertains solely to the petitioner's right to a divorce. Counsel concedes the authority of the court to appoint a guardian ad litem for a nonresident insane defendant in an action in which property rights are involved, even though of limited value. This is an action substantially in rem, and to our mind the right to have the marriage status preserved is one which may be of incalculable value to the defendant. The defendant is helpless; she cannot defend herself; if the court is without jurisdiction to appoint some

one to defend her, gross fraud and injustice may be perpetrated upon her. We are of the opinion that the courts of this state may appoint a guardian ad litem in any case in which the defendant is insane, whether resident or nonresident, in which jurisdiction to hear and determine the matter involved has been acquired. To hold to the contrary would be to open wide the door for the perpetration of fraud.

[2] A nonresident defendant in a divorce action has a right to defend such a suit, and that right should not be forfeited merely because the defendant happens to be insane. As was said in *Malin v. Malin*, 2 Johns. Ch. (N. Y.) 240:

"A person incompetent to protect himself, from age or weakness of mind, * * * ought to come under the protection of the court."

Greater reasons exist for the enforcement of this rule in divorce actions, because of the interest of the public in the preservation of the marriage status. The power of the court to make the appointment complained of cannot be doubted.

It is urged by appellant that certain language in the opinion in *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165, where there had been no personal service, wherein the authority of the trial court to enter a decree relative to alimony and the custody of the children of the parties was considered, sustains his contention. We are unable to so view the matter. About all that was decided there was that, in view of the lack of personal service of summons upon the defendant, the trial court had before it to act upon only the marriage statute, and that so much of the judgment as pertained to alimony and the custody of the children was erroneous. The reasoning in that case would apply with equal force to an action to quiet title to real estate where the defendant was a nonresident and where service of summons was obtained by publication.

It is ordered that the proceedings be, and the same are hereby, dismissed.

MCCARRAN, C. J., and SANDERS, J., concur.

(41 Nev. 406)

STATE ex rel. CITY OF RENO v. RENO TRACTION CO. (No. 2314.)

(Supreme Court of Nevada. March 15, 1918.)

REMOVAL OF CAUSES — § 41 — DIVERSITY OF CITIZENSHIP — QUO WARRANTO BY STATE AGAINST FOREIGN CORPORATION—"CITIZEN."

Quo warranto proceeding by the state, on the relation of a city, against a foreign corporation, for failure to comply with its franchise, instituted by the Attorney General, under Rev. Laws, §§ 5656-5659, 5663, as to quo warranto held an action by the state, and not the city, preventing removal for diversity of citizenship; a state not being a citizen.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Citizen.]

Original proceeding in quo warranto by the State, on the relation of the City of Reno, against the Reno Traction Company. Defendant moves to have the cause removed to the federal court. Denied.

George B. Thatcher, Atty. Gen., and L. D. Summerfield, City Atty., of Reno, for plaintiff. Hoyt, Gibbons, French & Springmeyer, of Reno, and Goodfellow, Eells, Moore & Orick, of San Francisco, Cal., for defendant.

McCARRAN, C. J. This is an original proceeding in quo warranto. The defendant has filed the necessary notice, petition, and bond, and has moved this court for an order removing the cause to the United States District Court for the District of Nevada, upon the ground and for the reason that the controversy is between citizens of different states and that more than \$3,000 is involved. It is admitted by the plaintiff here that there is involved more than \$3,000. Objection is interposed to the removal, however, on the ground that the state of Nevada is party plaintiff, and therefore the controversy is not between citizens of different states.

It is the contention of defendant, as movant in this proceeding, that the action is properly one between the city of Reno, as a municipal corporation, and the defendant as a foreign corporation. The complaint in this proceeding is entitled "State of Nevada ex rel. City of Reno, a Municipal Corporation." The proceedings were instituted in this court by the Attorney General of the state of Nevada, after having made application to this court for leave to bring action upon the relation of the city of Reno, and after having obtained orders granting leave pursuant to said applications. This action is commenced pursuant to the provisions of our Civil Practice Act, § 714 (section 5656 et seq., Rev. L.):

"A civil action may be brought in the name of the state: 1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, or a franchise, within this state or any officer in a corporation created by the authority of this state. * * *

Section 5657, Rev. L., provides:

"A like action may be brought against a corporation: 1. When it has offended against a provision of an act by or under which it was created, altered, or renewed, or any act altering or amending such acts. 2. When it has forfeited its privileges and franchises by a nonuser. 3. When it has committed or omitted an act which amounts to a surrender or a forfeiture of its corporate rights, privileges, and franchises. 4. When it has misused a franchise or privilege conferred upon it by law, or exercised a franchise or privilege not so conferred."

Sec. 5658, Rev. L., provides:

"The Attorney General, when directed by the Governor, shall commence any such action," etc.

Sec. 5659, Rev. L., provides:

"Such officer [the Attorney General], may upon his own relation, bring any such action, or he may, on the leave of the court, or a judge thereof, in vacation, bring the action upon the relation of another person; and, if the action be brought under subdivision one of the first sec-

tion of this chapter, he may require security for costs to be given as in other cases."

Sec. 5663, Rev. L., provides:

"An action under this chapter can be brought in the Supreme Court of the state or in the district court of the proper county."

On the face of the complaint it appears that the action is commenced by the state of Nevada, on relation of the city of Reno, a municipal corporation. After relating the corporate existence of the city of Reno, as well as the corporate existence of the defendant, the complaint proceeds as to the adoption of a city ordinance by the city of Reno, which said ordinance granted to H. E. Reid, H. J. Gosse, H. J. Darling, and S. H. Wheeler, their successors in interest, and assigns, a franchise to construct, maintain, and operate a street railroad over certain streets and avenues in the city of Reno; that thereafter the franchise thus granted to the parties named was by them sold to the Reno Traction Company, defendant in the proceedings instituted in this court; that the Reno Traction Company constructed in the city of Reno street railway tracks on certain designated streets within the corporate limits of the city of Reno; that for more than three years last past the defendant, Reno Traction Company, has wholly failed, refused, and neglected at its own expense to keep the space within and between its railway tracks and for two feet on each side thereof on certain designated streets in as good repair as the adjoining street, although frequently directed by the city council of said city of Reno so to do during the period aforesaid.

The complaint sets up, by way of exhibit, Ordinance No. 28, under which the defendant, Reno Traction Company, obtained and secured its franchise, and in violation of the provisions of which it is alleged the Traction Company has failed, refused, and neglected to keep its tracks and the space between the rails thereof in as good repair as the adjoining street. The complaint further alleges failure, refusal, and neglect on the part of the Traction Company to maintain its electrical equipment used in operating said street railway, so that return currents shall be carried according to the most approved method, so as to avoid, so far as possible, injury to water pipes through property on certain designated streets; further, that for more than three years the defendant, Reno Traction Company, has failed, refused, and neglected to run cars sufficient for the transportation of all desiring passage over said railway tracks constructed under Ordinance No. 28; and that the failure, refusal, and neglect of the defendant in this respect was not due to the elements, riots, strikes, litigation, or other unavoidable causes. The complaint avers failure on the part of the Traction Company to comply with the city ordinance in the way of carrying lights on the front and rear of its cars during the night-

time, when the same were being operated over the lines of the company on the streets designated.

Chapter 3 of the Judicial Code of the United States, relative to removal of causes, provides, *inter alia*:

"Any suit of a judicial nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the District Courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any state court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove such suit into the District Court of the United States for the proper district." Judicial Code of the United States, c. 3, p. 22 (U. S. Comp. St. 1916, § 1010).

The motion for removal in this case is sought for solely upon the ground that it is a controversy between citizens of different states, the matter in controversy exceeding, exclusive of interest and costs, the sum of \$3,000. In furtherance of this motion, the movant here asserts that the city of Reno is the real party in interest as plaintiff, and, it being a citizen of the state of Nevada, defendant may properly demand removal, being a citizen of California.

Mr. Moon, in his work on the Removal of Causes, concisely states the proposition thus:

"When does the duty of the state court to accept said petition and bond arise? Clearly, if the language of the statute is given any force, it does not arise unless the suit is a removable one and petitioner is entitled to remove it; nor does it arise in any such case until the petition and bond have been made and filed in compliance with the statute. When the case is found to be a removable one, and the conditions precedent to a removal have been performed, then and not until then, shall the state court accept said petition and bond and proceed no further in such suit." Moon on Removal of Causes, § 177.

Mr. Justice Harlan, in speaking for the Supreme Court of the United States in the case of *Crehore v. Ohio & M. R. Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144, illuminated the subject by the following assertion:

"It thus appears that a case is not, in law, removed from the state court, upon the ground that it involves a controversy between citizens of different states, unless, at the time the application for removal is made, the record, upon its face, shows it to be one that is removable. We say, upon its face, because 'the state court is only at liberty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further,' and 'all issues of fact made upon the petition for removal must be tried in the Circuit Court.' * * * If the

case be not removed, the jurisdiction of the state court remains unaffected, and, under the act of Congress, the jurisdiction of the federal court could not attach until it becomes the duty of the state court to proceed no further. No such duty arises unless a case is made by the record that entitles the party to a removal."

It is a well-settled principle that a city as a municipal corporation is a citizen of the state within which it exists, within the meaning of the Judicial Code. *Foster, A Treatise on Federal Practice*, vol. 1, p. 134; *Vincent v. Lincoln County* (C. C.) 30 Fed. 749; *Lincoln County v. Luning*, 133 U. S. 529, 10 Sup. Ct. 363, 33 L. Ed. 766; *Loeb v. Columbia* 1wp., 179 U. S. 472, 21 Sup. Ct. 174, 45 L. Ed. 280. Another principle which we deem to be established beyond successful controversy is that a suit between an incorporated city and a citizen of another state may be removed for diversity of citizenship. *Ysleta v. Canda* (C. C.) 67 Fed. 6. The proposition before us may be put thus: If the action is one instituted by the state as the real party in interest against a foreign citizen, the cause is not removable. If the action is one between the city of Reno as plaintiff and a foreign citizen, the cause is removable, and the order prayed for should be entered.

It is the contention of the movant here that inasmuch as the franchise by authority of which they operate their street railroad was granted by the municipal corporation, and inasmuch as the streets over which their street railroad is operated are properly within and under the control of the city of Reno, therefore it is the municipal corporation that is the real party in interest; hence the cause should be removed for diversity of citizenship. It is as a proposition of law eminently established that a municipal corporation is but the agency by and through which the state exercises its sovereignty in a given locality. The former is the creature of the latter and subject to its dominance and control within constitutional limitations. *City of Reno v. Stoddard and Dunkle*, 167 Pac. 317.

It is established by almost universal acceptance that the state, acting through its Legislature, may exercise complete control and dominance over the streets, avenues, and alleyways of towns, cities, and municipal corporations. This rule has found sanction in the expression of courts in various proceedings and for many purposes. We find it asserted to permit public service corporations to lay pipes and wires. *St. Paul v. Chicago R. Co.*, 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184; *Hodges v. Western Union Tel. Co.*, 72 Miss. 910, 18 South. 84, 29 L. R. A. 770; *Portland R. Co. v. Portland*, 14 Or. 188, 12 Pac. 265, 58 Am. Rep. 299; *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304, 26 Sup. Ct. 261, 50 L. Ed. 491; 13 R. C. L. 163. And where it was deemed necessary to destroy a public highway for the establishment of other

public works. *Heffmer v. Cass, etc., Counties*, 193 Ill. 439, 62 N. E. 201, 58 L. R. A. 353. The rule has been invoked to require a municipal corporation to appropriate money for the maintenance of a public way. *Pumphrey v. Baltimore*, 47 Md. 145, 28 Am. Rep. 446; *Simon v. Northup*, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171. It has been upheld where by legislative action the state sought to control certain streets of a city and to exercise that control through commissioners for the purposes of a driveway. *People v. Walsh*, 96 Ill. 232, 36 Am. Rep. 135.

In the case of *Cicero Lumber Co. v. Town of Cicero et al.*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155, the court said:

"While it is true that the public highways are for the use of the general public, it is at the same time true that the Legislature is a representative of the public at large. As such representative, it may grant the use or supervision and control over the highways to a municipal corporation, so long as the highways are not diverted to some use, substantially different from that, for which they were originally intended. * * * A city or incorporated town, not only bears a property or private relation to the state, but it also bears a political relation thereto. In its political relation, it is merely an agency of the state. The municipal corporations of the state are the mere creatures of the state, and exist by the authority of the Legislature and subject to its control. Hence, when a city or incorporated town holds a street for the benefit of the public, it holds it for the benefit of that entire public, of which the Legislature is the representative. As the municipality is a mere agent of the state, the Legislature can direct the manner in which it shall control the streets within its limits. The property rights and easements, which the municipality has in public streets and ways, are held by it at the will of the Legislature. Of course, this statement is subject to the further statement, that such property, as the municipality holds in its private capacity, is as much protected by the Constitution as the property of the private citizen. But, so far as it holds property as a mere agency of the government of the state, the constitutional provisions above referred to have no application, because the state can control the agencies created by it for the purposes of government."

Mr. Dillon, in his work on *Municipal Corporations*, says:

"The plenary power of the Legislature over streets and highways is such that it may, in the absence of such constitutional restrictions, vacate or discontinue them, or invest municipal corporations with this authority. Without a judicial determination, a municipal corporation, under the authority conferred by its charter to locate and establish streets and alleys and to vacate the same, may constitutionally order a vacation of a street; and this power when exercised with due regard to individual rights, will not be restrained at the instance of a property owner, claiming that he is interested in keeping open the streets dedicated to the public." *Dillon on Municipal Corporations*, § 666.

When the defendant in this action, through its predecessors, secured its franchise for the construction and maintenance of a street railroad on and over the streets and avenues of the city of Reno, it secured this franchise by the authority and grant of the state of Nevada acting by and through its duly au-

thorized agent, the city of Reno. To the city of Reno was delegated the power to grant the franchise and to pass ordinances in connection therewith. This, however, constituted but a delegation of authority from the sovereignty of the state. A municipal corporation, it is said, has no powers which are not derived from and subordinate to those of the state. This has been held, even in cases where the municipal corporation had its existence before the state in which it was located became an independent sovereign. *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699; *Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047; *Attorney General v. Lowrey*, 199 U. S. 233, 26 Sup. Ct. 27, 50 L. Ed. 167. It is stated in the text of *Ruling Case Law* that the people of a particular portion of a state, by enjoying the privilege of self-government, acquire no vested right therein as against the Legislature representing the people of the state. 19 R. C. L. 731. That the estate, acting through its Legislature, may exercise supreme control over all streets, alleyways, and avenues, has been declared to be a law in nearly every jurisdiction where the question has been brought before the courts. *Grand Trunk R. R. Co. v. South Bend*, 227 U. S. 544, 33 Sup. Ct. 303, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405; *Marietta Chair Co. v. Henderson*, 121 Ga. 399, 49 S. E. 312, 104 Am. St. Rep. 156, 2 Ann. Cas. 83; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Stanley v. Davenport*, 54 Iowa, 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216; *Ottawa R. R. Co. v. Larson*, 40 Kan. 301, 19 Pac. 661, 2 L. R. A. 59; *Crawford Electric Co. v. Knox County Power Co.*, 110 Me. 285, 86 Atl. 119, Ann. Cas. 1914C, 933; *Dooly Block v. Salt Lake Rapid Transit Co.*, 9 Utah, 31, 33 Pac. 229, 24 L. R. A. 610; *Ex parte Smith*, 26 Cal. App. 116, 146 Pac. 82; *Hoppes Co. v. Chicago*, 260 Ill. 506, 103 N. E. 455; *Wabash R. R. Co. v. Defiance*, 167 U. S. 83, 17 Sup. Ct. 748, 42 L. Ed. 87; *United R. R. Co. v. Jersey City*, 71 N. J. Law, 80, 58 Atl. 71; *Hoey v. Gilroy*, 129 N. Y. 132, 29 N. E. 85; *Simon v. Northup*, supra; *State v. Missouri Tel. Co.*, 189 Mo. 83, 88 S. W. 41; *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; *Council Bluffs v. Kansas City Ry. Co.*, 45 Iowa, 338, 24 Am. Rep. 773; *La Harpe v. Elm Tp. Gas Co.*, 69 Kan. 97, 76 Pac. 448; *Baltimore R. R. Co. v. Reaney*, 42 Md. 117; *Baird v. Rice*, 63 Pa. 489; 13 R. C. L. 163. It was the function of the state to determine as to what conveniences for traffic or travel the public might enjoy over the streets or avenues of the city of Reno. *Cicero Lumber Co. v. Cicero*, supra; *Barrows v. Sycamore*, 150 Ill. 588, 37 N. E. 1096, 25 L. R. A. 535, 41 Am. St. Rep. 400; *Simon v. Northup*, supra.

The rule recognizing the sovereignty of the state over the streets and avenues of a municipal corporation within its borders, founded as it is upon necessity and reason,

must be regarded as a reality and not a fiction. Hence in this case the state, looking to the mode of travel that was to be furnished as an accommodation to the public over the streets and avenues of the city of Reno, and being sovereign in control over those streets and avenues, granted, through its agent, the municipal corporation, a franchise to the predecessors in interest of defendant here. The granting of this franchise did not constitute a relinquishment of the sovereignty held by the state over those streets and avenues, nor a relinquishment of the power to control the letting and regulation of franchises on or over such streets and avenues. The city of Reno as a municipal corporation may have had at all times an interest co-ordinate with the state in the letting of franchises for public service on the streets and avenues within its limits. This, however, in no wise detracted from the sovereignty or control or interest which the state held in the matter. If the state, exercising its right of control over the streets of the city of Reno, was the real party in interest, and only acted through its agent in the granting of the franchise to the predecessors of the defendant, then we take it that it will not be gainsaid that the state is the real party interested, looking to the carrying out of the terms of that franchise and the enforcement of the ordinance by and through which the franchise was in the first instance granted. In the action at bar the state proceeds in this court on the relation of the city of Reno, but the state of Nevada is the plaintiff and the real party in interest.

Aside from the fact that the state, being sovereign over the streets and avenues of the city, is therefore the real party in interest, hence the real party plaintiff, it must be further observed that, inasmuch as the action commenced in this court is a special proceeding, which under our statute could only be instituted by the state through its Attorney General, and which in this instance is instituted in strict compliance with that statute, courts are bound to regard the state as the real party plaintiff. The municipal corporation as such has no power under the statute to institute the proceeding. This right is limited to the state alone. Were we to hold that the municipality is the party plaintiff, as contended for by defendant here, then for want of authority in the plaintiff corporation the proceeding would fall, and there would be no cause of action to remove.

In view of the many decisions rendered by the federal courts and by the Supreme Court of the United States, we take it that it will not be seriously contended that the rule of diversity of citizenship operates for the purpose of removal under the Judicial Code, where the state is a party and the other party to the action is the citizen of a foreign state. The action here is not such as may be termed a "suit arising under the Constitution or laws of the United States

or treaties made under their authority," inasmuch as a correct decision of the matter in controversy does not depend on the construction of either, nor is the title set up by the parties, so far as the pleadings are before this court, one such as may be denied by one construction of the Constitution or laws of the United States or sustained by the opposite construction. *Cohens v. Virginia*, 6 Wheat. 379, 5 L. Ed. 257; *Railroad Co. v. Mississippi*, 102 U. S. 135, 26 L. Ed. 96; *Starin v. New York*, 115 U. S. 248, 6 Sup. Ct. 28, 29 L. Ed. 388. "A suit by a state in one of its own courts cannot be removed," says the Supreme Court of the United States, "unless it be a suit arising under the Constitution or laws of the United States or treaties made under their authority." *Germania Ins. Co. v. State of Wisconsin*, 119 U. S. 473, 7 Sup. Ct. 260, 30 L. Ed. 461. "A state is not a citizen," says the Supreme Court of the United States, "and, under the Judiciary Acts of the United States, it is well settled that a suit between a state and a citizen or a corporation of another state is not between citizens of different states, and that the Circuit Court of the United States has no jurisdiction of it, unless it arises under the Constitution, laws or treaties of the United States." *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231.

In the case of *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144, the action was commenced by the state of Arkansas, on the relation of Jo Johnson, as prosecuting attorney for the Twelfth judicial circuit, against a foreign corporation defendant. The defendant filed a petition for removal to the United States court on the ground that the relator, Jo Johnson, was a citizen of Arkansas, and that the defendant was a citizen of Missouri. On refusal by the state court to remove, the matter was taken to the federal court. The latter refused to remand and retained the case for trial. On appeal to the Supreme Court of the United States, the action of the federal court in refusing to remand was reversed. In speaking for the court, Mr. Chief Justice Fuller said:

"We need not spend any time on the contention that this was a controversy between citizens of different states. The Circuit Court correctly held otherwise. The state of Arkansas was the party complainant, and a state is not a citizen."

Holding to the same effect are the cases of *Postal Telegraph Cable Co. v. State of Alabama*, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231; *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962.

We are referred by defendant to a number of authorities which they claim to support their contention that this is a case for removal. In the case of *State of Ill. ex rel. Hunt, Attorney General, v. Illinois Central R. Co. (C. C.)* 33 Fed. 721, the action was in quo warranto, brought in the name of the

state, by the Attorney General, to prevent a railroad from exercising certain rights and privileges and from controlling certain lands. The motion for removal was based upon ownership in land acquired under an act of the Legislature; that subsequently the act granting the land was repealed, and that such repealing act was in violation of the provisions of the Constitution of the United States relating to laws impairing the obligations of contracts and of the Fourteenth Amendment declaring that no person shall be deprived of property without due process of law. On motion to remand from the federal circuit court for the Northern District of Illinois, the court denied the motion, but rather upon the ground that the case was one arising under the Constitution of the United States and involving the interpretation of the federal Constitution, in order to arrive at a correct decision of the question presented. In that case the question of diversity of citizenship was not before the court.

In the case of *Ames v. Kansas ex rel. Johnston*, Attorney General, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482, two questions were considered by the Supreme Court of the United States: First, whether the suit was of a civil nature, at law or in equity, arising under the laws of the United States; and, second, whether, if they were such, it could be removed under the act of March 3, 1875, inasmuch as it was brought by a state to try the right of a corporation and its directors to exercise corporate powers and franchises within the territorial jurisdiction of the state. The purpose of the action was to test the validity of a consolidation entered into between the Kansas Pacific Railway Company and the Union Pacific Railway Company. The case turned solely upon the validity of the consolidation in the light of authority conferred for that purpose by an act of Congress. In arriving at a determination as to the matter, the court said:

"If the acts of Congress confer the authority, the consolidation is valid; if not, it is invalid. Clearly, therefore, the cases arise under these acts of Congress, for, to use the language of Mr. Chief Justice Marshall in *Osborn v. United States Bank*, 9 Wheat. 825 [6 L. Ed. 204], an act of Congress 'is the first ingredient in the case—is its origin—is that from which every other part arises.' The right set up by the company, and by the creditors as well, will be defeated by one construction of these acts and sustained by the opposite construction. When this is so, it has never been doubted that a case is presented which arises under the laws of the United States."

We are referred to the case of *City of New Orleans v. Sheppard*, 10 La. Ann. 268. There the suit was instituted by the municipal corporation for an amount alleged to be due for municipal taxes. The defendant Sheppard took a rule to show cause why the suit should not be transferred to the Circuit Court of the United States, asserting in furtherance of his motion that he was a citizen of the state of Virginia. The municipality contested his

citizenship. The trial court held, under the facts presented, that he was a citizen of the state of Louisiana. On appeal to the Supreme Court, that tribunal, reviewing the case, held that on the showing made the defendant had established his citizenship in the state of Virginia, and, inasmuch as the action was between a citizen of the state of Louisiana as plaintiff and a citizen of a foreign state as defendant, the action was properly removable to the federal court. It will be noted that this case turned rather on a question of fact than on a proposition of law.

In the case of *City of Ysleta v. Canda et al.* (C. C.) 67 Fed. 6, the controversy was between the city of Ysleta, a municipal corporation in El Paso county, Tex., as plaintiff, and a citizen of the state of New York. There the municipal corporation was suing in its individual corporate capacity, and the case was retained by the Circuit Court of the United States because this fact appeared on the face of the complaint. In the matter at bar we find from the face of the complaint that the action is one between the state of Nevada, on the relation of a citizen of that state, and a citizen of a foreign state. We are at a loss to discover the analogy.

In the case of *Vincent v. Lincoln County* (C. C.) 30 Fed. 749, the action was between an individual citizen of a foreign state and one of the counties of this state. There it was established, in conformity with the decisions of this court (*Waltz v. Ormsby County*, 1 Nev. 370; *Clarke v. Lyon County*, 8 Nev. 181; *Floral Springs Water Co. v. Rives*, 14 Nev. 434), that a county as a municipal corporation, or at least as a quasi municipal corporation, was liable to be sued in any court of competent jurisdiction. In that action the state was not a party, either nominally or otherwise.

In the case of *State of Washington ex rel. City of Tacoma v. Tacoma Railway & Power Co.* (C. C.) 244 Fed. 989, the action was in the form of a proceeding instituted pursuant to the Code of the State of Washington for a writ of mandamus to compel the holder of a street railway franchise to operate cars on one of its lines, so as to render an adequate service, for the compensation of a single continuous trip. The question of diversity of citizenship was not considered by the court. We take it from a reading of the opinion that it was conceded by all parties that the action was instituted by the city of Tacoma, acting in its individual corporate capacity. The Circuit Court for the Western District of Washington did not assume to determine its right to retain the action on the ground of diversity of citizenship. The court, after quoting from the statute of the state of Washington (*Pierce's Code*, 1905, § 1408), said:

"If this suit is such a proceeding as contemplated and authorized by the above-quoted sections of the Code, for a writ of mandamus pure and simple, it is not cognizable in this court, and the motion to remand should be granted. It becomes necessary, however, for the court to

examine the record and form its own conclusion as to the real nature of the proceeding, irrespective of the means by which the litigants propose to obtain the relief desired. The affidavit of the mayor, which stands as the complainant's pleading, does not set forth any duty specifically enjoined by law, nor any specific right or office, to the use or enjoyment of which any particular person is entitled, and from which he has been unlawfully precluded. On the contrary, the proceeding is in the interest of the general public, and the grounds of complaint are neglect and refusal to render the service of a common carrier in accordance with general principles of law and in the discharge of an obligation assumed by contract. In other words, the powers of a court of equity are invoked to compel the specific performance of a contract."

In view of the fact that the question presented in the matter at bar turns squarely on the question of diversity of citizenship, rather than as to its being an action at law or in equity under the Constitution of the United States or the acts of Congress, the Tacoma Case, last cited, furnishes neither assistance to determine nor light to review the matter before us. If the authority last reviewed does anything, it inferentially supports the position which we take here. The observation of the court there made is pat in the matter at bar; there it is said:

"If this suit is such a proceeding as contemplated and authorized by the above-quoted section of the Code [Code of Washington], for a writ of mandamus pure and simple, it is not cognizable in this court, and the motion to remand should be granted."

The proceeding here is that contemplated and authorized by the different sections of the Code of this state providing for actions in quo warranto to be instituted by the state through its adviser, the Attorney General, against a corporation, basing such proceeding on the several grounds nominated by the statute. It is therefore such a proceeding as, in the judgment of the learned federal court in the case of *Washington ex rel. City of Tacoma v. Tacoma, etc., Co.*, supra, would call for an order to remand, were it in that jurisdiction.

Section 1 of article 8 of our Constitution provides:

"The Legislature shall pass no special act in any matter relating to corporate powers except for municipal purposes; but corporations may be formed under general laws; and all such laws may from time to time be altered or repealed."

Under the provision of the organic law quoted, plenary powers were reserved to the Legislature to enact laws dealing with corporations and with franchises granted to corporations. Under this constitutional provision is contemplated statutes such as that under which this action was commenced. Franchises such as that held by the defendant issue from the sovereign. *State ex rel. Kansas City v. Fifth St. R. R. Co.*, 140 Mo. 539, 41 S. W. 955, 38 L. R. A. 218, 62 Am. St. Rep. 742. In the matter at bar the city of Reno could not, under the statute, bring this action in its own name. The proceeding is one reserved to the state.

It is suggested that, to justify this court in refusing to enter the order of removal, the action must be based upon some act done in violation of the common law or of the statute law of the state. In this respect it will be noted that the proceedings here are based on the violation of a city ordinance, passed in conformity with and under sanction and authority of our statutes. The very suggestion made is dealt with convincingly by the Supreme Court of Wisconsin in the case of *State ex rel. Attorney General v. Madison St. Railway Co.*, 72 Wis. 612, 40 N. W. 487, 1 L. R. A. 771. There it was said that a violation of the ordinance is a violation of the statute permitting such ordinance and sanctioning such franchise. The court observed:

"The common council, in passing the ordinance, acted as the agent of the state and as public officers by virtue of such delegated authority. The streets are for the public use, and so also are the street railways, affording increased advantages and facilities to the public, and they are primarily under the control of the Legislature, and the power of the municipalities in respect thereto is entirely derived from the Legislature. * * * The immunities and privileges granted to the company by the ordinance are as much the franchises of the corporation as if they had been directly granted by the statute under which it was organized. The common council of the city of Madison is authorized to grant them by the statute, and such power is a delegated one. What the common council does within that power is done by the Legislature through its agency. The public has an interest in these franchises; the power to grant them, therefore, must be derived from the Legislature."

To the same general effect was the declaration of the Supreme Court of the United States in the case of *Transportation Co. v. Chicago*, 99 U. S. 641, 25 L. Ed. 336.

It has been suggested that the ground relied upon in these proceedings is based entirely upon the violation of contractual rights flowing from the franchise granted by the city of Reno. In our judgment, it had better be said to be a proceeding where the ground relied upon is the abuse of corporate powers granted by the franchise and failure to comply with the requirements and conditions on which the franchise was acquired. It is a settled principle of law that the acts of a corporation in this respect can be assailed most appropriately in direct proceedings brought by the state for that purpose. *Hovelman v. Railroad*, 79 Mo. 643; *Mackall v. C. & O. Canal Co.*, 94 U. S. 308, 24 L. Ed. 161.

This principle was asserted, with approved authorities, by the Supreme Court of the United States in the case of *National Bank v. Matthews*, 98 U. S. 628, 25 L. Ed. 188. This very suggestion was made to the Supreme Court of Kansas in the case of *City of Olathe v. Mo. & Kan. Interurban Ry. Co.*, 78 Kan. 193, 96 Pac. 42. The proceedings there, as here, were quo warranto, brought by the city of Olathe against the railway company, seeking to forfeit the rights granted by the ordinance to the corporation. It was con-

tended by the company there that the controversy indicated by the petition related to mere matter of contractual rights between the city and the company, and was therefore not triable in quo warranto proceedings. The court there referred to its previous determination of the question in the case of *State v. Des Moines City Ry. Co.*, 135 Iowa, 694, 109 N. W. 867, saying:

"But it is a thoroughly well-established proposition that rights granted to a corporation, either directly, or by the state indirectly, through the act of a minor municipality authorized by the state, are to be regarded as franchises no less than is the right to be a corporation. Both classes of rights are derived mediately or immediately from the state, and both are subject to the inherent power of the state to guard against their abuse by the grantee or usurpation by a wrongdoer. The occupation of the public street for railway purposes is not a matter of common right, and without a legislative grant therefor the construction or maintenance of such a railway would expose the party responsible therefor to punishment as for a nuisance. The municipality to which is given authority to grant such privilege exercises a delegated power only, and it cannot grant to any person or corporation a privilege which is confessedly in derogation of the common right, in a manner which shall exclude the power of the state to inquire into its abuse, or to prevent the subversion of the public interests which the legislative grant was intended to protect. * * * That the right to occupy the public streets with a railway depends entirely upon legislative grant and is therefore a franchise, notwithstanding the fact that the terms of such grant and their acceptance constitutes also a contract, is too well settled to be open to serious question. * * * Not only is the application of quo warranto or its statutory substitute to cases of this kind upheld by the overwhelming weight of authority, but it is clearly in accord with the dictates of sound public policy."

At this point, and pursuant to the suggestion made, it may be well to consider the nature of the proceeding instituted here, and which defendant seeks to remove. This is an action in quo warranto. The common-law writ of quo warranto was in the nature of a writ from the sovereign, directed to one who claimed an office or franchise. The purpose in cases of franchise was to require of the defendant that he show by what warrant he exercised such. This writ, or proceedings identical in nature, has been written into the statute law of many of the states of the Union, and in nearly every instance the principles of the ancient writ have been recognized, in that the state has been made to take the place of the sovereign, the writ issuing from and by the state for the purpose of inquiring by what warrant an office or franchise is held or enjoyed. We have already made mention of the rule as to the propriety of the proceedings by quo warranto to test the right to exercise a franchise.

As regards foreign corporations it has been generally held that such like domestic bodies are subject to quo warranto proceedings to try rights to the enjoyment of franchises. *State v. Western Union Mutual L. I. Co.*, 47 Ohio St. 167, 24 N. E. 392, 8 L. R. A. 129; *Attorney General v. Booth Co.*, 143

Mich. 89, 106 N. W. 868. The proceeding here, being that of quo warranto, is to be distinguished from a proceeding involving acts violative of contractual obligations. So the matter at bar is, by reason of its nature, one to be distinguished from cases involving injunctive proceedings instituted to prevent municipalities from annulling or violating contractual relations by subsequent ordinance. Quo warranto inquires if, in view of certain alleged conditions, any franchise really exists.

One other view of this matter seems pertinent, in response to the suggestion. The franchise which is the subject-matter of the action here was accepted and its privileges enjoyed subject to the fulfillment of conditions therein expressly laid down. Under the ordinance by which the franchise came into existence, user and improvement being conditions stated upon which enjoyment might continue, the question cannot arise as to the impairment of the obligation of a contract; the company defendant having accepted its franchise privileges subject to the reserved power of the state to question by quo warranto proceedings the validity and existence of that franchise. *Sioux City St. Ry. Co. v. Sioux City*, 138 U. S. 103, 11 Sup. Ct. 226, 34 L. Ed. 898; *State ex rel. Kansas City v. Fifth St. R. R. Co.*, 140 Mo. 539, 41 S. W. 955, 38 L. R. A. 218, 62 Am. St. Rep. 742.

Reference is made to section 26 of the city ordinance under which the franchise was granted. The latter part of that section reads:

"The said city shall thereupon be entitled to take such action and institute such proceedings as may be necessary or essential to have such forfeiture fixed and declared."

This provision in the ordinance of the city of Reno could not be said to abrogate or suspend the plain provisions of the statutes of the state providing for actions such as that instituted here. Indeed, the city could not by the mere adoption of this ordinance delegate to itself the sole power to fix or declare a forfeiture of the franchise. The identical question here suggested was dealt with under a similar provision of a city ordinance in the case of *State ex rel. Kansas City v. Fifth St. R. R. Co.*, supra, where, referring to the provision of the ordinance as to the right of the city to proceed in its own name, the court said:

"The sovereign power of the state to proceed against defendant by quo warranto for forfeiture of its franchise, even at the relation of the city, cannot be contracted away or in any way abridged by the city. At most, such a provision in the ordinance only provided the city another remedy."

In this respect we might with propriety refer to similar analysis resorted to by the Supreme Court of Massachusetts in the case of *Attorney General v. Tudor Ice Co.*, 104 Mass. 239, 6 Am. Rep. 227.

But there is yet another view to be expressed as to this section of the ordinance.

It must be presumed that this ordinance was enacted by the city with a view to general laws and statutes bearing upon the institution of necessary or essential proceedings to have such forfeiture fixed and declared. By the very language of this section of the ordinance it is made plain that the city did not limit itself as to the manner or mode by which, or the jurisdiction in which, it would take action or institute such proceedings. If the city saw fit, as it did here, to make itself the relator to its sovereign, the state of Nevada, that the latter might, under constitutional rights and statutory provisions, institute this action, then it has done neither more nor less than that which by the language of the ordinance it declared the right to do.

Assuming that the city, acting in its own name, could have brought action to curtail or annul the franchise held by the defendant here, which is not according to our understanding of the law (*People v. Sutter St. Ry. Co.*, 117 Cal. 612, 49 Pac. 736), would the existence of such a right limit the city to that right only, if other modes or proceedings for accomplishing the same result were available? Or would the existence of such a right prevent the state of Nevada from instituting this action on relation of the city? Manifestly not. Neither the institution of this action nor the enactment of the Legislature providing for such constitutes an abrogation, abridgment, or circumscription of any right acquired by the city of Reno through the special act of incorporation. In the language of section 26 of the ordinance we find nothing which attempts to take from the force and effect of the general statute, nor which would attempt to bind the city to become the sole party plaintiff in taking such action or instituting such proceeding necessary or essential to have forfeiture declared.

It is asserted that to justify the refusal of this court to enter an order of removal under the statute the action must be based upon some act done in violation of the common law or of the statute law of the state. It will be sufficient to observe, in response to this suggestion, that the motion for removal here is instituted solely on the diversity of citizenship; and in view of the rule in that respect so oft declared, the movant here relies on the asserted fact that such diversity appears on the face of the complaint. Growing out of the suggestion it may be further observed that, in order to demand removal warrantable from the nature of the action, the latter must be such as, under the provision of chapter 3 of the Judicial Code, constitutes an action in law or in equity arising under the Constitution or laws of the United States, which might be defeated by one construction of these acts or sustained by the opposite construction. *Ames v. Kan-*

sas, *supra*. Such is not even contended for by eminent counsel here.

We must not be understood here as deciding any matter, save and except the question of the removal of the quo warranto proceedings from this court, where they were instituted, to the United States District Court for the District of Nevada, on the ground of diversity of citizenship. We do not, therefore, assume to determine the law of the case as regards the merits of the quo warranto proceedings. Many matters touched upon in the opinion are set up *arguendo*, and not as matters which we assume to decide. In this proceeding on motion for removal there was in fact but one question to be determined, namely, as to whether the action here commenced was one by the city of Reno, as a citizen of the state of Nevada, against a citizen of a foreign state, or one between the state of Nevada and a citizen of a foreign jurisdiction, having determined that it is the latter, and not the former, a mere suggestion as to the law fixing the jurisdiction of federal courts might have served to answer all other questions. This however, is not for our concern.

We conclude the question, in the light of observations already made, by saying that, inasmuch as the matter pending in this court is a proceeding instituted by the state of Nevada as plaintiff, in conformity with statutory provision, notwithstanding that it is on relation of the city of Reno, the state, and not the municipal corporation, is the party plaintiff. The proceeding here, being one between the state of Nevada and a citizen of a foreign state, is not an action between citizens of different states, hence is not such as may be removed to the United States District Court on the ground of diversity of citizenship.

The motion for removal is denied. It is so ordered.

COLEMAN and SANDERS, JJ., concur.

(41 Nev. 384)

In re DELANEY'S ESTATE. (No. 2311.)
(Supreme Court of Nevada. March 15, 1918.)

1. EXECUTORS AND ADMINISTRATORS §129(1)
— SPECULATIVE EXPENDITURES — NECESSITY OF COURT ORDER.

Where an estate had few debts, and consisted largely of cash and four mining claims, and the administrator, without court order, paid out \$1,000 for assessment work on the claims, when adjoining claims gave promise of profit, and later abandoned the claims, the venture was so speculative as to surcharge the administrator with such sums.

2. EXECUTORS AND ADMINISTRATORS §527—
DUTIES—SURETIES—LIABILITY.

An administrator is bound to the exercise of care and diligence, such as prudent and judicious men ordinarily bestow upon their own important affairs, and it is his duty to settle and distribute the estate with as little delay as practicable; and whenever he does what the law

prohibits, or fails to exercise reasonable care and diligence in the endeavor to do what the law enjoins, he and his sureties are liable for the damage consequent upon such act or omission.

3. EXECUTORS AND ADMINISTRATORS ⇐459— DUTIES OF ADMINISTRATOR.

Under Rev. Laws, §§ 5963, 5964, 5967, 6041, as to duties of an administrator, expedient administration is required, and where an estate had cash on hand to meet all indebtedness, and everything was present to facilitate a speedy discharge of the trust, but the administrator permitted the estate to drag on for nearly seven years without an accounting and without any attempt to secure an order for expenditure of money, he was guilty of a breach of his duties.

4. EXECUTORS AND ADMINISTRATORS ⇐104(4) —FUNDS—INTEREST.

Where the estate at all times had sufficient money on deposit under certificates of deposit to pay indebtedness, but the administrator made no accounting for nearly seven years, he was chargeable with interest on the moneys, although there was a suit to establish heirship.

5. EXECUTORS AND ADMINISTRATORS ⇐109(1) —SURCHARGING ADMINISTRATORS.

Where an estate was administered in a judicial district consisting of two counties where sessions of the district court might occur at the judge's direction, the administrator's failure to secure an order for expenditure of moneys in assessment work on mining claims for one year would not necessarily charge him with such amount when the investment proved to be speculative and worthless.

6. EXECUTORS AND ADMINISTRATORS ⇐104(4) —FUNDS—INTEREST.

Where money of an estate is held by an administrator after the time when by proper accounting and other administrative acts in conformity with the statutory requirements, he could have paid out and distributed the same by court order, he should be chargeable with interest on the money thus held.

Appeal from District Court, Lander County; Peter Breen, Judge.

In the matter of the estate of Patrick H. Delaney, deceased. On appeal from rulings on items of the account of the administrator, Reversed and remanded.

Milton B. Badt, of Elko, for appellants.
Charles B. Henderson and Carey Van Fleet, both of Elko, for respondents.

MCCARRAN, C. J. An administrator was appointed on the 26th day of February, 1908, to take charge of and administer the estate of Patrick H. Delaney, deceased. On December 8, 1908, an inventory and appraisal was filed which set forth the property of the estate and the appraised values as follows:

Certificate of deposit, Horton Banking Company	\$5,000 00
Cash in bank, Horton Banking Company...	1,200 00
Cash received from coroner.....	6 10
Four lots in Battle Mountain, Nev.....	118 00
One cabin, 12x14.....	250 00
Four mining claims in Battle Mountain mining district, known as Delaware No. 1, No. 2, No. 3, and No. 4.....	500 00
One iron bed, springs, and mattress.....	12 00
Two comforters and two pillows.....	4 00
One camp stove	3 00
Cooking utensils, three pieces.....	1 00

A total of..... \$7,094 10

It appears that from December, 1908, until July 1, 1915, no accounting was ever made by the administrator as to the estate or its condition. On the last-named date, pursuant to a citation duly issued by the district court, a first and final account was rendered. In this first and final accounting it appears that the administrator charges himself with cash received \$6,224.45, and credits himself with cash paid out in the total sum of \$4,370.94. Of the \$6,224.45 with which the administrator charges himself, \$6,200.45 was in the nature of certificates of deposit and cash at the time at which the administration commenced. The sum of \$24 appears to have been received in the form of rental for the cabin. In addition to this, the administrator testified at the hearing that he had on hand \$100 received as additional rental for this cabin.

Objection was raised in the district court to the several items of cash paid out by the administrator from the moneys of the estate. It is from the court's rulings on these objections that appeal is taken to this court.

In the first and final accounting there appear the items of cash paid out as follows:

Nov. 7, 1908.	To George W. Tripplett, assessment work on four mining claims	\$400
Dec., 1909.	To George W. Tripplett, assessment work on four mining claims	400
Nov., 1910.	To George W. Tripplett, assessment work on four mining claims	400
Dec., 1911.	To George W. Tripplett, assessment work on four mining claims	400

—making a total of \$1,600 appearing as paid out by the administrator from the moneys of the estate for assessment work on the Delaware claims for the years 1908, 1909, 1910, and 1911.

It is admitted by the administrator, and in this the record is conclusive, that no order of court was ever applied for, nor was any order made or entered, authorizing, allowing, requiring, or directing the expenditure of these several sums prior to their expenditure. It is the contention of respondent that inasmuch as the four mining claims known as the Delaware No. 1, No. 2, No. 3, and No. 4 were the property of the deceased Delaney, in order to hold these mining claims for the estate it was necessary to perform the annual assessment work thereon. From the testimony of the administrator it is disclosed that after the year 1911 no assessment work was performed on these claims. In other words, they were abandoned. In justification for the performance of the assessment work and the expenditure of the moneys of the estate on these mining claims, the administrator relates of the existence of other mining property in the immediate vicinity which, being worked and developed by other parties, gave promise of

presenting mineral deposits of great value; that inasmuch as the Delaney group was contiguous to this other mining property, he, as administrator, believed that the Delaney group should be protected by the performance of the annual assessment work, and thereby held for the estate. It is disclosed that no work was performed on the Delaware group after the year 1911, because development on the contiguous mining property had ceased and nothing of value had been disclosed.

Nothing appears in the record by way of justification or excuse for the failure of the administrator to secure an order of the district court allowing or directing the expenditure of these several sums of money. He was appointed administrator on the 26th day of February, 1908, and according to his own statement, as appears in the first and final accounting, the first expenditure of money for the assessment work was in December of that year. The inventory and appraisalment disclosing the existence of the mining claims known as the Delaware No. 1, No. 2, No. 3, and No. 4 belonging to the estate of Patrick Delaney had been made long prior to the date on which the first expenditure for assessment work was made by the administrator. The existence of the Delaware group of mining claims as property belonging to the estate of the deceased was known to the administrator prior to the death of the deceased. We make reference to these facts because we are forced to the conclusion that there was ample time and opportunity for the administrator to have presented the matter to the district court, the properly constituted authority, and to have received from that court an order directing the expenditure of such money as it deemed necessary for the preservation of the mining claims to the estate.

Another fact appears quite significant—I. e., even though it might have been reasonably necessary that the assessment work for the year 1908 should be performed upon the mining claims in order to hold them for the estate, later expenditures under the administration appear to us to have been entirely unnecessary and unwarranted, inasmuch as the condition of the estate, as disclosed by the final accounting, was such as would have warranted its being closed and the residue properly distributed to the parties entitled, long prior to the time at which it became necessary to perform the assessment work of 1909.

Aside from three claims of minor importance, amounting in the aggregate to \$306.19, the estate was practically free from indebtedness. Aside from the group of mining claims and a small piece of realty in the town of Battle Mountain, and a few items of minor personal property, the estate consisted entirely of cash represented by the certificates of deposit for \$5,000 and the open

account of \$1,200 in the Horton Banking Company in the town of Battle Mountain.

It is the contention of respondent here that good faith on the part of the administrator is all that is necessary to warrant the allowance of these several items, and that it was the duty of the administrator to see to it that the assessment work on this group of claims belonging to the estate was performed each succeeding year in order to hold the property for the estate. The learned counsel for the respondent, by way of argument in his brief, puts the matter thus:

"But what would have been said, and what bitter attack would have been made, if these claims had been abandoned by the administrator at the time that he took possession of the property and Senator Kearns had been doing the assessment work on these claims alongside of the claims possessed by the estate?"

In furtherance of the contention of respondent, we are referred to a number of decisions rendered by this court dealing with matters of somewhat similar import, and inasmuch as these decisions support the position which we take here, we deem it proper to review the same at some length. In the Matter of the Estate of Marco Millenovich, 5 Nev. 161, this court had occasion to pass upon the acts of an administrator where objection had been filed to his paying out certain sums of money to meet assessment levied upon mining stock belonging to the estate. At the very outset of the opinion of the court, speaking through Chief Justice Lewis, an observation is made which we deem most pertinent to the matter at bar. There it is said:

"When the law requires a thing to be done, and has not plainly marked out the manner in which it shall be performed, the executor or administrator is required to exercise not only the utmost good faith but also ordinary prudence and judgment in its execution. But when it has already pointed out a certain course to be pursued, that course must be strictly followed. * * * If the administrator has acted for the benefit of the estate, used proper diligence, and acted with ordinary care and circumspection in the discharge of his trust, he ought not to be held answerable for the losses which could not have been foreseen, and which ordinary precaution could not guard against."

Again, the court says, and here its observation is especially applicable:

"If, for example, he [the administrator] should in good faith do an act without an order of court, which the law declares shall not be done without such order, and if the act were one which the court would have approved or ordered done, and no injury has resulted from his action, he should not be chargeable with mismanagement of the estate. In every such case, however, the executor renders himself liable for any loss which may be sustained by reason of the irregularity of his proceeding."

As to the propriety of paying the assessment on valuable mining stock held in the estate and the continuation of such assessment, the court said:

"To allow valuable stock to be sold for assessments less than its value would certainly subject an executor to the charge of misconduct. It is perhaps not his duty, nor do we think he would

be justified in holding stock which is subject to assessments beyond such time as will be necessary to obtain an order of court respecting it. Property of this kind, which is only an expense to the estate, should certainly be disposed of in some way, unless it be quite evident that it would be for the interest of the estate to hold it. But in such case an executor would certainly subject himself to liability for all loss unless he acted under the direction of the court; for his primary duty, it would seem, is to obtain an order to sell such property. But an order of court, ordering him to pay all assessments, is a sufficient protection to him."

It appears that in that case the executor, before paying the assessment on the mining stock, had obtained an order of the probate court authorizing his action in this respect, and this court in reviewing the matter said:

"Had he not acted under an order of the court we should be induced to think it should not be allowed, for payment of the amount of assessments here charged would, if not paid by order of court, be unwarranted under the circumstances."

In the case of *Lucich v. Marco Medin*, 3 Nev. 93, 93 Am. Dec. 376, the court, in dealing with the question of the right of the administrator to pay out the moneys of the estate for assessments on mining stock, said:

"If he held mining stock which was likely to be forfeited before he could apply to the court for instructions, he might be justified in paying something to preserve it. * * * If he held stock liable to large assessments, he should have applied to the court for leave to do one of two things: Either to sell the stock, or, better still, if the estate was surely solvent without the stock, to turn it over to the legatees, and let them sell, or take their chances on speculation with it."

[1] The doctrine here announced is exactly applicable to the matter at bar. The mining claims belonging to the estate were of but conjectural or speculative value. At most they were but a prospect, the possibility of which was enhanced by reason of the contiguity of the property to other mining prospects upon which development work was being done. An administrator, in conducting the affairs of an estate, is not required nor presumed to enter into a game of chance where the money which belongs either to the creditors or to the heirs is thrown into the gamble. Expenditures made for the purpose of preserving the estate until proper court orders may be made with reference to its disposition is one thing; hazarding the money of the estate on speculative ventures, without court order, is another. The former looks to the preservation of the property of the estate until such time as it may be properly disposed of by order of court; the latter is an unwarranted depletion of the estate. An order of court is the administrator's protection in either case.

In the Matter of the Estate of Knight, 12 Cal. 200, 73 Am. Dec. 531, the Supreme Court there laid down the doctrine that an administrator is not permitted at discretion to expend the money of the estate even for the purpose of paying off incumbrances arising upon the property, upon the theory that the property may increase in value, and thereby

a speculation may be made for the estate. In that case the right of the court to direct such expenditures as might be necessary to save the estate from great sacrifice is recognized, but the act of the administrator in diverting the money of the estate without such order is declared to be one the result of which must be borne by him and for which he must be accountable.

A very interesting consideration of a matter quite similar to that presented in the case at bar is found in *Shinn's Estate*, 166 Pa. 121, 30 Atl. 1026, 1030, 45 Am. St. Rep. 656. There the money of the estate was expended in developing certain mining properties situated in a foreign jurisdiction. The property had been held by the deceased, and during his lifetime he had undertaken to develop the same. The administrator, with a view of continuing such, expended large sums of money. The venture was a failure. The court said:

"The iron ore operation was a speculative venture which the decedent, in his lifetime, had a perfect right to enter upon; his business was to accumulate an estate. If his ventures turned out successful, he reaped the profits; if unsuccessful, no others were interested or had a right to complain. But the business of this administrator was not to make money for the state by hazardous ventures but to save that which came into his hands, for creditors and kin, by prudent business management. Speculative ventures were not prudent business management."

In that case, as in the matter at bar, the expenditure was made by the administrator without order of court, and we find there the doctrine applied that under such circumstances such act was sufficient to establish a devastavit against the administrator, warranting a surcharge of the amount lost to the estate.

The doctrine applicable to risking assets of an estate in the continuation of the trade or business of the decedent, while not strictly applicable to the matter at bar, furnishes, nevertheless, no small degree of support for the position which we take here. The rule in that respect has been asserted to be that an administrator or executor, in the absence of authority therefor, is not permitted to use any part of the estate in trade or manufacturing or stock speculation, or other business ventures whereby the trust fund is put at hazard. *Western Newspaper Union v. Thurmond*, 27 Okl. 261, 111 Pac. 204, Ann. Cas. 1912B, 727; *Mathews v. Sheehan*, 76 Conn. 654, 57 Atl. 694, 100 Am. St. Rep. 1017; *Campbell v. Faxon*, 73 Kan. 675, 85 Pac. 760, 5 L. R. A. (N. S.) 1002; *Kelley v. Kelley* (C. C.) 84 Fed. 420; *Fleming v. Kelly*, 18 Colo. App. 23, 69 Pac. 272; *Lusk v. Patterson*, 2 Colo. App. 307, 30 Pac. 253; *Rose's Estate*, 80 Cal. 166, 22 Pac. 86; *In re Smith*, 118 Cal. 462, 50 Pac. 701.

[2] This estate was held by the administrator for a period of seven years, without even so much as filing the first accounting; and it appears that the first and final account was only filed by the administrator

after the issuance of an order and citation by the district court directing the same. From all that appears in the record, every claim against the estate could have been paid in cash, and every matter pertaining to the estate could have been, in compliance with statutory provision, performed and the whole estate wound up, ready for distribution, within a year, or at most a year and a half, from the date on which the administrator here was appointed.

The language of Mr. Justice Garber, in speaking for this court in the case of *McNabb v. Wixom*, 7 Nev. 171, and the doctrine laid down there, are especially pertinent to the matter at bar. There it was said:

"We quite agree that an administrator is bound to the exercise of care and diligence, such as prudent and judicious men ordinarily bestow upon their own important affairs; that it is his duty to settle and distribute the estate with as little delay as practicable; and that whenever he does what the law prohibits, or fails to exercise reasonable care and diligence in the endeavor to do what the law enjoins, he and his sureties are liable for the damage consequent upon such act or omission."

The respondent here relies upon the case of *Freud's Estate*, 131 Cal. 667, 63 Pac. 1080, 82 Am. St. Rep. 407, and it is contended that there the Supreme Court of California reversed its decision and overruled the doctrine as made in the case of *Knight's Case*, *supra*. His contention in this respect is not tenable. In the *Freud Case* the Supreme Court of California, referring to its decision in the *Knight Case*, said:

"Nor is the decision in *Re Knight's Estate* applicable here. In that case it was said, as is doubtless true, that, while it is the duty of the administrator to preserve the estate, 'this does not mean that he is, at discretion, to pay off all incumbrances resting on the property upon the notion that the property may increase in value, and thereby a speculation may be made by the estate'; and the point directly ruled was that 'he cannot advance money to remove incumbrances unless his intestate was bound to pay the money.' Thus, apparently, the decision is placed on two grounds, namely: (1) On the ground expressed, which is in effect that the administrator cannot pay all incumbrances at discretion for speculative purposes, or, it might have been said, for any purpose except for the preservation of the property, and where necessary for that purpose; and (2) on the ground that he cannot pay off incumbrances 'unless his intestate was bound to pay the money.'"

Continuing, the court says:

"But the power of the administrator to pay off incumbrances in any case results solely from the necessity of preserving the property, and can be justified only on the ground that the lien is a charge on the estate, and therefore a peril to it; and this is equally true whether the lien was created by the intestate, or, as in the case of taxes, in some other way."

It will be seen that the Supreme Court of California in the *Freud Case* rather adhered to the doctrine laid down in the case of *In re Knight*, but deemed the same inapplicable to the case then under consideration. In the case of *In re Smith*, 118 Cal. 462, 50 Pac. 701, the Supreme Court of California referred approvingly to its decision laid down

in *Re Moore's Estate*, 57 Cal. 437. There the court gave expression to that which is the accepted rule, namely, that the primary purpose and reason of administration of any estate are, first, to preserve the estate until distribution can be made, and, second, to pay off the debts of the decedent. In the case at bar the very nature and condition of the estate, as disclosed by the record, the fact that the estate consisted almost entirely of cash on hand, and that as against the estate there were but few and minor claims, made the whole trust one which could have been speedily discharged. The mining claims belonging to the decedent and remaining in his estate could have been made the subject of prompt and speedy court orders, by means of which they could have been properly disposed of or turned into the hands and possession of the heirs, in which case it would have been for them to have assumed the responsibility of speculation; or, if the conditions were such as to warrant the expenditure of the moneys of the estate, the court could have properly ordered such.

Much stress is laid by the respondent on the case of *Armstrong's Estate*, 125 Cal. 603, 58 Pac. 184. In that case an administrator, finding that certain horses belonging to the estate were held by a party who claimed a lien upon them for pasturage to the amount of \$93.66, redeemed the same under a compromise in which he paid out the money of the estate to the amount of \$89.50, believing at the time that the horses would sell for considerably more than the amount of the lien. It developed later, however, that the amount derived from the sale was but \$56.75. The court charged the administrator with the difference. The Supreme Court, in reviewing the question, held that the surcharge was improper, but said:

"The act might have been for the benefit of the estate, and as there is no proof of negligence or want of ordinary care, and the proof shows that the administrator acted in good faith, we must hold that if his acts could, under any state of facts, be sustained as valid, they must be presumed to be valid under such state of facts rather than be held invalid from the mere fact that the property did not sell for enough to repay the amount paid out by the administrator."

Continuing, the court said:

"We do not lay down the rule that an administrator can, of his own volition, redeem pledged personal property, or property upon which there is a valid lien, under all circumstances, and justify his acts in case of loss to the estate. If the proof should show that the property, at the time it was redeemed, was of little value, while a large amount was paid out for the purpose of redeeming it, or if the circumstances were such that we could not say a reasonably prudent man would have done the same thing, then the circumstances might justify the charging of the loss to the administrator."

The assertion but emphasizes the position which we take here with reference to the question at bar. The property upon which the money was invested was of no fixed, definite value. It was a mining prospect, pure and simple. A large amount was paid out for

the purpose of doing assessment work year after year without any effort to relieve this estate of the necessity of such expenditure, either by attempting to sell the property in the open market, under court order, or to distribute the same to the heirs of the estate; and, moreover, without any attempt on the part of the administrator to clothe himself with an order of court authorizing his acts in making such expenditures.

Respondent quotes at length from Ross on Probate Law, vol. 1, § 305, but the very doctrine which we apply to the case at bar is asserted in the quoted excerpt from the learned author. Speaking of the administrator, he says:

"In short, he may do whatever is necessary to the preservation of the estate intrusted to his care, subject to the contingency of the expense being disallowed by the court; but, as a rule, his duty is confined to preserving and administering the estate and turning it over to the heirs or devisees as soon as practicable, and not to speculate with it, carry on business on its account, or improve it for the benefit of distributees."

[3] In an estate like that presented by the record in the case at bar, where there is cash on hand in the estate to meet outstanding claims and indebtedness, where everything is present to facilitate a speedy discharge of the trust, but where, notwithstanding this, the estate is permitted to drag on for a period of nearly seven years without any accounting, without any attempt to secure an order of court permitting the expenditure of money, we are at a loss to know how, under such circumstances, it can be said the administrator complied with the rule fixing the duty of such officer as the same is laid down by Mr. Ross in his work on Probate Law.

"The duties of the executors," says Judge Lorigan in *Re Willey's Estate*, "are to preserve the estate, pay the indebtedness of the deceased, the charges of administration, and put the estate in such condition that distribution may be had to those entitled to it, under the will." In *Re Willey's Estate*, 140 Cal. 238, 73 Pac. 998.

Not only was the money of the estate forever lost to the heirs and devisees, but in addition to this the very property on which this money had been expended in the way of speculation had been by the administrator later abandoned and it too lost to those entitled. Such conduct, we say, fails to measure up to the rule, and fails, in our judgment, to clear the administrator of a surcharge.

We are referred to the case of *In re Sylvar's Estate*, 1 Cal. App. 35, 81 Pac. 663. This case is especially relied upon by respondent as asserting a doctrine justifying the delay in closing up the estate. In that case we find one of the very contingencies which might justify delay in administration, namely, the pendency of litigation. Indeed, we might concur in the assertion of the court there set forth:

"There are many cases in which the settlement of estates is unavoidably delayed without the fault of the administrator."

Indeed, we might join in the assertion that all presumptions are in favor of the regularity of the management of the estate by the administrator, and we would add to this by saying that when on the very face of the proceedings irregularity is made manifest, and neglect and irregularity made to be the apparent basis for loss to the estate, the presumption in favor of regularity is then overcome.

Deep-seated in the lines of our law as that law is written we find a persistent manifestation of a policy declaring for efficiency and promptness in the matter of administration of estates of persons deceased, and we might say here that this is especially true and especially to be desired where intestacy is present. Section 5963, Rev. L., provides that every executor and administrator shall, immediately after appointment, cause notice thereof to be given. Section 5964 provides that all persons having claims against such an estate shall file proof thereof within 3 months after the first publication of notice. Section 5967 provides that within 15 days after the time for filing proof of claims against an estate shall have expired, the executor or administrator shall examine and allow or disallow the claims so filed, and within 5 days from the time of taking such action all claims so acted upon by the executor or administrator shall be presented to the district judge for his allowance or disallowance. Section 6041 provides that within 30 days after the district judge shall have acted upon the claims so presented to him, the executor or administrator shall file his first account. The spirit, as well as the letter of these sections last referred to, expresses the policy of our law. Expedient administration is called for by every section of the statute. Conditions may arise in the course of an administration where reasonable delays in excess of those contemplated by the statute might be tolerable or justifiable.

[4] Appellants contend that the administrator should be surcharged with interest on the money of the estate held by him. The record shows that when he came into control of the estate the cash belonging thereto was represented to the extent of \$5,000 by certificates of deposit bearing no interest, and approximately \$1,200 was in the bank subject to check. The record suggests proceedings to establish heirship, filed in the year 1911, and decree establishing heirship entered March 16, 1915. The general rule applicable to personal liability of an administrator or executor to distributees for interest where there has been delay in closing up the estate is that it depends entirely upon the reasonableness or unreasonableness of the delay under all the circumstances of a particular case. Nonresponsibility for interest applies where the delay was reasonable; re-

sponsibility for interest attaches where the delay was unreasonable. 11 R. C. L. p. 148, § 156.

In a number of cases courts have held the pendency of suits to be sufficient cause for delaying settlement, hence sufficient cause to avert a charge of interest. *Chase v. Lockerman*, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277; *McIntire v. Mower*, 204 Mass. 233, 90 N. E. 567; *Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93. In the case of *Clark v. Knox*, supra, interest was deemed a proper charge against the administrator, he having held the moneys after the period of 18 months. In *Jacoway v. Hall*, 67 Ark. 340, 55 S. W. 12, interest was held a proper charge where funds were held for 20 years. In *McDonald v. People*, 222 Ill. 325, 78 N. E. 609, the administrator was held chargeable with interest after the expiration of 2½ years from his appointment, where moneys of the estate were held after that time. In *Hall v. Grovier*, 25 Mich. 428, interest was held properly chargeable where the money came into the hands of the administrator about one year after his appointment and was held 20 years. Holding to the same effect is the case of *Owens v. Owens*, 84 Miss. 673, 37 South. 149. In *Brandon v. Hoggatt*, 32 Miss. 335, the estate was distributed after one year from the appointment of the administrator. He was charged with interest because before that time there was more than sufficient money on hand to meet the payment of debts. In *Scott v. Crews*, 72 Mo. 261, the administrator sold property of the estate and accepted notes of solvent persons in payment therefor. He failed to collect the notes until compelled so to do by proceedings. Interest was held properly chargeable. In *re Childs*, 5 Misc. Rep. 560, 26 N. Y. Supp. 721, the administrator was held personally liable for interest, having allowed 10 years to elapse. Two years was held to be a reasonable time.

Under varying circumstances and periods of time administrators have been held personally liable for interest on money held by them belonging to the estate. *McKinney v. Nunn*, 82 Tex. 44, 17 S. W. 516; *Kenyon v. Kenyon*, 31 R. I. 270, 76 Atl. 798; *Foster v. Harris*, 10 Pa. 457; *Hasler v. Hasler*, 1 Bradf. (N. Y.) 248. The case of *Pickens v. Miller*, 83 N. C. 543, as to time and conditions, is quite in point here. The rule in England is found in the case of *Littlehales v. Gascayne*, 2 Eng. Rul. Cas. 172, and again in *Holgate v. Hawarth*, 17 Beavan's Rep. 259.

Respondent contends here that inasmuch as it required some time to establish heirship and such was not decreed until 1915, hence as administrator he should not be personally responsible for interest. Such does not appeal to us with any degree of force, in view of the circumstances presented by the record. From the very first the money was in the hands of the administrator. It was in the Horton Bank in Battle Mountain,

where the administrator lived. The estate was almost free from indebtedness. There was nothing about the estate which would cause the administrator to allow the money to remain idle. We find courts dealing with the proposition under very similar conditions, and in almost every instance the administrator has been charged with interest. In the case of *McCanse v. Goffe*, 66 Mo. App. 586, the estate was one against which there were no claims. The administrator made no settlement for a period of about 5 years. As a reason for delay he asserted a contention between the distributees as to a proper construction of the will, alleging that after long delay and contention with the heirs he filed a suit praying for an interpretation of the will. It was held that even though he was justified in asking for a construction of the will, he was not justified in delaying 4 or 5 years before proceeding. He was held chargeable with interest. In the case of *Boyd v. Swallows*, 59 Ill. App. 635, it was held that the administrator was chargeable with interest on the money retained for 2½ years from the date of his appointment; this, too, notwithstanding that if any order had been made directing him to distribute the money he could not have done so because the whereabouts of some of the distributees was unknown and others were thought to be dead.

Interest was held by the court to be properly chargeable where the executor delayed the settlement of the estate for more than 3 years, justifying his acts by saying that the distributees were foreigners and could not be reached. *King v. Berry*, 3 N. J. Eq. 261. To the same effect is the holding in the case of *Hetfield v. Deband*, 54 N. J. Eq. 371, 34 Atl. 882. In the case of *Almy v. Probate Court*, 18 R. I. 612, 30 Atl. 458, the money of the estate was held by the executors for a period of 3 years. The court said:

"The fact that it was not made to appear at the trial that the executors knew who the persons were that were entitled to share in the money in their hands, or their places of residence, is not enough to relieve them from the payment of interest. Even if such was the fact, it was still the duty of the executors to have deposited the money where it would have earned interest for the benefit of those entitled to the money when they were ascertained."

In the case of *Doster v. Arnold*, 60 Ga. 316, it was held that pending litigation with reference to the estate did not relieve the administrator from liability for interest, he having kept the funds uninvested in his hands.

[5] In view of the fact that this estate was administered in a judicial district consisting of two counties, where sessions of the district court may occur at such times as the judge thereof may direct, there might have been some reasonable excuse for the failure of the administrator to secure an order of the court authorizing the expenditure of the money for the first annual assessment

work after his appointment. For that reason, the administrator might be properly relieved of the surcharge for that item. As to the other items for assessment work, the absence of an order of court was without justification.

[6] We deem it proper to say that where money of an estate is held by an administrator after the time when by proper accounting and other administrative acts in conformity with the statutory requirements, he could have paid out and distributed the same by court order, he should be chargeable with interest on the money thus held. This matter must, in most instances, be for the court to determine. In the case at bar we are unable to see from the record as it is before us why distribution was not made. If the money of the estate or any part thereof was held by the administrator after he could, with reasonable diligence on his part, have distributed the same pursuant to proper orders, then he is chargeable with interest on the money thus retained. As this matter must be sent back to the district court, we assume that that tribunal, in conformity with the proofs as made when the matter is again presented, will apply the rule we have here asserted.

The order appealed from is reversed, and the cause remanded. It is so ordered.

COLEMAN and SANDERS, JJ., concur.

(88 Or. 228)

McLEMORE v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Oregon. March 5, 1918.)

1. MASTER AND SERVANT §78 — BENEFIT FUND—SCOPE OF PLAN—CONSTRUCTION.

A plan of benefits voluntarily promulgated by a large employer, which creates and maintains the fund from which they are to be paid, should not be extended by the courts to embrace cases falling without the intention of its author, as manifested by a fair and just construction of its language.

2. MASTER AND SERVANT §78 — BENEFIT FUND—CONTRACT.

A plan of benefits promulgated by an employer company, providing that all in its employ on or after a certain day shall be entitled to insurance against death by accident in their work, and that claims for death benefits shall be payable at a time stated, being brought to the attention of all employes, constitutes a contract, it being presumed to be accepted by an employé remaining in its service, and his services thereafter rendered being sufficient consideration to support the promise.

3. MASTER AND SERVANT §78 — BENEFIT FUND—RIGHT UNDER PLAN—SUBMISSION TO COMMITTEE—WAIVER.

Right of employer, under its plan of benefits for employes, to have the facts decided by the committee, is waived by its answer in an action for benefits, admitting the facts are as stated in the complaint.

4. MASTER AND SERVANT §78 — BENEFIT FUND—DETERMINATION BY COMMITTEE.

Under the rule of *expressio unius exclusio alterius*, it is to be inferred from provision in

an employer's plan of benefits for employes, that questions of fact shall be determined conclusively by the committee, that the committee has no authority to bind either party by any decision on a question of law.

5. MASTER AND SERVANT §78 — BENEFIT FUND—ACTION—SUBMISSION TO COMMITTEE.

Though the plan of benefits promulgated by an employer declares the employer's obligation limited to the appointment of a committee to administer the funds according to the regulations, and to make payments out of the fund on the order of the committee, yet, it limiting the committee's power to the determination of the facts, and the employé's contract for insurance, to which insurance the plan declares an employé entitled, being with the employer, and the claim for benefit against it, a right which the courts are competent to enforce arises by operation of law, on the facts being determined by action of the committee or by agreement of the parties, so that failure of the committee to act on a claim does not bar maintenance of action thereon; the employer's answer admitting the fact to be as alleged in the complaint.

6. PLEADING §403(3) — COMPLAINT—AIDER BY SUBSEQUENT PLEADINGS.

Failure of complaint to allege tender of release of liability, delivery of which is by contract made a condition to right of payment, is aided by answer, showing that defendant denies all liability, so that tender would have been unavailing.

7. MASTER AND SERVANT §78 — BENEFIT FUND—TENDER OF RELEASE—WAIVER.

A tender of release of liability made, by contract between employer and employé for death benefit, a condition of payment is waived by employer's denial of all liability.

8. MASTER AND SERVANT §78 — BENEFIT FUND—PROVISION OF PLAN—BENEFITS UNDER STATE LAW.

Provision of voluntary plan of benefits for employes promulgated by an employer doing business throughout the country, that in case any employé or his beneficiaries shall be entitled under the law of any state to any compensation greater than that herein provided, the amount paid the employé shall be that provided by the statute (though drawn by one evidently familiar only with compensation laws providing for payments by employer directly to employé), applies in case of a state compensation law, thereafter enacted, under which payments are made by the state, from a fund supplied chiefly by contributions of employers.

9. MASTER AND SERVANT §78 — BENEFIT FUND—PROVISION OF PLAN—PAYMENT UNDER STATE LAW.

Provision of voluntary plan of benefits for employes promulgated by an employer, that in case any employé or his beneficiaries shall be entitled under the laws of any state to any compensation greater than that therein provided, the amount paid to the employé shall be that prescribed by the statute, means that it shall be read in the light of the law of the state in which the employé resides and is injured, and that, if the benefit to which the law entitles him or his beneficiaries is greater than provided by the plan, the larger benefit shall be paid, and shall exclude right to the smaller, and that, if the amount provided by the statute is less than that provided by the plan, the employer shall pay such sum as, added to the statutory payment, shall equal the sum provided by the plan.

10. MASTER AND SERVANT §78 — BENEFIT FUND—BURDEN OF PROOF UNDER PLAN—GREATER BENEFIT UNDER STATE LAW.

A widow of a deceased employé being under a plan of benefits promulgated by the employer entitled to recover of it a certain sum on account of his death, unless her right is barred

by the provision of the plan denying the right if the benefit provided for her by the statute is greater than that provided for her by the plan, the employer has the burden of showing it is greater.

11. MASTER AND SERVANT §78 — BENEFIT FUND—RIGHT UNDER PLAN—GREATER BENEFIT UNDER STATE LAW—EVIDENCE.

The employer fails in his necessary showing that the benefit provided by statute for the widow of an employé killed in his work—\$30 a month as long as she lives and remains unmarried—exceeds that provided by benefit plan promulgated by the employer—\$2,700—there being no presumption that she will remain unmarried for eight years, so that she is entitled to judgment.

12. MASTER AND SERVANT §78 — BENEFIT FUND—AMOUNT OF RECOVERY.

Benefits provided by statute for widow of employé killed in his work—\$30 a month as long as she lives and remains unmarried—not being shown to exceed the benefit of \$2,700, provided by the plan of benefits promulgated by the employer, she is entitled to judgment under such plan to \$2,700, less the sum she shall have received from the Industrial Accident Commission at the time judgment is entered.

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Jessie McLemore against the Western Union Telegraph Company. Judgment for defendant on a directed verdict, and plaintiff appeals. Reversed and remanded.

* Judgment modified on rehearing, 171 Pac. 1049.

This is an action brought by Jessie McLemore, the widow of Homer McLemore, to recover the sum of \$2,700 claimed to be due her as a life insurance benefit under a plan promulgated by the defendant January 1, 1913. It appears that Homer McLemore entered the employ of the defendant in March, 1912, and remained in such employ until March 1, 1915, when he lost his life through accident while in the performance of his work. While plaintiff's husband was working for defendant, the latter announced a plan for employes' pensions, disability benefits, and insurance, which, under the contention of plaintiff, constituted a contract with each of its employes. The salient provisions of the plan are as follows:

"1. Object.

"The company undertakes in accordance with these regulations, to establish, maintain and administer a fund to be known as the 'Employes' Benefit Fund' for the payment of definite amounts to its employes when they are disabled by accident or sickness or when they are retired from service, or, in the event of death, to their dependent relatives.

"2. Definitions.

"(3) The word 'committee' shall mean the persons appointed by the board to administer the employes' benefit fund in accordance with approved regulations.

"(4) The word 'employes' shall mean those persons who receive a regular and stated compensation from the company other than a pension or retainer.

"(5) The word 'fund' shall mean the 'Employes' Benefit Fund' as set forth in the first paragraph of these regulations.

"3. The Fund.

"(1) The company has made an appropriation for the establishment of the fund and agrees to make further appropriations as provided in section 11.

"(2) The company shall be the custodian of the fund which shall draw interest at the rate of 4 per cent. per annum on the average balance payable semiannually.

"(3) The company guarantees the disbursement of the fund in accordance with these regulations.

"4. Committee.

"(1) There shall be a committee of five (5) appointed by the board to serve during its pleasure, which committee shall be charged with the administration of the plan and the fund hereby established. This committee shall be called the employes' benefit fund committee and shall be empowered to employ a secretary and such other assistants as may be required in the administration of the fund.

"8. Life Insurance.

"(1) All employes of the company on January 1, 1913, or thereafter shall be entitled to insurance against death by accident occurring in and due to the performance of work for the company. This insurance shall be paid to the employes' beneficiaries as hereinafter provided, and shall equal three years' average wages as hereinafter defined, but in no case shall it exceed five thousand dollars (\$5,000).

"9. General Provisions.

"(3) Benefits may be suspended or terminated by the committee in all cases of gross misconduct."

"(19) Payment of benefit on account of death of an employé shall be made in the following order: Provided, however, that upon written application of an employé, and good cause shown, the committee shall authorize a change in such order of payment, but no persons other than the beneficiaries herein designated shall receive payment on account of such benefit: First. To the wife (or husband) of such employé, if dependent upon him (or her) for support.

"(20) Claims for death benefits will be payable within thirty days after the required evidence of their validity is furnished.

"(21) All claims for death benefits, to be valid, must be made within one year from the date of the alleged death on which the claim is based."

"(28) In case of injury to or death of an employé entitling him or his representatives or beneficiaries to benefits under these regulations, he or they may elect to accept such benefits or to prosecute such claims as he or they may have at law against the company.

"(29) Should claim otherwise than hereunder be presented or suit brought against the company, or against any other corporation, which may be at the time associated therewith in administration of the employes' benefit fund, for damages on account of injury or death of an employé, such employé or his beneficiaries shall not be entitled to any payment from the employes' benefit fund on account of such injury or death, unless such claim shall be withdrawn or such suit shall be discontinued before trial thereof or decision rendered therein."

"(31) The acceptance of any benefits from the employes' benefit fund by an employé or his beneficiary or beneficiaries, on account of injury or death, shall operate as a release and satisfaction of all claims against the company for damages arising from or growing out of such injury or death, and, further, in the event of the death of an employé no part of the death benefit or unpaid disability shall be due or payable unless and until good and sufficient release

shall be delivered to the committee, of all claims against the employes' benefit fund as well as against the company, arising from or growing out of the death of the employé, said release having been duly executed by all who might legally assert such claims.

"(32) In case any employé or his beneficiaries shall be entitled under the laws of any state to any compensation, pension, or other benefit greater than that herein provided, the amount paid to the employé shall be that prescribed by statute. The committee are authorized to pay the amount of such liability in the manner prescribed by law instead of in accordance with the provisions contained herein. In case the statutory liability is less than the company's liability hereunder, the committee may make the payments required by law and shall pay to such employé or to those persons entitled to take hereunder the excess of the amount payable hereunder above the amount so paid in accordance with law. In case any statutory payment has to be made or any judgment is recovered by an employé or his beneficiaries against the company on account of the legal liability above described, or any liability for damages on account of accident or death, or on account of any liability hereunder, the amount of the statutory payment or judgment shall be chargeable to the fund.

"(33) Questions of fact arising in the administration of these regulations shall be determined conclusively for all parties by the committee."

"11. Obligation of the Company.

"The obligation of the Company is limited:

"First. To safeguarding the sum already appropriated.

"Second. To crediting said sum 4 per cent. per annum of the unexpended balance of the fund.

"Third. To the appointment of a committee to administer the fund according to these regulations.

"Fourth. To making payments out of the fund upon the order of the committee.

"Fifth. To adding to the fund at the end of each fiscal year such amount as will restore it to the original amount, provided that such addition shall in no year exceed 4 per cent. of the company's pay roll."

"13. Change in Regulations.

"The committee, with the consent of the president, may from time to time make such changes in these regulations as in their judgment will more effectually carry out the purpose expressed therein, but such changes shall not without his consent affect the rights of any employé to any benefit, insurance, or pension to which he may have previously become entitled hereunder."

In 1913 the Legislature of this state enacted a law published as chapter 112 of the Session Laws for that year, which provides for compensation to employes injured and dependent relatives of employes killed in the occupations coming under the operation of the statute. Both defendant and the deceased elected to assume the obligations and accept the benefits defined by this legislation. On the death of her husband plaintiff applied to the Industrial Accident Commission, and it was adjudged that she should receive the sum of \$30 a month so long as she should remain unmarried, and the additional sum of \$6 a month for the care of a child born to her after the death of her husband, the latter payments to terminate when the child should become 16 years of age. These are the payments prescribed by section 21 of the act of

1913, and it is admitted that plaintiff has been receiving them. Plaintiff was 19 years of age on March 5, 1915, and her expectancy of life was 42.87 years. If she lives out her expectancy and remains unmarried she will receive \$15,433 from the state for herself and \$1,152 for her child. Her husband was earning \$900 a year at the time of his death; under the defendant's plan plaintiff is entitled to \$2,700 if she is entitled to anything. The lower court held that the payments to which plaintiff is entitled under the act of 1913 are a greater benefit than that provided under the defendant's plan, and that plaintiff's right to recover was barred by the provisions of section 32 of article 9 of the plan above quoted. A directed verdict was given for defendant, judgment was entered thereon, and plaintiff appeals.

V. A. Crum, of Portland, for appellant. Hall S. Lusk, of Portland (Dolph, Mallory, Simon & Gearin, of Portland, on the brief), for respondent.

MCCAMANT, J. (after stating the facts as above). [1] It is contended that the plan promulgated by the defendant should be treated like a policy of life insurance and construed strictly against defendant. This contention is supported by *Western Union Co. v. Hughes*, 228 Fed. 885, 143 C. C. A. 283. We are committed to such strict construction in the case of a life insurance policy. *Stringham v. Mutual Co.*, 44 Or. 447, 448, 75 Pac. 822. This is not an action on a life insurance policy. The defendant is not a life underwriter, but a telegraph company. Its promulgation of the plan under which this action is brought is differentiated from an ordinary transaction in the commercial world. The protection and benefits assured by the defendant to its employes impose upon the defendant a burden greater than any exacted from employers by the law in its present state of development. The fund from which these benefits are paid is created and maintained by the defendant; there is no provision for deductions from the wages of the employes for the benefit of the fund. A plan of this character voluntarily promulgated by a large employer of labor should not be extended by the courts so as to embrace cases falling without the intent of the author of the plan as manifested by a fair and just construction of the language used. These principles of construction seem to be applied by the Appellate Division of the Supreme Court of New York in *McNevin v. Solvay Process Co.*, 32 App. Div. 610, 53 N. Y. Supp. 98, a case affirmed by the Court of Appeals, 167 N. Y. 530, 60 N. E. 1115.

[2] It is contended that the plan is a mere benefaction, and that the evidence fails to sustain the charge in the complaint that it constitutes a contract made by the defendant with its employes. It is provided in article 8, section 1:

"All employes of the company on January 1, 1913, or thereafter shall be entitled to insurance against death by accident occurring in and due to the performance of work for the company."

The plan containing this offer was brought to the attention of all employes. The language used imports a right in the employe to the protection specified. The statement in section 20 of article 9 that claims for death benefits will be payable at a time stated implies an obligation of the defendant to make such payments. Section 28 of article 9 quoted above clearly implies the creation of a right under the plan which may be asserted or waived at the election of the employes. In effect, the defendant said to its employes:

"If you remain in the discharge of your duties, those dependent upon you shall be entitled to benefits in the event of your death, to the extent of the sums specified in this plan."

Plaintiff's husband did remain in defendant's employ and lost his life while in the performance of his duties. We find here all the elements of a contract.

"Where the offer is to do something if the offeree will not merely promise to do, but do, something, compliance with the condition of the offer by doing the act in the way prescribed is ordinarily sufficient evidence of the acceptor's assent." 13 C. J. 284.

We are committed to the foregoing principle by *Fisk v. Henarie*, 13 Or. 156, 168, 9 Pac. 322. Plaintiff's husband must be deemed to have accepted the plan offered, and his services rendered subsequent to the promulgation of the plan are a sufficient consideration to support the defendant's promise to pay. While this question is not discussed in *Western Union Company v. Hughes*, 228 Fed. 885, 143 C. C. A. 283, the effect of the opinion is to decide that the plan offered by the defendant constitutes a contract with its employes on which an action may be maintained. In *McNevin v. Solvay Process Co.*, 32 App. Div. 610, 617, 53 N. Y. Supp. 98, the defendant admitted that a similar scheme to that with which we are concerned constituted a contract between employer and employes.

[3-5] Under article 11 of the plan:

"The obligation of the company is limited: * * * Third. To the appointment of a committee to administer the fund according to these regulations. Fourth. To making payments out of the fund upon the order of the committee."

It is neither alleged nor proved that the committee has acted on plaintiff's claim, and defendant contends that for this reason plaintiff's suit cannot be maintained. Defendant relies on *Legg v. Swift & Co.*, 167 Mo. App. 427, 151 S. W. 230, and *McNevin v. Solvay Process Co.*, 32 App. Div. 610, 53 N. Y. Supp. 98. In the first of these cases plaintiff's claim was not against the defendant, but against an association organized at the instance of the defendant for the protection of defendant's employes. The fund was created wholly by deductions from the wages of the employes, and the defendant was merely the treasurer of the fund. A demur-

rer to the petition was sustained in the lower court and this action was affirmed. In the case at bar the contract of the deceased was with the defendant, and plaintiff's claim if valid at all is against defendant. In *McNevin v. Solvay Process Co.*, the plan provided that the funds available should be and remain the sole property of defendant until paid over to the employe, and that in no case could an employe demand payment except when the defendant through its trustees should adjudge him entitled thereto. The defendant's trustees were entitled under the plan to decide without appeal all questions both of law and of fact. It was held that the employe had no vested right in the fund until payment was made to him.

The functions of the defendant's committee are by no means so extensive as those of the trustees in the New York case. It is provided in section 33 of article 9 of the plan that "questions of fact arising in the administration of these regulations shall be determined conclusively for all parties by the committee." Under this provision it was competent for the defendant to refuse payment of plaintiff's claim until the facts on which it is based had been determined in her favor by the committee. It has waived this right by admitting in the answer that the facts with reference to the employment of plaintiff's husband and his accidental death while in defendant's service are as stated in the complaint. *Expressio unius exclusio alterius*. The inference is that the committee has no authority to bind either the defendant or one of its employes by any decision on a question of law. It is provided by section 1 of article 8, quoted above, that plaintiff's husband was entitled to life insurance. A right was created subject to the determination of the facts on which the right is dependent in the manner set out in the plan. A fair construction of the plan leads us to the conclusion that when the facts are once determined, either by the action of the committee or by agreement of the parties, a right arises by operation of law which the courts are competent to enforce. The failure of the committee to act on plaintiff's claim does not bar the maintenance of this action.

[6, 7] It is provided in section 31 of article 9:

"In the event of the death of an employe no part of the death benefit or unpaid disability shall be due or payable unless and until good and sufficient release shall be delivered to the committee, of all claims against the employes' benefit fund as well as against the company, arising or growing out of the death of the employe, said release having been duly executed by all who might legally assert such claims."

We think that plaintiff should have tendered the release specified above and demanded the sum she claims from the defendant. Such tender should have been alleged in the complaint. In this respect, however, the complaint is aided by the answer. It appears from the defendant's pleading that such a

tender would have been unavailing, as the defendant denies all liability to plaintiff. The law does not exact a vain thing. The allegations of the answer excuse the failure of plaintiff to make tender of the release called for by the provision above quoted. *Merrill v. Hexter*, 52 Or. 138, 144, 94 Pac. 972, 96 Pac. 865; *Livesley v. Krebs Hop Co.*, 57 Or. 352, 367, 97 Pac. 718, 107 Pac. 460, 112 Pac. 1; *Woods v. Wikstrom*, 67 Or. 581, 601, 135 Pac. 192; *Wallowa Co. v. Hamilton*, 70 Or. 433, 447, 142 Pac. 321. It should be noted in this connection that the acceptance by plaintiff of any money from the fund created by defendant operates to discharge defendant from any claim which might otherwise be asserted by plaintiff because of the death of her husband. Such is the express provision of section 31 of article 9 of the plan.

[8, 9] This brings us to the point on which the case turned in the lower court. Section 32 of article 9 of the plan provides:

"In case any employé or his beneficiaries shall be entitled under the laws of any state to any compensation, pension or other benefit greater than that herein provided, the amount paid to the employé shall be that prescribed by the statute."

Plaintiff contends that the entire section of the plan from which the above words are quoted should be disregarded because the author of the plan had in mind compensation laws under which the benefits are paid by the employer and that the Oregon statute, under which the payments are made by the state, is wholly without the scope and purview of this section. We are not favorably impressed with this contention. The fund from which the state makes payments under the act of 1913 is supplied chiefly by contributions made by employers of labor. Most of the payments made to the employés and their beneficiaries are made indirectly by the employers. Giving to the plan the fair construction to which it is entitled, an intention is manifested that it shall be read in the light of the laws of the state in which the employé resides and in which he is injured. If the benefit to which he or his beneficiaries are entitled under the law is greater than the benefit provided by the plan, the larger benefit shall be paid and shall exclude any right to the smaller benefit for which defendant has made provision. If the amount provided by statute is less than that provided by the plan, the company shall pay to the employé or his beneficiaries such sum as, added to the statutory payment, shall equal the sum provided by the plan. At the time when the defendant promulgated its scheme the Oregon statute had not been enacted. The author of the plan was evidently familiar only with compensation laws which provided for payments by the employer directly to the employé. The intention is nevertheless apparent from the language used in section 32

of article 9, and it should be given effect as above stated.

[10-12] It remains to apply these facts to the instant case. Under the plan plaintiff is entitled to \$2,700. Under the statute she is entitled to \$30 a month so long as she lives and remains unmarried. If she lives and remains unmarried for as much as eight years, she will receive under the statute a larger sum than that provided by the plan. If she dies or marries within seven years, the benefit prescribed by the plan is greater than that provided by the statute. She was 19 years of age at the time of her husband's death, and the record justifies the presumption that she will live 42.87 years. There is no presumption that she will remain unmarried for that period or for eight years.

We have seen that plaintiff is entitled to recover unless her right is barred by the provisions of section 32 of article 9 of the plan. Under this section the burden devolves on defendant to show that the benefit provided for plaintiff under the act of 1913 is greater than that provided by the plan. Defendant's showing is defective for the reason that plaintiff may marry within seven years from the death of her husband. It does not appear from this record that her benefit under the law is greater than that under the plan. Defendant, having failed to show this fact, has failed to make out its defense. Plaintiff is entitled to judgment for \$2,700, less the sum she shall have received from the Industrial Accident Commission at the time when the judgment is entered. In figuring this amount she should not be charged with the sum of \$6 a month paid for the care of her child. If the parties are unable to agree as to the credit to which the defendant is entitled, the amount can be determined at a hearing in the circuit court.

The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

MCCRIDE, C. J., and MOORE and BEAN, JJ., concur.

(87 Or. 614)

SANFORD v. PIKE et al.

(Supreme Court of Oregon. March 5, 1918.)

1. BILLS AND NOTES §489(3)—ACTION—DEFENSES—WANT OF CONSIDERATION—PLEADING.

The complaint, in action on a note, alleging an indebtedness in settlement of which the note was given, and the answer not denying this, but, though alleging want of knowledge of the exact amount of the indebtedness, pleading a set-off, the defense of want of consideration is not available.

2. SET-OFF AND COUNTERCLAIM §41 — CLAIMS IN WHICH OTHERS ARE INTERESTED.

A fund constituting an asset in which others than defendants are interested, and rights in which have not been segregated, cannot be used by way of set-off.

Department 1. Appeal from Circuit Court, Coos County; G. F. Skipworth, Judge.

On petition for rehearing. Denied.

For former opinion, see 170 Pac. 729.

O. P. Coshow, of Roseburg, for appellants. A. S. Hammond, of North Bend, and E. D. Sperry, of Coquille, for respondents.

McCAMANT, J. [1] In a petition for a rehearing the defendants Pike again press upon us their contention that the note sued on was without consideration to support it. It is contended that, even if the account standing to the credit of Pike, trustee, be disregarded, there was no debt owing from the defendant W. E. Pike to the bank at the time when his firm executed the note secured by the deed of trust. This contention is not available to these defendants under the pleadings. It is alleged in the complaint:

"That at said time the above-named defendants W. E. Pike and P. L. Phelan were indebted to the First National Bank and one W. B. Hammitte in a large sum of money, to wit, in excess of \$18,000. That by the terms of an arrangement and settlement between said W. E. Pike and said P. L. Phelan the said P. L. Phelan assumed \$4,883 of said indebtedness, and gave his note therefor to the plaintiff, securing the same by a mortgage on real property situate in Coos county, Or., and the defendant W. E. Pike gave to the first National Bank of Roseburg, Or., his note bearing date of April 15, 1910, that being the date of the alleged settlement between said Pike and said Phelan, for the sum of \$13,500."

The corresponding portion of the answer is as follows:

"Answering the allegations contained in paragraph 2 of plaintiff's complaint, defendants admit that at about the time alleged a settlement was had between W. E. Pike and P. L. Phelan, substantially as alleged in said paragraph 2, and that the defendant Pike executed a note set out in said paragraph, but defendants allege that they had no knowledge of and no dealings with W. B. Hammitte and cannot state exact amount due or owing to the First National Bank, at said date."

The complaint plainly alleges an indebtedness to the bank and to Hammitte of \$13,500. This allegation is not denied. It clearly appears that Hammitte's share of the debt was \$4,000 and the defendants Pike therefore admit a debt due to the bank amounting to \$9,500.

The gist of the defense asserted by the answer is stated in the extracts quoted in the former opinion. It plainly appears that the pleader claimed for the defendants Pike the right to set off against their debt to the bank the balance in the Pike Trustee account. The claim that there was nothing due the bank is based on the contention that the credit due Pike, trustee, is greater than the debt evidenced by the note sued on.

[2] It is of no consequence that Mrs. Pike is one of the Kinnicutt heirs, and therefore one of the beneficiaries in the trust. It appears by the testimony of W. E. Pike that two of the beneficiaries had not been settled

with when the case was tried. The amount due these beneficiaries has not been segregated from the amount which W. E. Pike claims as his own. The fund was therefore an asset in which others than these defendants were interested. Such a fund cannot be used by way of set-off to pay the debts of the defendants Pike. A relaxation of this rule would lead to intolerable abuses.

It is finally contended in the petition for rehearing that the question on which the case turns under the former opinion is not raised by the pleadings. The portions of the answer quoted in the opinion are not separately stated as an affirmative defense to the suit, and that may be the reason why plaintiff failed to attack them by demurrer. Issue is joined on these allegations by the reply, and plaintiff in his brief and in his oral argument contended that the set-off pleaded by the defendants Pike is unavailable to them. This contention is supported chiefly by arguments which we have not found it necessary to pass on. Error is assigned on the findings of the circuit court which gave the defendants Pike credit for the balance in the Pike Trustee account, and especially on a finding that the amount with which the defendant bank is charged was due to W. E. Pike individually. The question decided in the former opinion is the controlling question in the case, and it is squarely presented by the record before us. The petition for rehearing is denied.

MOORE, BURNETT, and BENSON, JJ., concur.

(87 Or. 649)

STATE v. AUSPLUND.

(Supreme Court of Oregon. March 12, 1918.)

Department 1. Appeal from Circuit Court, Multnomah County; John P. Kavanaugh, Judge.

On petition for rehearing. Rehearing denied.

For former opinion, see 167 Pac. 1019.

J. F. Logan, of Portland (Logan & Smith and J. J. Fitzgerald, all of Portland, on the brief), for appellant. O. C. Hindman, of Portland, for the State.

BENSON, J. Counsel for defendant has presented an exceedingly vigorous argument for a rehearing, based upon the contention that affidavits of jurors offered for the purpose of impeaching their verdict ought to be considered by the court upon a motion for a new trial. However, nothing is said therein that has not had very serious consideration of this court upon several occasions, and yet we have not been able to arrive at a conclusion which would reverse the doctrine announced in *Cline v. Broy*, 1 Or. 89, and consistently followed ever since. Nothing can be added at this time to the original opinion

herein, to which we adhere. The petition is denied.

McBRIDE, O. J., and BURNETT and HARRIS, JJ., concur.

(87 Or. 624)

CITY OF SEASIDE v. OREGON SURETY & CASUALTY CO.

(Supreme Court of Oregon. March 5, 1918.)

1. MUNICIPAL CORPORATIONS §145—BOND OF CITY TREASURER—ESSENTIALS.

A bond of a city treasurer, providing that the surety shall make good any loss sustained by the city by any act of fraud or dishonesty of the treasurer amounting to larceny, was sufficient; it not being necessary to detail in the bond the treasurer's duties fixed by law.

2. MUNICIPAL CORPORATIONS §173(2)—BOND OF CITY TREASURER—LARCENY.

That the money appropriated by the city treasurer to his own use passed through the vaults of a bank of which he was cashier did not render the funds not a subject of larceny within his official bond securing against larceny.

3. APPEAL AND ERROR §82(10)—EXCLUSION OF EVIDENCE—INVITED ERROR.

Where tendered evidence was excluded upon solicitation of defendant, defendant cannot complain.

4. MUNICIPAL CORPORATIONS §173(2)—TREASURER'S BOND—"LARCENY."

A bond of a city treasurer, agreeing to make good any loss sustained by the city by any act of fraud or dishonesty of the treasurer amounting to "larceny," included larceny as defined by L. O. L. § 1957, as to conversion of public money.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Larceny.]

5. INTEREST §19(1)—ACCRUAL OF RIGHT—UNLIQUIDATED DEMAND.

Under L. O. L. § 6023, providing for interest on money received for the use of another and retained beyond a reasonable time, in an action on an official bond of a defaulting city treasurer not stipulating for interest, there could be no recovery of interest until after judgment; the amount of liability not having been ascertained or agreed upon.

6. COSTS §69 — DISBURSEMENTS OF FIRST TRIAL.

Where defendant secured an erroneous decision on the first trial, which decision was set aside on plaintiff's motion, plaintiff, who secured judgment on the second trial, was entitled to disbursements incurred at the first trial under L. O. L. § 566, providing that party entitled to costs shall have allowed all necessary disbursements.

7. WITNESSES §29—ATTENDANCE OUTSIDE OF COUNTY—MILEAGE.

Under L. O. L. § 3145, entitling witnesses to mileage at the rate of 10 cents a mile in going to and returning from the place of service except in counties of 50,000 inhabitants, where the rate is fixed at 5 cents, a witness from a county of the first class, attending court in a county of the latter class by order of the court, would be entitled to double mileage at the rate of 5 cents only.

8. CONSTITUTIONAL LAW §205(1)—WITNESSES §29—REVERSALS AND ANNUITIES.

L. O. L. § 3145, entitling witnesses to mileage at the rate of 10 cents a mile except in counties of 50,000 inhabitants, where the rate is fixed at 5 cents, applies to all citizens, and is not inimical to Const. art. 1, § 20, providing that no law shall be passed granting to any

citizen privileges of annuities, which upon the same terms shall not equally belong to all citizens.

Department 2. Appeal from Circuit Court, Multnomah County; R. G. Morrow, Judge.

Action by the City of Seaside against the Oregon Surety & Casualty Company. Judgment for plaintiff, and defendant appeals, plaintiff also appealing from judgment denying interest. Modified and affirmed.

This is an action brought by the plaintiff, City of Seaside, a municipal corporation, to recover the sum of \$7,949.09, together with interest thereon at the rate of 6 per cent. per annum from November 4, 1910, upon a bond to insure the fidelity of E. N. Henninger, as treasurer of Seaside, during his term of office of two years. It was executed and delivered by E. N. Henninger and the Union Guarantee Association to the plaintiff on March 9, 1910, and later, the defendant, Oregon Surety & Casualty Company, took over the business of that association and assumed all the liabilities upon the bond. The cause was tried by the court and jury. Judgment went for the plaintiff for the principal amount claimed without interest. Defendant appeals from the principal judgment and as to certain costs. Plaintiff also appeals from that part of the judgment denying it interest. A former appeal of this case was taken to this court (see 80 Or. 345, 157 Pac. 150), wherein a clear statement of the issues was fully made. We will therefore refer only to those directly involved herein. Among its several provisions the instrument recites the following:

"Whereas, Edmund N. Henninger, hereinafter called the 'employé,' has been appointed to the position of treasurer in the service of the town of Seaside, Oregon, hereinafter called the 'employer,' and has been required to furnish a bond for his honesty in the performance of his duties in the said position. * * * Now therefore, in consideration of the sum of one hundred five and 00/100 dollars, paid as a premium for the period from March 9, 1910, to March 9, 1912, at 12 o'clock noon, and upon the faith of the said statement as aforesaid by the employer, which the employer hereby warrants to be true, it is hereby agreed and declared, that subject to the provisions and conditions herein contained, which shall be conditions precedent to the right on the part of the employer to recover under this bond, the association shall, within three months next after notice, accompanied by satisfactory proof of a loss as hereinafter mentioned, has been given to the association, make good and reimburse to the employer all and any pecuniary loss sustained by the employer, of money, securities, or other personal property in the possession of the employé, or for the possession of which he is responsible, by any act of fraud or dishonesty on the part of said employé in the discharge of the duties of his office or position as set forth in said statement referred to, amounting to larceny or embezzlement, and which shall have been committed during the continuance of this bond, or any renewal thereof, and discovered during said continuance, or within six months thereafter, or within six months from the death or dismissal, or retirement of the employé from the service of the said employer. Provided always that said

association shall not be liable, by virtue of this bond, for any mere error of judgment or injudicious exercise of discretion on the part of said employé, in and about all or any matters wherein he shall have been vested with discretion, either by instruction or rules and regulations of the said employer. And it is expressly understood and agreed that the said association shall in no way be held liable hereunder to make good any loss that may accrue to the said employer by reason of any act, or thing done, or left undone, by said employé, in obedience to, or in pursuance of any discretion, instruction or authorization conveyed to and received by him from said employer, or its duly authorized officer in its behalf; and it is expressly understood and agreed that the said association shall in no way be held liable hereunder, to make good any loss by robbery, or otherwise, that the said employer may sustain, except by direct act, or connivance of said employé. * * * The association shall not in any wise be responsible to the employer under this bond, to a greater extent than fifteen thousand and 00/100 (\$15,000.00) dollars. * * * It being the true intent and meaning of this bond that the association shall be responsible only as aforesaid, for moneys, securities or property diverted from the employer through fraud or dishonesty, amounting to larceny or embezzlement as aforesaid on the part of the employé within the period specified in this bond, while in the discharge of the duties of the office or position to which he has been elected or appointed. * * *

The plaintiff seeks to recover because the city treasurer as alleged in the complaint "wrongfully and unlawfully embezzled and failed to account for and failed to pay over to the plaintiff or the successor in office of said E. N. Henninger the full sum of \$7,949.09, which said sum of money the said E. N. Henninger as such treasurer wrongfully and unlawfully stole and embezzled." The evidence tended to support the averments of the complaint and to show that Henninger, as treasurer, on or about November 4, 1910, "had received and not paid out the sum of \$7,949.09." Henninger was cashier of the Bank of Seaside, and committed suicide on November 4, 1910. After this action was commenced the receiver of the bank paid a dividend of 10¹/₁₀ per cent., and the city received \$775 on that account. The jury returned a verdict in favor of the plaintiff in the sum of \$7,174.09, principal, and the further sum of \$2,608.50, interest thereon. Judgment was duly entered upon this verdict but upon motion to set aside the verdict and judgment the court modified the judgment as to the item of interest and entered judgment in favor of the plaintiff and against the defendant in the sum of \$7,174.09, and costs and disbursements taxed at \$432.65.

S. C. Spencer, of Portland (Wilbur, Spencer & Beckett, of Portland, Frank Spittle, of Astoria, and F. C. Howell, of Portland, on the briefs), for appellant. G. C. Fulton, of Astoria (A. C. Fulton, of Astoria, and Victor J. Miller, of Seaside, on the briefs), for respondent.

BEAN, J. (after stating the facts as above). The defendant contends that the policy only guaranteed the honesty and integrity of Hen-

ninger as treasurer, and did not insure the repayment of the fund to the city in any event or provide against technical or statutory larceny as is provided in section 1957, L. O. L. The plaintiff contends that because of that section the defendant was liable upon the policy when the treasurer did not repay the sum received by him, and the trial court so ruled, and charged that larceny as mentioned in the obligation of defendant included the definition of larceny contained in section 1957, L. O. L. At the close of plaintiff's case counsel for defendant moved the court for a judgment of nonsuit, which was denied. Defendant offered no evidence. A request was made that the court instruct the jury to return a verdict in favor of defendant, and also in accordance with defendant's theory of the case. This was refused. These rulings are assigned as errors.

The charter of the city of Seaside required the city treasurer to give a bond with surety in the sum of \$15,000, but did not provide the form nor detail the conditions of such obligation. Defendant urges that the instrument is not a bond as required by the charter, but has only the force of a common-law bond; that the defalcation of the city treasurer does not come within the terms of the bond, in that the failure to account for or pay over the money in his hands belonging to the city does not constitute fraud or dishonesty amounting to larceny or embezzlement. This contention was disposed of upon the former appeal by the opinion of Mr. Justice Benson (80 Or. 354, 157 Pac. 150) where, in anticipation of a new trial herein in expressing the view of this court as to whether the larceny defined in section 1957, L. O. L., is covered by the language of the bond, the learned justice said:

"As we read this statute, it provides that when a public officer receives public moneys, the burden is upon such officer to pay the money to the party entitled thereto, or to so account for it as to free his own skirts of dishonesty. Failing to do this, the animus furandi is a legitimate inference."

[1] We reaffirm the terse and plain announcement made as a direction for the trial that has since been had in this cause, wherein it was shown that as city treasurer, E. N. Henninger, received the sum of \$7,949.09 belonging to the plaintiff city, and failed to pay the same to the plaintiff or to any one for it, or to account for the same in any manner. No evidence was offered tending to show that the public funds were lost or destroyed in any innocent way. No conclusion can be drawn from the facts in evidence except that the city treasurer was guilty of larceny of public money as defined by the statute. By the explicit terms of the obligation of the defendant company, by whatever name the instrument may be called, the obligor is required to pay to the city the sum so lost by the dishonesty of its official. By the recitation of the memorandum in writing it is apparent that it was executed with a view

to conforming to the requirements of the city charter, and we think it is presumed that the statute of this state in regard to larceny of public money was also contemplated. Perhaps it may be said that the document is a kind of blanket agreement spread over a large area and was intended as a sort of "cure for all ills," yet when the pertinent part is sifted out of the verbiage we find that in consideration of the premium mentioned "it is hereby agreed and declared" that "the association shall within" the time specified "make good and reimburse to the employer (the city) all and any loss sustained by the employer * * * of money, securities, or other personal property in the possession of the employé, or for the possession of which he is responsible, by any act of fraud or dishonesty on the part of said employé in the discharge of the duties of his office or position as set forth in said statement referred to, amounting to larceny or embezzlement, and which shall have been committed during the continuance of this bond." The association shall not be responsible under this bond for more than \$15,000. It seems to us that the obligation is just as efficacious as though the usual words "are held and firmly bound" had been employed. The obligation of the association is plain. The written instrument shows that Henninger was treasurer of the city. The law fixes his obligations, and it was unnecessary to detail the same in the bond. There was no error in denying the motion of defendant for a nonsuit and refusing to direct a verdict for defendant.

It is contended by counsel for defendant that the words of the contract "fraud or dishonesty amounting to larceny or embezzlement" mean the dishonest conduct of the treasurer, which is equivalent to larceny or embezzlement; that the contract "cannot mean conduct which does not involve a crime, nor does it involve a crime statutory or otherwise, in which there is absent the element of fraud or dishonesty." This claim may be wholly conceded. It is only necessary to refer again to the law of this case as declared in the former opinion, where it was held that the allegation of the complaint as to the violation of section 1957 by the larceny of the city's money constitutes fraud and dishonesty. The evidence in the case shows prima facie a crime on the part of Henninger. It has not been explained or refuted so "as to free his (Henninger's) own skirts of dishonesty."

In *Rankin v. U. S. Fidelity & Guaranty Co.*, 86 Ohio St. 267, 99 N. E. 314, cited by defendant, the court had under consideration the terms of a bond precisely the same as those in this case. It was held that:

"When the terms of a bond clearly indicate the intention of the obligor and obligee that there shall be an indemnity to the latter on account of the default of an employé, doubtful terms will be so construed as to effectuate rather than to defeat that intention."

It might be apropos to quote with suggestiveness of application from 86 Ohio St. 317, 99 N. E. 231, in that opinion, namely, that: "A decision in favor of the guaranty company upon this ground would imply that its business in this state consists in the collection of premiums."

[2, 3] The contention of defendant that the defalcation of Henninger did not amount to larceny under our statute is made upon the theory that he was cashier of the Bank of Seaside and deposited the city's money in the bank and it failed. The evidence tended to show, however, and the jury found that Henninger as cashier received and disbursed the money for the bank for a long time before it closed its doors; that but a small percentage of the money remained in the bank when Henninger committed suicide, and that he had appropriated the same to his own use. The fact that the money passed through the vault of the bank would not render it not the subject of larceny. When Mr. F. S. Godfrey, receiver for the defunct bank, was on the witness stand, for the purpose of showing that Henninger, who was cashier of the bank and received and paid out all of its money, was responsible for the wrecking of the bank, plaintiff's counsel asked the witness: "How much money was in the bank at the time it closed its doors, if you know?" Upon objection of counsel for defendant as irrelevant the answer was excluded. Thereupon counsel for plaintiff offered to prove by the evidence, and stated that the witness would testify, that at the time he was appointed receiver of the Bank of Seaside and took charge of it, which was very shortly after and within two days after E. N. Henninger committed suicide, there was less than \$500 in the bank vaults; that the bank had received on open accounts deposits aggregating \$70,000, and was indebted to that amount at the time the bank was closed. Upon objection of defendant's counsel the tender of the evidence was rejected. Under this state of the record the defendant, as Henninger's sponsor, cannot claim any advantage by contending that the evidence shows that the money in question was paid to Henninger at the bank, and that he deposited it in the bank, or that the loss was occasioned by the failure of the bank. The evidence in regard to the transaction at the bank having been kept from the jury at the solicitation of defendant, we are of the opinion that that feature of the case is not before this court. If there was any error in this respect, it was invited by the defendant, and it cannot complain. *Caldwell Bk. & T. Co. v. Porter*, 52 Or. 318, 331, 95 Pac. 1, 97 Pac. 541; *State v. Ryan*, 53 Or. 524, 531, 108 Pac. 1009. It is claimed by defendant that the court erred in giving the following instructions to the jury:

[4] "Larceny is ordinarily defined to be the taking and carrying away of the property of another with intent to convert it to your own use. But the statute of the state has a further defi-

dition of larceny. Section 1957 provides: 'If any person shall receive any money whatever for this state, or for any county, town or other municipal or public corporation therein, or shall have in his possession any money whatever belonging to such state, county, town or corporation, or in which such state, county, town or corporation is interested, and shall in any way convert to his own use any portion thereof, or shall loan, with or without interest, all or any portion thereof, or shall neglect or refuse to pay over any portion thereof as by law directed and required, or when lawfully demanded so to do, such person shall be deemed guilty of larceny.' The word 'larceny' as used in this bond means, not only its ordinary acceptance of taking and carrying away, what we commonly call stealing, but it also includes the meaning given by this statute."

The instruction correctly states the law of this state as applied to the facts in this case and is approved. The judgment for the principal amount, \$7,174.09, is affirmed.

[5] The court eliminated from the judgment the amount of interest, \$2,606.50, as found by the verdict, and plaintiff appeals from that part of the judgment. There are two ways only in which interest may be collectible: (1) By contract to pay interest; and (2) by statutory authority. In the present case the claim is made by virtue of the latter, namely, section 6028, L. O. L., as it was prior to the amendment by chapter 358, Laws of 1917. In the case of *Holtz v. Olds*, 84 Or. 581, 164 Pac. 583, 1184, the rule in *Baker v. Huntington*, 48 Or. 593, 603, 87 Pac. 1036, 89 Pac. 144, was reaffirmed. This rule has stood too long to be disturbed otherwise than by legislation. The *Baker Case*, like the present one, was for the enforcement of the collection on an official's bond on account of the defalcation of that officer. The ruling in that case precludes the recovery of interest by plaintiff. The bond in suit is not for a liquidated amount, but provides for a penalty or indemnity. The amount, in so far as the liability of the defendant is concerned, was not ascertained, fixed, or agreed upon in any way until the judgment herein was rendered. Until then as to the defendant the amount due was unliquidated. A bona fide contest of the right to recover was made. The bond does not stipulate for the payment of interest. On the contrary, it provides for a certain time of payment after proof of loss. For different phases of the question see *Sorenson v. Oregon Power Co.*, 47 Or. 24, 82 Pac. 10; *Richardson v. Inv. Co.*, 66 Or. 353, 133 Pac. 773; *Templeton v. Bockler*, 73 Or. 494, 507, 144 Pac. 405; *Schade v. Muller*, 75 Or. 225, 233, 146 Pac. 144; *Sargent v. Am. Bk. & Trust Co.*, 80 Or. 16, 39, 154 Pac. 759, 156 Pac. 431; *Carlton Lumber Co. v. Lumber Ins. Co.*, 81 Or. 396, 158 Pac. 807, 159 Pac. 969. The judgment as to interest is affirmed.

[6] Over the objection of defendant the trial court allowed plaintiff's disbursements incurred upon a previous trial of the case. This is assigned as error. This raises the question as to costs and disbursements upon a former trial of the cause when the verdict

was returned in favor of defendant and on motion of plaintiff set aside. It is urged by counsel for defendant that the matter is governed by the rule announced in *Wade v. Amalgamated Sugar Co.*, 71 Or. 75, 77, 142 Pac. 350, where Mr. Chief Justice McBride remarked that:

"There is a dearth of authority on this subject, and plausible arguments may be urged on either side."

The common-law rule that, "where after a reversal a party again recovered judgment, he could recover only the disbursements of the last trial" was adopted. The basis of this rule is that as the party erroneously obtained the former judgment, he is not entitled to disbursements incurred upon such previous trial. In the present case we have the reverse, as defendant secured an erroneous decision upon the first trial which was reversed by the trial court and the granting of a new trial was affirmed upon appeal on account of an erroneous charge to the jury. Plaintiff was compelled to have its witnesses in attendance upon such trial; otherwise judgment would have gone against it beyond recall. The prejudicial errors of the first trial were not the fault of plaintiff. The plaintiff having recovered a judgment for \$7,174.09, the question now presented under section 566, L. O. L., which provides that "a party entitled to costs shall also be allowed for all necessary disbursements" is: Were the disbursements of plaintiff upon the former trial necessary? The trial court found that they were, and such ruling should be upheld.

[7, 8] The court denied defendant's objection to the allowance of double mileage at 10 cents per mile for witnesses residing and served with a subpoena in Clatsop county who attended by order of the court. Defendant contends that such witnesses are entitled to only 10 cents per mile in accordance with section 3145, L. O. L., which provides:

"Every officer or person whose fees are prescribed in this title who shall be required to travel in order to execute or perform any public duty, in addition to the fees hereinbefore prescribed, shall be entitled to mileage at the rate of ten cents per mile in going to and returning from the place where the service is performed; provided, however, that in counties containing more than fifty thousand inhabitants, jurors and witnesses shall be entitled to such mileage at the rate of five cents per mile, and no more, in so going and returning."

Counsel for plaintiff contend that witnesses living in a county where 10 cents a mile is allowed by statute should be allowed the larger rate for attendance upon court in a county where the lesser rate prevails. While there may be reason to regret the want of uniformity of the enactment, it is a legislative question in which various conditions, such as transportation facilities and other metropolitan environments, are taken into account by the legislative mind. A litigant submitting himself to the jurisdiction of a court in either class of counties is bound by the

law applicable to that county. The law applies to all citizens alike, and is not inimical to section 20, art. 1, of the Constitution. Plaintiff's witnesses subpoenaed and ordered to attend court from outside of Multnomah county should be allowed double mileage at the rate of 5 cents per mile or 10 cents per mile.

The judgment of the lower court as to the taxation of costs will therefore be corrected so as to allow plaintiff for the Clatsop county witnesses 10 cents double mileage instead of 20 cents. In all other respects the judgments is affirmed.

McBRIDE, C. J., and MOORE and McCAMANT, JJ. concur.

(87 Or. 637)

CITY OF GRANTS PASS v. ROGUE RIVER PUBLIC SERVICE CORP. et al.

(Supreme Court of Oregon. March 5, 1918.)

1. STATUTES §120(5) — REPEAL — CONSTITUTIONAL PROVISION.

Const. art. 4, § 20, declares that every act shall embrace but one subject, and matters properly connected therewith, which subject shall be embraced in the title, but that if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to that subject. Act Feb. 28, 1913 (Laws 1913, p. 689), is entitled "An act to provide for the organization and incorporation of cities and towns and to legalize such corporations as heretofore have attempted to be incorporated under chapter 1 of title XXVI of Lord's Oregon Laws, and are now exercising the functions of incorporated cities and towns under such attempted incorporation." Section 11 of the act expressly repealed title 26, L. O. L. *Held*, that as the caption of the Act of 1913 did not mention the repeal of any existing laws, and did not suggest any attempt to repeal any law or curtail the established privileges of any city or town, the attempted repeal of L. O. L. tit. 26, was ineffective, save in so far as a change in procedure for incorporation of municipalities might work an implied repeal, and hence sections 3211, 3229, giving privileges to municipalities, which were part of title 26, were not repealed.

2. MUNICIPAL CORPORATIONS §57—AUTHORITY OF MUNICIPALITY—CHARTER.

The powers of a municipality are not necessarily restricted to those expressed in its charter, and a municipality may rely on the general statutes applicable to all municipalities enacted prior to the grant of its charter.

3. MUNICIPAL CORPORATIONS §4—CHARTER—CONSTITUTIONAL PROVISIONS.

Those constitutional provisions (article 11, § 2) adopted June 4, 1906, forbidding the Legislature to enact, amend, or repeal any charter or act of incorporation for any municipality or town, do not apply to a municipal corporation already chartered, and which under existing laws was entitled to exercise enumerated privileges.

4. DAMAGES §78(4)—MUNICIPAL CORPORATIONS — LIGHTING PLANTS — BONDS — RECOVERY.

A municipal corporation authorized by L. O. L. §§ 3211, 3229, to sue and be sued, contract and be contracted with, acquire, hold, possess, dispose of property, and to provide for the lighting of streets, and furnishing the city or town and the inhabitants therewith with gas

or other lights as well as to allow the use of streets and alleys of the city to any person or corporation who may desire to establish works for supplying the city and its inhabitants with water, or lights, upon such reasonable terms as the council may prescribe, granted defendant corporation a franchise to erect poles and string wires in the streets of the town, the ordinance requiring defendant to give a bond conditioned that it should have a certain portion of its service in full operation within nine months after the grant of the franchise and should maintain it so as to furnish electricity adequate for light and power purposes. Defendant accepted the terms of the grant and accepted and executed its bond, but failed to erect poles or in any way to comply with the requirement that it should have a certain percentage of its service in full operation within nine months. *Held*, that the municipality might without proof of any special or actual damages recover the full amount of the undertaking.

Department 1. Appeal from Circuit Court, Josephine County; F. M. Calkins, Judge.

Action by the City of Grants Pass, a municipal corporation, against the Rogue River Public Service Corporation and another. From a judgment for plaintiff, defendants appeal. Affirmed.

By an ordinance adopted by its legal voters the city of Grants Pass granted a franchise to the defendant Rogue River Public Service Corporation to plant poles, string wires, and do other things necessary for the establishment of an electric plant in that town. The ordinance required that the grantee give a bond to the municipality in the sum of \$1,000, conditioned, substantially, that it should have a certain portion of its service in full operation within nine months after the date of the enactment, and afterwards should maintain it so as to furnish electricity adequate for light and power purposes. The defendant accepted the terms of the grant and executed its bond as required, with the American Surety Company of New York as its surety. Nothing, however, was done by the defendant under the franchise at any time. After the lapse of the nine months' period specified in the bond the city by an ordinance also adopted by the people declared a forfeiture of the undertaking and afterwards brought this action to recover the amount named. Each of the defendants filed a general demurrer to the complaint, which, being overruled, they refused to plead further, and judgment followed for the face of the bond and costs. They have appealed.

F. C. Howell, of Portland (O. S. Blanchard, of Grants Pass, on the brief), for appellants. H. D. Norton, of Grants Pass, for respondent.

BURNETT, J. (after stating the facts as above). [1] The plaintiff city operates under a charter enacted by the Legislative Assembly of the state in the form of an act approved February 16, 1901. In the present juncture it relies for sanction of its action not only upon that enactment, but also upon

the general statute of 1893 embodied in title 26, L. O. L., chapters 1-5, inclusive. Section 3211, L. O. L., reads thus:

"Municipal corporations now existing in this state, or hereafter organized therein under this act, shall be bodies politic and corporate, under the name of the city or town, as the case may be, of _____, and as such may sue and be sued, contract and be contracted with, acquire, hold, possess, dispose of property subject to the restrictions contained in this act or other laws of this state, have a common seal, and change or alter same at pleasure, and exercise such other powers and have such other privileges as are now conferred by law, or by this act, or which may hereafter be conferred by laws duly enacted by the legislative assembly of this state, and shall have perpetual succession."

It is said also in section 3229, L. O. L.:

"The mayor and aldermen shall compose the common council of any such city or town organized under this act, and at any regular meeting thereof shall have power to provide for lighting the streets, and furnishing such city or town and inhabitants thereof with gas or other lights, and with pure and wholesome water; and for such purposes may construct such water, gas, or other works, within or without the city limits as may be necessary or convenient therefor, and may allow the use of the streets and alleys of the city to any person, company, or corporation who may desire to establish works for supplying the city and inhabitants thereof with such water or lights upon such reasonable terms and conditions as the council may prescribe."

By the terms of the legislation of 1893, noted above, the privileges accorded by the latter section inured not only to municipalities created under the act itself, but also to all others of the kind then existing. We are not unmindful of the act of February 28, 1913 (Laws 1913, p. 689), the title of which reads thus:

"An act to provide for the organization and incorporation of cities and towns and to legalize such corporations as heretofore have attempted to be incorporated under chapter 1 of title XXVI of Lord's Oregon Laws, and are now exercising the functions of incorporated cities and towns under such attempted incorporation."

Section 11 thereof declares:

"Chapter 1 of title XXVI of Lord's Oregon Laws and all acts and parts of acts in conflict therewith are hereby repealed."

We here set down section 20, article 4, of the Constitution of the state:

"Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

In the title of the act in question there is no hint whatever of any intention to repeal any law or to curtail the established privileges of any city or town. The right to contract and to prescribe the terms thereof was vested by that statute in all municipal corporations and no one reading the title in question could divine that the legislative body intended to cancel those rights. The principal features of the law appearing in the body thereof relate to the manner in which the creation of a new city or town may be initiated; and, so far as it actually and nec-

essarily supersedes the former procedure, it would probably amount to a repeal by implication; but only so because we are advised by the title of the probable scope of the act, and not, however, of any proposed avulsion of long-settled rights. We hold, therefore, that as against the grant of the privileges mentioned the repealing words in section 11 are void under the constitutional provision already noted because the subject of such repeal is not named in the title.

[2] The defendants urge that the act of 1893 is not available to the plaintiff corporation, that it can operate solely by its charter, and that unless in this latter instrument it has express authority to exact a bond the attempt to do so is void and creates no liability upon the defendants, although they disregarded the covenant thereof. It is true that by the strict letter of some utterances of the court in cases heretofore under consideration color is given to such a contention, for it is often said that a corporation is bound by its charter and cannot exceed the terms thereof. Without exception, however, in those cases a charter was confessedly the only source of corporate power then under judicial consideration. In our judgment it is not necessary that all the authority of any municipality shall be found in some one enactment of the legislative department of the state. That branch of the government is not restricted within such narrow terms as to require it to express all its will upon any subject in a single statute.

[3] Neither is the question before us within the scope or prohibition of the later constitutional provisions forbidding the Legislative Assembly to enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town (article 11, § 2). This constitutional measure was not adopted until June 4, 1906, while the privileges conferred by the actual charter of Grants Pass and by the act of 1893 were all promulgated long before. At that time at least it was not necessary that such a subject be treated as if the state should tender to a municipality a certain privilege which the latter could accept or reject as if it were a high contracting party. Then municipalities of the kind were under the sole control of the legislative department. The latter could award or withhold privileges, and without further ado the town could operate under the franchises thus conferred.

[4] The resulting legislative situation is substantially like that portrayed in and governed by the case of City of Salem v. Anson, 40 Or. 339, 67 Pac. 190, 56 L. R. A. 169, 91 Am. St. Rep. 485. In that instance Anson had procured a franchise from the city allowing him the use of the streets and alleys for the purpose of establishing an electric light plant. The town exacted from him a bond almost precisely like the one in question in its general provisions. This court sustained the city in recovering the full amount of the

undertaking, without being compelled to show that it had suffered any special or actual damages whatever. That case rules the present one. On its authority we affirm the judgment of the circuit court.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

(89 Or. 659)

In re CHEWAUCAN RIVER.

(Supreme Court of Oregon. March 5, 1918.)

1. APPEAL AND ERROR \S 329—PARTIES—INTERVENTION ON APPEAL.

The Supreme Court is a court of appellate jurisdiction only, and cannot admit interveners who were strangers to the proceeding below, as that would be an exercise of original jurisdiction.

2. APPEAL AND ERROR \S 414—NOTICE OF APPEAL—ADVERSE PARTIES.

Any one whose rights may be injuriously affected by the modification of a decree is a party adverse to the one appealing, and should be served with notice of appeal.

3. APPEAL AND ERROR \S 413—NOTICE OF APPEAL—PARTIES—DISMISSAL.

A proceeding was commenced before the board of control to determine the relative rights of the users of the water of a river, and on notice numerous users appeared and filed their claims and notices of contest, and after hearings, etc., the record was filed in the circuit court, and it entered a decree modifying the findings of the board, from the whole of which decree two of the parties appearing before the board and the circuit court separately appealed, but failed to serve notice of appeal upon all the parties appearing in the circuit court. L. O. L. \S 6650, as amended by Laws 1913, p. 161, provides that in such proceedings appeals from the decree may be taken to the Supreme Court the same as in other cases in equity, except that notice of appeal must be served and filed within 60 days from the entry of the decree, and section 553 provides that upon an appeal from a decree the suit shall be tried upon the transcript and accompanying evidence. *Held* that, as the rights of all the parties were put in issue by the appeals, the failure to give notice of appeal to all who were parties below deprived the Supreme Court of jurisdiction of the subject-matter.

4. APPEAL AND ERROR \S 414 — APPELLATE JURISDICTION—NOTICE OF APPEAL.

To give the Supreme Court jurisdiction, notice of appeal must be served upon every adverse party.

5. APPEAL AND ERROR \S 396—RIGHT OF APPEAL—CONDITIONS.

The privilege of appeal is not inherent or constitutional, but exists only by virtue of the statute, and if the statute is burdensome in respect to notices of appeal, expenses, etc., it is not the province of the court to amend it or to dispense with its requirements, especially in view of L. O. L. \S 550, as amended by Laws 1913, p. 617, granting the privilege of giving oral notice of appeal in open court at rendition of final decree.

6. APPEAL AND ERROR \S 417(1)—NOTICE OF APPEAL—CONTENTS.

A notice of appeal should contain enough in its terms to show that the party presenting the same is really a party to the record sought to be reversed or modified.

In Banc. Appeals from Circuit Court, Lake County; Bernard Daly, Judge.

Proceeding before the Board of Control, or the State Land Board, to determine the relative rights of the users of the water of Chewaucan River and its tributaries, a tributary of Lake Abert, in which numerous respondents appeared and filed their claims and notices of contest, whereupon the record made up by the Board was filed in the circuit court. From a decree modifying the findings of the Board the Northwest Town-Site Company and the Portland Irrigation Company separately appeal, and certain parties, strangers to the proceeding, move for leave to intervene. Appeals dismissed.

A proceeding was commenced before the board of control under section 6635 et seq. L. O. L., to determine the relative rights of the users of the water of Chewaucan river in Lake county. Responding to the notice of the board issued by virtue of section 6636, 99 users of the water filed their claims before the board. Some 30 notices of contest were also filed before that body, and after the hearings and examinations provided for by the statute the record thus made up by the board was filed in the circuit court of Lake county. A date for hearing the same was fixed by the court, and notice thereof was given to all the claimants who had appeared in the proceeding. After hearing the parties and taking further evidence, the circuit court modified the findings of the board, and entered a decree accordingly. From this decree and the whole thereof the Northwest Town-Site Company and the Portland Irrigation Company, parties appearing both before the board and the circuit court, have separately appealed. Neither of them served its notice of appeal upon the other appellant nor on all of the individuals who appeared before the board and the circuit court. In fact, there are about 70 claimants and parties to the record in the circuit court upon whom no such notice has been served by any one.

Some of the parties upon whom that paper was served have moved to dismiss the appeal on the ground that it was not served upon the other parties to the record before the circuit court named in the motion. Another ground of dismissal specified by another motion is that the notice does not contain the names of the parties to the suit, and that there is nothing in the paper itself to show that the one promulgating it was a party to the proceeding at any stage. Separate motions were made on behalf of certain individuals who were not made parties to the proceeding at any stage and applied to this court for the first time for leave to intervene and dismiss the appeal of the Portland Irrigation Company on the ground that they had entered into contract with that concern to buy land included in a certain irrigation project, and were induced to do so by sundry representations that ample water rights were

appurtenant to the tracts which they had contracted to buy, but that said statements were untrue and amounted to fraud upon them. These matters appeared by affidavit filed in this court and the affiants move to dismiss the appeal on the ground that the prolongation of the litigation involved would defer their settlement with the company with which they had contracted. We also have a brief emanating from the office of the Attorney General and that of the state desert land board, as amici curiæ, resisting the motion to dismiss the appeals, contending that the award of water to the parties to this proceeding will materially interfere with proposed irrigation projects contemplated by the state authorities.

Wood, Montague, Hunt & Cookingham and Lionel R. Webster, all of Portland, for appellants. A. E. Reames, of Medford, for W. Y. Miller and others. W. Lair Thompson, of Portland, for Fred T. Elsey and others, and Chewaucan Land & Cattle Co. Conrad P. Olson, of Portland, for J. T. Westrom and others. Geo. M. Brown, Atty. Gen., and Percy A. Cupper, Asst. Sec. State Desert Land Board, of Salem, amici curiæ.

BURNETT, J. (after stating the facts as above). [1] The motion of the interveners, who attack the Northwest Town-Site Company and the Portland Irrigation Company for the first time in this court, in an effort to remove their appeals as an obstacle to their settlement with the latter concern, is not entitled to consideration here. This court is one of appellate jurisdiction only. It cannot admit interveners, as that would be an exercise of original jurisdiction. If the parties concerned in this motion had desired to participate in the litigation, it was their duty to apply at least to the circuit court, if not to the water board. Acting under section 38, L. O. L., and to preserve the matter involved in the appeal over which it has jurisdiction, this court has in some instances substituted parties when the suit or action would otherwise abate by the death or other disability of a party or by transfer of some interest therein if the cause of action survived, but that is not like the case before us, where strangers intrude upon the litigation, not seeking to be substituted for any party thereto, but making a new attack upon one of the litigants.

The statement of the principle that this court is one of appellate jurisdiction only, and that to admit strangers to participate in litigation here would be the exercise of original jurisdiction, is sufficient to dismiss the motion of such parties from further consideration.

[2, 3] The chief question to be decided is whether the failure to serve notice of appeal upon all the parties who appeared in the circuit court prevents the jurisdiction of this court attaching to the subject-matter. It

appears to be conceded by all parties that any one whose rights may be injuriously affected by a modification of the decree is a party adverse to the one appealing and should be served with notice.

It is said in section 6650, L. O. L., as amended by the act of February 21, 1913 (Laws 1913, c. 97), treating of this sort of procedure, that:

"Appeals may be taken to the Supreme Court upon such decrees in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within sixty days from the entry of the decree."

It is also said in section 556, L. O. L., that:

"Upon an appeal from a decree given in any court the suit shall be tried anew upon the transcript and evidence accompanying it."

We note also that the appeal in each instance here is from the decree and the whole thereof, so that the entire determination of the circuit court is called in question. In other words, the adjustment of the relative rights of all the parties concerned before the trial court respecting the waters of the Chewaucan river is put at stake by the appeals. This necessarily involves the examination of the entire question and all the issues of the proceeding. The whole affair is subjected to readjustment, if we have jurisdiction of the same. The two parties appealing are dissatisfied with the settlement in the circuit court. They want more water or more favorable terms for the use of what they have. If successful, this means that the award to other parties will be disturbed in some measure. The enterprise of the Portland Irrigation Company, for instance, must be within irrigation limits of the stream. We will suppose that this appellant is successful in securing a modification of the decree, so that it will acquire more water. If such is the result, it will pro tanto lessen the amount which will flow down the stream and be open to future appropriation, not only to those parties who are served with notice, but also by those who are not served, and who already have or may hereafter obtain access to the stream. The fact that appropriations for certain tracts of land, as related to all others involved, have been established by the decree, does not deprive their owners of the right to make additional appropriations in the future, if water is there to be appropriated and can be applied to beneficial uses. This is true of both those below and those above any existing appropriator. Those below him are entitled to the water in excess of his appropriation; those above him are entitled, of course, to their original rights, and also to appropriate water otherwise unappropriated, and not necessary to fill his quota.

If the presence of these parties was necessary for the exercise of the jurisdiction of the circuit court, it is none the less essential to the exercise of the limited appellate authority of this court. The reason is that the very

essence of any decree in such litigation is the determination of the relative rights of the parties. This element of each right being relative to all others persists from the beginning to the end of such litigation, so that the plaint of one party must affect all others in a greater or less degree.

The uses to which water may be put are manifold and variable and fluctuate as much as the rise and fall of the stream itself, so that it is important at every stage of the proceeding for the court to have before it all whose rights attach to the thing submitted to the court for adjustment. This quality of variability was so apparent to the legislative power that it has provided in section 6654, L. O. L., as follows:

"Within six months from the date of the decree of the circuit court determining the rights upon any stream, or if appealed within six months from the decision of the Supreme Court, the Board of Control, or any party interested, may apply to the circuit court for a rehearing upon grounds to be stated in the application. Thereupon, if in the discretion of the court it shall appear that there are good grounds for the rehearing, the circuit court, or judge thereof, shall make an order fixing a time and place when such application shall be heard."

[4] This, however, does not alter the rule long established in respect to proceedings in this court that, in order to give it jurisdiction to act, the notice of appeal must be served upon every adverse party.

[5] It is contended that this involves such a great expense, owing to the large number of parties, that it practically destroys the right to appeal. This privilege, however, is not inherent nor constitutional. It exists only by virtue of the statute, and if the application of the enactment is burdensome, it is not the province of the courts to amend the same or to dispense with its requirements. The remedy must be found in the legislative branch of the government. Moreover, the Code, in section 550, L. O. L., as amended by chapter 319, Laws of 1913, grants the privilege of giving oral notice of appeal in open court at the rendition of final decree which certainly cannot be extraordinarily expensive.

[6] Respecting the contents of the notice of appeal, it would seem that such a document should contain enough in its terms to show that the party presenting the same is really a party to the record sought to be reversed or modified. Otherwise any stranger could intrude upon a proceeding without having any interest whatever in the same. It would more widely open the door to those who come before the court under the designation of amici curiae, when in reality they are bitter partisans or "Greeks bearing gifts." So far as the terms of the notices before us are concerned, they might have been given by the various strangers. It is sufficient for the purposes of this decision, however, to rest it upon the principle that the court has not acquired jurisdiction because many of the

adverse parties have not been served with notice of appeal.

The appeals must be dismissed.

BEAN, J., concurs in the result. BENSON and McCAMANT, JJ., took no part in the consideration of this case.

(37 Or. 650)

THOMAS et al. v. THRUSTON.

(Supreme Court of Oregon. March 12, 1918.)

1. APPEAL AND ERROR \S 913—GRANTEES IN DEED—PRESUMPTION.

Where sheriff's return upon order to bring in new parties showed that E. had succeeded to rights of M., it will be presumed that E.'s wife, who joined him in demurring to complaint, and who is named as a proper party in assignments of error, is one of grantees in deed executed by M.

2. WATERS AND WATER COURSES \S 152(11)—USE OF WATER FOR IRRIGATION—RIGHTS—DETERMINATION.

In suit to establish relative rights to use of water for irrigation, whether a party's interest wholly coincides with that of plaintiffs or defendants is not very important, since a decree applicable to rights of each should be rendered where justified by pleadings and evidence.

3. APPEAL AND ERROR \S 414—NOTICE OF APPEAL—ADVERSE PARTIES.

As those brought in by due service of court's order and whose demurrers to complaint were sustained were adverse parties as to defendant, whose motion to amend his answer so as to make demurrants defendants in the suit was denied, the Supreme Court acquired no jurisdiction of defendant's appeal from decree after trial where no notice of appeal was served on demurrants in view of L. O. L. \S 41, providing that when a complete determination of a controversy cannot be had without the presence of other parties, the court shall cause them to be brought in, and section 558, providing that the appellate court may review any intermediate order involving the merits or necessarily affecting the judgment or decree appealed from.

Department 1. Appeal from Circuit Court, Lake County; Robert G. Morrow, Judge.

Suit by L. G. Thomas and others against E. O. Thruston. In which an order was made requiring others to be brought in and made parties plaintiffs or defendants. From decree rendered, Thruston appeals. Appeal dismissed.

A. E. Reames, of Medford, in this court only (L. F. Conn, of Lakeview, on the brief), for appellant. W. Lair Thompson, of Portland, for respondents.

PER CURIAM. This suit was begun July 22, 1908, to restrain the destruction of a dam built in Cogswell creek, Lake county, Or., at the head of an irrigating ditch which diverted from that stream water and conducted it to the plaintiffs' lands where it was used for raising crops. An amended complaint was filed October 22, 1908, and an answer was put in April 5, 1909, when the defendant filed his affidavit, showing that designated persons were asserting rights to the use of water from that creek. The defendant's counsel

thereupon moved that the persons so indicated be brought in and made parties, as plaintiffs or defendants. A reply was filed May 10, 1909, when the plaintiff L. G. Thomas submitted a counter affidavit opposing the making of the persons named as parties. Two days thereafter the defendant filed a supplemental and amended affidavit, indicating the interest of the designated persons in the subject-matter of the suit. An order was made by the court December 27, 1910, requiring that there should be brought in and made parties, as plaintiffs or defendants, Anna McGrath, George Barrington, Wm. Barrington, Eliza McCready, and D. E. Henderson, or the grantee or successor in interest of either, and that a copy of the order, certified by the clerk, should be served by the sheriff upon the persons so named, who were commanded to appear and plead on or before March 1, 1911. The return of that officer shows that he served a duly certified copy of the order upon H. Vernon and Ed Hartzog, the successors in interest of Anna McGrath; that he also delivered a like copy thereof to all the other persons named therein, except Eliza McCready, who, after diligent search and inquiry, he was unable to find in the state of Oregon, and that he further served a copy of the order on all the original parties to this suit, except the plaintiff Lewis E. McCulley, whom he was unable to find in the state, but learned he was absent therefrom. D. E. Henderson on April 3, 1911, filed a disclaimer showing he had never asserted a right to or interest in the use of any of the water in Cogswell creek. On the 10th of that month Eliza McCready, formerly Eliza Barrington, George Barrington, and W. J. Moore, as guardian of the estate of Wm. Barrington, a minor, demurred to the amended complaint, on the ground that it did not state facts sufficient to constitute a cause of suit against either of them. At the same time Hurley Vernon, Elma E. Hartzog, and Ed Hartzog, her husband, as the successors in interest of Anna McGrath, also demurred to that pleading for the same reason. Pursuant to a declaration made by the court that all subsequent matters relating to the suit should be submitted to the judge of another circuit court, a stipulation was entered into August 29, 1911, by the plaintiffs' attorney and counsel for the parties who had demurred to the amended complaint, that these demurrers should be considered upon briefs by the judge of the circuit court for Jackson county at chambers, who was thereby authorized to determine the same and make the necessary orders thereat, whereupon all the papers including written arguments were sent to that judge, who, after due examination, made an order sustaining the demurrers. The defendant's counsel on January 10, 1913, served upon all the interested parties a motion for leave to file an amended answer, and asked that his pleading be altered

so as to make the parties who had demurred to the amended complaint defendants in the suit. This motion by agreement of the parties was transmitted to the judge of the circuit court for Jackson county, who, on July 8, 1913, denied the application. Thereafter the cause was tried resulting in a decree from which the defendant undertook to appeal by serving a notice thereof upon the original plaintiffs and their attorney and by giving the required undertaking. The plaintiffs' counsel moved to dismiss the appeal because the notice was not served upon Eliza McCready, George Barrington, Wm. Barrington, W. J. Moore, as guardian of the latter, Anna McGrath, or Hurley Vernon, Elma E. Hartzog, and Ed Hartzog, as successors in interest of Anna McGrath, or D. E. Henderson, or upon either thereof, or upon his or their attorney. This motion was temporarily denied by this court, with leave, however, to renew the application at the argument of the cause on the merits, when it was again insisted by plaintiffs' counsel that, by reason of the failure thus to serve the notice of appeal upon the persons last named, no jurisdiction of the cause was obtained.

The question to be considered is whether or not the interest of such persons, in relation to the decree which has been brought up for review, is in conflict with a modification or a reversal thereof. The *Victorian*, 24 Or. 121, 32 Pac. 1040, 41 Am. St. Rep. 838. See, also, *Van Zandt v. Parson*, 81 Or. 453, 159 Pac. 1153, where other like discussions upon this subject are collated. One of the errors assigned in the abstract of the defendant's counsel reads in part:

"That the court erred in denying appellant's motion * * * for permission to file an amended answer, setting up appellant's rights as against the new parties, Elma E. Hartzog, Ed Hartzog, Hurley Vernon, George Barrington, William Barrington, and Eliza McCready, for the reason that said parties, and each of them, were necessary parties to the adjudication, and without whose presence the rights of the respective parties, to the waters of said stream, could not be adjudicated."

"The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall cause them to be brought in." Section 41, L. O. L.

The defendant's affidavits in support of his motion to bring in other parties describes the real property owned by Anna McGrath, and states that, at the commencement of this suit and for four years prior thereto, she and her grantors were using and claiming a right to appropriate a part of the waters of Cogswell creek to the irrigation of her land, giving the point of diversion as located above the head of the ditch owned by the plaintiffs and the defendant.

[1] The return of the sheriff indorsed upon the order to bring in new parties shows that H. Vernon and Ed Hartzog had succeeded

to the rights of Anna McGrath. As Elma E. Hartzog joined her husband, Ed Hartzog, in demurring to the amended complaint, and as she is also named in the assignment of errors as a proper party, it must be assumed she is one of the grantees named in a deed executed by Anna McGrath, or that she succeeded to her interest wholly or in part to the land.

The defendant's affidavit also states that George and William Barrington, who are minors, and Elizabeth McCready own specified parcels of real property, and for more than three years they have been and are using, under a claim of right, a part of the waters of the creek in irrigating their lands, by an extension of the Anna McGrath ditch.

The affidavit further shows that D. E. Henderson is the owner of particularly described land, and at the commencement of this suit he was diverting, from a tributary of Cogswell creek, water and using it under an assertion of right in irrigating his premises by means of a ditch dug further up the stream than the ditches of the plaintiffs and of the defendant.

In *Hough v. Porter*, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728, which was a suit to determine the right to the use of flowing water for irrigation purposes, it was held that under section 41, L. O. L., the court properly exercised its discretion and was authorized to make an order requiring all interested parties to submit their claims for adjudication.

In *Williams v. Pacific Surety Co.*, 66 Or. 151, 155, 127 Pac. 145, 131 Pac. 1021, 132 Pac. 959, 133 Pac. 1186, it was ruled that while at common law only one judgment could be given in favor of all plaintiffs or defendants, the court, under section 41, L. O. L., might give judgment for or against one or more of several defendants, or for or against one or more plaintiffs, as justice might require, and determine the ultimate rights of the parties between themselves.

[2] In a suit to establish relative rights to the use of water for irrigation, while there may be a community of interest between the plaintiffs or the defendants, adverse claims may possibly arise between parties of the same class in which case each becomes an Ishmael, for "his hand will be against every man, and every man's hand against him." In such a suit whether a party's interests wholly coincides with that of the plaintiffs or the defendants is not so very important, since a decree applicable to the rights of each to the use of water for the purpose specified should be made when it is justified by the averments of the pleadings and substanti-

ated by the evidence, even if the final determination be prejudicial to one or more parties of the same class.

It will be borne in mind that one of the plaintiffs filed an affidavit against the making of an order to bring in new parties. In view of this hostility it is not reasonable to suppose that, in the absence of a command by the court to that effect, the complaint would have been amended so as to charge the parties who were ordered to be brought in with any infringement of the plaintiffs' right to the use of water for irrigation. No alteration having been made in this respect in the plaintiffs' primary pleading, the demurrers interposed thereto by the new parties were necessarily sustained. This action did not leave the defendant remediless, and his counsel taking advantage of the situation moved for leave to amend the answer so as to charge the parties who had been brought in with the use of water to his prejudice from the creek for irrigation, which motion was denied. If the notice of appeal had been served upon the new parties, it would have been necessary, in reviewing the decree, if the alleged error had been assigned, to consider the action of the court in denying the motion, and if it were found that discretion had been abused in this particular a reversal of the decree would have been inevitable, and the cause could have been remanded to correct the error, for an appeal brings up all intermediate orders that have been made preceding the final disposition of the cause. L. O. L. § 558.

[3] Pursuant to due service of the court's order, the parties who were thus brought in, except D. E. Henderson, demurred to the amended complaint, thereby appearing in the suit. In sustaining the demurrers, the parties who interposed them remain as such until the decree rendered herein passes beyond the possibility of a reversal or modification. It is safe to predict that the parties ordered to be brought in opposed a judicial investigation of their alleged rights to the use of the waters of Cogswell creek.

If the notice of appeal had been served upon them, and the action of the court in refusing to permit the defendant to amend his answer so as to charge them with interfering with his right to the use of the water of that stream had been set aside, the interests of the new parties in relation to the final determination would necessarily have been in conflict with a modification or reversal sought by the appeal, and hence they are adverse parties, a failure to serve whom with the notice of the appeal did not confer upon this court jurisdiction of the cause, and for that reason the appeal is dismissed.

(89 Or. 240)

CARRIKER et ux. v. LAKE COUNTY et al.

(Supreme Court of Oregon. March 12, 1918.)

STATUTES \S 35 $\frac{1}{2}$ —LOCAL LAWS—INITIATIVE—POWERS OF PEOPLE OF COUNTY.

Const. art. 4, § 1a, providing that the initiative and referendum powers reserved to the people by the Constitution are further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation of every character in and for their respective municipalities and districts, does not confer on the voters of a county power to adopt a law, authorizing the county court to levy taxes for the payment of bounties on jackrabbits, in the absence of any enabling act passed by the Legislature, or by the people of the whole state granting such power to the people of a county.

Department 1. Appeal from Circuit Court, Lake County; L. F. Conn, Judge.

Suit by L. A. Carriker and wife against Lake County and others. From a decree in favor of plaintiffs, defendants appeal. Affirmed.

This suit involves the question of whether the voters of Lake county can, in the exercise of the initiative and without an enabling act, enact a law authorizing the county court to levy taxes for the payment of bounties on jackrabbits. A petition was signed by more than 15 per cent. of the legal voters residing in Lake county and filed with the secretary of state on July 7, 1916, asking that a proposed measure providing for the levying of taxes for the payment of bounties on jackrabbits killed in Lake county, be submitted to the voters of that county at the regular biennial election to be held on November 7, 1916. The title and first two sections of the measure read as follows:

"An act to authorize, empower and direct the county court of Lake county, Oregon, to provide for the payment of a bounty for the killing of jackrabbits in Lake county, Oregon, by the residents of said county; to levy a sufficient tax for the payment of such bounty, and directing the payment of the same from the general fund of the county if such levy be not made; and to prescribe regulations for the manner of making the necessary proof of the number of rabbits killed and the rules under which such bounty shall be paid. "Be it enacted by the people of the county of Lake, state of Oregon:

"Section 1. That the county court of Lake county, Oregon, be, and it is hereby authorized, empowered and directed to order paid from the general fund of said county, or from a special fund created for that purpose by the said county court, the sum of five cents for each jackrabbit that may be killed within the boundaries of Lake county, Oregon, by residents of said county, from and after the taking effect of this act.

"Sec. 2. It shall be the duty of said county court, at the regular term thereof for the purpose of levying taxes, to compute the estimated expenditure for the purpose of this act for the ensuing year, and to make a sufficient levy, either as a general county tax or a special 'Rabbit Bounty Tax,' to cover such estimate: Provided, that should the amount so levied in any one year be insufficient to pay the earned bounty for that year, or should the said county court fail, neglect or refuse to make such levy, the

bounty provided for in this act shall be paid from the general fund of the said county." See chapter 4, Laws 1917.

The remaining sections relate to the manner of making proof of claims, and to the payment of bounties. The measure was submitted to the voters of Lake county pursuant to the petition. There were 1,049 votes for and 589 against the measure. On December 9, 1916, the county court made a tax levy to meet the county expenses estimated for the ensuing year, including a tax "for jackrabbit bounty fund—4.8 mills." If all the taxes had been paid the levy made by the county court would have produced the following amounts:

For jackrabbit bounty.....	\$45,217 27
For general school purposes.....	32,028 90
For general road purposes.....	27,803 31
For all county purposes including payment of Lake county's portion of state tax	79,130 22

The county assessor extended the total levy, on the assessment rolls, against all the taxable property in Lake county, and the sheriff proceeded to attempt to collect all the taxes levied by the county court, including the tax levied for the purpose of paying bounties on jackrabbits. The plaintiffs, who are taxpayers residing in Lake county, paid all their taxes except the rabbit bounty tax, and then brought this suit to enjoin the collection of the rabbit bounty tax. The trial court overruled a demurrer to the complaint. The defendants declined to plead further, and a decree was entered canceling the jackrabbit bounty tax, and enjoining the county officers from collecting it. The defendants appealed.

T. S. McKinney, Dist. Atty., of Lakeview, and Wm. S. U'Ren, of Portland (Arthur D. Hay, of Lakeview, on the brief), for appellants. W. Lair Thompson, of Portland, for respondents.

HARRIS, J. (after stating the facts as above). Article 9, § 3, of the state Constitution provides that "no tax shall be levied except in pursuance of law." Unless the jackrabbit bounty tax was levied "in pursuance of law" it would contravene the Constitution, and therefore would be invalid. There is no law authorizing the levy of the tax in question, unless it can be said that the measure voted upon by the people of Lake county became a law when a majority of the voters by their ballots registered their approval of the measure on election day. The validity of the measure depends upon whether the voters had power to enact it into a law for Lake county. No act has ever been passed by the Legislature or by the people of the whole state granting unto the voters of a county the right to enact a jackrabbit bounty law for themselves. It is argued by the defendants that article 4, section 1a, of the state Constitution of itself, without the aid of an

enabling act passed by the Legislature or by the people of the whole state in the exercise of the initiative, grants to the people of a county the power to pass a law for their county. The instant case is controlled by *Rose v. Port of Portland*, 82 Or. 541, 556, 557, 162 Pac. 498, 508, where we held that:

"Both sections [article 4, § 1a, and article 2, of the state Constitution] recognize the necessity of a charter as the measure of the legislative power to be exercised by corporations and both sections contemplate that no local subdivision of government except cities and towns can appropriate legislative power unto itself."

And that:

"No subdivision of government like a port or district can exercise power unless that power is first granted by some lawmakers authorized to legislate that power to the municipality or district."

Although the municipality in *Rose v. Port of Portland* was a port, and the municipality in the instant case is a county, nevertheless the legal principle involved is identical in both cases. The opinion in *Rose v. Port of Portland* was the unanimous opinion of this court, and represented the careful and deliberate judgment of all its members; and therefore for the reasons stated in that opinion and on the authority of that precedent and of *Barber v. Johnson*, 167 Pac. 800, we hold that the voters of Lake county were without power to authorize the tax, and that the jackrabbit bounty measure is void.

The demurrer to the complaint was properly overruled, and the decree is affirmed.

McBRIDE, C. J., and BURNETT and MOORE, JJ., concur.

(87 Or. 657)

COOPER v. FOX et al.

(Supreme Court of Oregon. March 12, 1918.)

1. MUNICIPAL CORPORATIONS ~~§986~~—COUNTY ROADS—JURISDICTION OF COUNTY COURT—EXCLUSION OF INTERFERENCE BY CITY—STATUTES.

Under Laws 1917, p. 588, § 2, and page 613, §§ 2, 5, 7, 10, and 24, relating to county roads, control thereof, and taxation therefor, a county court has exclusive jurisdiction over all county roads within the county, necessarily excluding the right of every municipal corporation through whose limits such highways extend from interfering therewith, and neither a city nor its officers can superintend the outlay of any money raised by municipal taxation for maintenance of streets, etc., in improving a county road within its borders.

2. HIGHWAYS ~~§105(2)~~—DELEGATION OF POWER TO IMPROVE—LIMITATION OF EXERCISE TO COUNTY OFFICERS—STATUTE.

The delegation of power to the county court, by Laws 1917, p. 588, § 2, to improve a county road, limits its exercise to the specified authority, thereby excluding the councilmen of a city or any other officer or person, except as assistant to a member of the county court or other county officer.

In Banc. Appeal from Circuit Court, Clackamas County; George R. Bagley, Judge.

Suit by Julia Cooper against D. B. Fox,

substituted for A. King Wilson, deceased, M. Dedzun and others, and the City of Oswego, Clackamas County, Or., to enjoin threatened outlay of money in improving county road within city. From a decree granting the relief prayed, defendants appeal. Affirmed.

Jos. E. Hedges, of Oregon City, for appellants. Wm. M. Stone, of Oregon City, for respondent.

MOORE, J. The evidence received at the trial supports the findings of fact made by the court to the effect that by an exercise of initiative power, the city of Oswego was incorporated January 15, 1910; that about 40 years prior thereto a county road, extending from Oregon City northerly, was laid out and established across land now included within that city, which part of the highway in such municipality, though there designated as Front street, always has since it was laid out been used by the public, and is subject to the jurisdiction and control of the county court of Clackamas county; that the plaintiff is a taxpayer of the city of Oswego, and the defendants, aside from the municipality, are the mayor and councilmen thereof respectively, and a contractor; that for the past four years there has been levied on all assessable property in that city, pursuant to the provisions of its charter, an annual tax of 10 mills on the dollar, a part of which exaction has been set aside for the maintenance and repair of streets and sidewalks; that there is now on hand for such purpose \$4,915, of which sum about \$900 was received by the city from the county court of that county as the share due the municipality of the public road fund; that on August 10, 1917, an ordinance was enacted and approved providing for the improvement of Front street according to plans and specifications thereof, and the payment of a part of the costs thus to be incurred from the fund so raised by taxation; and that pursuant to such legislation the defendant contractor proposed to do the required work for \$2,756.90, and such executive officers accepted the bid and threatened to enter into a contract with him for such improvement. As a conclusion of law the court also found that no part of the sum of money so raised by levy of the municipal tax could legally be used in improving Front street, which highway was a county road, and not a city street.

It satisfactorily appears that no part of the county road within the city of Oswego, and there known as Front street, was ever vacated, or jurisdiction thereof abandoned by the county court of Clackamas county. If the expense to be incurred by improving that part of the highway within the city had been attempted to be liquidated by a fund to be raised by a special assessment of the real property abutting upon the county road, for

the benefit supposed to be conferred, the proceedings would have been wholly futile. *Cole v. Seaside*, 80 Or. 73, 156 Pac. 569; *Christie v. Bandon*, 82 Or. 481, 162 Pac. 248.

Excerpts from statutes which are deemed to be involved herein will be set forth:

"All county roads shall be under the supervision of the county court wherein said road is located. Each county court within this state shall have the authority, and it shall be its duty, to supervise, control and direct the * * * maintenance and keeping in repair, improvement and vacation of all county roads within its county, and to prescribe the methods and manner of working, improving and repairing the same. * * *

The powers herein given may be exercised directly by the court, or through some one of its members designated for that purpose, with the aid of necessary assistants." Gen. Laws Or. 1917, c. 295, § 2.

"On and after January 1, 1918, the offices of road supervisor and road master, as fixed and defined by law prior to the taking effect of this Act, shall be and are hereby abolished." Gen. Laws Or. 1917, c. 299, § 2.

"The county court shall employ such deputy roadmasters, patrolmen and assistants as may in its judgment be necessary to enable the roadmaster to perform his duties expeditiously and economically." Id. § 5.

"It shall be the duty of the county roadmaster and his deputies and assistants * * * to superintend all work done upon the roads and bridges within the county, whether done under contract or otherwise. * * * To discharge and perform all duties that are imposed upon road supervisors by any law of this state." Id. § 7.

"Each county court at the September term thereof, shall so arrange the road districts of the county as to conform to the provisions of this section. * * * Provided, that all road districts formed under the provisions of this act shall be formed from contiguous territory: Provided further, that every incorporated city and town shall constitute a separate road district." Id. § 10.

"The county court may levy a tax not to exceed ten mills on the dollar on all taxable property of such county, at the time of making the annual tax levy, which shall be set apart in the county treasury as a general road fund. * * * Said tax shall be paid in money, and levied and collected in the same manner as other county taxes are levied and collected, and when so collected shall be used for road purposes only, as provided in this act, and seventy per cent. thereof shall be apportioned to the several road districts, including districts composed of incorporated cities and towns." Id. § 24.

As these statutes contained no emergency clauses, they went into effect 90 days after February 19, 1917, when the Legislature adjourned, or May 20, 1917. Const. Or. art. 4, § 28.

[1] From these selections it will be seen that the county court has exclusive jurisdiction over all county roads within the county, thereby necessarily excluding the right of every municipal corporation through whose limits such highways may extend from interfering therewith. The city of Oswego cannot, as an independent agency of the state, nor can any of its officers, superintend the outlay of any money raised by taxation in improving a county road within its borders.

[2] The prayer of the complaint herein

does not ask that the defendants be enjoined from expending any part of the \$900 received from Clackamas county in repairing the highway known as Front street in the city of Oswego, and the decree rendered conforms to such request. The right of any officer of the municipality, unless specially appointed by the county court to assist it or one of its members or other officer of the court, to superintend the outlay of any part of the money so received from the county, may well be doubted. It will be remembered that the authority to improve a county road is vested in the county court, which power may be exercised by that tribunal, or by one of its members designated for that purpose with the aid of necessary assistance. Gen. Laws Or. 1917, c. 295, § 2. This delegation of power necessarily limits its exercise to the authority specified, thereby excluding the councilmen of a city or any other officer or person, except as an assistant to a member of the county court or other county officer. That part of the decree, however, will not be disturbed, for it is quite probable that, since the outlay of the money which was received from the county was not enjoined, the \$900 may have been expended by or under the direction of a city officer.

It is not necessary to inquire whether or not a municipal corporation can legally appropriate money which has been raised by direct taxation to aid in repairing a county road within its corporate limits, when the county court or some member thereof, or other county officer, superintends the improvement, for that question is not before us.

As the highway undertaken to be improved herein is a county road which has never been vacated by the county court, upon condition that the street was to be kept open and in repair for public use by the municipality, the decree should be affirmed; and it is so ordered.

(87 Or. 662)

SPENCER et al. v. SMALL et al.

(Supreme Court of Oregon. March 12, 1918.)

JUSTICES OF THE PEACE §122(2)—PROOF OF SERVICE—SUFFICIENCY.

Where the sheriff's return on summons did not state that copy of complaint served with summons was certified to be correct by plaintiff, his agent or attorney or the justice, the service was insufficient to warrant a judgment by default. in view of L. O. L. § 2420, providing that the summons shall be served by delivering a copy thereof, together with a copy of the complaint certified to be correct by plaintiff, his agent or attorney or the justice.

In Banc. Appeal from Circuit Court, Tillamook County; George R. Bagley, Judge.

Action by H. B. Spencer and another against F. D. Small and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

This is an action brought for the conversion of an automobile. The defendants jus-

tify under an execution sale on a judgment which they allege was recovered by the defendants Small and Urie against the plaintiff Spencer in a justice's court in Tillamook county. Plaintiffs deny that any such judgment was rendered. The defendant Burke was a deputy sheriff who is alleged to have conducted the execution sale. It appears that an action was brought against the plaintiff Spencer as alleged, and a default judgment was rendered against him. The real dispute has to do with the service of the summons, plaintiffs contending that the record fails to show any service sufficient to support the judgment as against a collateral attack. Plaintiffs had judgment in the instant case, and defendants appeal.

E. J. Claussen, of Tillamook, for appellants.
George P. Winslow, of Tillamook, for respondents.

MCCAMANT, J. (after stating the facts as above). The only error assigned is the exclusion by the court of the summons and the return thereon in the case of Small and Urie against Spencer. The return was as follows:

"State of Oregon, County of Tillamook—ss.:
"I hereby certify that I served the within summons within said state and county on the 23d day of December, 1915, on the within named defendant H. B. Spencer, by delivering a copy thereof prepared and certified to by me as deputy sheriff, together with a copy of the complaint prepared and certified to by _____ to _____ personally and in person.

"H. Crenshaw, by J. L. Burke, Deputy."

Section 2420, L. O. L., is as follows:

"The summons shall be served by delivering a copy thereof, together with a copy of the complaint, certified to be correct by the plaintiff, his agent or attorney or the justice, to the defendant in the manner provided for in the Code of Civil Procedure for the service of summons in actions in courts of record. The summons shall be returned to the justice by whom it was issued by the officer serving it, with the proof of such service, or that the defendant cannot be found."

In holding this return insufficient to support a judgment, the circuit court followed *Belfils v. Flint*, 15 Or. 158, 161, 14 Pac. 295, 296. In this case Mr. Chief Justice Lord said:

"The return on the summons does not show that a copy of the complaint certified by the justice of the peace before whom the cause was pending, or certified to by the plaintiff, his agent or attorney, was served on the defendant. This is a statutory requirement which must be observed before jurisdiction can be assumed or conferred. Whether it has been complied with or not, we must look to the return of the officer upon whom is imposed this duty. As the return of that officer does not show that a copy of the complaint, certified as required, was served, the service is insufficient to warrant a judgment by default against the defendant."

The statute in force at the time the above case was decided provided that in actions in courts of record service should be made as follows:

"The summons shall be served by delivering a copy thereof, together with a copy of the complaint prepared and certified by the plaintiff, his agent or attorney, or by the county clerk." Deady and Lane Code, page 115, § 54.

The above provision was made applicable to actions in justice's courts by section 7 of the statute governing procedure in these courts, found on page 463 of the Code. It will be noted that the statute under which *Belfils v. Flint* was decided is substantially identical with section 2420, L. O. L. *Belfils v. Flint* has never been overruled. It is cited with approval in *Lane v. Ball*, 83 Or. 404, 415, 160 Pac. 144, 163 Pac. 975. In the case at bar the return fails to show the service on Spencer of a copy of the complaint certified to be correct by the plaintiff, his agent or attorney or by the justice of the peace. This case is therefore not to be distinguished from *Belfils v. Flint*. Defendants cite *Moore Realty Co. v. Carr*, 61 Or. 34, 39, 120 Pac. 742, and *Stadelman v. Miner*, 83 Or. 348, 155 Pac. 708, 163 Pac. 585, 983. These cases are instructive as to the principles which should be applied when a judicial record is collaterally attacked, but neither of them involved the sufficiency of a sheriff's return on a summons. These authorities do not modify the rule announced in *Belfils v. Flint*.

It follows that the judgment should be affirmed; and it is so ordered.

(87 Or. 665)

BELCHER v. LA GRANDE NAT. BANK.

(Supreme Court of Oregon. March 12, 1918.)

1. FRAUDULENT CONVEYANCES — 221 — DELIVERY OF DEEDS — RIGHT TO QUESTION.

A judgment creditor of one of two grantors could only question the delivery of the conveyance so far as it involved the interest of his debtor.

2. DEEDS — 58(2) — SUFFICIENCY OF DELIVERY — DELIVERY TO AGENT OF GRANTEE.

Where a deed by S. and B. was delivered to B., as the agent of the grantee, there was a sufficient delivery so far as the interest of S. was concerned.

3. JUDGMENT — 788(1) — PRIORITY OF LIEN — UNRECORDED CONVEYANCE.

Under L. O. L. § 207, providing that a conveyance of real property shall be void as against the lien of a judgment, unless recorded at the time of docketing the judgment, or unless recorded within the time after its execution provided by law, a judgment lien, in order to have precedence over a prior unrecorded deed, must have been taken or acquired in good faith, without notice or knowledge of the unrecorded conveyance.

4. JUDGMENT — 788(2) — PRIORITY OF LIEN — UNRECORDED CONVEYANCE.

Where owners of land, who had contracted to sell it, conveyed the land and assigned the contracts to the grantee, but the deed was not recorded, the possession of the land by the executory purchasers was such possession by strangers to the legal title as charged a judgment creditor with notice of the grantee's rights, though the premises were in possession of the same persons before and after the conveyance.

Department 2. Appeal from Circuit Court, Multnomah County; John P. Kavanaugh, Judge.

Suit by Lou A. Belcher against the La Grande National Bank. From a decree for plaintiff, defendant appeals. Affirmed.

This is a suit to remove a cloud from the title to real estate. The history of the transactions involved is about as follows: W. F. Stine and F. S. Belcher were the joint owners of two pieces of residence property in the city of Portland. On March 30, 1909, they executed a contract of sale of one tract to John F. Beaumont and wife, providing for monthly payments upon the purchase price, and a covenant to convey upon payment of a stipulated sum, and the purchasers entered into immediate occupation of the premises. On July 16, 1909, they entered into a similar contract for the sale of the other lot of land to Genevieve Chapman Sweet, who entered into immediate occupation of the premises. On November 1, 1909, they executed a deed conveying both tracts, subject to the above contracts and certain mortgages, to plaintiff, who is the mother of F. S. Belcher and the aunt of Mrs. Stine. On the same day that the deed to plaintiff was executed the two contracts of sale above mentioned were also assigned to her by written indorsement thereon, which indorsement was made upon the duplicates held by the purchasers. The conveyance to plaintiff was signed and acknowledged by Stine and F. S. Belcher and their wives, and at that time handed to F. S. Belcher as the agent of the plaintiff, but, due to an oversight, it was not recorded at that time. On June 13, 1913, defendant obtained a judgment against Stine in Union county, where it was docketed, and on August 12, 1913, a transcript thereof was docketed in Multnomah county. The occupation of the purchasers Beaumont and Sweet or their assignees continued until after the judgment was docketed and this suit was commenced. There was a decree for plaintiff, from which defendant appeals.

Turner Oliver, of Spokane, Wash. (C. H. Finn, of La Grande, and Rogers MacVeagh, of Portland, on the brief), for appellant. Robert F. Maguire, of Portland (Littlefield & Maguire, of Portland, on the brief), for respondent.

BENSON, J. (after stating the facts as above). [1, 2] Upon the facts as above stated we are called upon to decide whether or not plaintiff's unrecorded deed is superior to the lien of defendant's docketed judgment. Counsel for defendant urge that the evidence does not establish a delivery of plaintiff's deed.

The defendant can only question the delivery of the conveyance so far as it involves the interest of the grantor Stine; and as to his interest, at least, the evidence is clear that the deed was delivered to the son as the agent of his mother. The conveyance was executed at a time when, so far as the record discloses, there were no creditors to complain, and the transaction carries no taint of fraud. The judgment was not docketed in Multnomah county until nearly four years after the transfer of the property to plaintiff. Prior to such transfer and at all times subsequent thereto, and until after this suit was commenced, the properties involved were in the open and notorious occupancy of strangers to the legal title; that is, of the holders of contracts for the purchase of the land.

[3, 4] In support of the contention that the lien of its judgment is superior to plaintiff's deed, defendant relies upon the language of section 207, L. O. L. The effect of this statute was first considered by this court in *Stannis v. Nicholson*, 2 Or. 332, in which it was held that a judgment lien cannot, by virtue of that act, prevail over known equitable rights, and this view has been consistently maintained in many decisions since then. In one of these (*Laurent v. Lanning*, 32 Or. 11, 18, 51 Pac. 80, 81), Mr. Justice Wolverson says:

"It has become the settled construction of this statute that a judgment lien, in order to have precedence over a prior unrecorded deed or mortgage, must have been taken or acquired in good faith, without notice or knowledge of such prior unrecorded conveyance or mortgage, thus putting the judgment lien creditor upon the same footing as if he had subsequently acquired a deed to the same premises."

In *Randall v. Lingwall*, 43 Or. 383, 73 Pac. 1, Mr. Justice Bean says:

"It seems to be well settled that the open, exclusive, and notorious possession of property by a stranger to the title is sufficient to put those who deal with it upon inquiry concerning the rights and equities of the party in possession, and to charge them with knowledge thereof when no inquiry is made."

Defendant urges that in this case the occupants of the premises prior to the execution of plaintiff's deed are the same people who occupied them afterward. We cannot see that the identity of the occupants makes any substantial difference in the result, for the fact at all times remained the same—they were strangers to the title and possessed the information which should have informed defendant of plaintiff's equities. We conclude that the decree of the trial court should be affirmed; and it is so ordered.

McBRIDE, C. J., and BEAN and MOORE, JJ., concur.

(88 Or. 410)

MERCER v. GERMANIA FIRE INS. CO.
(Supreme Court of Oregon. March 12, 1918.)**1. EVIDENCE** ¶405(1) — **PAROL EVIDENCE VARYING WRITINGS.**

In action on insurance policy, it was error to admit parol evidence to vary the contract, unless the insurer was estopped to avail itself of the portions of the contract sought to be modified.

2. INSURANCE ¶124 — **CHARACTER OF CONTRACT.**

A policy of insurance is a personal contract.

3. INSURANCE ¶156(1) — **CHARACTER OF CONTRACT—RIGHTS OF WIFE.**

A wife cannot recover on an insurance policy in her husband's favor.

4. INSURANCE ¶372 — **CONTRACTS—ESTOPPEL.**

Notwithstanding L. O. L. § 4666, providing the standard form of fire insurance policy, an insurer may estop itself to rely on a defense reserved to it in such standard policy.

5. PRINCIPAL AND AGENT ¶143(2) — **UNDISCLOSED PRINCIPAL—RIGHT TO SUE.**

An undisclosed principal may ordinarily sue on a contract made by his agent for his benefit.

6. INSURANCE ¶156(1) — **UNDISCLOSED PRINCIPAL—RIGHT TO SUE.**

An action on an open insurance policy is within the rule that an undisclosed principal may ordinarily sue on a contract made by his agent for his benefit.

7. INSURANCE ¶373(1) — **CONTRACTS—ESTOPPEL.**

Where the property owner, on learning that a fire policy was in her divorced husband's name, sent her agent to the insurer's agent, who advised her to get an assignment of the policy, but said that the policy was all right, when in fact it was void, the insurer was estopped to defend under clause of policy avoiding it if the insured's interest were other than as therein stated.

8. PLEADING ¶180(2) — **REPLY—DEPARTURE.**

Where property owner set up fire policy in her divorced husband's name, and the insurer set up clause avoiding policy if the insured's interest were other than as stated, and the reply only relied on estoppel in pais to set up such defense, in that insurer's agent told plaintiff the policy was valid, plaintiff could not recover, since the estoppel, being pleaded only in the reply, was not available to plaintiff.

Department 2. Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Action by Mary I. Mercer against the Germania Fire Insurance Company, a corporation. Judgment on verdict for plaintiff, and defendant appeals. Reversed and remanded.

This is an action brought by Mary I. Mercer on a policy of fire insurance issued by the defendant April 7, 1915, covering some real and personal property in Marion county belonging to plaintiff. The property was destroyed by fire January 27, 1916. The policy was in favor of A. G. Mercer, who is alleged in the complaint to have been the agent of plaintiff and to have negotiated the insurance on plaintiff's behalf. The answer denies that defendant made any contract with plaintiff. It alleges that the policy written in favor of A. G. Mercer contained all the stipulations required to be placed therein by the laws of Oregon, and provided that the policy should be void if

the interest of the insured were other than sole and unconditional ownership. The reply alleges that in December, 1915, plaintiff learned for the first time that the policy had been written in the name of A. G. Mercer; that she requested defendant to amend the policy by inserting plaintiff's name therein in lieu of that of A. G. Mercer, or that defendant cancel the policy and issue to her a new one for the remainder of the term; that defendant refused to comply with these requests or to return to plaintiff any part of the premium paid; that defendant advised plaintiff to secure an assignment of the policy from A. G. Mercer, and assured her that she would be indemnified in the event of a fire pending the assignment of the policy. These facts are alleged as an estoppel against the affirmative defense relied on by defendant. A jury found for plaintiff on the above issues, and defendant appeals from a judgment entered on this verdict.

J. C. Veazle, of Portland (Veazle, McCourt & Veazle, of Portland, on the brief), for appellant. John H. McNary, of Salem (McNary & McNary, of Salem, on the brief), for respondent.

MCCAMANT, J. [1-3] Error is assigned on the reception of evidence that the property destroyed belonged to plaintiff, and that her husband, A. G. Mercer, acted as her agent in procuring the insurance. This parol evidence tended to modify the terms of the written contract, and the court erred in receiving it unless defendant is estopped from availing itself of the portions of the contract so undertaken to be modified. A policy of insurance is a personal contract. *Joyce on Insurance* (1st Ed.) § 23; *Drennen v. London Assurance Corporation* (C. C.) 20 Fed. 657, 658, 659. A wife cannot recover on a policy of insurance written in favor of her husband. *Trott v. Woolwich Co.*, 83 Me. 362, 22 Atl. 245; *Pelican Co. v. Smith*, 107 Ala. 313, 18 South. 105. The form of a fire insurance policy is statutory in this state. Section 4666, L. O. L. It is held that the conditions of this statutory policy can be waived by the insurer only in the manner therein specified. *Oatman v. Bankers' Association*, 66 Or. 388, 396-398, 133 Pac. 1183, 134 Pac. 1033; *Boardman v. Insurance Co. of Pennsylvania*, 84 Or. 60, 70, 164 Pac. 558.

[4] The distinction between waiver and estoppel as applied to an action on a contract of insurance is clearly pointed out by Mr. Chief Justice Moore in *Kimball v. Horticultural Fire Relief*, 79 Or. 133, 140, 141, 154 Pac. 578. It was not the intention of the Legislature when it enacted the statute defining the form of an insurance policy to relieve insurance companies from those estoppels in pais which are essential to fair dealing in the business world. Notwithstanding this legislation, an insurer may still

estop itself from relying on one or more of the defenses reserved to it in the standard policy. 1 Clement on Fire Insurance, 409, 410; Welch v. Fire Association, 120 Wis. 456, 98 N. W. 227; Kimball v. Horticultural Fire Relief, 79 Or. 133, 140, 141, 154 Pac. 578. It is admitted that plaintiff was sole owner of the insured property at the date of the policy and at all times thereafter, and it is clearly proved that A. G. Mercer acted as her agent in negotiating the insurance. The money used to pay the premium belonged to plaintiff.

[5-7] It appears from the testimony that five or six weeks prior to the fire plaintiff learned for the first time that the policy was taken in the name of A. G. Mercer, whom in the meantime she had divorced; she thereupon sent an agent to Mr. W. E. Liston, defendant's agent who had written the policy; there is no substantial dispute as to the conversation which ensued; Liston advised Mrs. Mercer to secure an assignment of the policy, but told her that the policy then in her possession was all right. There was sufficient testimony to take to the jury the question of whether plaintiff relied on this statement and failed for this reason to secure other insurance. Liston was still agent for the defendant when the above conversation took place.

We find here all of the elements of an estoppel within the rule announced in Page v. Smith, 13 Or. 410, 414, 10 Pac. 833, and Oregon v. Portland General Co., 52 Or. 502, 528, 95 Pac. 722, 98 P. 160. The policy written in April, 1915, was void; plaintiff was informed it was all right. This statement was made to a woman ignorant of the truth; it was made by an underwriter of large experience who knew the facts. He must have intended that plaintiff should act upon it and there is evidence that she did rely upon it to her injury. Defendant should not be permitted to escape liability on this policy on the ground that it named A. G. Mercer as the insured. An undisclosed principal may ordinarily sue on a contract made by his agent for his benefit. Kingsley v. Siebrecht, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486; Powell v. Wade, 109 Ala. 95, 19 South. 500, 55 Am. St. Rep. 915; Warder v. White, 14 Ill. App. 50; Prichard v. Budd, 76 Fed. 710, 22 C. C. A. 504; Morris v. Chesapeake Co. (D. C.) 125 Fed. 62. An action on an open insurance policy is within this rule. New Orleans Co. v. Spruance, 18 Ill. App. 576. The evidence was sufficient to justify the jury in holding defendant estopped to insist on those provisions of the policy which take this contract out of the operation of the foregoing principles of law.

[8] The facts constituting the estoppel are alleged only in the reply, and defendant contends that they are for that reason unavailable to plaintiff.

"It has often been held by this court that the plaintiff must prevail, if at all, upon the matters alleged in his complaint, and that he cannot set up one cause of action or suit in the complaint, * * * and recover upon another and different ground of relief alleged in a reply." Union Street Railway Co. v. First National Bank, 42 Or. 606, 611, 72 Pac. 588.

In applying the foregoing principle it has been held that in an action on a contract plaintiff must prove a right to prevail under the contract unless he alleges in his complaint a waiver on the part of the defendant of some of the provisions of the contract or an estoppel to assert them as a defense. Hannan v. Greenfield, 36 Or. 97, 102, 58 Pac. 888; Young v. Stickney, 46 Or. 101, 104, 105, 79 Pac. 345. This doctrine has been repeatedly applied in actions on insurance policies. Bruce v. Phoenix Co., 24 Or. 486, 491, 34 Pac. 16; Long Creek Association v. State Insurance Co., 29 Or. 569, 573, 46 Pac. 366; Cranston v. West Coast Co., 63 Or. 427, 442, 128 Pac. 427; Waller v. City of New York Co., 84 Or. 284, 293, 164 Pac. 959. This question was not called to the attention of the court in Lindstrom v. National Co., 84 Or. 588, 165 Pac. 675, and this case must not be considered as overruling the earlier decisions. The question is concluded in this jurisdiction by the precedents above cited.

The contract on which plaintiff sues is an insurance policy in favor of A. G. Mercer. It provides that the policy shall be void if the interest of the insured be other than sole and unconditional ownership of the property covered. A. G. Mercer did not own this property. It is manifest, therefore, that plaintiff cannot recover on the contract as drawn, and the complaint fails to allege an estoppel of the defendant to insist on its rights under the policy.

It follows that the court erred in receiving oral evidence which tended to modify the written contract sued on, and the judgment must be reversed. If this testimony had been excluded because of the condition of the pleadings, it is probable that plaintiff could have amended so as to obviate the objections. We think, therefore, that we should not direct judgment of nonsuit, but should remand the cause for further proceedings, and it is so ordered.

MCBRIDE, C. J., and MOORE and BEAN, JJ., concur.

(88 Or. 247)

WEST v. KERN.

(Supreme Court of Oregon. March 12, 1918.)

1. MASTER AND SERVANT §330(3) — THIRD PERSON'S INJURY—AUTOMOBILE ACCIDENT—PRESUMPTION.

Where plaintiff proves that the vehicle which caused his injury belonged to defendant, he makes a prima facie case, since the jury may infer that the driver was defendant's servant and that the vehicle was being used for defendant's purposes.

2. APPEAL AND ERROR \Rightarrow 1001(1)—SCOPE OF REVIEW—FINDINGS OF FACT.

The decision on a question of fact by the jury, submitted upon sufficient evidence, is final and cannot be disturbed on appeal.

Department 1. Appeal from Circuit Court, Multnomah County; H. H. Belt, Judge.

Action by Clarence W. West against Daniel Kern. Judgment for plaintiff, and defendant appeals. Affirmed.

Judgment affirmed on rehearing, 171 Pac. 1050.

The defendant, Daniel Kern, has appealed from a judgment obtained against him by the plaintiff, Clarence W. West, for injuries resulting from a collision with an automobile in the city of Portland. Lawrence R. Kern is a nephew of Daniel Kern. Fidelo Lopez worked as gardener and "all-around man around the house" of Daniel Kern, who resided on the east side of the Willamette river. East Burnside street extends east and west. East Twenty-Second street runs north and south and intersects East Burnside street. The plaintiff was riding a motorcycle going west along the north side of East Burnside street, intending to proceed across and beyond East Twenty-Second street. Lawrence R. Kern and Fidelo Lopez, with Lopez at the wheel, were traveling east along the south side of East Burnside street in an automobile owned by Daniel Kern, intending to turn to the left and go north on East Twenty-Second street. Instead of passing around the center of the intersection of the two streets, the driver of the automobile "cut the corner" and struck and seriously injured the plaintiff, who was proceeding west on the motorcycle.

The complaint alleges that:

"Said automobile was with the consent and knowledge and direction of said defendant being operated by certain agents and employees of said defendant who were then and there driving said automobile in behalf of said defendant and within the scope of their employment and authority for said defendant."

R. W. Wilbur, of Portland (Wilbur, Spencer & Becket and F. O. Howell, all of Portland, on the brief), for appellant. Dan J. Malarkey and A. M. Dibble, both of Portland (Malarkey, Seabrook & Dibble, of Portland, on the brief), for respondent.

HARRIS, J. (after stating the facts as above). The only error assigned by the defendant arises out of the refusal of the court to direct a verdict in favor of the defendant. This assignment of error is predicated upon the contention that there was no evidence to show that Lawrence R. Kern was an agent of Daniel Kern; that, although Lopez was employed as a gardener and "an all-around man around the house," he was acting beyond the scope of his employment when driving the automobile; and that therefore there was no evidence upon which the jury could find that the automobile was being driven by

a servant or servants of the defendant while acting within the scope of their employment. The plaintiff argues that the motion for a directed verdict was properly denied for two reasons: First, because the admission by the defendant that he owned the automobile was prima facie evidence that the car was being driven for him and by his servant or servants; and, second, because, independent of the admission of ownership, there was evidence to support a finding that the automobile was being driven for the defendant by his servant or servants.

Daniel Kern admitted that he owned the automobile which struck the plaintiff; he denied that Lawrence R. Kern was his agent; and, while admitting that Lopez was his servant, he denied that Lopez had any duties to perform in connection with the automobile. The defendant says in his brief that the court permitted the case to go to the jury upon the theory that a prima facie case had been made out by his admission that he owned the automobile, plus the fact that the driver was his employé. The defendant takes the position that:

"If a prima facie case is ever established in such an action as this, two facts must concur: (1) The ownership of the automobile by the defendant; (2) that it was operated by an employé whose duty it was to drive the car and care for it. In other words, he must be the regularly employed and acting chauffeur."

The rule contended for by the defendant is the doctrine of some jurisdictions. *White Oak Coal Co. v. Rivoux*, 88 Ohio St. 18, 102 N. E. 302, 46 L. R. A. (N. S.) 1091, Ann. Cas. 1914C, 1082; *Trombley v. Stevens-Duryea Co.*, 206 Mass. 516, 92 N. E. 764, 2 N. C. O. A. 806; *Lotz v. Hanlon*, 217 Pa. 339, 66 Atl. 525, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731; *Berry on Automobiles* (2d Ed.) § 617, p. 700; *Babbitt on Motor Vehicles*, § 559; *Huddy on Automobiles* (3d Ed.) §§ 281, 283. Other jurisdictions have adopted a more liberal rule.

In *Joyce v. Capel*, 8 Car. & P. 370, the plaintiff averred that he was in possession of a lug-boat and that the barque of the defendants, navigated by their servant, was, by his negligence, run against the lug-boat. A witness, who was on board the lug-boat, stated that he saw the name of Capel on the barge, and the No. 1055; but that, when the men in the employ of the defendants were shown to him at their wharf, he could not identify the bargeman who steered the barge. It was proved that the No. 1055 was the number belonging to the barge of the defendants. For the defendants it was urged that it had not been shown that the barge was navigated by the defendants' servant at the time, and that the barge might have been taken by some one else, or that it might have been on hire. But it was ruled by Lord Denman that:

"If the barge was on hire that will be for the defendants to show. The barge being the barge

of the defendants, there is prima facie evidence that the bargeman was their servant till they explain it."

In 1 *Shearman & Redfield on Negligence* (6th Ed.) § 158, the authors say that:

"When the plaintiff has suffered injury from the negligent management of a vehicle, such as a boat, car, or carriage, it is sufficient prima facie evidence that the negligence was imputable to the defendant, to show that he was the owner of the thing, without proving affirmatively that the person in charge was the defendant's servant. It lies with the defendant to show that the person in charge was not his servant, leaving him to show, if he can, that the property was not under his control at the time, and that the accident was occasioned by the fault of a stranger, an independent contractor, or other person, for whose negligence the owner would not be answerable."

The excerpt taken from *Shearman & Redfield on Negligence* is quoted with approval in *Houston v. Keats Auto Co.*, 85 Or. 125, 129, 166 Pac. 531.

In *Vonderhorst Brewing Co. v. Amrhine*, 98 Md. 406, 56 Atl. 833, there was evidence showing that the wagon which collided with the plaintiff was owned by the Vonderhorst Brewing Company, and there was also evidence that the wagon which ran into plaintiff's team had on it the name of the Vonderhorst Brewing Company. It was held that these facts were sufficient to justify the jury in concluding that the driver of the wagon was the agent of the owner of the wagon. The court there says:

"It is a reasonable presumption that a person driving the team of another is the agent or servant of the owner of the team, unless it be shown by the owner of the team that the contrary is the fact."

In *Geiselman v. Schmidt*, 106 Md. 580, 586, 68 Atl. 202, 205, the plaintiff offered evidence tending to prove that the horse and wagon driven against the plaintiff belonged to the defendant, and the court ruled that: "The jury might reasonably conclude that the driver was his agent."

In *Norris v. Kohler*, 41 N. Y. 42, it appeared that William H. Norris, who was killed while standing on the sidewalk peddling vegetables, was struck by the pole of a wagon to which a span of runaway horses were attached. The runaway team was proved to be owned by the defendant, and the name of the defendant was on the rear of the wagon. It was urged on appeal that it had not been shown that the person driving the team was in the service of the defendant. The court disposed of the objection thus:

"On the second point, whether the driver of the wagon was the servant of the defendant, the evidence consisted, first, of the fact of ownership. The property being proved to belong to the defendant, it is urged that a presumption arises that it was in use for his benefit, and on his own account. This argument, I think, is a sound one. The ownership of the personal property draws to it the possession. The owner is entitled to have and keep possession, and no other person can justly obtain possession until some act of authority from the owner is proved. Ownership implies possession, and possession is

in subordination to title. No proof was given in the present case, separating the ownership from the possession, and the presumption of law is that the wagon and horses of the defendant were in use in his service, and on his account."

In *Edgeworth v. Wood*, 58 N. J. Law, 463, 468, 33 Atl. 940, 942, the plaintiff was injured by being run over in the public street by a wagon drawn by two horses and there was evidence to show that the United States Express Company was the owner. The court held that proof of ownership "is sufficient to establish prima facie that the wagon, being owned by the company, was in its possession, and that whoever was driving it was doing so for the company."

In *Knust v. Bullock*, 59 Wash. 141, 143, 109 Pac. 329, 330, the court says:

"In cases of this kind, where it is shown that the wagon and team doing damage belonged to the defendants at the time of the injury, that fact establishes prima facie that the wagon and team were in possession of the owner, and that whoever was driving it was doing so for the owner."

To the same effect are *Purdy v. Sherman*, 74 Wash. 309, 133 Pac. 440; *Birch v. Abercrombie*, 74 Wash. 486, 489, 133 Pac. 1020, 50 L. R. A. (N. S.) 59.

[1] While there was evidence in *Kahn v. Home Tel. & Tel. Co.*, 78 Or. 308, 162 Pac. 240, and in *Houston v. Keats Auto Co.*, 85 Or. 125, 166 Pac. 531, tending to show that the driver of the offending automobile was an agent having duties in connection with the car, nevertheless these two cases, and particularly the latter, when read in the light of the authorities cited in the respective opinions, plainly incline towards the doctrine that proof of ownership is prima facie evidence that the negligence was imputable to the defendant without proving affirmatively that the person in charge was the defendant's servant. Indeed, the opinion in *Houston v. Keats Auto Co.*, supra, may be regarded as a precedent supporting the contention of the plaintiff here; for this court, speaking through Mr. Justice McCamant, expressly stated that:

"The admission of ownership made by the defendants in the case at bar was therefore sufficient to make out a prima facie case on the controverted questions."

This rule proceeds on the theory that the facts are peculiarly within the knowledge of the defendant and that he can easily furnish the necessary evidence to show that the vehicle was not being used for him, if such is the fact. If it be said that this rule occasionally imposes a hardship upon a defendant, the answer is that a less liberal rule would more frequently result in hardship to a plaintiff. We adhere to the doctrine towards which the opinion in *Kahn v. Home Tel. & Tel. Co.*, supra, inclines and for which the opinion in *Houston v. Keats Auto Co.*, supra, pronounces, and we hold that proof of ownership makes a prima facie case against the owner.

This conclusion, it is true, does not entirely harmonize with the disposition made of the case of *Smith v. Burns*, 71 Or. 133, 135 Pac. 200, 142 Pac. 352, L. R. A. 1915A, 1130, Ann. Cas. 1916A, 666. A verdict was returned against both Burns, the owner, and Gossman, the driver of the automobile, and on appeal the judgment against Burns was annulled. If the fact that Burns owned the car made a prima facie case of liability against him, then there was some legal evidence to support the verdict and the court was powerless to set it aside. *Sullivan v. Wakefield*, 65 Or. 528, 535, 133 Pac. 641. And hence the fact that the court did set aside the verdict would imply that proof of ownership does not make a prima facie case if it be assumed that the rule announced in *Sullivan v. Wakefield* was kept in mind. The only question discussed in *Smith v. Burns* was whether the court should have directed a verdict for Burns; and the decision of that question turned on the fact that:

"Gossman was not running the machine for the purpose for which Burns owned and kept it, but solely for his own private purpose, without the knowledge or direction of Burns."

The owner was, of course, exempt from liability if Gossman was running the car "solely for his own private purpose, without the knowledge or direction of Burns." In *Smith v. Burns* it was decided that the evidence showed that Gossman had the car for his own use without the knowledge or direction of its owner, and on that fact it was held that Burns was not liable. The question of whether or not proof of the ownership of the offending automobile made a prima facie case of liability was not discussed in the opinion; nor, assuming that proof of ownership made a prima facie case, was any notice taken of the question of whether or not the court can under the present form of our Constitution grant a nonsuit, or direct or set aside a verdict when the court thinks that the evidence overcomes the prima facie case made by mere proof of ownership. The precedents principally relied upon in *Smith v. Burns* are taken from the state of Washington; but it must be remembered that, while the courts of that state recognize the rule that proof of ownership makes a prima facie case of liability, they also exercise the power, which the courts of Oregon once possessed, of setting aside a verdict when it is against the clear weight of the evidence. *Series v. Series*, 35 Or. 289, 57 Pac. 634; *Ludberg v. Barghoorn*, 78 Wash. 476, 131 Pac. 1165.

While the court did not, in *Smith v. Burns*, squarely decide that proof of ownership does or does not make a prima facie case against the owner of the automobile, yet in the final analysis, if such proof does make a prima facie case, it would furnish some evidence of liability, and the court would therefore be precluded from re-examining the fact tried and determined by the jury. Although *Smith v. Burns* and the instant case cannot be completely harmonized when the former case is analyzed in the light of the rule established in *Sullivan v. Wakefield*, yet we do not regard *Smith v. Burns* as a precedent holding that proof of ownership does not make a prima facie case of liability, for the reason that the question is not discussed or even noticed in the opinion.

[2] However, the prima facie case which is made out from the admission of ownership is, in the instant case, supplemented by other evidence. While the evidence was circumstantial, nevertheless there was evidence from which the jury could conclude that the automobile was being driven by agents of the defendant acting within their authority. A complete statement of all the evidence would not serve any good purpose. It is sufficient to say that we have carefully examined the entire transcript of the testimony and find that there are many facts which, when construed together and with relation to each other, form a chain of circumstances tending to show that the persons were driving the car in behalf of defendant and within the scope of their authority. The court told the jury in the plainest language that the plaintiff could not recover unless he proved that the automobile was being driven with the consent and knowledge of the defendant and by his agent or agents acting within the scope of their employment. The verdict is irrefutable evidence that the jury found that the car was being driven by agents of the defendant while acting within the scope of their authority. It is not for us to say whether we think the evidence preponderates for or against the defendant. The decision of that question was for the jury, and by their verdict they have decided the question against the defendant. We cannot affirmatively say that there was no evidence to support the verdict, and the verdict of the jury is therefore a finality. *Sullivan v. Wakefield*, 65 Or. 528, 535, 133 Pac. 641; *Kahn v. Home Tel. & Tel. Co.*, 78 Or. 308, 152 Pac. 240.

The judgment is affirmed.

MCCBRIDE, O. J., and BENSON and McCAMANT, JJ., concur.

(177 Cal. 631)

E. CLEMENS HORST CO. v. NEW BLUE POINT MINING CO. et al.**DURST v. SAME (two cases).**

(Sac. 2465-2467.)

(Supreme Court of California. Feb. 27, 1918.
On Rehearing, March 29, 1918.)**1. WATERS AND WATER COURSES ⇨130—APPROPRIATION—"FOREIGN WATERS."**

Where plaintiffs had always used the natural water of a stream, but the stream had been augmented by foreign waters deposited in it by a city, such foreign waters constituted abandoned personalty, and defendants, who could first take them from the stream, had the right to their use, since plaintiffs could recover, if at all, only on the strength of their own title, and not on the weakness of defendant's, and as plaintiffs could not prevent the removal of such foreign waters by those responsible for their presence in the stream, they could acquire no title to the waters by adverse possession.

2. WATERS AND WATER COURSES ⇨42, 142—APPROPRIATION—ARTIFICIAL WATERS.

A riparian owner has a right to the usufruct of the natural water of the stream, but an appropriator of the waters artificially added is a taker of the corpus of that which exists in the stream only by virtue of its abandonment.

3. WATERS AND WATER COURSES ⇨152(11)—RIGHTS OF RIPARIAN OWNERS—JUDGMENTS—SUFFICIENCY.

A judgment finding that a riparian owner was entitled to all the natural flow of 1,191 inches, and that defendants were entitled to the foreign water varying from 500 to 1,400 inches in the course of the year, was sufficiently definite.

4. APPEAL AND ERROR ⇨907(1)—SCOPE OF REVIEW—PRESUMPTIONS.

Under the rule favoring the sustaining rather than the reversal of judgments, the court, in the absence of the evidence, must assume that the evidence justifies the findings, and that the judgment is in accordance with equity.

5. WATERS AND WATER COURSES ⇨152(4) — RIGHTS OF RIPARIAN OWNER — JURISDICTION.

Where plaintiff sought to quiet its right to the natural flow of a river at its lands in one county, the mere fact that a tributary creek had a separate name, and extended through another county, did not make it less a part of the river, so that the court of the county wherein plaintiff's land lay had jurisdiction under Const. art. 6, § 5, requiring actions as to real property to be brought within county where the property is situated.

In Bank. Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Three suits by the E. Clemens Horst Company, Ralph H. Durst, and Rose Frances Durst, as executrix, respectively, against the New Blue Point Mining Company and others. From those parts of the judgments adverse to them, the plaintiff in each case appeals. Affirmed.

On petition for rehearing, petition denied.

W. H. Carlin, of Marysville, and Samuel C. Wiel, of San Francisco, for appellants. Bert Schlesinger, James F. Sheehan, C. J. Heggerty, and Knight & Heggerty, all of

San Francisco, F. T. Nillon, of Nevada City, Byron Coleman, of Los Angeles, and John Mulroy, of Grass Valley, for respondents.

MELVIN, J. Plaintiffs appeal from parts of judgments identical in three cases involving the flow of Bear river and its tributary Wolf creek to the lands of plaintiffs in Yuba and Placer counties. The three appeals are by stipulation to be governed by the decision based upon the transcript in the case entitled "E. Clemens Horst Company v. New Blue Point Mining Company."

E. Clemens Horst Company (hereinafter to be known as "plaintiff" or "appellant") has owned for more than a quarter of a century land riparian to Bear river. The water flowing to said land comes partly from a tributary of Bear river known as Wolf creek, which has its confluence with the river above plaintiff's land. Upon Wolf creek the predecessors of defendants maintained a dam. This dam was completed in 1862, and was constructed at large cost, and has been maintained by defendants or their predecessors in interest ever since. Heading at this dam was a ditch sometimes known as the "Campbell Ditch." It was 28 miles long. Two miles from its head this ditch crossed a tributary of Wolf creek known as French ravine, and no water carried beyond French ravine in said ditch ever did, now does, or can return to Wolf creek or Bear river above the land of plaintiff.

Beginning in 1862, 2,000 inches of water was carried by said ditch in the winter time each year and not returned to either the creek or the river, being used in gravel mines at Smartsville. A small quantity has been and still is distributed in such manner that a portion of it has been returned to the stream above the land of plaintiff, but as there is no controversy over this water, it will not be considered in this opinion. Winter diversions through the ditch continued until 1883, when the mining at Smartsville outside of the watershed of Bear river and Wolf creek was stopped by injunction. Between 1883 and 1910 no water in winter was carried by the ditch outside of the said watershed.

In the irrigation season, however, from 1862 to 1901, water for irrigating purposes was distributed along the course of the ditch in amounts varying from 100 to 800 inches of water, none of which was returned at or above plaintiff's lands. All the other water diverted by the ditch was released before reaching French ravine. In 1901 the flume crossing French ravine broke down, and from that year until 1910 no water was conducted beyond that place. At all times between 1901 and 1910 all water taken from Wolf creek by the dam and ditch was returned to the stream above plaintiff's lands and flowed on plaintiff's lands, where it was used by plaintiff.

Upon this history of the use of the water it was held that defendants, between the years 1901 and 1910, had forfeited all right to take any of the natural flow of Wolf creek to any place outside of the watershed of that stream or that of Bear river, and had never recovered said right either by prescription or otherwise. In regard to all of the natural flow of these streams, plaintiff as a riparian owner was found to have rights prior and superior to any which defendants might assert. In 1909 defendants reopened Campbell ditch, rebuilt the flume across French ravine, and began to distribute at places beyond French ravine and outside of the watershed of Wolf creek and that of Bear river water varying in amount from 500 to 2,500 inches.

It was found by the court that Wolf creek receives, and for more than half a century has received, in addition to its natural flow, water coming from sources without its watershed and known as "foreign water." This "foreign water" is made up of sewage from the city of Grass Valley and water discharged from mines and mills, the city, mines, and mills receiving their supply from a canal which leads from Yuba river. The canal is owned by persons not in privity with these litigants, or any of them, and not parties to this controversy. All of the discharges of "foreign water" enter Wolf creek above the Campbell dam and commingle with the other waters of said stream. Said "foreign water" is never less than 500 inches nor more than 1,400 inches. The natural flow of Wolf creek at the lowest stage is found to be always at least 1,191 inches. It was further found by the court that plaintiff has a paramount right to the natural flow to its lands of the water in Wolf creek and Bear river, but that defendants have a right superior to plaintiff to all of the "foreign water" at all times for use at any place within or without the watershed of Wolf creek or Bear river.

The essential conclusions of law were that plaintiff is entitled to all of the natural flow to its lands; that defendants, as against plaintiff, have a right to use the "foreign water" not exceeding 1,400 inches; and that plaintiff may have an injunction restraining defendants from diverting any save the "foreign water" from Wolf creek. By the judgment which follows the conclusions of law, the title of plaintiff to the natural flow is quieted.

The principal question involved in this appeal is the following: Where the flow of a natural stream is augmented by artificial means, that is by waters which, without the intervention of human agency would never reach the stream, does this artificial flow inure to the benefit of riparian owners, or is it merely in the nature of abandoned personality which may be appropriated by the first person who can take it from the stream?

Appellant agrees with respondents that the "foreign water" is an increment of Wolf creek abandoned by those who produce it. While the right of the producers at any time

to forsake the practice of putting water into Wolf creek is conceded, the right of respondents, in the absence of any privity with said producers, to appropriate this surplus flow is denied. Appellant calls the court's attention to the case of *Arkwright v. Gell*, 5 Meeson and Welsby, 203-226. In that case mine owners had drained their workings by a tunnel from which water was discharged in such a way that it flowed to plaintiffs and was used by them to operate mills. For the purpose of securing better drainage the owners of the mine dug a deeper tunnel which caused the other to run dry. In this they were upheld on the ground that those creating the supply may discontinue it. In principle that case seems to fit the one point upon which appellant and respondents agree, namely, the right of the producer of the artificial flow to cease furnishing it, but appellant lays great stress upon the comment on the case in *Washburn on Easements* at page 420 (4th Ed.), which is as follows:

"It will be remarked, as an important circumstance in this case, that the one who dug the second sough and caused the diversion was interested in the mines thereby to be drained. Had it been otherwise, had he been a stranger, or merely the owner of the land lying between the outlet of the first sough and the place where the water entered into the natural stream, he would have had no right to divert the current issuing from the mine, so as to deprive the plaintiff of the use of the water flowing in the same, after having enjoyed it so long."

It is contended that as among all the rest of the world except the producer, the mingled stream of natural and artificially introduced water follows the usual law of water courses, and that it is immaterial as between two claimants how the water got into the bed of the stream. In this behalf a number of authorities are cited, including *Wood v. Waud*, 3 Exch. 748, *Druley v. Adam*, 102 Ill. 177, *Eddy v. Simpson*, 3 Cal. 249, 58 Am. Dec. 408, *Schulz v. Sweeny*, 19 Nev. 359, 11 Pac. 253, 3 Am. St. Rep. 888, and *Hollett v. Davis*, 54 Wash. 326, 103 Pac. 423. In the case last cited it was held that the owner of a spring who diverts its waters into an artificial channel may not, after the lapse of the period of the statute of limitations, return the waters to their natural channel to the injury of a lower riparian owner on the water course through which the water has long been discharged. The case was decided upon the doctrine of estoppel, and has little value here. The other cases were determined upon authority of decisions under the common law. *Eddy v. Simpson*, the Californian authority cited was to the effect that producers of water who had abandoned it could not retake it from the stream into which it had been discharged if by so doing they prevented its application to the lands of lower riparian owners who had been making beneficial use of it; but in *Hoffman v. Stone*, 7 Cal. 46, this doctrine was modified and a ruling made, which has been consistently followed ever since, that an appropri-

ator may use a natural water course as a part of the process of conducting the appropriated fluid to a place of storage. In that case it was held that only the natural water in the stream belonged to the first appropriator, and that the artificial water might be retaken by those who had discharged it into the water course. And in the leading case of *Katz v. Walkinshaw*, 141 Cal. 116-135, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, *Eddy v. Simpson* was cited during the discussion of the deviations from the common law which have been brought about by local necessities and the physical and climatic differences between England and California. Very early in the history of irrigation in California this court began to draw distinctions between the riparian rights recognized under the common law and the law of appropriation which was called a law of necessity, following custom rather than fixed conditions. In *Miller v. Wheeler*, 54 Wash. 429, 103 Pac. 641, 23 L. R. A. (N. S.) 1065, this difference is discussed and many cases are listed, the court citing with special approval and quoting from *Butte Canal & Ditch Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769, wherein the right of the original appropriator of water again to take it after its discharge into an alien water course—a right denied in the case of *Eddy v. Simpson*—is again declared. It is unnecessary, however, to prolong the discussion of this phase of the case because appellant admits that, under the authorities, the people who put the water brought from sources outside of the watershed into Wolf creek might at their pleasure discontinue such increment, leaving appellant without remedy.

[1] If, then, the appellant can obtain no easement or right by adverse possession or user against the people at Grass Valley who add to the corpus of the stream, how, ask respondents, can plaintiff maintain the present action without first establishing a right to the use of this water? We can find no satisfactory answer to this question that will fit with appellant's contentions. Respondents invoke the rule of property that plaintiff must rely upon the strength of its own title, and not upon the weakness of that of its adversaries—citing *Little Sespe Consolidated Oil Co. v. Badgalupl*, 167 Cal. 381, 139 Pac. 802. We can see no escape from the logic of the rule so invoked and its application to the conditions here presented for our consideration.

[2] A riparian owner has a right to the usufruct of the natural water of the stream, but an appropriator of the waters artificially added is a taker of the corpus of that which exists in the stream only by virtue of its abandonment. So jealous have the courts of this state been for economy in the use of water and the fair apportionment of the precious fluid for beneficial purposes that they have refused to restrain the diversion

of water by a nonriparian appropriator, at the suit of a lower riparian owner, when the amount diverted would not be used by the latter, but would greatly benefit the person diverting it. *San Joaquin & Kings River Canal & Irrigation Co. v. Fresno Flume & Irrigation Co.*, 158 Cal. 626, 112 Pac. 182, 35 L. R. A. (N. S.) 832; *Modoc Land & Live Stock Co. v. Booth*, 102 Cal. 151, 36 Pac. 431; *Fifield v. Spring Valley Water Works*, 130 Cal. 552, 62 Pac. 1054.

In *Gallatin v. Corning Irrigation Co.*, 163 Cal. 405, 126 Pac. 864, Ann. Cas. 1914A, 74, the court was discussing a situation in which defendant proposed to divert for purposes of irrigation on nonriparian lands surplus water carried in a stream during periods of unusual flood. Injunction against defendants was refused when demanded by plaintiffs, who were lower riparian proprietors, on the ground that the taking of the flood waters wrought no present damage to said plaintiffs. After a review of the decisions applicable to the problem before the court the following language was used in the decision:

"These decisions in effect establish the just rule that flood waters which are of no substantial benefit to the riparian owner or to his land, and are not used by him, may be taken at will, by any person who can lawfully gain access to the stream, and conducted to lands not riparian, and even beyond the watershed, without the consent of the riparian owner and without compensation to him. They are not a part of the flow of the stream which constitutes 'parcel' of his land, within the meaning of the law of riparian rights."

In *Cohen v. La Canada Land & Water Co.*, 151 Cal. 680, 91 Pac. 584, 11 L. R. A. (N. S.) 752, the plaintiff sought to restrain defendants from diverting and carrying away certain waters developed by tunnels on lands from which plaintiff had conducted the flow of certain springs. It was found that the developed waters were not such as would under natural conditions find their way to the springs, and that, except for the tunnels the supply thereby made available would have gone by percolation outside of the watershed of the stream on which plaintiff's land was located. Among other things the court said:

"Under these circumstances, as the waters developed by the tunnels were not waters which would have trended towards or supported or affected any stream flowing by the land of appellant, nor any springs in or to the waters of which she had any claim or interest, she was not injured as an adjoining proprietor or as an appropriator, and hence could not complain or insist upon the application of the rule announced in the cases cited to prevent the respondents from taking such developed waters to any lands to which they might see fit to conduct them. For authority sustaining this proposition, we cite *Hanson v. McCue*, 42 Cal. 306 [10 Am. Rep. 299], *Gould v. Eaton*, 111 Cal. 639 [52 Am. St. Rep. 201, 44 Pac. 319], and *Montecito, etc., Co. v. Santa Barbara*, 144 Cal. 585 [77 Pac. 1113]."

So in the present case it may be said that as the surplus waters would not in the course

of nature reach appellant's land, that corporation may not complain of being deprived thereof either by the producers of the excess, by their assignees, or by a stranger to their title who appropriated the abandoned excess for proper purposes.

Respondents cite *Dannenbrink v. Burger*, 23 Cal. App. 587, 138 Pac. 751, as supporting their contention that where water has been conducted into a stream other than that from which it was taken and has been abandoned, the rights therein are in the nature of those which one may enjoy in personality; the appropriator being entitled to the corpus thereof rather than the usufruct. The discussion in the opinion in that case supports the contention of respondents, for the following language is there used:

"It is well settled that where water escaping or leaking from an artificial water course goes to waste by flowing promiscuously over other lands or finds its way to some other stream than the one from which it is diverted into such artificial water course, a person appropriating such water thus merely takes the corpus and not the usufruct therein. In such case, having the usufructuary right in such water, the owner of such ditch or artificial water course is at liberty at any time to change or alter it without invading any vested right of the appropriator, even though the effect of such change or alteration must inevitably result in depriving the appropriator of the water escaping from such water course and which he has appropriated and used, perhaps for a long period of time. As is said in *Hanson v. McCue*, 42 Cal. 303 [10 Am. Rep. 299], and approved in *Katz v. Walkinshaw*, 141 Cal. 116 [39 Am. St. Rep. 35, 64 L. R. A. 236, 70 Pac. 663, 74 Pac. 766], the owner of an artificial water course is not bound to maintain the artificial stream for the benefit of those who have appropriated waters escaping therefrom. * * * In other words, the appropriator merely secures the corpus of the water thus escaping as personality, but does not thereby secure or acquire the right to the continuous flow of such water."

We are convinced that plaintiff and respondents were upon an equal footing with reference to the surplus water, and that the ones who first secured it may not be deprived of the right to the use of it, even outside of the watershed of Wolf creek by the person or corporation claiming as a lower riparian proprietor on Bear river. This disposes of the principal question involved herein, and our determination of this matter is not altered by the opinion in *Schwann v. Cotton*, [1916] 2 Chancery, 459, dealing with a controversy between riparian proprietors in a jurisdiction in which our law of appropriation of waters has no application. The case of *Davis v. Gale*, 32 Cal. 26, 91 Am. Dec. 554, also cited in this behalf, is of little value to us here because the points decided were so different from those involved in this controversy. That was a suit between appropriators, each claiming a priority, not a controversy based upon riparian rights of either party.

[3, 4] Appellant attacks the judgment upon the ground that it is not definite. That the amount of "foreign water" varies greatly at different periods during the year is found. Its maximum (1,400 inches) and its minimum

(500 inches) are fixed by the findings, but it is argued that as the amount of the flow of the added water is never constant, and never will be, it is impossible to tell when respondents are going beyond the appropriation of the added water and taking from the natural flow. The effect of the judgment says appellant is to restrict it over the whole year to the minimum flow of natural water found to be in the stream at the end of the season. It is argued that the judgment is just as uncertain as that found erroneous for uncertainty in *Watson v. Lawson*, 166 Cal. 235-243, 135 Pac. 961. An examination of the said judgment shows, however, that it is much more specific than the one described in the cited case. In that case defendants had been found by the superior court to be entitled to "sufficient water for the proper irrigation of so much of their several lands as they have heretofore irrigated with such water." As there was nothing to show the number of acres previously irrigated, nor the amount of water such irrigation would require the judgment was of course hopelessly indefinite. In the case at bar defendants are adjudged to be entitled to all of the "foreign water" not exceeding 1,400 inches, and are enjoined from taking more than that quantity. Conversely stated, the court forbade defendants to take more than would leave in the stream 1,191 inches of the water from Wolf creek which had been judicially determined to be the minimum quantity of natural water flowing at the intake of their ditch. Under the rule which favors the sustaining rather than the reversal of judgments we must assume that the evidence (which is not set forth in this record) justifies the findings, and that said judgment is in accordance with fairness and equity.

[5] Certain of the respondents question the jurisdiction of the court to try this case and contend that they should have been awarded a judgment of dismissal under section 5 of article 6, of the Constitution of California. This, they say, is an action to quiet title to the waters of Bear river and its tributaries, including Wolf creek, and as the latter stream is entirely within the county of Nevada, they assert that the superior court in and for the said county alone had jurisdiction to entertain such a suit. The court found that plaintiff's right sought to be quieted was "a part and parcel of its Yuba county lands." The action was properly commenced and tried in Yuba county. *Miller & Lux v. Madera Canal & Irrigation Co.*, 155 Cal. 59-73, 99 Pac. 502, 22 L. R. A. (N. S.) 391; *Lux v. Haggin*, 69 Cal. 255-391, 4 Pac. 919, 10 Pac. 674. Plaintiff was seeking to quiet its right to the natural flow of Bear river at its lands in Yuba county. The mere fact that Wolf creek has a separate name and extends through another county does not make it less a part of Bear river. *Porters Bar Dredging Co. v. Beaudry*, 15 Cal. App. 751-765, 115 Pac. 951.

It follows that respondents were not entitled to a judgment of dismissal.

The parts of the judgments from which appeals are taken are affirmed.

We concur: ANGELLOTTI, O. J.; SHAW, J.; VICTOR E. SHAW, Judge pro tem; SLOSS, J.; WILBUR, J.

On Rehearing.

PER CURIAM. The petition for rehearing is denied. The court does not construe the opinion herein as deciding the question as to what rights may be acquired in so-called "foreign waters," as between appropriators, or by prescription. The record in these cases presents a controversy between the plaintiffs claiming the waters in question solely by virtue of their lower riparian ownership of the banks of Bear river, of which Wolf creek is a tributary, and the defendants claiming the right to divert the foreign waters of Wolf creek by virtue of their appropriation and application of the same to beneficial uses.

(177 Cal. 507)

HOLLAND v. KELLY. (S. F. 7572.)

(Supreme Court of California. Dec. 27, 1917.

On Rehearing in Bank, March 18, 1918.)

1. DESCENT AND DISTRIBUTION §74—STATUTES.

On death of a wife, intestate, all of her estate, real and personal, vested in her heirs, under Civ. Code, §§ 1383, 1384, 1386, 1402, but without right of immediate enjoyment, the rights and duties of the administrator intervening.

2. DESCENT AND DISTRIBUTION §80—COLLECTION OF DEBTS—TITLE TO PERSONALTY.

Generally speaking, in the absence of some default or fraud or refusal on the part of the administrator to collect the property of the estate, the heir may not bring action in his individual capacity to collect debts due the estate or to preserve title to the personality.

On Rehearing.

3. DESCENT AND DISTRIBUTION §91(5) — COLLECTION OF ESTATE BY HEIR—PLEADING SPECIAL CIRCUMSTANCES.

In order to maintain an action for the recovery of or affecting the personal estate of his decedent, an heir in his complaint must set forth the special circumstances which constitute as to him an exception to the general rule that the qualified personal representative of deceased alone may sue.

4. EXECUTORS AND ADMINISTRATORS §57 — SUIT TO SET ASIDE FRAUDULENT TRANSFER BY INTESTATE.

An administrator cannot sue to set aside a fraudulent transfer made by his intestate unless there is a deficiency of assets wherewith to pay existing creditors.

5. EXECUTORS AND ADMINISTRATORS §49 — MONEY PROCURED FROM DECEDENT BY FRAUD—ACTION BY ADMINISTRATOR.

Where decedent in her lifetime might have sued to recover money in bank which she was induced to part with by fraud, it is her personal representative's duty to sue for the recovery thereof as part of the estate to which he is entitled.

Department 2. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Patrick Holland against Julia McCarthy. From a judgment for defendant, plaintiff appeals; William A. Kelly, as executor of defendant's estate, being substituted on her death. Judgment affirmed.

See, also, 158 Pac. 1045; 169 Pac. 1000.

W. E. Cashman, of San Francisco (R. M. F. Soto, of San Francisco, of counsel), for appellant. William A. Kelly, of San Francisco, for respondent.

MELVIN, J. Plaintiff appeals from a judgment entered after the sustaining of defendant's demurrer to the complaint and the failure of plaintiff to amend his pleading within the time allowed by the court. Upon suggestion of the death of Julia McCarthy, the executor of her last will has been substituted as respondent.

Patrick Holland sued as surviving husband of Mary Anne Holland, deceased, to quiet title to a fund deposited by said Mary Anne Holland during her lifetime in the bank of defendant, the Hibernia Savings & Loan Society. There are four counts in which it is elaborately pleaded that prior to her death Mrs. Holland, by an instrument in writing, apparently made the account payable to herself or Julia McCarthy or to the survivor; that thereafter Julia McCarthy caused the money to be transferred to another and new account in the names of "Julia McCarthy or Mary Anne Holland, payable to either or the survivor"; and that all of the original sum still remained on deposit in the said bank except \$500 drawn by Julia McCarthy during the life of Mrs. Holland. There are allegations, which we need not set forth in full, to the effect that Julia McCarthy by fraud, undue influence, and by plying Mrs. Holland with liquor, succeeded in wrongfully securing the fund in question, at a time when Mrs. Holland was incompetent lawfully to dispose of said property.

[1, 2] One of the points made by the demurrer to the complaint was that plaintiff did not have capacity to sue. This objection was, in our opinion, well taken.

While conceding that in California there is no authority supporting the right of one taking by inheritance as plaintiff herein to sue to quiet title to personal property of his decedent, nevertheless appellant bases his assertion of such right upon the propositions: (1) That upon the death of Mrs. Holland, intestate, all of her estate, real and personal, vested in her heirs (citing Civ. Code, §§ 1383, 1384, 1386, 1402; Estate of Patterson, 155 Cal. 626, 102 Pac. 941, 26 L. R. A. [N. S.] 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625; Raulet v. Northwestern National Insurance Co., 157 Cal. 213, 107 Pac. 292, and other authorities to the same effect); (2) that in California a tenant in common may sue alone without joining his cotenants (citing section 384, Code Civ. Proc.; Cassin v. Nicholson, 154 Cal. 497, 98 Pac. 190, and other authorities). While his premises are undoubtedly

correct, the conclusion drawn by appellant is erroneous. Indeed one of the sections cited in his brief (1384 of the Civil Code) provides that the property of an intestate passes to his or her heirs "subject to the control of the probate court." Therefore, in the absence of special equitable reasons (of a sort which are not set forth in this complaint), no heir as such would be permitted to sue directly to quiet title to property belonging to the estate of his intestate. While title to the property of his intestate vests in an heir upon the death of such intestate, his title does not carry with it the right of immediate enjoyment. The rights and duties of the administrator of the estate intervene between vesting of title and right to possession. Section 1452, Code of Civil Procedure, authorizing such suits by heirs or devisees, is limited to real property. Therefore, generally speaking and in the absence of some default or some fraud or a refusal on the part of the administrator to collect the property of the estate, the heir may not, in his individual capacity, bring an action to collect debts due the estate or one to preserve title to the personal property. *Robertson v. Burrell*, 110 Cal. 568, 42 Pac. 1086; *Bollinger v. Bollinger*, 154 Cal. 695-707, 99 Pac. 196; *Miller v. Ash*, 156 Cal. 544-556, 105 Pac. 600; *Rogers v. Schlotterback*, 167 Cal. 35, 56, 138 Pac. 728; 18 Cyc. 355.

Our conclusion upon this branch of the case removes the necessity of deciding whether or not plaintiff is estopped to prosecute this action by the decision of the District Court of Appeal in *McCarthy v. Holland*, 80 Cal. App. 495, 158 Pac. 1045, a case which we refused to transfer to this court on petition to that end.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.

On Rehearing.

VICTOR E. SHAW, Judge pro tem. Defendant's demurrer to the complaint was sustained, and plaintiff failing to answer within the time allowed therefor, a judgment was entered for defendant, from which plaintiff appeals.

The complaint is in four counts, and, in so far as material to our consideration of the case, alleges: That plaintiff and Margaret I. McNamara are the sole heirs of Mary Anne Holland, who died intestate; that at the time of her death deceased had on deposit in the Hibernia Savings & Loan Society the sum of \$5,633.43, which was her separate property; that some time prior to her death, by reason of the mental incompetency of the deceased and the wrongful acts of Julia McCarthy (for whom since her decease William Kelly, as executor of her estate, has been substituted as defendant), the latter secured from deceased a written instrument authorizing a transfer of said de-

posit from the name and account of Mary Anne Holland to a new account in the names of "Julia McCarthy, or Mary Anne Holland, payable to either, or the survivor"; that the instrument so authorizing such transfer was procured by undue influence; that it was never signed by Mary Anne Holland, nor delivered to Julia McCarthy, who wrongfully and without right claims title to the deposit of money. The prayer of the complaint is that said written instrument authorizing the transfer of the account be declared void; that said deposit of money be adjudged to be a part of the estate of the decedent; that the Hibernia Savings & Loan Society holds said money in trust for the use and benefit of the estate of deceased and for the plaintiff; and that the court direct that payment thereof be made to plaintiff. Among other grounds of demurrer sustained by a general order was want of plaintiff's capacity to maintain the action and want of sufficient facts to constitute a cause of action.

Assuming, as we must, against the demurrer, that this money as alleged belonged to deceased at the time of her death and that she died intestate, leaving plaintiff and Margaret I. McNamara as her sole heirs, they are, as provided by section 1384 of the Civil Code, entitled to it "subject to the control of the probate court, and to the possession of any administrator appointed by that court, for the purposes of administration." To like effect is section 1452 of the Code of Civil Procedure, which declares the executor or administrator entitled to the possession of all the estate of a decedent until the estate is settled or delivered by order of the court to those entitled thereto, but which, as to real estate only, provides that the heirs alone, or jointly with the executor or administrator, may sue to recover or quiet title to the same. By section 1581 of the Code of Civil Procedure, the executor or administrator is required to take into possession all the estate of a decedent, and by section 1582 such personal representative is empowered to institute actions for the recovery of such property, whether real or personal, "or to determine any adverse claim thereon." These sections, and the provisions of others pertinent to the subject, contemplate that transfers of property of deceased persons shall be effected by means of administration under the control and orders of the probate court acting under and pursuant to provisions of law designed to protect the rights and interests, not only of the estate of the decedent, but of all persons interested therein, whether creditors, claimants, heirs, or legatees. To permit one claiming to be sole heir of a deceased person, who is alleged to have died intestate, leaving a deposit of money in bank, to maintain an action of any character affecting the property, whether for the direct recovery thereof or to determine an adverse right thereto, is well calculated to lead to in-

evitable confusion and inconvenience. There might be legatees under a will, or heirs other than the one suing, or creditors of the decedent entitled to such money in payment of their claims, none of whom would be affected by the judgment.

Assuming that in the case at bar and upon issue joined upon all the allegations of the complaint, judgment had been rendered for the defendants, such judgment would be ineffectual as a plea in bar to an action against the same defendants for the same property brought by the administrator of the estate. One having possession of money or property of a decedent at the time of the latter's death should not at the suit of an heir be called upon at his peril to deliver or pay it over, unless he can conclusively establish for all time that there was no will, no legatees, no creditors of the estate, and no other heirs, without all of which he could not be exempt from liability, nor unless a judgment therein rendered in his favor would protect him in subsequent litigation for the same property by other heirs or the personal representatives of the deceased. In *Grattan v. Wiggins*, 23 Cal. 16, it is said, quoting from the syllabus:

"A debt due to the intestate is a personalty, and does not descend to the heir like realty, but vests in the administrator, who has the sole right to maintain actions to collect the same."

To this point the case was cited with approval in *Robertson v. Burrell*, 110 Cal. 568, 42 Pac. 1086, where the court says:

"Nor can the heir, by any act of his own, strip the representative of any of his rights, nor relieve him from the performance of any of his duties. The heir may sell his interest, but the administrator still has control of the property sold for the payment of debts and the general purposes of administration. The heir cannot bring an action to enforce payments or collect debts; and, even when he attempts to do so by suing in his individual capacity and as executor, the right of action not being in both, but in the executor alone, a demurrer will be sustained."

To the same effect is *Buchanan v. Buchanan*, 75 N. J. Eq. 274, 71 Atl. 745, 22 L. R. A. (N. S.) 454, 138 Am. St. Rep. 563, 20 Ann. Cas. 91, where it is held that the next of kin of a decedent have no standing in a court of law or equity to maintain an action for the recovery of property alleged to belong to the estate of their decedent. The general rule, supported by all the authorities in this as in other jurisdictions, is that in the absence of special circumstances an heir cannot maintain an action for the recovery of or affecting the personal estate of his decedent.

[3] If such be the general rule, then it follows that in order to maintain the action the

heir must in his complaint set forth the special circumstances which as to him constitute the exception to the rule, and by virtue of which he is entitled to maintain the action. To undertake to specify grounds which would bring a case within the exception could serve no purpose, since each case must be governed by the circumstances thereof. Sufficient to say that the complaint in the instant case (the material allegations of which we have set out) is entirely barren of any facts constituting grounds for invoking the equitable aid of the court in protecting plaintiff's interest in the estate of decedent. Such actions can be maintained only by the qualified personal representative of the deceased, the existence of whom, having charge of the estate, we must assume in the absence of any allegations to the contrary.

[4, 5] Appellant in support of his contention cites a number of cases to the effect that an administrator cannot sue to set aside a fraudulent transfer made by his intestate, unless there is a deficiency of assets wherewith to pay existing creditors. This is quite true, for the reason that the creditors only are interested. The heirs stand in the shoes of the fraudulent grantor, and since he would have been precluded from setting aside such conveyance it necessarily follows that they are likewise bound. *Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34; *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 303. The instant case, however, does not involve a fraudulent conveyance made by plaintiff's intestate. According to the complaint, the fraud and wrong whereby Mary Anne Holland was induced to part with the money was committed by Julia McCarthy, and since Mary Anne Holland in her lifetime might have brought suit to recover it, her personal representative not only has the power, but it is his duty, to sue for the recovery thereof as a part of the estate of decedent, to which, as administrator, he is entitled. The cases of *Tully v. Tully*, 137 Cal. 60, 69 Pac. 700, and *Estate of Page*, 57 Cal. 241, cited by appellant as upholding the right of an heir to bring suit to quiet title to real estate, are not applicable, for the reason that such right is secured by the provisions of section 1452 of the Code of Civil Procedure.

Upon further consideration of the case, we are satisfied with the conclusion reached in the department decision.

The judgment is therefor affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; WILBUR, J.; RICHARDS, Judge pro tem.

(177 Cal. 592)

COHEN v. ADOLPH KUTNER CO. et al.
(S. F. 7923.)(Supreme Court of California. Feb. 23, 1918.
Rehearing Denied March 25, 1918.)**1. EASEMENTS ⇨26(4)—STAIRWAY—DESTRUCTION OF BUILDING.**

An instrument giving an adjoining landowner, and her heirs forever, a right of way in a stairway in the grantor's building and referring to the privilege as an easement appurtenant to the grantee's property, conveyed no estate which survived the building's destruction by fire.

2. EASEMENTS ⇨26(4)—TERMINATION—DESTRUCTION OF BUILDING.

Ordinarily an adjacent landowner's right to use a particular part of a building for a special purpose terminates with the building's destruction.

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action to quiet title by Ethel Ruth Cohen against the Adolph Kutner Company, a corporation, and Alfred Kutner. Judgment for defendants, and plaintiff appeals. Affirmed.

Wise & O'Connor, of San Francisco, for appellant. Barbour & Cashin, of Fresno, for respondents.

MELVIN, J. In this case defendants' demurrer to the complaint was sustained without leave to amend, and judgment was accordingly entered.

Plaintiff sought by this action to quiet title to an alleged easement on the land adjoining her property which was owned by the defendants; for an injunction to restrain defendants from interfering with plaintiff's use of the said easement; for damages; and for other relief. The essential facts set forth in the complaint are as follows: In 1885 W. D. Grady was the owner of lots 27, 28, and 29 of block 72 of the city of Fresno. Defendants herein are his successors in interest. On the Grady property was a building and at one end of the building nearest to lot 30 was a stairway extending from the street to the second story of said building. Eliza Ruth desired to purchase a part of lot 30 in block 72 adjoining the property of W. D. Grady and belonging to his infant son. On February 6, 1885, Mr. Grady and Mrs. Ruth entered into an agreement whereby said Grady did "grant, bargain, sell, and confirm unto said" Eliza Ruth, and to her heirs and assigns forever, "a right of way in, over, down, and up said stairway on said lot 29 in said block 72." Eliza Ruth purchased the part of lot 30 adjoining lot 29, erected a building thereon in accordance with the terms of the written agreement, made a doorway opening from her building onto the stairway in question, and she and her tenants used the said stairway from that time until the year 1915, when the Grady building was destroyed by fire. Defendants are about to erect upon their property a one-story building, making

no provision for the restoration of the destroyed stairway.

[1, 2] It is agreed by counsel on both sides that there is just one question involved in this case, namely: Did W. D. Grady, by the instrument referred to, grant to Eliza Ruth any estate in the land? In order to discuss this question it will be necessary to quote the essential parts of the writing made by Mr. Grady and Mrs. Ruth. By the terms of this writing Mr. Grady, party of the first part,

"does hereby grant, bargain, sell, and confirm unto said party of the second part [Mrs. Ruth], and to her heirs and assigns forever, a right of way in, over, down and up said stairway hereinbefore described on said lot 29 in said block 72 as aforesaid; for the said party of the second part, her heirs and assigns and her and their servants and tenants, at all times freely to pass and repass, on foot or otherwise, from said public street in said town of Fresno to the landing of said stairway in the second story of said brick building of said party of the first part and from said landing to the said public street as aforesaid; the said stairway being of the width of five feet and running from said I street to the second story of said brick building belonging to the said party of the first part as aforesaid, and the said way shall be forever of the dimensions as aforesaid."

The closing paragraph of the instrument is as follows:

"To have and to hold said easement and privilege to the said party of the second part, her heirs and assigns, forever, as appurtenant to said lot 30 in said block 72."

Appellant insists that an easement was granted for the following reasons: First, the agreement refers to the right granted by Grady to Mrs. Ruth as an easement; second, the grant is in terms to her heirs and assigns forever; third, the habendum clause states that she is "to have and to hold said easement and privilege to the said party of the second part, her heirs and assigns, forever, as appurtenant to said lot 30 in block 72"; and, fourth, it is contended that the form of the entire instrument which appears to be most carefully drawn, permits of but one interpretation, and that is that a grant of an interest in the land was intended. While it is true that the right granted is referred to in the document as an easement, respondent cites authority to the effect that the words "easement" and "license" are used indiscriminately even by courts, and that in interpreting documents of this kind courts look to the intent of the parties rather than to the mere choice of words. As was said in *Cook v. Chicago, B. & Q. R. R. Co.*, 40 Iowa, 451-456:

"The distinction between a license and an easement is, oftentimes, very subtle and difficult to discern."

But, by whatever name we may call the right granted by the instrument in question, it is clear that the parties to the contract did not intend to convey any interest in the land beyond that which was necessary for the maintenance of the stairway during its

existence. We are convinced that upon the destruction of the building the right of the plaintiff to the use of defendants' property ceased. The authorities amply sustain this conclusion. Mr. Leonard A. Jones, in his treatise on Easements, at section 838, uses the following language:

"An easement in a building is extinguished by the destruction of the building, so that there is nothing upon which it can operate. An easement is an interest in real estate, and survives the destruction of a part of the servient estate when there is anything remaining upon which the dominant estate may operate. If the right is a mere license, the fact of destruction is not material, since the denial of the right works a revocation; there being no such right as a license not subject to revocation and falling short of an easement. But a reservation on the sale of half a lot improved by a double building, of a right of way over the stairways of the other half, such as would be necessary to the proper use of the second story, does not create an interest in the soil which survives the destruction of the building."

In support of his text he quotes *Shirley v. Crabb*, 138 Ind. 200-204, 37 N. E. 130, 46 Am. St. Rep. 376. Another oft-quoted authority which sustains respondents' position is *Hahn v. Baker Lodge*, No. 47, 21 Or. 30, 27 Pac. 166, 13 L. R. A. 158, 28 Am. St. Rep. 723. Defendant in that case owned a lodge hall in plaintiff's building, and as appurtenant thereto possessed an easement to a means of ingress and egress. The building was destroyed by fire, and subsequently defendant undertook to exercise its supposed right of rebuilding the walls for the purpose of reconstructing an upper story and recreating a middle room in place of the one destroyed by fire. It was held that under the language of the grant to the defendant no interest in the property was given, and that upon the loss of the building the right to maintain the room vanished. Regarding the easement, the court spoke as follows:

"The remaining question is whether the easement for the purpose of ingress and egress was extinguished by the destruction of the building. The facts show that such easement was granted for the particular purpose of affording ingress and egress to the building. Without it the principal thing (the room granted) would be practically useless. It was essential and necessary for the enjoyment of the room, and was granted on account of it. Nor is it of any use, within the purposes of the grant, without the existence of the room. In such case the general rule, as stated by Mr. Washburne, is that, 'if an easement for a particular purpose is granted, when that purpose no longer exists, there is an end of the easement.' Wash. on Eas. 654, 657. When the reason and necessity for the easement ceased, within the intent for which it was granted, as it did when the building was destroyed by fire, it would logically result there was an end of the easement."

In *Douglas v. Coonley*, 84 Hun, 158, 32 N. Y. Supp. 444, the conveyance under discussion granted, sold, and conveyed to Margaret A. Cantwell, her heirs and assigns, the right of way to pass and repass up and down the passageway or stairway between the store owned by said Margaret A. Cantwell and that of the grantors. The Appellate Divi-

sion of the Supreme Court held that the easement continued only so long as the building of which the stairway was a part existed, and that it ceased with the destruction of the building. In that case it appeared, however, that the building had been reconstructed upon exactly the same lines as its predecessor, and the Court of Appeals reversed the judgment, holding that under the peculiar circumstances of the case the easement had been revived. *Douglas v. Coonley*, 156 N. Y. 521, 51 N. E. 283, 66 Am. St. Rep. 580. That decision, however, is authority in favor of respondents' position in the case at bar. In the very able opinion by Mr. Chief Justice Parker the following language is used:

"The Appellate Division regarded the case as controlled by *Heartt v. Kruger*, 121 N. Y. 386 [24 N. E. 841, 9 L. R. A. 135, 18 Am. St. Rep. 829]. That case is certainly authority for the proposition that these plaintiffs had no right to insist upon a reconstruction of the party wall or of the stairway. The buildings having been destroyed without fault on the part of the defendants, it was their right thereafter to make such use of the land as should seem to them most conducive to their interests; they could not by their own act affect the plaintiffs' easement, but an outside force beyond the defendants' control having destroyed the buildings and the major part of the party wall, it was within their power thereafter to so use the land that the plaintiffs' easements should not be revived. Had they done so, a situation would have been presented within the doctrine of *Heartt v. Kruger*, supra."

It is to be noted that the terms of the grant in the *Coonley* Case and those of the writing in the case before us are very similar. Plaintiff's predecessor in this case was granted "a right of way in, over, down, and up said stairway." While there was a covenant for maintenance of the stairway at the width indicated, there was no agreement to rebuild in case of its destruction, and there can be, we think, no rational doubt that the parties had not in contemplation the grant of any interest in the real property as distinguished from the stairway itself.

The use of the word "forever" in connection with the words "heirs and assigns" adds no particular strength to plaintiff's position. Doubtless that word would become highly significant if defendants had reconstructed the building on its former lines without building a stairway similar to the one destroyed by fire. But in the present state of facts the word "forever" does not, as we have indicated, assist plaintiff materially. Nor is the appurtenance made a perpetual adjunct to the soil merely because it is specified as an appurtenance in the grant. An appurtenance does not remain a servitude for all time, but only during the existence of the servient tenement. Where a mere right to use a part of a building is granted, no proprietary interest in the land is conveyed, and upon this principle it has been held that one to whom is granted the right to construct a second story upon a building "to have and to

own said second story" for his use perpetually does not thereby acquire any proprietary interest in the freehold of which such second story becomes a part. *Thorn v. Wilson*, 110 Ind. 325, 11 N. E. 230, 59 Am. Rep. 209. Generally speaking, the right to the use of a particular part of a building for any special purpose by the owner of adjacent property terminates with the destruction of the building, and the courts will only hold otherwise in cases where a different intention is plainly manifested by the language of the grant. For example, the right to the use of a wall on a neighbor's property ends when the building of which the wall is a part is destroyed by fire. *Bowhay v. Richards*, 81 Neb. 764, 116 N. W. 677, 19 L. R. A. (N. S.) 883. And the Supreme Court of New Hampshire has held that the grantee of a right to grind at a cornmill cannot maintain an action against one owning the mill for not keeping it in repair. *Bartlett v. Peaslee*, 20 N. H. 547, 51 Am. Dec. 242. It is unnecessary to multiply authorities upon this point.

As we are convinced by an examination of the instrument pleaded by plaintiff that the intent of the parties thereto was that the easement over the stairway should be enjoyed only while the building existed, in its then present form, we agree thoroughly with the conclusions reached by the superior court.

The judgment is affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 618)

KEMPER v. INDUSTRIAL ACC. COMMISSION. (S. F. 8434.)

(Supreme Court of California. Feb. 25, 1918.
Rehearing Denied March 25, 1918.)

1. MASTER AND SERVANT §414—WORKMEN'S COMPENSATION—POWERS OF COMMISSION.

The Industrial Accident Commission has the power to determine whether or not it has jurisdiction to hear a controversy after the apparent bar caused by the passage of the period of the statute of limitations.

2. LIMITATION OF ACTIONS §15—AGREEMENT—ESTOPPEL.

Parties to a controversy may agree to forego the statute of limitations for a definite period, and such an agreement may operate as an estoppel to a plea of the statute.

3. LIMITATION OF ACTIONS §15—WAIVER—ESTOPPEL.

Where employer and insurer agreed to waive the statute of limitations for a reasonable time, as to an injured servant's claim, when he later attempted to file a claim, he ceased to rely on such waiver or estoppel, and when his claim was not completed for over six months thereafter, a denial of award could not be disturbed, since estoppel in no case extends beyond the act done or omitted in reliance on the conduct or representation of the party sought to be estopped.

In Bank. Proceeding by William H. Kemper for workmen's compensation, opposed by

the Nathan-Dohrmann Company, employer, and the Aetna Life Insurance Company, insurer. To review a denial of an award by the Industrial Accident Commission, Kemper seeks writ of review and order to show cause. Order discharged, and writ denied.

Edwin H. Williams and George J. Hatfield, both of San Francisco, for petitioner. Christopher M. Bradley and Redman & Alexander, all of San Francisco, for respondent.

MELVIN, J. Petitioner sought a review of a judgment made by respondents, as members of and constituting the Industrial Accident Commission of the state of California, denying to such petitioner any compensation for certain injuries which the commission found he had sustained in the course of his employment on or about the 29th day of September, 1915. An order to show cause was issued, and a hearing was duly had before this court.

On the date mentioned the applicant received an injury to his hand by scratching it upon a piece of scrap iron. Infection set in, but in October he returned to his employment, and worked from that time until nearly the end of November. In December he was afflicted with what was believed to be metastatic infection, and he quit work until the 3d day of January, 1916, when he returned to his employment and remained two weeks. Subsequently he went to a hospital and was treated for serious illness for a long time. An application for adjustment of the controversy was not filed until the 5th day of March, 1917, and the Industrial Accident Commission found that under the limitation provided by section 16 of the Compensation Act (St. 1913, p. 279) his cause of action was barred. The commission found that under the facts the applicant would have been entitled to compensation, but, "inasmuch as he failed to file any application at all until more than six months from the date when disability occurred, this commission is without jurisdiction to extend any relief in the premises."

The petitioner admits that his claim was not filed within the time prescribed by the statute, but insists that the time limit was waived by the defendants below. Respondents contend, however, that conceding everything claimed by petitioner, he did not rely upon any assurances of the defendants after October, 1916, and that therefore he is not entitled to claim estoppel after that date. The applicant asserts that he relied upon a letter written by Mr. Stockwell, of the Aetna Life Insurance Company, his employer's insurance carrier, and also upon the assurances given him by Mr. Nevin, superintendent of Nathan-Dohrmann Company, his employer. It appears virtually without con-

tradition that Mr. Nevin, at the suggestion of Mr. Kemper, took up with the insurance company the matter of a waiver of the statute of limitations, and such a letter was written under date of September 21, 1916, and was as follows:

"In re W. H. Kemper.

"Mr. Muesdorffer has requested us to write you concerning our attitude in regard to pleading the statute of limitations if a claim should be made against us by the above injured before the Industrial Accident Commission. While the time within which the injured has to prove his claim has long since passed, we are willing to waive the statute of limitations if the injured presents his claim within a reasonable time from this date."

[1-3] We are of the opinion that undoubtedly the commission has the power to determine whether or not it has jurisdiction to hear a controversy after the apparent bar caused by the passage of the period of the statute of limitations. It is undoubtedly true that parties to a controversy may enter into an agreement to forego the statute of limitations for a definite period, and that such an agreement may operate as an estoppel to a plea of the statute. *Wells Fargo & Co. v. Enright*, 127 Cal. 669, 60 Pac. 439, 49 L. R. A. 647; *State Loan & Trust Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600. But nevertheless we do not feel constrained to set aside the action of the Industrial Accident Commission for the reason that the uncontradicted testimony shows that after October, 1916, when Mr. Kemper took affirmative action looking to the filing of his claim for compensation, he no longer depended upon the agreement to forego the statute. At that time he telephoned to the officers of the commission advising them of his condition and telling them of his desire to file a claim. A representative of the Industrial Accident Commission was sent to the hospital. A blank application was partially filled. The employé of the commission was requested to complete the preparation of the document and to file it with the commission, and Mr. Kemper supposed that he had done so, but, as a matter of fact, no claim was actually filed until March, 1917.

As is suggested by respondents, the insurance carrier is not responsible for this abortive attempt on Kemper's part to commence his suit. Obviously he did not rely upon the agreement to forego the statute after the day he took matters into his own hands, for he then intended to wait no longer. Estoppel "in no case extends beyond the act done or omitted in reliance on the conduct or representation of the party sought to be estopped." 16 Cyc. 783; *Bigelow on Estoppel* (6th Ed.) 694 et seq. The person asserting an estoppel must be induced to act or refrain from acting by his opponent's conduct. *Barnhart v. Fulkerth*, 93 Cal. 497, 29 Pac. 50. Considered in its strongest aspect, the

waiver of the statute of limitations only extended to a reasonable time from the date thereof. Undoubtedly the commission was clothed with authority to determine what in fact was a reasonable delay for the commencement of the action, and inasmuch as the commissioners have determined this question, we are not in a position to overrule their findings. While the language of the commission to the effect that it was without jurisdiction to determine that the waiver nullified the plea of the statute of limitations is somewhat equivocal and not altogether clear in its meaning, it is probable that, as suggested by counsel for respondents, "the person drawing the findings for the commissioners merely meant to convey the idea that, as the plea of the statute of limitations had been sustained, the commission would not hear the case in chief." But, whatever may have been the intent of the commissioners in the use of the word "jurisdiction," the fact remains that they had the right to apply the statute of limitations under the facts as presented, that they did apply it, and that therefore their finding must stand.

Upon this record we may not review the judgment.

The order to show cause is discharged, and petitioner's prayer for the issuance of a writ of certiorari is denied.

We concur: ANGELLOTTI, C. J.; SHAW, J.; VICTOR E. SHAW, Judge pro tem.; WILBUR, J.; SLOSS, J.; RICHARDS, Judge pro tem.

(177 Cal. 610)

MARYLAND CASUALTY CO. v. MATSON NAV. CO. et al. (S. F. 7428.)

(Supreme Court of California. Feb. 23, 1918. Rehearing Denied March 25, 1918.)

1. WHARVES & 22—INJURIES TO—LIABILITY. In action for damages from collision of defendant's steamer with dock warehouse of plaintiff's assignor, plaintiff could only recover upon a sufficient showing of negligence on the part of defendants in the handling of their steamer.

2. APPEAL AND ERROR & 1011(1)—FINDING BASED ON CONFLICTING EVIDENCE—REVIEW. The evidence being in sharp conflict on issue of negligence, trial court's finding that defendants were not negligent will not be disturbed.

3. WHARVES & 22—INJURIES DUE TO SUDDEN UPHEAVAL OF TIDE.

Defendants handling their vessel with due care would not be responsible for injury to dock if heaving forward of vessel, the cause of injury, was due to the sudden upheaval in tide.

4. NEGLIGENCE & 121(2)—RES IPSA LOQUITUR—APPLICATION.

Conceding that plaintiff was entitled to the application of the principle of *res ipsa loquitur*, defendants could avoid its application by an affirmative showing of due care which would justify a court finding that any inference to be drawn from application of principle had been overcome.

Department 1. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by the Maryland Casualty Company against the Matson Navigation Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Gavin McNab, A. H. Jarman, and Nat Schmulowitz, all of San Francisco, for appellant. Andros & Hengstler and Golden W. Bell, all of San Francisco, for respondents.

RICHARDS, Judge pro tem. This is an action for damages, commenced by the plaintiff as assignee of California & Hawaiian Sugar Refining Company, against the defendants, said damages being alleged to have arisen by reason of the negligence of the defendants in the management and operation of the steamer Hyades, through which the said steamer collided with the dock warehouse of the California & Hawaiian Sugar Refining Company, at Crockett, Cal.; the consequence of which collision being the breakage of certain water pipes constituting a sprinkler system for the extinction of fire within said warehouse, by which the waters in said pipes escaped and damaged a large quantity of sugar stored therein. The complaint sets forth in detail the facts relating to the arrival of the steamer Hyades at the dock of the plaintiff's assignor on the day preceding the occurrence of the collision, and its safely docking there and discharging the greater part of its cargo, after which it moved out into the bay, remaining over night, but returning the following morning to resume its former position at the dock. It was while said steamer was again attempting to lay alongside of said dock that the collision occurred which caused the damage out of which this action arose. The complaint in that behalf alleges that the defendants so willfully, negligently, carelessly, and unskillfully managed and steered said steamer that it ran into said dock warehouse with great force, tearing and destroying a portion of the north wall thereof, and causing the immediate injury complained of. The answer of the defendants, while admitting in the main the plaintiff's detailed statement of the movements of the steamer on the day preceding the accident, and up to the time of its attempted second docking at the pier, denies that the management and operation of its said steamer was in any respect negligent, careless, or unskillful, or that said steamer ran into or against said dock warehouse through any negligence, willfulness, or want of skill upon the defendants' part. The defendants' answer proceeds to aver that the only negligence existing at the time of such accident was that of the plaintiff's assignor, consisting in the maintenance by it of an improper, insecure, insufficient, and faultily constructed dock warehouse, by reason of which the injuries in question arose.

The cause was tried by the court sitting without a jury, and upon submission of the cause it made its findings of fact to the effect that the defendants had been guilty of no negligence, carelessness, or unskillfulness in the management and operation of their said steamship at the time of the collision, or at any time having relation thereto; as to the defendants' plea regarding the improper and faulty construction of the dock warehouse of plaintiff's assignor, the court found "that said dock warehouse at the time when said steamer Hyades made fast thereto was improper, insecure, insufficient, and faulty in its construction and nature." The judgment of the court was accordingly in the defendants' favor, and from such judgment the plaintiff prosecutes this appeal.

[1] The appellant takes the position that the only question presented upon this appeal is the question as to whether the defendants were negligent, careless, or unskillful in their attempted docking of said steamer at the immediate time of the accident from which its assignor's injuries arose. Our attention is called to a colloquy between counsel for the respective parties to the action, at the inception of the trial, as a result of which, according to the appellant's contention, every other question, including the question as to the faulty construction of the dock warehouse, was eliminated from the case. The respondents did not so construe the colloquy, and apparently the trial court did not regard the issue as to the faulty construction of the dock warehouse as abandoned, since it made a finding thereon; but in our view of the case this particular controversy is not material, since the plaintiff could only recover, if at all, upon a sufficient showing of negligence on the part of the defendants in the handling of their ship, as a result of which the injury complained of arose; and if the finding of the trial court, to the effect that there was no negligence in respect to the matter complained of on the part of the defendants, is sustained by sufficient evidence, there is an end to the plaintiff's case.

[2, 3] Upon this branch of the case the record is voluminous, and the evidence is in sharp and irreconcilable conflict. Just what caused the collision does not appear very definitely, but there is ample evidence on the part of eyewitnesses to the docking of the ship to justify the finding of the trial court that this was being brought about in the exercise of due care on the defendants' part; and there is also some evidence to the effect that the action of the vessel in heaving forward at a critical moment in the process of bringing her up to the dock was due to a sudden upheaval in the tide, throwing the bow of the ship in towards the wharf in such a way as to strike the dock warehouse at the point of its injury; a fact for which the defendants would not be responsible, if, as the court finds, they were handling their ship with due care. In this state of the evi-

dence in the case this court will not disturb the findings and judgment of the trial court.

[4] The appellant, however, contends that it is entitled to the application of the principle of *res ipsa loquitur* in aid of its assertion that the accident occurred through the negligence of the defendants. But conceding, without determining, that this is a proper case for the application of this principle, and that the plaintiff would have had a right to rely upon it, as affording a *prima facie* showing of negligence, still the defendants would not be prevented from avoiding its application and effect by affirmative proof that it had been in no wise negligent in docking its ship; and the trial court, sitting as a jury and hearing these proofs, would be entitled to find, as it did find, that any inference which might have arisen through the application in the plaintiff's favor of the doctrine of *res ipsa loquitur* had been overcome by the defendants' affirmative showing of due care.

Judgment affirmed.

We concur: SLOSS, J.; SHAW, J.

(177 Cal. 614)

FIDELITY & CASUALTY CO. OF NEW YORK et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.
(L. A. 4794.)

(Supreme Court of California. Feb. 25, 1918.
Rehearing Denied March 25, 1918.)

1. MASTER AND SERVANT — 371—WORKMEN'S COMPENSATION ACTS — CONSTRUCTION — "ACCIDENT."

Under the Workmen's Compensation Act (St. 1913, p. 279) § 12, as it stood in January, 1914, providing for compensation for any personal injuries by accident arising out of and in the course of the employment, the word "accident" cannot be confined to an injury by external, violent, and accidental means, but includes injuries to workmen which are unexpected and unintentional.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident.]

2. MASTER AND SERVANT — 371—WORKMEN'S COMPENSATION ACTS—CONSTRUCTION—"ACCIDENT."

A show card sign writer who used quantities of wood alcohol in an air brush used in writing cards, and owing to rush of work used such quantities of the alcohol that his sight was permanently impaired, was entitled to compensation: his injuries having been sustained by accident.

In Bank. Application to the Industrial Accident Commission by Lester M. De Witt for workmen's compensation, opposed by Jacoby Bros., Incorporated, employer, and the Fidelity & Casualty Company of New York, Incorporated, insurer. To review an award of the Commission in favor of the applicant, the insurer and the employer apply for writ of review against the Commission and A. J. Pillsbury and others, members thereof. Petition denied and award affirmed.

Jennings & Horton and R. P. Jennings, all of Los Angeles, for petitioners. Christopher M. Bradley, of San Francisco (Frank P. Doherty, of Los Angeles, of counsel), for respondents.

RICHARDS, Judge pro tem. This is an application for a writ of review after an award by the Industrial Accident Commission in favor of one Lester M. De Witt against his employers, Jacoby Bros., a corporation, and its insurer, the Fidelity & Casualty Company of New York, a corporation, the petitioners herein.

The facts of the case upon which it is alleged by the petitioners that the commission arrived at an erroneous conclusion as a matter of law are set forth in the findings of the commission, which it is conceded there was evidence adduced before it sufficient to support. Said findings are as follows:

"(1) That Lester M. De Witt, applicant herein, was injured by accident on the 7th day of January, 1914, while in the employment of defendant Jacoby Bros., and that said accident arose out of and happened in the course of said employment and in the manner following:

"(a) Said Lester M. De Witt was for about two years prior to the happening of said accident a show card sign writer, and, the better to shade in colors in the artistic writing of said cards, he was, and for about 1½ years had been, in the habit of using dyes dissolved in wood alcohol and forced through a fine needle by air pressure.

"(b) That ordinarily he used this appliance only a very small portion of time, but during the holidays immediately preceding said accident there was a very much greater use of [this] apparatus, and directly after the holidays, when the pressure of work had somewhat slackened, said De Witt used an extraordinary quantity of wood alcohol in cleaning the apparatus and in washing and cleaning his hands; that he used such extraordinary quantity by pouring it on cloths.

"(c) That on the 7th of January said De Witt had not noticed anything the matter with his eyesight, but, on that day, he suddenly found that his vision was very greatly affected and went to see an oculist who fitted him with glasses, but told him that glasses would do him very little good because there was a degeneration of the optic nerves.

"(d) By the 13th of January he was entirely unable to use his eyes for the work he had been doing, and from and after that date until the date of hearing had been barely able to make his way about the streets and was unable to do any work requiring even ordinary vision.

"(e) That, while using wood alcohol, as hereinbefore described, for such cleaning purposes, on or about the 7th of January, 1914, the eyes and optic nerve were exposed to and came in contact with the vapor of wood alcohol in unusual quantities, involving the sudden impairment of the vision of said applicant, and that said injuries so received constituted an accident which arose out of and happened in the course of said employment, and were not the result of an occupational disease."

[1,2] It is the concluding phrase of the foregoing findings which the petitioners assail as a legal conclusion not justified by the language of the Workmen's Compensation Act as it read at the time of the injury up-

on which the award herein was made. Section 12 of the Workmen's Compensation Act, the so-called Boynton Act, as it stood in January, 1914, the time of the applicant's injury, provided that:

"Liability for the compensation provided by this act, in lieu of any other liability whatsoever, shall, without regard to negligence, exist against an employer for any personal injuries sustained by his employes by accident arising out of and in the course of the employment."

It is the contention of the petitioners herein that the injury suffered by the applicant under the state of facts as found by the commission was not an "injury sustained by accident" within the meaning of that phrase as used in the foregoing excerpt from the Workmen's Compensation Act. In support of this contention the petitioners urge that the words "injury sustained by accident" are to be given a meaning which would confine their application to cases where the means or cause of the injury was accidental; as where it was the result of a casualty or of the happening of some precedent circumstance or event which, being itself unexpected or out of the ordinary, was thus to be deemed accidental; and that the word "accident" as employed in the act cannot be given application to the instant case where the result in the way of injury to the applicant, however unexpected and unintended, was due to the doing by him of acts which he intended to do and to the use of means which he intended to use in the course of his ordinary employment. In support of this contention the petitioner herein chiefly relies on the cases of *Rock v. Travelers' Ins. Co.*, 172 Cal. 463, 156 Pac. 1029, L. R. A. 1916E, 1196, and the cases cited therein, where this doctrine is laid down as applicable to accidents to recover upon ordinary life or accident insurance policies. There can be no doubt as to the correctness of the principle announced in these cases in respect to the construction to be placed upon such insurance policies which, as in the case of the policy sued upon in the *Rock Case*, limited their application to "injuries effected through external, violent and accidental means."

This court has, however, heretofore held that the phrase "injuries sustained by accident" as used in the Workmen's Compensation Act is to be given the broader interpretation in harmony with the spirit of liberality in which it was conceived and in which by the terms of the act we are required to construe it, so as to make it applicable to injuries to workmen which are unexpected and unintentional and which thus come within the meaning of the term "accidents" as it is popularly understood. In adopting this interpretation of the terms of the act above referred to we have been mindful of the source from which our statute was evident-

ly derived, viz. the Workmen's Compensation Act of England, enacted by Parliament in the year 1897, under section 1 of which employers are declared to be liable to their employes for "personal injuries by accident arising out of and in the course of the employment." Construing this act of Parliament, Lord MacNaughton, in the leading case of *Fenton v. Thorley, Ltd.* (1903), A. C. 443, said:

"The expression 'accident' is used in the public and ordinary sense of the word as denoting an unlooked for event which is not expected or designed."

In the case of *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398, this language was expressly adopted as defining the word "accident" as used in our Workmen's Compensation Act. In the case of *Southwestern Surety Insurance Co. v. Pillsbury*, 172 Cal. 769, 158 Pac. 762, this court drew attention to the distinction to be drawn between cases arising out of the more limited phraseology of life or accident insurance policies as illustrated in the *Rock Case*, and the broader meaning to be applied to the language employed in the Workmen's Compensation Act; while in the yet more recent case of *Ocean Accident & Guaranty Co. v. Industrial Accident Com.*, 173 Cal. 313, 159 Pac. 1041, L. R. A. 1917B, 336, the words of the act in question were again considered as having been taken literally from the Workmen's Compensation Act of England with the construction they had there received prior to their incorporation into our California statutes. Applying this current of authority to the facts of the case at bar, it must be evident that the injury suffered by the applicant as set forth in the findings of fact of the Industrial Accident Commission and for which he was awarded compensation was an "accident" within the meaning of the act. Many cases might be cited from other states having similar statutes and from England, in which like unforeseen, unexpected, and unintended injuries to employes have been classed as "accidents" and held sufficient to justify awards, such as injuries sustained by persons while lifting heavy objects, or through exposure to drafts or chilly air, or icy water in mines, or through the rupture of blood vessels brought on by unusual heat or over exertion, or through the inhalation of poisonous gases, and the like; but we think the reasoning of the decisions of this court above cited sufficient to define the scope and meaning of the act so as to justify its application to the instant case.

For the foregoing reasons the petition herein is denied, and the award of the commission affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; WILBUR, J.; MELVIN, J.

(177 Cal. 600)

HALLIDIE v. FIRST FEDERAL TRUST CO. (S. F. 7678.)(Supreme Court of California. Feb. 23, 1918.
Rehearing Denied March 25, 1918.)**1. APPEAL AND ERROR §996, 1011(1)—FINDINGS BASED ON CONFLICTING EVIDENCE—REVIEW.**

Finding made upon conflicting evidence is conclusive, and appellate court must view inferences which the trial court might reasonably have drawn as evidence tending to support the finding assailed.

2. FRAUD §20—RELIANCE ON MISREPRESENTATIONS—NECESSITY.

Reliance on fraudulent misrepresentations is a necessary element in an action based on fraud or deceit.

3. FRAUD §58(4)—RELIANCE ON REPRESENTATIONS—SUFFICIENCY OF EVIDENCE.

In an action to compel an accounting for dividends realized by purchaser of shares of stock, *held*, under evidence, that the seller did not rely upon purchaser's alleged fraudulent representations, but upon his own judgment, experience, and information.

4. FRAUD §23—PARTIES IN FIDUCIARY RELATION—DUTY TO DISCLOSE FACTS.

As between the purchaser of stock who was director and general manager of a corporation and the seller who was director and president, there was no duty of either to disclose all facts within his knowledge.

5. CORPORATIONS §116—SALE OF STOCK—SETTING ASIDE—GROUNDS—INADEQUACY OF PRICE.

Where the parties stood on equal terms, that stock purchased was worth very much more than the price paid would not afford a ground for setting aside sale.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Martha E. Hallidie, as trustee for the stockholders of the California Wire Works, against the First Federal Trust Company, as administrator of the estate of Victor Enginger, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Osgood Putnam and Wm. O. Crittenden, both of San Francisco, and Chas. C. Boynton, of Oakland, for appellant. Cushing & Cushing, William H. Gorrill, and Wm. S. McKnight, all of San Francisco, for respondent.

SLOSS, J. For many years California Wire Works, a corporation, had been engaged in the manufacture of various wire products, including wire netting. The company had been founded by A. S. Hallidie, who was its manager and principal stockholder. Victor Enginger, who had been in its employ, engaged in the manufacture of wire cloth and netting on his own account. In 1895 Hallidie and Enginger organized California Wire Cloth Company, a corporation which was formed to take over the wire cloth and netting business of the wire works and that of Enginger. Enginger took a majority of the stock of the new corporation, and became its treasurer and general manager. Certain machinery of the wire works was sold to the

wire cloth company for an agreed price, paid in part by the issuance to California Wire Works of 50 shares of the capital stock of the California Wire Cloth Company, regarded by the parties as paid up to the extent of \$50 per share.

In January, 1899, Enginger bought these 50 shares for \$1,625, or \$32.50 per share. The present action was brought to compel an accounting of dividends and other proceeds realized by the purchaser, on the ground that the sale had been induced by fraudulent misrepresentations made by Enginger to Hallidie, who was acting in the transaction for California Wire Works. The plaintiff, who is the widow of A. S. Hallidie, maintains the action as trustee for the stockholders of California Wire Works, which has forfeited its charter. Judgment went in favor of the defendant Enginger, and the plaintiff appeals. Pending the appeal Enginger died, and the First Federal Trust Company, the administrator of his estate, has been substituted as defendant and respondent.

The findings of the court were against the averments of fraud contained in the complaint. There is a further finding that neither Hallidie nor the California Wire Works acted or relied upon any false statement or representation alleged to have been made by Enginger. The only substantial ground urged by the plaintiff in support of her appeal is that the evidence does not support these findings.

The complaint set up two classes of fraudulent misrepresentations, which, as was claimed, had operated to induce Hallidie to sell the stock of the wire works to Enginger at \$32.50 a share. It was alleged, in considerable detail, that during the several years preceding the sale Enginger had made false entries in the inventories and accounts of said California Wire Cloth Company, and had thereby deceived Hallidie into the belief that the assets and profits of said corporation were smaller than they in fact were. We may dismiss this branch of the case with the statement that the court found that there had been no falsification of the corporate records, and that a reading of the transcript satisfies us that the appellant concedes little enough when she admits that this finding is sustained by the evidence. The learned judge of the trial court had strong warrant for saying, as he did, that "the evidence is conclusive that the defendant [Enginger] did not make those alterations." The other alleged misrepresentations were oral, relating, principally, to the profits earned by the California Wire Cloth Company for the two or three years preceding the purchase of the fifty shares by Enginger. In substance, the allegation of the complaint is that the corporation had made large profits during the years from 1895 to 1899; that Enginger repeatedly

stated to Hallidie that the company was not making any profits; that these representations were made by him for the purpose of misleading Hallidie and inducing him, as manager of the California Wire Works, to sell said 50 shares of stock to defendant for a price far below their actual value, which is alleged to have been, at the time of the sale, in excess of \$185 per share.

[1] As we have said, the court found that no false representations were made. The appellant's claim that this finding is contrary to the uncontradicted evidence is based upon a distorted and partial view of a few isolated extracts from the testimony of Enginger. Findings made upon conflicting evidence are conclusive here, and an appellate court must view all inferences which the trial court might reasonably have drawn as evidence tending to support a finding assailed. *Ryder v. Bamberger*, 172 Cal. 791, 158 Pac. 753. The record, read in the light of this rule, is entirely consistent with the conclusion that whatever representations Enginger may have made to Hallidie were substantially true. Much is sought to be made of the fact that the California Wire Cloth Company derived large profits from the sale of netting for use in fish nets, a branch of business that began to develop shortly before the sale of the shares of stock here in question. Without going into this matter at length, we deem it sufficient to say that the evidence fully justified the conclusion that Enginger said and did nothing tending to mislead Hallidie in this, or in any other matter affecting the value of the stock.

[2, 3] But, regardless of these considerations, the appellant is still confronted by the finding that Hallidie did not rely upon Enginger's statements. Such reliance is, of course, a necessary element in an action based on fraud or deceit. *Maxon-Nowlin Co. v. Norswing*, 166 Cal. 509, 137 Pac. 240. The finding is amply sustained by the evidence. Hallidie was a man of long experience in the manufacture and sale of the very class of articles made and sold by the California Wire Cloth Company. The California Wire Works, of which he was manager, had for many years been engaged in the manufacture of wire netting. As stated above, the wire cloth company was organized for the purpose, among other things, of taking over the wire netting business and machinery of the California Wire Works. Hallidie became a director and the president of the California Wire Cloth Company, and continued in these capacities until the sale of the 50 shares. It was his practice to attend the meetings of the board of directors, which were held monthly. While his health was somewhat impaired, there is no suggestion that he was suffering from any mental weakness or derangement, or that he was incapacitated from attending to business. At the meetings of the California Wire Cloth Com-

pany, statements of the accounts and transactions of the company were presented by Enginger and read to the directors. The general conditions of the business were discussed. The evidence indicates that, throughout the first years of the business career of the wire cloth company, Hallidie was anything but optimistic with regard to the company's ability to realize substantial profits from the manufacture of wire netting. In August or September, 1898, Enginger made an offer of \$32.50 per share for the stock owned by California Wire Works. Hallidie did not act on the offer for three or four months. Finally, in January, 1899, he advised Enginger that the board of directors of the Wire Works had decided to sell the stock at the figure offered. Just prior to this, public announcement had been made of a consolidation of the manufacturers of wire to whom the wire cloth company had to look for its supplies of wire to be used in the making of its netting and cloth. The record justifies the inference that Hallidie feared that the manufacture and sale of wire netting would be rendered more difficult and hazardous by the amalgamation, and that this apprehension was, in large part at least, the moving cause of his decision to sell. At any rate, the trial court was warranted in concluding that Hallidie relied upon his own judgment, experience and information in acting upon the offer made by Enginger. That he had not the same faith in the future of the business that Enginger had is apparent. That the subsequent progress of the corporation vindicated Enginger's judgment is equally plain. But the fact that the purchase proved very profitable to Enginger would not justify a court in setting it aside.

[4] It is suggested in the appellant's brief that, even if there was no active misrepresentation by Enginger, there was a failure upon his part to disclose all of the facts within his knowledge. But the evidence did not show any such relation between the parties as to impose upon Enginger the stringent obligations of a trustee. While Enginger was a director and general manager of the wire cloth company, it must be remembered that Hallidie himself was not only a director but the president of the corporation. In negotiating for the stock, the two stood on equal terms, and neither owed the other any special duty of a fiduciary nature.

[5] This being the relation between the parties, the fact, if it be a fact, that the stock was, at the time of the purchase, worth very much more than the price paid, does not furnish a ground for setting the transaction aside.

"Where the parties were both in a situation to form an independent judgment concerning the transaction, and acted knowingly and intentionally, mere inadequacy in the price, unaccompanied by other inequitable incidents, is never of itself a sufficient ground for canceling an executed or executory contract." *Pom. Eq. Jur.* (3d Ed.) § 926.

We see no reason to question the correctness of the conclusions reached below.

The judgment is affirmed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

(177 Cal. 626)

BRYAN v. TEVIS. (S. F. 8548.)

(Supreme Court of California. Feb. 27, 1918.)

1. APPEAL AND ERROR \S 622—TRANSCRIPT—TIME FOR FILING.

From a judgment of March 16, 1914, defendant appealed on May 13, 1914, having given notice of intention to move for new trial "upon a statement of the case," on April 24, 1914. No transcript was filed. On May 1, 1916, the proceeding for new trial was dismissed for lack of diligence, and such order became final. On May 6, 1916, defendant gave notice of motion to vacate such order. On September 15, 1916, the order was vacated, but on September 21, 1916, the last order was vacated and the motion to vacate was set for further hearing. On January 5, 1917, such motion was finally denied. Held, that the last order in effect ended such proceedings for new trial, and from its date the time began to run within which the transcript must be filed where proceedings for new trial are pending in the lower court, under rules 2 and 5 (119 Pac. ix and x), providing that the transcript must be filed within 40 days after perfection of appeal, but that, if prepared under Code Civ. Proc. \S 953a, the time for filing shall not begin to run until the proceeding to obtain it has been terminated.

2. APPEAL AND ERROR \S 622—TRANSCRIPT—TIME FOR FILING.

In such case, where defendant on January 15, 1917, was refused settlement of statement on motion for new trial to be used on appeal from the judgment, such order being in effect dismissal and termination of the proceeding for settlement, thenceforth no proceeding for the settlement of the statement which might be used on the appeal was pending, and the time within which the transcript might be filed commenced to run.

3. APPEAL AND ERROR \S 624—TRANSCRIPT—TIME FOR FILING.

In such case, pendency of appeals from the orders of January 5 and 15, 1917, did not ipso facto extend the time for filing transcript on appeal from the judgment.

4. APPEAL AND ERROR \S 628(2)—TRANSCRIPT—TIME FOR FILING.

If, in the matter of obtaining a record, it is clearly made to appear in the Supreme Court on a motion to dismiss an appeal that there had been an arbitrary disregard by the lower court of the rights of the appellant in the dismissal of his proceeding for a record or bill to determine whether the appellant had proceeded with due diligence, with the result that there is substantial merit in an appeal involving the question of the right of a party to a record on another appeal, and the party is prosecuting the same diligently, the court might be warranted in refusing to dismiss the former appeal until the question of the right to the record is finally terminated, but in the absence of such a showing in regard to the subsequent appeal the court will not regard its pendency as an answer to the motion to dismiss.

In Bank. Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Sarah A. Bryan, administratrix of the estate of Jesse W. Bryan, deceased,

against William S. Tevis. On plaintiff's motion to dismiss defendant's appeal from judgment for plaintiff. Appeal dismissed.

John E. Bennett, of San Francisco, for appellant. Thomas, Beedy & Lanagan, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is a motion to dismiss an appeal from a judgment on the ground that appellant has failed to file his transcript on appeal within the time prescribed by our rules. Rules 2 and 5 (119 Pac. ix, x). The appeal was taken May 13, 1914, from a judgment entered March 16, 1914, notice of intention to move for a new trial "upon a statement of the case" to be thereafter prepared, having been given and filed April 24, 1914. No transcript has ever been filed. Under the rules hereinbefore referred to, the 40-day period within which appellant could file his transcript did not begin to run "until the motion for a new trial has been decided, or the proceeding therefor dismissed." Likewise such time did not begin to run during the pendency of any proceeding "for the settlement of the bill of exceptions or statement which may be used in support of such appeal." It is upon these provisions of our rules that appellant must necessarily rely to defeat the motion to dismiss.

[1] As to the motion for a new trial, it appears that on April 1, 1916, the trial court, on motion duly made, heard, and submitted, made an order dismissing the proceeding on the ground that the defendant had not prosecuted the same with due diligence. No appeal was ever taken from this order, and it has long since become final. This motion was in effect one denying the motion for a new trial. *Voll v. Hollis*, 60 Cal. 572; *Lang v. Superior Court*, 71 Cal. 491, 12 Pac. 306, 416; *Galbraith v. Lowe*, 142 Cal. 295, 75 Pac. 831. Instead of appealing from this order appellant, on May 6, 1916, gave notice of a motion to vacate it, on the ground that his delay in prosecuting the motion for a new trial was due to mistake and excusable neglect. On September 15, 1916, the superior court made an order purporting to vacate the order of dismissal. On September 21, 1916, the superior court made an order ex parte purporting to vacate the last-named order, and setting the motion to vacate the order dismissing the proceedings for a new trial for further hearing. On January 5, 1917, after a hearing, the superior court made its order finally denying the motion to vacate the order dismissing the proceedings for a new trial. Whatever may be said as to the effect of any of the previous orders made after that of April 1, 1916, dismissing the proceeding for a new trial, this order of January 5, 1917, was certainly in substance and effect one deciding and denying the motion for a new trial and definitely ending the

proceeding therefor. In so far as the provision of our rules postponing the commencement of the time within which the transcript must be filed where a proceeding for a new trial is pending in the lower court is concerned, the time for transcript commenced to run at least as early as that date.

[2, 3] As to the pendency of the proceeding for a statement which might be used on said appeal from the judgment: On January 15, 1917, appellant demanded of the judge of the lower court that he settle the statement on motion for a new trial in order that he might use the same on his appeal from the judgment. The judge refused to do this. On the same day an order signed by the judge was entered on the minutes of the court denying the application for the settlement of the statement. This order was in effect one dismissing and terminating the proceeding in the lower court for the settlement of the statement. Thenceforth, within the meaning of our rules, no proceeding for the settlement of the statement which might be used on the appeal was pending, and the time within which the transcript might be filed commenced to run. See *Williams v. Williams*, 168 Pac. 19. No resort to mandate to compel the settlement of the statement was made prior to the service of the notice of motion to dismiss the appeal (October 26, 1917), and indeed no application for any such remedy has been made up to this time. See *Murphy v. Stelling*, 138 Cal. 642, 643, 72 Pac. 176; *Hartmann v. Smith*, 140 Cal. 461, 467, 74 Pac. 7. Appellant in February, 1917, did appeal from the orders of January 5th and 15th, and is now seeking to obtain the settlement of a bill of exceptions to be used on those appeals, but up to this time apparently without success. If we concede that these orders are appealable, the pendency of the appeals does not ipso facto extend the time for filing transcript on the appeal from the judgment. See *Williams v. Williams*, supra.

[4] As substantially suggested in the case just cited, if, in the matter of obtaining a record, it is clearly made to appear in this court on a motion to dismiss an appeal that there had been an arbitrary disregard by the lower court of the rights of the appellant in the dismissal of his proceeding for a record or bill—a gross abuse of the discretion committed to it, to determine whether the appellant had proceeded with due diligence, with the result that there is substantial merit in an appeal involving the question of the right of a party to a record on another appeal, and the party is prosecuting the same diligently, we might be warranted in refusing to dismiss the former appeal until the question of the right to the record is finally determined. But where such a showing in regard to the subsequent appeal is not made to appear, we will not regard its pendency as an answer to the motion to dismiss. In the

case at bar appellant's proposed bill of exceptions on the subsequent appeals has been presented as a part of the evidence on this motion. It is apparent to us, therefrom, that there is no merit in the subsequent appeals. The conclusion of the court below that the appellant had not proceeded with due diligence in the matter of obtaining a settlement of the statement to be used on the motion for a new trial, and that the lack of diligence was inexcusable, which was the very matter determined by the court in dismissing the proceeding for a new trial, could not be disturbed by us under the circumstances shown, in view of such authorities as *Dorcy v. Brodis*, 153 Cal. 673, 875, 96 Pac. 278, *Galbreith v. Lowe*, 142 Cal. 295, 75 Pac. 831, and *Miller v. Queen Ins. Co.*, 2 Cal. App. 267, 83 Pac. 287. The order regarding the new trial proceeding would therefore have to be affirmed, as would also the order of January 15, 1917, relative to the statement itself, which, in view of the ground upon which the order dismissing the new trial proceeding was based, was a necessary consequence thereof. The inexcusable lack of diligence was necessarily the same in each case, and the showing was of such a nature that the action of the trial court could not be disturbed as to either.

It follows that the motion to dismiss the appeal is well based, and must be granted.

The appeal is dismissed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 622)

THE EMPORIUM v. CITY OF SAN MATEO
et al. (S. F. 7395.)

(Supreme Court of California. Feb. 26, 1918.)

1. LICENSES §6(12) — POWERS OF CITIES —
DELIVERY WAGONS.

Under Const. art. 11, § 11, providing that any city may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws and Municipal Incorporation Act (St. 1883, p. 270) § 862, subd. 10, authorizing the board of trustees of cities of the sixth class to license all kinds of business transacted and carried on in such city, a city of such class was authorized to impose a license tax on persons operating or maintaining delivery wagons on its streets.

2. LICENSES §6(12) — POWERS OF CITIES —
DELIVERY WAGONS.

Where the proprietor of a department store in San Francisco established and regularly maintained in the city of San Mateo a local delivery system with horses, wagons, and employees regularly engaged in receiving goods from the railroad stations in such city, and delivering them to the store's customers, it brought itself within the taxing powers of the city of San Mateo, and an ordinance, imposing a license tax on persons operating or maintaining delivery wagons on the streets of the city, was valid as applied to it.

In Bank. Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by The Emporium against the City of San Mateo and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Dudley D. Sales and Theodore A. Bell, both of San Francisco, for appellant. Charles N. Kirkbride, City Atty., and Joseph B. Gordon, both of San Mateo, for respondents.

PER CURIAM. This appeal was first heard in the District Court of Appeal for the First District, where the following opinion, prepared by Mr. Justice Richards, was filed:

"This is an appeal from a judgment in the defendants' favor following an order sustaining their demurrer without leave to amend.

"The complaint shows that the plaintiff is a corporation engaged in the retail dry goods business in the city of San Francisco, having customers within said city and also within the several cities and towns in proximity to said metropolis and around the San Francisco Bay, among which is the city of San Mateo; that for the purpose of delivery of articles of merchandise purchased from it by residents of or in the vicinity of the city of San Mateo the plaintiff maintains within said city of San Mateo a system of local delivery, consisting of horses and wagons in charge of its employes, whose daily duty it is to receive such articles of merchandise at the stations in said city to which they have been shipped by rail, there to load same upon such delivery wagons and deliver the several articles of merchandise to their respective purchasers within and about said city; that the city of San Mateo has an ordinance entitled 'General License Ordinance,' which provides, in subdivision 13 of section 11 thereof, for the levying and collection of a license tax upon every person, firm, or corporation driving, operating, or maintaining upon any street in said city a delivery wagon or wagons, at a specified rate for each such wagon according to its tonnage capacity. The defendants are averred to have persistently attempted to collect the amount of license required by this ordinance from the plaintiff, and this action was instituted to enjoin them from so doing. The plaintiff contends that the ordinance is invalid for several reasons, and also that, even though generally valid, it is inoperative in its application to the plaintiff.

[1] "With respect to the power of the city of San Mateo to enact the ordinance in question we think its authority to do so was ample under section 11 of article 11 of the state Constitution; and also under section 862, subd. 10, of the Municipal Incorporation Act (St. 1883, p. 270), under which San Mateo was organized as a city of the sixth class.

[2] "The main question in the case arises out of the disputed applicability of the ordinance to the plaintiff, its contention in that behalf being that the power conferred by the Constitution and statute upon the city of San Mateo and attempted to be exercised in the form of the ordinance in question was that of imposing a tax upon business privileges, and that as such said ordinance must be confined in its operation to such business as is transacted and carried on in such city and town, and under the express terms of the grant of power to it in the act of its incorporation; and hence that the plaintiff, as a business institution established and being conducted in San Francisco, is not subject to the terms of said ordinance.

"It may be conceded that if the case presented by the complaint shows that the plaintiff, selling articles of merchandise in and at its place of business in San Francisco to persons residing in the city of San Mateo and its vicinity, and as an incident to such sales was engaged in mak-

ing such casual and occasional deliveries of such merchandise in San Mateo and other outside towns or cities as their retail sales therein required, by means of delivery wagons going out from its said place of business in the metropolis and passing over and along the streets of the city of San Mateo in the course of making such deliveries, the said plaintiff would not be subject to the imposition or collection by such outside municipality of a license tax upon its said delivery wagons. It would seem to be the rule that such use of the streets of a city as would be merely occasional and incidental to a business conducted elsewhere than within its boundaries would not be the proper subject of taxation. In *re Smith*, 33 Cal. App. 161, 164 Pac. 618. On the other hand, when a business institution, though located as to its central place of conduction or of the sale of its goods or products in one city or town, conducts through delivery wagons or other vehicles a regular system of delivery to customers within another municipality, the latter under proper authority may impose a license tax upon the wagons or other appliances of the distributing business which is thus actually done within it and upon and along its streets. *Memphis v. Bataille*, 55 Tenn. (8 Heisk.) 524, 24 Am. Rep. 285; *City of Cartersville v. Blystone*, 160 Mo. App. 191, 141 S. W. 701; *Wonner v. Cartersville*, 142 Mo. App. 120, 125 S. W. 861. These authorities from other jurisdictions seem to us to correctly state the rule in this regard, and they are not out of harmony with the recent case of *Bramman v. City of Alameda*, 162 Cal. 648, 124 Pac. 243, which upon a somewhat different state of facts lays down a broad rule respecting the powers of municipalities in this state to levy taxes for revenue and regulation upon business privileges conducted within them, to the extent of holding that under a proper classification the city of Alameda had power to pass an ordinance imposing a license tax upon persons doing a certain business within it, and also upon the delivery wagons of those engaged in such business who maintained, in addition thereto and in aid thereof, a system of delivery wagons within the municipality. The present action presents an even stronger case for the application of the latter and, we think, the better rule. The plaintiff in the instant case, as its complaint affirmatively shows, has not been satisfied to make deliveries of its goods sold to patrons in San Mateo through the occasional and purely incidental means of delivery wagons operated as an immediate adjunct to its drygoods store in San Francisco, and using the streets of San Mateo therefor in a transient way; but, on the contrary, the plaintiff has established and regularly maintains in the said city of San Mateo a local delivery system, with horses, wagons, and employes regularly engaged in the occupation of going daily to the railroad stations of said city, and there receiving and loading upon their said wagons the goods and merchandise of the plaintiff sent to said places of distribution by rail and thence carried by regular deliveries upon and along the streets of said city to the places of business or residence of the persons purchasing the same. In other words, the complaint herein places the case in precisely the same position it would have been had the plaintiff, instead of organizing and equipping its own local delivery system in San Mateo, made a contract with a local delivery establishment for the sole carriage and delivery by it of the goods of the plaintiff shipped to said point by rail, which local institution would seek to avoid the burdens of the ordinance in question upon the ground that it and its activities were merely incidental to the business of the plaintiff conducted in San Francisco. This statement of the situation illustrates the distinction in principle between the different lines of cases cited by the respective parties to this controversy. The business which the defendants are seeking to bring within the

scope of the ordinance is not that which the plaintiff is conducting at its San Francisco store, but is that which it is maintaining in its regular local delivery system within and upon the streets of San Mateo. Under the foregoing circumstances as outlined by its own pleading we are entirely satisfied that the plaintiff has brought itself within the taxing powers of the city of San Mateo, and that the ordinance in question is not only valid as within the scope of the powers of the municipality to enact the same, but is also valid in its application to the plaintiff upon the state of facts disclosed in this complaint.

"Judgment affirmed."

Upon petition of the appellant, the cause was ordered transferred to this court. After careful consideration of the points presented, we have reached the conclusion that the opinion of the District Court of Appeal makes an entirely correct and satisfactory disposition of the questions presented.

For the reasons therein stated, it is ordered that the judgment appealed from be affirmed.

(36 Cal. App. 16)

OBERHOLZER v. HUBBELL. (Civ. 2297.)
(District Court of Appeal, First District, California. Jan. 19, 1918. Rehearing Denied by Supreme Court March 18, 1918.)

1. MUNICIPAL CORPORATIONS — 706(7) — USE OF STREETS — PERSONAL INJURIES — QUESTION FOR JURY.

That occupants of buggy on left side of street injured in collision with automobile which, in order to avoid collision with vehicle on right side, turned obliquely to left side, could have seen automobile and would have stopped had they been looking, does not constitute contributory negligence as a matter of law.

2. MUNICIPAL CORPORATIONS — 706(4) — USE OF STREET—COLLISION—EVIDENCE.

In action for injuries to occupants of buggy in collision with automobile, evidence of disposition of horse is irrelevant where there was no showing that horse was frightened or was unmanageable before the collision.

3. TRIAL — 28(3)—VIEW BY JURY—CHANGE OF CONDITIONS.

Where 15 months intervened between time of collision of buggy with automobile, during which time the automobile had been in use and had made several long trips, refusal to permit jury to inspect automobile was proper.

4. APPEAL AND ERROR — 974(1) — DISCRETION—SPECIAL ISSUES.

Under Code Civ. Proc. § 625, as amended in 1909, making submission of special issues to jury discretionary with trial court, such discretion will not be reviewed unless abuse is shown.

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by Mary Oberholzer against Orton B. Hubbell. From judgment for plaintiff, defendant appeals. Affirmed.

Rolfe L. Thompson and R. M. Barrett, both of Santa Rosa, for appellant. Gil P. Hall, of Petaluma, and W. F. Cowan, of Santa Rosa, for respondent.

LENNON, P. J. This is an appeal from a judgment of \$1,000 obtained by plaintiff in an action for damages for personal injuries sus-

tained by her in the collision of an automobile owned by the defendant with the buggy in which she was riding.

The evidence which supports the allegations of plaintiff's complaint is to the effect that the plaintiff, accompanied by her husband, was riding in a horse-drawn vehicle driven by her husband westerly along and on the right-hand side of Western avenue in the city of Petaluma; that an automobile owned by the defendant Hubbell was being driven by him at a speed of about 20 miles per hour along Keller street, in said city, in a northerly direction; that upon arriving at the intersection of Western avenue and Keller street the automobile suddenly encountered another horse and wagon; that in an endeavor to avoid a collision with the latter rig the defendant turned his automobile obliquely from the right to the left-hand side of Keller street, and collided with the plaintiff's rig, which had partly passed the intersection of the center line of the two streets; that because of the fact that the defendant had turned and directed his automobile to the left-hand side of the street and behind the horse and wagon which he first encountered he failed to observe the plaintiff's rig, and consequently collided with it; and that the defendant had sounded no warning whatever of the approach of his automobile. The result of the collision was that the plaintiff and her husband were thrown to the roadway and injured.

[1] It was developed upon the cross-examination of the plaintiff that there was nothing to obstruct her view or that of her husband of the approach of the defendant's automobile; that neither she nor her husband looked to see if other vehicles were approaching; and that if they had looked in the direction from which the defendant's automobile approached they could have seen it and "would have stopped." Because of this testimony it is insisted upon behalf of the defendant that the plaintiff should have been nonsuited upon the theory that the evidence adduced in support of her case showed contributory negligence affirmatively and as a matter of law. In an endeavor to sustain this contention counsel for defendant rely upon the rule declared in a series of cases decided in this and other jurisdictions which deal with the standard of conduct by which the contributory negligence of persons who are approaching and intending to cross the tracks of a railway company is ascertained.

It is obvious that the rule governing the standard of conduct of a person approaching a railway track, in itself a warning of danger, is not applicable to a case where the facts, as here, are of such a character as to give no warning to the plaintiff of any immediate danger, and that the amount of vigilance necessary to constitute due care is correspondingly less in the latter case.

Similarly the case of *Davis v. Breuner Co. et al.*, 167 Cal. 683, 140 Pac. 586, cited and relied on by defendant, is distinguishable on its facts. That case deals with the standard of conduct of a pedestrian in crossing a street, and there it is said that it is the duty of the pedestrian to look both ways before starting to cross.

Ordinarily plaintiff and her husband would not be required to observe the progress of vehicles to the left of them, and prior to the collision involved here there was no warning of the approach of the defendant's automobile, which had swerved to the left and wrong side of the road, and thereby suddenly came into a position which plaintiff and her husband were not required and had no reason to anticipate.

In the case of *Hamlin v. Pacific Electric Ry. Co.*, 150 Cal. 776, 89 Pac. 1109, the court said:

"Manifestly it is impossible for one driving a vehicle along a street to look in both directions at once, and it should ordinarily be left to the jury to determine under the circumstances of each particular case what amount of vigilance was requisite in order to constitute due care."

Under these circumstances the question of the alleged contributory negligence of the plaintiff and her husband was, we think, not one of law, but was rather one of fact for the jury to determine, and that question having been decided adversely to the defendant in accord with the evidence, the finding of the jury in that behalf cannot be successfully assailed upon appeal.

[2] The court did not err in excluding evidence of the nature and disposition of the plaintiff's horse. It was not claimed, and there was no showing or offer to show that the horse had become frightened at the approach of the defendant's automobile or was in any way unmanageable until after the collision had occurred.

[3] Nor did the court err in refusing to permit the jury to inspect the defendant's automobile for the purpose of ascertaining the extent and character of the damage done to the automobile by the collision. Some 15 months had intervened between the time of the collision and the hearing of the case, during which time the automobile had been in use, and had made several long trips, one as far as to Los Angeles and back. Under these circumstances we think that the trial court was justified in refusing to permit the jury to inspect the automobile upon the ground that such inspection was too remote in point of time from the collision complained of. Moreover, it appears from the record that the nature and extent of the injuries to the automobile resulting from the collision were testified to in detail by a witness for the defendant, and that testimony was neither disputed nor attempted to be contradicted by the plaintiff.

[4] There is no merit in the contention that the court erred to the prejudice of the defendant in refusing to submit to the jury two special issues proposed and presented by the defendant relative to the alleged contributory negligence of the plaintiff. Section 625 of the Code of Civil Procedure, as amended in 1909, makes the submission of special issues discretionary with the trial court, and we cannot say that under all of the circumstances of the case that the court abused its discretion.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

(36 Cal. App. 20)

SANTINA v. TOMLINSON. (Civ. 2292.)
(District Court of Appeal, First District, California. Jan. 23, 1918.)

1. MUNICIPAL CORPORATIONS ⇨706(4)—USE OF STREETS—NEGLIGENCE—PLEADING.

Generally, in an action for injuries from collision with automobile on street ordinances claimed to be violated are admissible in evidence under the general averment of negligence.

2. MUNICIPAL CORPORATIONS ⇨705(4) — USE OF STREET — PERSONAL INJURIES—ORDINANCES—EVIDENCE.

A traffic ordinance providing that driver of vehicle shall keep such vehicle six feet on right side of running board of street car which is stopping to take on or discharge passenger is not applicable to running board on left side of car, and such ordinance is irrelevant in action for injuries to passenger alighting on left side of car struck by automobile running nearer to left running board than six feet.

3. APPEAL AND ERROR ⇨1050(2)—HARMLESS ERROR—EVIDENCE.

Under such circumstances the admission of the ordinance was prejudicial error as leading the jury to believe that ordinance had been violated.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Peter Santina against Richard R. Tomlinson. From a judgment for plaintiff, defendant appeals. Reversed.

Chas. L. Brown and John J. Mazza, both of San Francisco, for appellant. Hadsell, Sweet & Ingalls, of San Francisco, for respondent.

LENNON, P. J. This is an appeal from a judgment in favor of the plaintiff in the sum of \$300 damages.

Peter Santina, the plaintiff, was riding on a street car traveling in a northwesterly direction along Columbus avenue in the city and county of San Francisco. When the car approached the crossing of Vallejo street and Columbus avenue the plaintiff asked the conductor to stop at Vallejo street. There is a conflict in the testimony as to whether or not the car had fully stopped when the plaintiff alighted, but the testimony is clear to the effect that the plaintiff swung off the front left-hand side of the car. Immediately up-

on reaching the ground plaintiff started for the corner of Columbus avenue and Vallejo street. A Ford automobile was parked along the curbing on Columbus avenue and plaintiff descended from the street car in front of this machine. Defendant, Dr. Tomlinson, driving his automobile, was traveling in a southeasterly direction along Columbus avenue, and was passing the parked Ford car, driving the wheels of his automobile astride the outer rail of the westerly car track at the time plaintiff alighted. The plaintiff had taken a couple of steps when he was struck by defendant's automobile. The car upon which the plaintiff was riding was composed of three sections, an open front, a closed middle section, and an open back, and passengers could, if they desired, board or alight from the car without interference on either side thereof.

[1] The principal point made in support of the appeal is that the trial court erred to the prejudice of the defendant in permitting in evidence over objection a traffic ordinance of the city and county of San Francisco, which provides that:

"Every person riding, driving, propelling or in charge of any vehicle upon any street shall keep such vehicle at least six feet on the right hand side from the running board or lower step of any street car which is stopping for the purpose of taking on or discharging passengers."

The only objection made to the introduction of the ordinance in evidence was that it was immaterial, and it is now urged that this objection was well taken because the plaintiff failed in the first instance to plead the ordinance, and that the evidence adduced in support of the plaintiff's case did not establish nor tend to establish any fact or set of facts upon which the ordinance in question had any natural legitimate bearing or influence. With reference to the first phase of this contention it will suffice to say that in actions of this character the existence of an ordinance and the fact of its violation are essentially matters of evidence and not of pleading, and therefore are, generally speaking, admissible in evidence under the usual general averment of negligence such as was made in the present case. *Cragg v. Los Angeles Trust Co.*, 154 Cal. 663, 98 Pac. 1063, 16 Ann. Cas. 1061; *Connell v. Harris*, 23 Cal. App. 537, 138 Pac. 949; *Fresno Traction Co. v. Atchison, etc., Ry. Co.* (Sup.) 165 Pac. 1013.

[2] The second phase of the defendant's contention concerning the materiality of the ordinance in question is well taken and must be sustained. Although not required to be specifically pleaded, nevertheless the existence of the ordinance and the fact of its violation were neither relevant nor material in the face of the manifest fact that the ordinance itself had no application to the main, material facts and circumstances developed upon the plaintiff's case concerning the cause and character of the collision of the defendant's automobile with the plaintiff. For instance, it

was an established fact of the plaintiff's case that the defendant was driving an automobile in a southerly direction upon the right-hand side of the street where he was privileged and required to be, and that the street car was proceeding in a northerly direction upon the opposite side of the street. Thus it will be seen that the defendant's automobile was traveling to the left of the street car as the car itself was proceeding in an opposite direction up Columbus avenue. While there was some evidence that the defendant's automobile was traveling less than six feet away from the left-hand running board of the street car at or about the time it was stopped to permit the defendant to alight therefrom, nevertheless the ordinance in question plainly and unequivocally pertains to and prohibits the driving of an automobile on the right-hand side of a stopping street car closer than six feet from the running board on that side of the car. In other words, the ordinance plainly refers to one and only one running board, and that is the running board on the right-hand side of the street car. No other construction can be placed upon the ordinance.

[3] This being so and the evidence showing without conflict that the defendant's automobile never approached the right-hand running board of the car upon which the plaintiff was riding, it seems very clear that the ordinance in question was entirely irrelevant and immaterial to the facts established and relied upon by plaintiff to support his cause of action for negligence and damages. That the admission of the ordinance in evidence was prejudicial to the defendant is obvious. Undoubtedly it had a tendency to cause the jury to believe that the defendant had been guilty of a violation of it. Its admission could serve no other purpose, and serving that purpose doubtless prejudiced the defendant and his case upon the issue of negligence in the eyes of the jury. It is further contended upon behalf of the defendant that the evidence does not support the finding of the jury implied from the verdict that the defendant was guilty of negligence in the operation of his automobile at the time of the collision, and that the evidence on the other hand does show that the plaintiff was guilty of contributory negligence.

The argument made in support of this contention is directed largely to a consideration of the weight of the evidence and the credibility of the witnesses, and we are satisfied, after a review of the record, that the question of the negligence of the defendant and the claimed contributory negligence of the plaintiff were, under all of the facts and circumstances of the case, questions of fact for the jury to determine, and were therefore properly submitted to it for decision.

The judgment and order appealed from are reversed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

(38 Cal. App. 20)

PEOPLE v. TANNER et al. (Cr. 420.)

(District Court of Appeal, Third District, California. Jan. 21, 1918.)

1. ROBBERY — 23(1)—EVIDENCE—HEARSAY—MATERIALITY.

In prosecution for robbery, while exclusionary hearsay rule does not apply to documents and testimony that defendants sought to force the prosecuting witness to join the I. W. W., the issue of membership of defendants in the I. W. W. was irrelevant, except for the purpose of establishing motive in the robbery after prosecuting witness refused to join the order.

2. CRIMINAL LAW — 1169(5) — APPEAL — HARMLESS ERROR.

In prosecution for robbery, no prejudice resulted from admission of evidence concerning connection of defendants with the I. W. W., and their attempt to force the prosecuting witness to join such organization, where the judge specifically instructed the jury to disregard all testimony not pertinent, and especially that concerning the I. W. W.

3. CRIMINAL LAW — 1144(8)—APPEAL—PRESUMPTIONS—SELECTION OF JURY.

On appeal, the court must assume that a jury carefully selected were men of at least average intelligence, fully capable of appreciating and following the instructions given them.

4. CRIMINAL LAW — 730(12) — APPEAL — HARMLESS ERROR.

Misconduct of district attorney in prosecution for robbery in referring to connection of defendants with the I. W. W. was not prejudicial, where the court specifically instructed not to consider any insinuations that defendants were members of the I. W. W.

5. ROBBERY — 24(1)—EVIDENCE—SUFFICIENCY.

Evidence held to sustain conviction of the crime of robbery.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

George Tanner and Edwin Engle were convicted of robbery, and from the judgment and order denying new trial they appeal. Affirmed.

Metzler & Mitchell, of Eureka, for appellants. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendants were informed against by the district attorney of the county of Humboldt for the crime of robbery committed upon one James McMurray. They were thereupon duly tried and convicted of the crime charged. Defendants moved for a new trial, which motion was denied, and they were thereupon sentenced to imprisonment in the state prison, the judgment fixing an indeterminate sentence. Defendants prosecute this appeal from the judgment and order, alleging for reversal that the court erred in its rulings on the admissibility of evidence, that the district attorney was guilty of misconduct, and that the verdict was against the law and the evidence.

Briefly the facts disclose that soon after James McMurray had met the defendants and convivialized with them, he was invited to their room in a hotel; that upon entering the room defendants locked the door; that

after a few drinks defendants, exhibiting certain I. W. W. blanks and documents, requested McMurray to join the I. W. W.; that upon his refusal one of the defendants assailed him with a small table that stood in the room, and then ordered him to deliver over his money. McMurray was forced to undress and get into bed and his clothes were searched. Upon arising in the morning McMurray found defendants to have left. He then reported the matter to the police, who found upon defendants, when arrested, money in denominations possessed by the prosecuting witness the night before.

Appellants' complaint is particularly and solely aimed at the admission of the evidence that defendants in the room requested McMurray to join the I. W. W., to the admission of certain papers of defendants bearing the I. W. W. title, and to the remarks of the district attorney characterizing defendants as members of that organization. The gist of all defendants' objections is the reference to the I. W. W.

[1] Respondent seeks to support the admission of this evidence as a part of the *res gestæ*. Whatever the meaning of that phrase, it is at once apparent that the exclusionary hearsay rule has no application here. The truth or falsity of defendants' membership in the I. W. W. is, as is at once obvious, irrelevant to the charge of robbery. It is probable, however, and the remarks of the district attorney seem to so indicate, that the prosecution's theory was that McMurray's refusal to join the organization of Industrial Workers furnished a motive, at least in part, for the treatment he subsequently and immediately received. We can readily understand how the evidence could be offered and received for such purpose, and the ruling of the court was undoubtedly correct.

[2] As to the question of membership in said organization and the district attorney's reference thereto, it is clear that defendants suffered no prejudice in view of the following instructions given at defendants' request:

"You are instructed to disregard all testimony given, other than that pertinent to the crime as alleged in the information; the fact that some evidence has been introduced which would tend to show that the defendants had some literature of the I. W. W.'s (Industrial Workers of the World) upon them or in their possession must have no weight in determining the guilt or innocence of the defendants of the crime of robbery, and you are not permitted to take any evidence which does not pertain to the crime as alleged in the information into consideration in rendering your verdict.

"You are instructed that the defendants are on trial for the commission of the crime as charged in the information; and in reaching a verdict, you are not to take into consideration any insinuations that may have been made, during the trial that the defendants are or were members of any disreputable organization, or any organization at all. Neither are you to consider the presence of any literature found in the possession of the defendants as a circum-

stance tending to prove that they are guilty of the crime as charged in the information."

[3] The jurors were carefully examined by defendants, who exercised many peremptory challenges, to the end, unquestionably, that they might obtain a jury with whose intelligence, common sense, and impartiality they were satisfied. And we must assume that the jury thus carefully selected were men of at least average intelligence and understanding, and fully capable of appreciating and following the instructions given them. We cannot hold otherwise than that they followed the instructions in question and put from their minds any influence that may have been occasioned by reference to the Industrial Workers of the World. So viewing the case, it is difficult to see how defendants suffered the prejudice complained of.

[4] What is said above disposes also of the question of the district attorney's misconduct in referring to the organization of the I. W. W. It thus becomes unnecessary to descant further upon that point.

[5] The evidence was sufficient to justify the verdict.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(38 Cal. App. 25)

PEOPLE v. BARKDOLL. (Cr. 409.)

(District Court of Appeal, Third District, California. Jan. 22, 1918.)

1. CRIMINAL LAW §37—ILLEGAL SALE—DEFENSE—PURCHASE BY DETECTIVE.

It was no defense to a prosecution for unlawfully selling alcoholic liquor in no-license territory that the purchase was made by one in the service of the county, employed by the sheriff for \$50 a month to ferret out "blind piggers," or illicit sellers of intoxicants.

2. WITNESSES §318—CHARACTER EVIDENCE—ABSENCE OF ATTACK.

In a prosecution for unlawfully selling alcoholic liquor in no-license territory, where defendant's reputation for truth and veracity was not questioned by any evidence introduced by the people, his offer to prove that his character in such respect was good was properly refused.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Charles D. Barkdoll was convicted of having unlawfully disposed of alcoholic liquor within no-license territory, and, from the judgment and an order denying his motion for new trial, he appeals. Affirmed.

Weldon & Mockler, of Ukiah, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was indicted for and convicted of having unlawfully sold, furnished, and distributed alcoholic liquor to one William Frey within the boundaries of the third supervisor district of Mendocino county; the same being no-license territory. He appeals from the judgment of conviction

and from the order denying his motion for a new trial.

Counsel for appellant present three questions for review: (1) That the court erred in not granting defendant's motion, made at the close of the people's evidence, to instruct the jury to acquit; (2) that the court erred in not permitting defendant to introduce evidence of his good character; (3) that the court erred in not pronouncing judgment on the verdict of the jury. The first and third of these points rest upon the same proposition as stated in defendant's brief:

"That all the evidence in this case shows that instead of a sale it was an 'entrapment'; that it was made by an officer who was under the pay of officers of this county; that if any crime was had it was instigated by a representative of the officers of the county and at their instance and with money furnished by them."

Defendant was conducting a barber shop in the town of Covelo, Round Valley. The shop consisted of a front or operating room and a room back of the working room. One Swaney was in the service of the county, employed by Sheriff Byrnes, and was receiving \$50 per month, and no other compensation for his services, which were to ferret out "blind piggers," or illicit sellers of intoxicating liquors, in Round Valley. Among his acquaintances in the valley was one Frei or Frey, the prosecuting witness. Frei was well known to defendant, and was in the habit of visiting defendant in his shop "to chat with him—pretty chummy." Swaney and Frei met at Covelo in front of defendant's barber shop, on the day charged in the indictment, and Swaney asked Frei to go into defendant's shop and buy a small bottle of whisky, giving Frei a dollar of his own money with which to pay for it. Frei did not know at the time that Swaney was a detective. Frei was somewhat given to drinking, and admitted that he had been drinking that day, and might have been in some degree intoxicated. His testimony was that he went into the shop and purchased "one of the small soda bottles or pint bottles," and afterward delivered it to Swaney, and drank some of the contents with Swaney and another man in a nearby alley; that it was delivered to him personally in the back room of his shop by defendant, to whom he paid the dollar given him by Swaney. The bottle, with what remained of the contents, was afterwards delivered to the sheriff, who marked it for identification and placed it in his safe, where it remained and was produced at the trial and its contents shown to contain 45 per cent. "of absolute alcohol by volume." Detective Swaney was asked to state what was done at the time, and testified as follows:

"Why, I met Frei on the street in front of Barkdoll's barber shop, and I asked him if he could get me a bottle of whisky, and he said, 'Yes,' he would, so I gave him a dollar, and we went over on the sidewalk in front of the bar-

ber shop, and he told me to wait outside, and he went in, and about ten minutes he came out and said he didn't have any; he would have to wait a little while, so I waited about 20 minutes, and then I went in to see about it, and Frei wasn't in there at the time, so I went into the back room, and there was a couple of Indians in there, and opened the back door, and I seen Mr. Barkdoll coming with a sack. Q. Where was he? A. Why, he was coming in from the back yard. Q. He was out in the back yard when you saw him? A. Yes, sir. Q. Well, go ahead and tell us. A. And I asked him if Frei hadn't given him a dollar for a bottle, and he told me, 'Yes'; I told him I would like to get the bottle, and he told me that he wouldn't give me the bottle; he would give it to Frei; he was the one that gave him the dollar. So I went out then, and I see Frei on the sidewalk, and I reminded him of it again, and about ten minutes he came out with a bottle and told me to come over into the pool room next door there. About ten minutes after I came out, I met Mr. Frei; I reminded him of the bottle again, and he went back into the barber shop; when he came out with the bottle why he told me to come into the pool room; I went into the pool room, opened the bottle then, and had a couple of drinks out of it, him and another fellow by the name of George Fitch. Then he gave me the remainder of the bottle. Q. And what kind of a bottle was it in? A. That's the bottle there."

He testified that he kept the bottle with its remaining contents and delivered it to Sheriff Byrnes without in any way changing the contents of the bottle. He testified further:

"Q. Where were you when Frei went in the last time? A. I was on the sidewalk in front of Barkdoll's barber shop. Q. And are there windows in the front of the barber shop? A. Yes. Q. Could you see into the shop? A. Well, there was two rooms in the shop, front room and barber room and back room in there. Q. Well, could you see into either one of the rooms? A. Yes, I could see into the front room. Q. And could you see into the back room? A. No, sir. Q. Did you see where Mr. Frei went when he went into the barber shop? A. Yes. Q. And where did he go? A. Into the back room. Q. And was Barkdoll in the shop, that is, in the front part of the shop, when Frei went in? A. Yes. Q. And did he remain there all of the time that Frei was inside? A. No, sir; he went into a back room when Frei went in. Q. Did you see Frei when he came from the back room? A. Yes. I seen him when he came out. Q. And did you see Barkdoll? A. No, sir. I didn't see Barkdoll. Q. He didn't come out with Frei? A. No, sir."

Counsel for defendant cite certain Colorado cases which announce the rule that:

"The sale of liquors, in violation of a town ordinance, to one who purchases the liquor, at the instigation of the town, for the purpose of laying a foundation to prosecute the seller, does not authorize a conviction under the ordinance." *Wilcox v. People*, 17 Colo. App. 109, 67 Pac. 343; *Ford v. City of Denver*, 10 Colo. App. 500, 51 Pac. 1015; *People v. Braisted*, 13 Colo. App. 532, 58 Pac. 796.

In *People v. Chipman*, a later Colorado case, 31 Colo. 90, 71 Pac. 1108, the detective was in the pay of the municipality, but purchased the liquor with his own money. It was held no defense that he was an officer. In *People v. O'Brien*, 35 Mont. 482, 90 Pac. 520, 10 Ann. Cas. 1006, a Montana case, the money with which the liquor was purchased

was furnished the witness by the county attorney. It was held no defense. Citing the rule as stated in 23 Cyc. at page 184:

"It is no defense to a prosecution for an illegal sale of liquor that the purchase was made by a 'spotter' detective, or hired informer."

Numerous cases are cited in support of the text.

[1, 2] Where a person is innocent of any intention to commit a crime, and is inveigled into its commission by an officer of the law for the purpose of advancing his standing for efficiency or to obtain revenue by fine for the municipality, it might be said to uphold such practices would be repugnant to any just conception of good morals and violative of sound public policy. But we have no such case here. The facts and circumstances surrounding the transaction in the present instance were quite sufficient to justify the jury in believing that the defendant was ready, able, and willing to comply with the request made of him. He testified in his own defense, and his testimony went no further than to deny that he sold or gave a bottle of liquor to Frei, as testified to by him. The evidence in the case has no tendency to place defendant in the category of those persons in whose behalf some courts have enforced the rule invoked by him. Defendant's reputation for truth and veracity was in no wise questioned by any evidence introduced by the people. It was not error to refuse defendant's offer to prove that his character in that respect was good where there was no evidence introduced tending to show that his general reputation for truth and veracity was bad. *People v. Cowgill*, 93 Cal. 596, 29 Pac. 228; *Title Ins. Co. v. Ingersoll*, 153 Cal. 1, 7, 94 Pac. 94.

The judgment and the order are affirmed.

We concur: BURNETT, J.; HART, J.

(36 Cal. App. 23)

PEOPLE v. FRANKLIN. (Cr. 413.)

(District Court of Appeal, Third District, California. Jan. 22, 1918. Rehearing Denied by Supreme Court March 21, 1918.)

CRIMINAL LAW §1202(5)—VERDICT—FINDING ON PRIOR CONVICTION.

Under Pen. Code, § 1158, where the information charges a prior conviction, unless the answer admit it, the verdict must find thereon; and its omission to do so is fatal, unless the subsequent crime charged is itself one for commission of which the court can impose punishment.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Ida Franklin, convicted of selling morphine, was granted a new trial, and the People appeal. Affirmed.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People. Walter F. Lynch, of Stockton, for respondent.

CHIPMAN, P. J. Defendant was informed against by the district attorney of San Joaquin county for the crime of selling and furnishing morphine, and having suffered two prior convictions for like crimes and punishable under the same statute. The defendant moved the court for a new trial, which was granted, and the people thereupon took an appeal from the order.

The minute order made by the court following the motion reads as follows:

"Thereupon the court made an order granting defendant's motion for a new trial upon the ground that the defendant had not been properly arraigned, in that said defendant had not been asked whether or not she had suffered the prior convictions charged against her in the information and had not specifically entered her plea thereto, and that the jury did not find specifically on the charge of the prior convictions."

The minute entry made at the arraignment of defendant reads as follows:

"The defendant waived time allowed by the statute before answering the information, and, upon being asked by the court whether she pleads 'guilty' or 'not guilty,' to the offense charged in the information, the defendant in person pleads that she is not guilty."

Thereupon the court fixed the day for the trial. The verdict reads:

"We, the jury in the above-entitled cause, find the defendant, Ida Franklin, guilty as charged."

The points now urged as grounds for reversing the order were before this court in *People v. Dueber*, 168 Pac. 578. In a careful and painstaking opinion, written by Mr. Justice Hart, it was shown, we think with clearness, that under section 1158 of the Penal Code, where a previous conviction of the accused is charged, the jury must, unless the answer of the defendant to the charge of a previous conviction admits it to be true, find whether or not he has suffered such previous conviction, and where the jury fail to make such specific finding, the omission is fatal to the judgment, unless the subsequent crime charged is itself one for the commission of which it is within the jurisdiction of the superior court to impose punishment. The *Dueber* Case cannot be distinguished from this case, and, as no reason is advanced which convinces us that the *Dueber* Case was not correctly decided, it must rule this case.

The order is therefore affirmed.

We concur: BURNETT, J.; HART, J.

(36 Cal. App. 63)

PEOPLE v. DONALDSON. (Cr. 699.)

(District Court of Appeal, First District, California. Jan. 26, 1918. Rehearing Denied Feb. 26, 1918. Denied by Supreme Court March 25, 1918.)

1. CRIMINAL LAW §1167(4)—HARMLESS ERROR—AMENDMENT OF INFORMATION.

Amendment of an information was not prejudicial, where evidence of matters therein would have been admissible without amendment.

2. FALSE PRETENSES §38 — INFORMATION — SCOPE OF INVESTIGATION.

Under an information for obtaining money by false pretenses, in that defendant falsely rep-

resented that mining property contained a "vast quantity of pay ore," evidence of acreage of claim, improvements, personal appearance, and innocent expression of defendant and his beguiling smile was admissible.

3. CRIMINAL LAW §703 — MISCONDUCT OF PROSECUTION.

In prosecution for obtaining money by false pretenses, it was not misconduct for the prosecuting attorney to state that he was going to prove conspiracy between defendant and a pretended psychologist, who foretold the coming of the defendant, and then not to introduce any evidence concerning the conspiracy, where there was nothing to show that the statement was not made in good faith, and that testimony was not offered on such phase because the prosecution found it was unable to prove the conspiracy.

4. CRIMINAL LAW §728(5)—MISCONDUCT OF PROSECUTION—WAIVER OF OBJECTION.

Objection to statement made by prosecution is waived, where it was not assigned as misconduct and no request was made to admonish the jury.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

John T. Donaldson was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

Edgar D. Peixotto, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. Defendant was charged by information filed by the district attorney of the city and county of San Francisco with the crime of obtaining money by false pretenses. He was tried, convicted, and sentenced to four years' imprisonment in the state prison. He now appeals from said judgment and from the order denying his motion for a new trial.

From the record it appears that one Marguerite H. Nesbitt, the prosecutrix, conducted a small grocery store in the outskirts of San Francisco, and that the defendant, having heard that she had recently won \$20,000 in a lottery, conceived a plan to get this money from her. Accordingly, after having by a ruse made her acquaintance, he represented to her that he was the owner of a very valuable mine out of which he had made within the past six months the sum of \$100,000; that if she cared to do so he thought he could arrange to let her invest \$20,000, which amount was needed to complete certain necessary improvements on the mining property, and that if she should do so she would, within a short time, thereby gain at least \$100,000. She was inexperienced, gullible, and gulleless; he was persuasive, tactful, and unscrupulous. She parted with her money. The mine was worthless. This prosecution resulted.

Taking up the main point relied upon by the defendant for a reversal of the judgment, we find that during the trial, in order to meet an objection of the defendant and out of an excess of caution, the court made an

order permitting the district attorney to make a further amendment to the information (one having already been made) so as to include within its averments certain specific pretenses not set forth therein. The defendant now assigns as error the order allowing this amendment, claiming that it was one of substance and not within the terms of section 1008 of the Penal Code. The asserted defect in the proceedings of course does not appear upon the fact of the information, and therefore is not raised by the demurrer; and, as the defendant did not object to the admission of the evidence introduced under this amendment, he cannot now be heard to complain unless the motion to strike the information from the record, which was filed by the defendant, may on the ground set forth therein be regarded as broad enough to raise the point now made.

[1, 2] Assuming, without deciding, that this is so, still we think the contention untenable, for in our view the evidence was admissible under the information before the amendment complained of was made; and if this be true the amendment was unnecessary, and no prejudice to the rights of the defendant resulted from the admission of this evidence. We think that where, as in the present case, the main inducing cause of the parting with the money or property is stated in the information, it is sufficient, and that evidence amplifying such main inducing cause is admissible. In the case at bar it appears from the averments of the information that the chief misrepresentations made by the defendant were as to the immense value of the mining property claimed to be owned by him, and as to the "vast quantity of pay ore" on the claim all ready to be worked. Under these averments the evidence introduced by the prosecution of representations made by the defendant as to the value in money of such ore, as to the acreage of the claim, the improvements thereon, and the number of men there employed was, we think, clearly admissible. Such representations were but detailed statements relating to and tending to support the principal false pretenses averred in the information, and no amendment thereof was essential in order to permit those matters to go to the jury. Carrying defendant's argument to its logical conclusion, it would be necessary to charge all the inducing statements which may have influenced the victim to part with her money. Here it appears that the defendant, when about to propose this so-called investment to the prosecutrix, dressed for the occasion, that he wore a large diamond stud in his shirt front, and caused his face to be freshly massaged. Suppose the testimony had gone further and had described his well-dressed appearance, his expression of countenance, his beguiling smile, his appearance of frankness, and attributed to him all the charm of a Wallingford, would it be pretended that such matters were not admissible in evidence unless incor-

porated in the information? No doubt the rule is that where the main pretense is charged, evidence is admissible of minor pretenses which may have exercised some influence in producing the result. Although the sacks might not have broken the camel's back without the final straw, yet if the sacks be specified without the straw, that must be sufficient. *Cowen v. People*, 14 Ill. 348.

[3, 4] In his opening statement to the jury the prosecuting officer stated that he expected to be able to show a conspiracy between the defendant and a certain so-called psychologist parading under the name of Dr. Byron Kingston, in which Kingston called upon the prosecutrix concerning certain charitable work in which he claimed to be interested, on which occasion, pretending to be greatly pressed for time, he asked her to call on him at his office the next day to discuss the subject further; that she did so, and during their conversation she was led to speak of spiritualism, whereupon Kingston drew some mystic signs upon a piece of paper and also a star and circle, placed the palm of his open hand across his forehead, and informed the prosecutrix that a man would call upon her soon (describing the defendant) with a business proposition, which she ought to accept, and that if she did so she would have limousines and rings and things and fine array. Three days later the defendant visited her, pretending to be looking for one Frank Pollock, with whom, he said, as boys they "skinned cattle together in Santa Cruz," and for whom he was now looking with a view to letting him in "on the ground floor" of a rich mining investment. Here follows a statement of the prosecuting officer of the conversations between the defendant and the prosecutrix to which a brief reference has already been made. It appears that the prosecution, through inability to prove the conspiracy, offered no testimony thereon; and the defendant now claims that the reference to such matters constituted misconduct for which the judgment should be reversed. There is absolutely nothing in the record indicating that the statement of the district attorney was made in bad faith, and therefore it did not constitute misconduct. *People v. Gleason*, 127 Cal. 323, 59 Pac. 592. But even if it did, the defendant did not assign it as such, nor request the court to give the usual admonition. Consequently the objection of the defendant made at the time must be deemed to have been waived. *People v. Mancuso*, 23 Cal. App. 146, 137 Pac. 278.

There is no merit in the defendant's further point, raised by the demurrer, that the information does not show the causal connection between the false pretenses and the parting with the money.

Judgment and order affirmed.

We concur: LENNON, P. J.; BEASLY, Judge, pro tem.

(68 Okl. 63)

BARNARD v. BILBY et al. (No. 7389.)
(Supreme Court of Oklahoma. Oct. 30, 1917.
Rehearing Denied March 19, 1918.)

(Syllabus by the Court.)

1. DESCENT AND DISTRIBUTION \S 34—CHILDREN OF DECEASED BROTHER OF DECEDENT—STATUTE.

Under section 6895, Wilson's Annotated Statutes of 1903, children of a deceased brother of the decedent take their interest in the estate of the decedent directly from such decedent, and not through their father, who died before the decedent, and their right to their inherited interest in the estate is not affected by the acts of their father in reference to the property descended.

2. EXECUTORS AND ADMINISTRATORS \S 38—"ASSETS."

The term "assets," as applied to decedents' estates, means property, real or personal, tangible or intangible, legal or equitable, which can be made available for or may be appropriated to the payment of debts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assets.]

3. INDIANS \S 13—HOMESTEAD ALLOTMENT—"ASSETS."

The homestead allotment of a minor Creek freedman who died April 22, 1908, is not subject to the payment of the debts of the decedent, and is therefore not assets of the decedent's estate.

4. INDIANS \S 15(1)—ADMINISTRATOR'S SALE OF ALLOTTED LAND—TITLE—COLLATERAL ATTACK.

A purchaser at an administrator's sale of the allotted land of a minor Creek freedman takes the title subject to all the restrictions, conditions, or limitations imposed thereon by the acts of Congress relating thereto, and such a sale is subject to a collateral attack.

Thacker, J., dissenting.

Error from District Court, Wagoner County; Fred P. Branson, Judge.

Suit in ejectment by John S. Bilby against James M. Barnard, and, pending such suit, action for injunction by Barnard against Bilby and others. Actions consolidated and tried together, and from the judgment, and from the overruling of his motion for a new trial, Barnard brings error. Reversed and remanded, with directions.

Robert F. Blair, of Wagoner, for plaintiff in error. Rittenhouse & Brown, of Wagoner, for defendant in error Bilby. Dan M. Meredith and F. Scruggs, both of Muskogee, for other defendants in error.

RAINEY, J. This case involves the title to the allotment of Tom Rentie, an enrolled Creek freedman, who died on the 22d day of April, 1908, intestate, unmarried, and without issue, leaving surviving him as his next of kin and heirs at law the following: Sophia Thompson, mother, Louis E. Nero, and Robert Nero, half-brothers, Sam Rentie, brother, Alice Rentie, sister, Curtis Nero and Sadie Nero, nephew and niece, respectively, children of his predeceased brother, Will Nero, and Mattie Cooks, a niece.

Louis E. Nero was appointed administra-

tor of the estate of the said Tom Rentie on the 9th day of June, 1908, and soon thereafter filed his petition in the county court of Wagoner county for the sale of the homestead allotment of the decedent for the purpose, as alleged in said petition, of paying the debts of the deceased, costs of administration, etc. The petition was granted, and said homestead allotment was purchased at the administrator's sale by one John S. Bilby.

Tom Rentie, who was a minor at the time of his death, when about 14 years of age, attempted to convey by two warranty deeds, one for 80 acres and one for 40 acres, his surplus allotment to his half-brother, Will Nero. Soon after the execution of these deeds Will Nero attempted to convey the 80-acre tract to James M. Barnard, and the 40-acre tract to H. V. Lowe, and H. V. Lowe, in turn, attempted to convey the 40-acre tract to James M. Barnard.

Subsequent to the execution of these deeds Louis Nero, as next friend of Tom Rentie, commenced an action in the District Court of the United States at Wagoner, Okl., against James M. Barnard, to cancel and set aside these conveyances, as clouds upon the title of the said Tom Rentie. With the advent of statehood this action was transferred to the district court of Wagoner county, as successor to the United States District Court, and while the cause was pending therein Tom Rentie died, and the cause was revived in the name of his heirs and Louis E. Nero, as administrator of his estate, and on April 27, 1909, judgment was rendered therein canceling the aforementioned deeds. No appeal was taken from this judgment.

Subsequent to the death of Tom Rentie, and prior to the administrator's sale of his homestead allotment to Bilby, Sophia Thompson and Alice Rentie sold to James M. Barnard the interest inherited by them in both the surplus and homestead allotments of the deceased.

Louis E. Nero, as administrator of the estate of the deceased, agreed to give Mr. F. Scruggs, an attorney at law of Wagoner, Okl., an undivided one-fourth interest in the deceased's allotment, as attorney's fees in cause No. 1373, said action being the one wherein judgment was procured canceling the deeds above mentioned. This agreement was in writing and approved by the county court of Wagoner county.

Will Nero died prior to the death of Tom Rentie, and left as his children and only heirs at law Curtis Nero and Sadie Nero. Barnard went into possession of the surplus allotment soon after Will Nero and H. V. Lowe attempted to convey the land to him, and he went into possession of the homestead allotment immediately after Sophia Thompson sold him her interest therein. After his purchase at the administrator's sale Bilby filed

sult in ejectment in the district court of Wagoner county, said action being No. 380, against James M. Barnard, for the possession of Tom Rentie's homestead allotment. Barnard answered, alleging that Bilby's title was void, and while this action was still pending and undecided, Barnard instituted an action in the same court against Bilby and the heirs of Tom Rentie, deceased. In this action Barnard sought to enjoin the prosecution by Bilby of cause No. 380, and to set aside the judgment in cause No. 1373, alleging that the judgment in said cause was void, for the reason that the action had never been properly revived. The action instituted by Barnard in the district court was No. 639, and was consolidated with cause No. 380, and the two cases were, by agreement, tried together, before the court, a jury being waived.

The findings of the trial court in said consolidated cases are too long to be incorporated herein in full, but in substance they were as follows:

(1) That the devolution of the estate of Tom Rentie, deceased, is governed by the laws of descent and distribution of the state of Oklahoma.

(2) That the administrator's sale of the homestead allotment of the deceased operated to vest in John S. Bilby the fee-simple title thereto.

(3) That John S. Bilby is entitled to possession of said homestead allotment, together with damages in the sum of \$720.

(4) That James M. Barnard is entitled to recover of and from John S. Bilby the sum of \$1,000, the same being the value of the improvements placed on the homestead allotment of Tom Rentie by Barnard, in good faith and under color of title.

(5) That Mattie Cooks has an undivided one-seventh interest in the surplus allotment of Tom Rentie, deceased.

(6) That Louis E. Nero has an undivided three-sevenths interest in said allotment, having purchased the interests of Robert Nero and Sam Rentie.

(7) That James M. Barnard has an undivided two-sevenths interest in said surplus allotment.

(8) That Curtis Nero and Sadie Nero together have an undivided one-seventh interest in said surplus allotment.

(9) That F. Scruggs has an undivided one-fourth interest in said surplus allotment, and "that F. Scruggs recover of and from each of the said defendants and plaintiffs an undivided one-fourth interest in said surplus allotment, and that the shares of Louis E. Nero, James M. Barnard, Mattie Cooks, Sadie Nero, and Curtis Nero be calculated after said 30 acres of the said F. Scruggs is taken away from the said 120 acres."

Mr. Barnard excepted to the judgment, and filed a motion for a new trial, which was overruled, and as plaintiff in error brings

the case here for review. Hereinafter he will be denominated as plaintiff, and all the other parties herein as defendants.

Plaintiff first contends that the judgment in the suit instituted by Tom Rentie against him in the United States court is void, for the reason that said cause was not properly revived in the name of the heirs and administrator of the estate of the deceased. The trial court found:

That the cause was properly revived, and "that the judgment rendered by the district court of Wagoner county in cause No. 1373 was rendered after a general appearance therein by Barnard, and after the same had been revived by the heirs at law and the administrator of the estate of Tom Rentie, deceased, and after full notice to the plaintiff, and to his attorney of record, that no appeal had been taken from the judgment in said cause, and that the judgment therein was conclusive as to all matters and subjects litigated therein."

This finding of the trial court is not clearly against the weight of the evidence, and we are not at liberty to disturb the same. *Schock et al. v. Fish*, 45 Okl. 12, 144 Pac. 584.

In the trial of the instant case it was contended by the plaintiff that Louis E. Nero and Will Nero entered into a conspiracy whereby they were to convey Tom Rentie's allotment to the plaintiff, knowing that said land could not be lawfully conveyed on account of the minority of Tom Rentie, Will Nero's grantor, and that the said Louis E. Nero and the heirs of Will Nero, deceased, are estopped to claim any title or interest in the land in controversy. The alleged conspiracy was one of the vigorously contested issues in the case, and evidence was offered in support of and against plaintiff's contention, but the trial court found against plaintiff, in the following language:

"That said Louis E. Nero was not present when any of the said deeds by Tom Rentie to Will Nero or from Will Nero to H. V. Lowe and James M. Barnard were executed, and had no knowledge or information of their execution, and did not enter into any conspiracy or confederation with the said Will Nero and Tom Rentie to take the said deeds from Tom Rentie to the said Will Nero for the purpose of cheating and defrauding James M. Barnard and H. V. Lowe, by and through the sale of the said land."

We have weighed the evidence in the record, and the weight thereof, in our opinion, is in accord with the findings of the court. *Schock et al. v. Fish*, supra.

[1] It is next urged that Curtis Nero and Sadie Nero, children of Will Nero, deceased, are estopped from asserting any title to the land in controversy by the alleged wrongful conduct of their father in imposing upon the plaintiff an invalid title to said land. It is plaintiff's theory that when Will Nero executed and delivered his deed, with covenants of general warranty to the plaintiff and to the plaintiff's grantor, Lowe, that the said Will Nero and all persons in privity with him, including Curtis Nero and Sadie Nero, as his heirs, are estopped forever from claiming

any right, title, or interest in and to the land described in said deeds, and are estopped to claim the right to the possession of said land. It is plaintiff's contention that upon the death of Tom Rentie the title went through Will Nero to his heirs, and that the interest inherited by said heirs through Will Nero was an after-acquired title in Will Nero, and vested in Barnard, as Will Nero's grantee. We cannot agree with this contention, for the reason that Will Nero died prior to the death of Tom Rentie, and upon the death of Tom Rentie he never acquired any title to Tom Rentie's allotment. The applicable part of our statutes on succession is section 6895 Wilson's Annotated Statutes of 1903, which was in force and effect at the time of the death of Tom Rentie. It reads:

"If there be no issue, nor husband, nor wife, nor father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation."

Under this statute Curtis Nero and Sadie Nero did not take their share in the allotment of the deceased, Tom Rentie, from Will Nero, but took direct from their ancestor, Tom Rentie, by representation.

In the case of *Case v. Wildridge*, 4 Ind. 51, the Supreme Court of Indiana held that, where a grandfather dies leaving a granddaughter as his heir, the latter inherits from the grandfather, and not through her father, who died before the grandfather, and she is therefore not affected by the acts of her father in reference to the property descended. This is also the holding of the Supreme Court of Louisiana in the case of *McKenzie v. Bacon*, 40 La. Ann. 157, 4 South. 65, wherein the court said:

"Where a person dies leaving no descendants or ascendants, but a brother and children of a predeceased brother, the latter are called to the succession of their uncle by representation, the children representing their predeceased father," and "derive their right to inherit from * * * the law," which "right is not affected by any act of their father."

In the case of *Powers v. Morrison*, 88 Tex. 133, 30 S. W. 851, 28 L. R. A. 521, 53 Am. St. Rep. 738, the Supreme Court of Texas held that the grandchildren of an intestate took by substitution, not through, but paramount to, their deceased parent. In that case the Texas law upon which the decision was based designated the grandchildren as persons to take title, under the circumstances of the case, and it was held that said grandchildren derived their title, not from the parent, but immediately from the intestate. We think this is the intent of our statute, and since the title was never in Will Nero, Sadie Nero and Curtis Nero did not inherit from him, but directly from Tom Rentie. See, also, *Valentine v. Borden*, 100 Mass. 273.

[2-4] Under section 16 of the Supplemental Agreement of June 30, 1902 (32 Stat. L. 500 c. 1323), the deceased, Tom Rentie, would not be estopped from asserting title to the land by reason of the execution of the void deed

during his minority, and since Sadie Nero and Curtis Nero took directly from him, it necessarily follows that no estoppel could be asserted against them.

We concur with the plaintiff in the view that the administrator's deed from Louis E. Nero to John S. Bilby is void, and that Mr. Bilby did not obtain any title by virtue of the administrator's sale of the 40-acre homestead in controversy. It will be remembered that the land attempted to be thus conveyed is the homestead allotment of the deceased, Tom Rentie, who was a duly enrolled Creek freedman and a minor at the time of his death on April 22, 1908. At that time section 16 of the Supplemental Creek Agreement was in full force and effect. It reads:

"Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

"Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who cannot select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

At the time of the sale the act of May 27, 1908 (35 Stat. L. 312, c. 199), was in full force and effect. Section 4 of this act reads as follows:

"That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: Provided, that allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law."

Under these acts the homestead in question was not subject to the payment of the debts of the deceased. In *re Davis' Estate*, 32 Okl. 209, 122 Pac. 547; *Redwine v. Ansley*, 32 Okl. 317, 122 Pac. 679; In *re French Estate*, 45 Okl. 819, 147 Pac. 319; *Roth v. Union Nat. Bank of Bartlesville*, 160 Pac. 505.

Counsel for defendant Bilby agree that

It was the intention of Congress to exempt the property sold by the administrator from any form of claim or demand against the allottee, but insists that there is nothing in the record in the county court disclosing that the land sold was the homestead allotment of the decedent, or that he was a minor Creek freedman, and that because of the condition of the record the validity of the sale cannot now be called in question in a collateral proceeding against the purchaser of the land.

We have examined the record in the case and find that in the proceedings for the appointment of the administrator of Tom Rennie's estate, and for the sale of his homestead allotment, it nowhere appears that the decedent was a minor Creek freedman at the time of his death, or that the land sold was any part of the land allotted to him as such, but we cannot agree with counsel that the sale was not subject to collateral attack. We do not think the cases of *Hathaway v. Hoffman*, 153 Pac. 184, *Eaves v. Mullen*, 25 Okl. 679, 107 Pac. 433, and *Baker v. Cureton*, 150 Pac. 1090, are in point. We agree with the holding in these cases that the county courts are courts of record in probate matters, and that the records in such courts import absolute verity, and cannot be collaterally impeached as to any matter within the jurisdiction of said courts. If the county court of Wagoner county in this case had jurisdiction over the subject-matter and the power to hear and determine the question as to whether or not the land sold was subject to sale for the payment of the debts of the deceased, the authorities cited by counsel for defendant would govern. But the county court of Wagoner county did not have jurisdiction of the subject-matter, nor the power to hear and determine whether or not the land sold was subject to sale by the administrator.

Section 8417, Rev. Laws of Oklahoma 1910, provides that the real property of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the county court and to the possession of any administrator appointed by that court for the purpose of administration.

It is well settled that probate courts do not have jurisdiction to authorize an administrator to sell lands that are not assets of the decedent's estate for the payment of the decedent's debts, or for any other purpose. Was the land sold assets of the deceased's estate? In *Mutual Life Insurance Company of New York v. Farmers' & Mechanics' Nat. Bank of Cadiz, Ohio* (C. C.) 173 Fed. 390-397, it is held that the term "assets," as applied to decedents' estates, means property, real or personal, tangible or intangible, legal or equitable, which can be made available for or may be appropriated to the payment of debts. See, also, 3 Cyc. 1111.

Since under the acts of Congress above cited, which control in these matters, the land was not subject to the payment of the debts

of the deceased, it did not become assets of the estate in the hands of the administrator, and therefore the county court of Wagoner county did not obtain jurisdiction to hear and determine whether or not said land was subject to sale for the payment of the debts of the deceased, or the expenses of administration. Since under the federal law the land was not subject to sale for payment of the debts of the deceased, upon the death of the allottee the title to the allotment of this minor Creek freedman passed immediately to his heirs, and the administrator was not entitled to the possession thereof and was not authorized to administer thereon.

In this jurisdiction, as in practically all jurisdictions, the purchaser is bound to take notice that the administrator, as the representative of the deceased, is authorized to sell only such property as came into the administrator's hands as assets of the decedent's estate. It is the duty of the purchaser at such a sale to examine the record and title to the land, in order to know what he is buying.

Counsel for Bilby have filed a very able brief, and have made an ingenious argument in support of their contention, but surely counsel would not contend that the probate courts of this state would have jurisdiction to authorize the guardian of a full-blood Indian minor to sell such minor's lands from which the restrictions had not been removed. If such a sale were made, and even though there was nothing on the face of the record to show that the land was the restricted allotment of a full-blood Indian minor, and therefore not subject to sale, we still think the sale would be void, and that said minor would not be estopped to attack the same collaterally. In such a case the probate court would not have the power to hear and determine the question as to whether or not such restricted land was subject to sale. That question has already been determined by Congress. It cannot be doubted that the applicable acts of Congress relating to the allotted lands of members of the Five Civilized Tribes are an integral part of the title to such lands, and since the purchaser at an administrator's sale does not acquire any greater estate or better title than the deceased had, such a purchaser, in the case of allotted Indian lands, takes the land purchased with all the restrictions, limitations, or conditions incident thereto as provided by the federal law, and the title of the real owner to such land is not impaired by reason of the fact that the probate proceedings on their face are regular and do not disclose the infirmities in the estate conveyed.

It has often been held that, where the title of a stranger is attempted to be conveyed by an administrator's sale, such stranger is not bound by the sale proceedings, although there are no irregularities on the face thereof, but may disregard said proceedings and sue in ejectment to recover his land

or in equity to quiet his title if he is in possession. The proceedings are absolutely void as to him.

Therefore the trial court erred in not holding the administrator's deed to Bilby void.

Likewise Louis E. Nero, as administrator of the estate of Tom Rentle, deceased, was without authority to agree that Mr. Scruggs should have an undivided one-fourth interest in the surplus allotment for his services as attorney in cause No. 1373. It is not contended that any contract was made by Tom Rentle or any person acting for him during his lifetime for said services. We are convinced that Mr. Scruggs has rendered valuable services to the heirs of this estate, and we regret that under the law he is not entitled to compensation in this action involving the title to the land, but do not hold that he would not be entitled to compensation in a proper proceeding.

For the errors committed by the trial court, this cause is reversed and remanded, with directions to enter judgment in accord with the views herein expressed. All the Justices concur, except THACKER, J., who dissents.

(68 Okl. 81)

STATE ex rel. CRICKETT et al. v. PITCH-FORD, District Judge. (No. 9358.)

(Supreme Court of Oklahoma. Feb. 12, 1918. Rehearing Denied March 19, 1918.)

(Syllabus by the Court.)

1. DISMISSAL AND NONSUIT §37 — VOLUNTARY "DISMISSAL"—PAYMENT OF COSTS.

Under section 5126, Rev. Laws 1910, the plaintiff has the right, upon payment of costs, to dismiss his action without an order of court any time before the trial has commenced. But the filing of the præcipe without paying the costs does not constitute a dismissal of the action.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dismissal.]

2. MANDAMUS §58—ENTRY OF JUDGMENT.

After the mandate of this court was received and spread of record in the trial court, plaintiff filed a præcipe for dismissal of the case, but did not pay the costs. The court refused to render judgment in obedience to the mandate, treating the case as automatically dismissed upon filing of the præcipe. Held, the action not having been dismissed by filing the præcipe without paying the costs, mandamus will lie to compel the trial court to enter judgment in obedience to the mandate.

Application for mandamus by the State of Oklahoma, on relation of Charles Crickett and others, against John H. Pitchford, Judge of the District Court. Writ issued.

J. H. Jarman, of Sallisaw, and S. A. Horton, of Oklahoma City, for plaintiffs. W. L. Curtis, of Ft. Smith, Ark., for defendant.

OWEN, J. This is an original action instituted by plaintiffs for mandamus to compel the defendant, Judge of the district court of Sequoyah county, to enter judgment in ac-

cordance with the mandate issued by this court in the case of Crickett et al. v. Hardin (No. 7478) 159 Pac. 275.

It appears from the petition and response that judgment was rendered by this court June 27, 1916, reversing the case of Crickett et al. v. Hardin, with direction to the trial court to render judgment in conformity to the views therein expressed. The mandate of this court was received and filed by the clerk of the trial court, and spread of record by order of the court.

On March 27, 1917, after the mandate had been spread of record, Charles Crickett, plaintiff in that case, filed a præcipe for dismissal of the cause in the following language:

"To the Court Clerk of Sequoyah County, Oklahoma: You will please dismiss the above-entitled cause with prejudice at cost of the plaintiff. [Signed] Charles Crickett, Plaintiff."

On April 26, 1917, a motion was filed by Charles Crickett to withdraw this præcipe for dismissal. On May 13, 1917, Hardin, the defendant in error, filed a motion for judgment in his favor in keeping with the opinion and mandate of this court, as he construed it. On May 21, 1917, plaintiffs in error filed a motion for judgment in their favor in keeping with the opinion and mandate, as construed by them. On July 9, 1917, plaintiff in error Crickett filed a motion for leave to amend his original petition to include certain lands alleged to have been inadvertently omitted. The cause coming on to be heard upon these several motions, the court held that the cause had been automatically dismissed on March 27, 1917, upon filing of the præcipe for that purpose by Charles Crickett, and entered an order denying the several motions, including the motion to withdraw the præcipe for dismissal and the motions to enter judgment in accordance with the mandate.

[1] In treating the filing of the præcipe as a dismissal of the case, the court was in error. It appears the costs of the action were not paid at the time the præcipe was filed. Section 5126, Rev. Laws 1910, permits a plaintiff at any time before the trial is commenced, on payment of the costs, to dismiss his action without an order of the court. In the case of Harjo v. Black, 153 Pac. 1137, it was said:

"But the filing of the stipulation by plaintiff is not all; for the statute requires that the costs be paid. * * * It cannot be said, therefore, that the mere filing of the stipulation automatically dismissed the suit. Until the costs were paid, it remained upon the court docket as though the stipulation had not been filed. The court was not divested of jurisdiction over the action until a compliance with the statute."

To the same effect is the case of Davis v. Mimey, 159 Pac. 1112. In this connection counsel for respondent insist that the statute was complied with in this respect on May 17, 1917, when one of the attorneys for Crick-

ett paid the costs in arrears to the clerk in order to secure the issuance of a subpoena. This payment did not work a dismissal, for the reason a motion had been filed by Crickett to withdraw this præcipe, and this payment was made in order to secure the attendance of witnesses in support of this motion. The clerk refused to issue a subpoena until the costs had been paid. This payment was to prevent a dismissal rather than to secure it, as the statute contemplates. That the trial court considered the case dismissed upon filing the præcipe appears from the language of the order, as follows:

"It is therefore ordered and adjudged that petition of the plaintiff Charles Crickett to withdraw and set aside the præcipe for dismissal of this action be denied, for the reason that said plaintiff had a lawful right to dismiss said action, which he did, when said præcipe for dismissal was filed herein."

[2] It is urged by counsel for respondent that mandamus will not lie in this action for the reason (1) plaintiff had an adequate remedy at law in appeal from the order of the court; and (2) in accordance with the views expressed in the opinion reversing the case, applied to the facts, plaintiff was not entitled to any interest in the land. Neither of these positions is tenable. The original action was brought by plaintiffs alleging that Charles Crickett, as the half-brother and sole heir of Mary Gann, was the owner of the land allotted to Mary Gann, deceased. The defendant, Hardin, denied Crickett was the heir of Mary Gann, alleging that Mary Gann was an illegitimate child. The issue was whether she was the legitimate child of Josiah Crickett, father of Charles Crickett; that is, whether the relation between Josiah Crickett and Mary Gann's mother was matrimonial or meretricious. Hardin claimed title through a maternal uncle of Mary Gann. In the opinion, prepared by Commissioner Bleakmore, appears the statement:

"The principal, if not the sole, question involved, for a determination by the trial court, and presented here for review, is the legitimacy of the allottee [Mary Gann]."

The lower court found that Josiah Crickett and the mother of Mary Gann, "did assume a cohabital relation, ranging from one to two years, and that during this relation Mary was born," but concluded as a matter of law, that this relation did not constitute a marriage. That conclusion was reversed by this court, and the cause remanded, with direction to the trial court to render judgment in conformity to the views therein expressed. Under this direction it was the duty of respondent to enter judgment granting Crickett a new trial. It was not within his discretion to perform or refuse to perform such duty. In the case of *Stearns, Mayor, v. State ex rel.*, 23 Okl. 462, 100 Pac. 909, it was held that mandamus will lie to compel an officer to perform a duty purely ministerial and without discretion, where it appears (1) there is a

legal right to have the act done; (2) that it is a plain legal duty of respondent, and that respondent is without discretion to perform or refuse to perform such duty; (3) that the writ will afford an availing remedy, and petitioner has no other plain, speedy, adequate remedy. This holding was approved in the case of *City of Guthrie v. Stewart*, 45 Okl. 603, 146 Pac. 585. In the case of *Gaines v. Caldwell*, Judge of the U. S. Circuit Court, 148 U. S. 228, 13 Sup. Ct. 611, 37 L. Ed. 432, it was said:

"Obeying the mandate of this court and proceeding in conformity with its opinion are not matters within the discretion of the Circuit Court; and therefore the cases which hold that this court will not direct in what manner the discretion of an inferior tribunal shall be exercised have no application to a petition for a mandamus to require the Circuit Court to obey the mandate of this court."

It may be said that Crickett had a right to appeal from the order overruling his motions to withdraw the dismissal and enter judgment on the mandate, but this right did not afford an adequate or speedy remedy.

In the case of *St. Louis & S. F. R. Co. v. Hardy*, 45 Okl. 423, 146 Pac. 38, Mr. Justice Brown, in delivering the opinion of the court, said:

"It may be contended that the defendant below had an adequate remedy at law in an appeal to this court from any judgment rendered against it in a subsequent trial, on plaintiff's amended petition, but we are of the opinion that such right of appeal would not afford the defendant adequate relief from the burden of such unauthorized trial, and, in case of a judgment for plaintiff, the trouble and expense of another appeal to this court."

It is contended by counsel for respondent, notwithstanding this court held the facts, as found by the trial court, to constitute a legal marriage according to the tribal custom of the Cherokees, and that Mary Gann was a legitimate half-sister to Charles Crickett, that judgment cannot be rendered for Crickett in obedience to the mandate, for the reason that he would inherit only a one-half interest in Mary Gann's allotment, and it appeared in the trial of the original case that Crickett had conveyed his one-half interest in the land to Littlejohn and Hardin under deeds held in that action to be champertous. With these questions we are not concerned at this time. The duty of the trial court to enter judgment in obedience to the mandate was ministerial, but the judgment of this court did not undertake to carve out the interest to which Charles Crickett was entitled; that was not an issue presented on that appeal. The trial court concluded that Mary Gann was an illegitimate child, and therefore Crickett was not her heir. That conclusion was reversed and the trial court directed to render a judgment in conformity with the holding that Mary Gann was a legitimate child, and therefore Charles Crickett is her heir. If the trial court can, from the evidence in the record, determine the inter-

est to which Charles Crickett is entitled as the heir of Mary Gann, then it is the duty of that court to render judgment accordingly, but if this cannot be done, it is the duty of the court to proceed further in the cause and determine all the issues properly presented.

The plaintiff insists that the writ of mandamus should direct the respondent to enter judgment upon the mandate, and also to enter an order permitting the plaintiff to amend his petition so as to include the lands inadvertently left out. It is true that under section 4790, Rev. Laws 1910, the court may, after judgment, permit the insertion of other allegations, but that is not a question properly presented here. That is a matter to be presented to the trial court after judgment has been rendered on the mandate granting a new trial. The opinion of this court in the original case directs the trial court to render judgment in conformity to the view that Mary Gann was a legitimate child of Josiah Crickett. It is the duty of the trial court under that mandate to proceed to dispose of the issues in conformity to that view, and in such proceeding, if the court commits error in refusing to permit proper amendment, that will be a proper matter to present to this court on appeal, as any other error that might be committed in disposing of the case.

Let the writ issue directing respondent to enter judgment in the case of Crickett et al. v. Hardin, 1477, district court of Sequoyah county, granting plaintiffs a new trial, and to proceed in said cause in accordance with the finding and conclusion that Mary Gann, the allottee, was a legitimate child of Josiah Crickett, and the half-sister of Charles Crickett. All the Justices concur.

(68 Okl. 43)

BANK OF BUFFALO v. VENN. (No. 8389.)

(Supreme Court of Oklahoma. March 5, 1918.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE §44(8) — AMOUNT IN CONTROVERSY—ITEMS—ATTORNEY'S FEES.

Where an action was brought to recover twice the amount of usurious interest paid on a loan and for an attorney's fee as provided by section 1006, Rev. Laws 1910, the attorney's fee is not to be taken into consideration in determining the amount in controversy, as such attorney's fee is recoverable, and must be taxed as part of the costs of the case.

2. APPEAL AND ERROR §1046(1)—REVERSAL—GROUNDS.

Where a judgment is manifestly right upon the record, the cause will not be reversed because the county attorney appeared as counsel for plaintiff, especially where no objection was made in the trial court to his appearance.

3. JUSTICES OF THE PEACE §54(1)—TIME FOR TRIAL—JURISDICTION.

A justice of the peace court does not lose jurisdiction of an action for failure to try the case on the return day at the hour fixed in the summons.

4. JURY §83(1)—QUALIFICATIONS.

Parties to an action have no vested right in any particular juror, and all that either can insist upon is that the jurors actually selected to try the case shall be competent, disinterested, and selected according to law.

Error from County Court, Harper County; A. H. Walker, Judge.

Action by L. E. Venn against the Bank of Buffalo. From a judgment for plaintiff in the county court on appeal from justice's court, defendant brings error. Affirmed.

E. J. Dick, W. C. Lewis, and M. W. McKenzie, all of Buffalo, for plaintiff in error. W. E. Morris, of May, and W. H. Springfield, of Woodward, for defendant in error.

HARDY, J. This was an action by L. E. Venn against the Bank of Buffalo to recover \$151.20, alleged to be twice the amount of usurious interest paid to the bank by plaintiff on a loan to him, and for a reasonable attorney's fee and for costs. Judgment was rendered in plaintiff's favor in the justice court for the sum of \$151.20, penalty on account of the usurious interest exacted and for an attorney's fee in the sum of \$100 and for costs. The case was appealed to the county court and tried, and again resulted in a judgment in plaintiff's favor, from which the bank prosecutes error.

[1] The amount sued for was within the jurisdiction of the justice of the peace. The jurisdiction of the justice court as fixed by section 18, art. 7, of the Constitution includes all civil cases where the amount involved does not exceed \$200 exclusive of interest and costs. Construing this provision, it has been held, in an action on a promissory note containing a provision for the payment of an additional amount as an attorney's fee, that the attorney's fee so provided for must be included in determining the amount in controversy. *Miller et al. v. Mills et al.*, 32 Okl. 388, 122 Pac. 671; *St. Paul F. & M. Ins. Co. v. Peck*, 37 Okl. 85, 130 Pac. 805. The statute upon which this action is based provides that in all cases the prevailing party shall be entitled to recover, as part of the costs, a reasonable attorney's fee in a sum not less than \$10 to be fixed by the court. Section 1006, Rev. L. 1910. The attorney's fee in this case, not being provided for in the contract, and being expressly designated as part of the costs and recoverable as such, is by the constitutional provision excluded from consideration in determining the amount in controversy of which the justice court had jurisdiction.

[3] The justice court did not lose jurisdiction because the case was not heard promptly. There is nothing in the statute which requires the justice to hear the cause within any specified time after the hour fixed in the summons. If by reason of a failure to take up the action for hearing within any specified time after the hour fixed in the summons

the justice lost jurisdiction, interminable confusion would be created in all the justice courts in the state. Many times the justice would be engaged in the trial of another action, and would be compelled to suspend proceedings in the case then on trial and take up other matters, and it would often happen that a number of cases would be returnable at the same hour, and it would be an impossibility for the justice to hear all of them at once, and if the rule contended for was the law, he would lose jurisdiction in all cases except the one actually heard by him. Even if it were error for the justice to render default judgment without hearing evidence upon the merits of the controversy, that error cannot be urged because an appeal was prosecuted from the judgment of the justice to the county court where another trial was had.

[2] No objection was made to Hon. W. E. Morris, county attorney, appearing as attorney for plaintiff. If objection had been made, it would have been error to permit him to further appear. *Aldridge v. Capps*, 156 Pac. 624.

However, on the facts it appears but one judgment could have been rendered, and that the judgment in fact rendered was in accordance with the law and the evidence, and we would not reverse the cause for that fact alone when the judgment rendered was so manifestly correct.

[4] The defendant had no vested right in any particular juror. All that it could insist upon was that the jurors actually selected to try the case should be competent, disinterested, and selected according to law, and it was not prejudicial error for the court to excuse the juror Newberry. *City of Guthrie v. Shaffer*, 7 Okl. 459, 54 Pac. 698; *Cochran et al. v. United States*, 14 Okl. 108, 76 Pac. 672; *Boutcher v. State*, 4 Okl. Cr. 576, 111 Pac. 1006.

There is no merit in the remaining contentions, and the judgment is affirmed.

(68 Okl. 80)

LOUGHRIDGE v. MORRIS et al.
(No. 8063.)

(Supreme Court of Oklahoma. Feb. 12, 1918.
Rehearing Denied March 19, 1918.)

(*Syllabus by the Court.*)

JUDGMENT ¶585(3) — **BAR — EJECTMENT — RENTS AND PROFITS.**

Where plaintiff brought an action of ejectment and prosecuted same to judgment in his favor, but made no demand therein for rents and profits of the land involved, the judgment in the ejectment suit is not a bar to a subsequent action for rents and profits.

Error from District Court, Carter County; S. H. Russell, Judge.

Action by B. F. C. Loughridge against Minerva Morris and another. Judgment for defendants, and plaintiff brings error. Reversed, and cause remanded for new trial.

J. T. Coleman and H. T. Sims, both of Ardmore, for plaintiff in error. J. B. Moore, of Ardmore, for defendants in error.

HARDY, J. Plaintiff, B. F. C. Loughridge, commenced an action in the district court of Carter county, Okl., against Minerva Morris and Jim Morris, to recover \$880 as damages caused by defendants' unlawfully dispossessing and withholding from plaintiff certain lands described in plaintiff's petition during the years 1908 and 1909, which sum is alleged to be the value of the rents and profits thereof for said years. The answer of the defendants, after general denial, pleaded specially that the matters in controversy had been heard and adjudicated by the district court of Love county, Okl., in an action between the same parties, and that said judgment was a bar to any recovery by plaintiff herein. The parties occupy the same position in this court which they occupied in the trial court, and will be designated accordingly. The trial was to the court who sustained the plea of former adjudication and rendered judgment for defendants, and plaintiff prosecutes error.

It appears that plaintiff had commenced an action in ejectment against said defendants for possession of said premises, and that a judgment had been rendered in his favor, from which no appeal was prosecuted. In his petition in the original case there was no claim for damages or rents and profits, and none were awarded him by the judgment of the court. It is contended by defendants that the claim for rents and profits was embraced within the issues in the ejectment case, and that further litigation thereof is precluded by such judgment.

The rule is well established that a former judgment of a court of competent jurisdiction between the same parties and involving the same subject-matter is conclusive not only as to every matter involved in the former case, but as to every matter which might have been pleaded or given in evidence whether same was pleaded or not. *Prince v. Gosnell*, 47 Okl. 570, 149 Pac. 1162, and cases cited. This rule, however, does not apply to matters growing out of separate and independent causes of action which might have been pleaded. *Farmers' State Bank v. Stephenson et al.*, 23 Okl. 695, 102 Pac. 992; *Pioneer Tel. & Tel. Co. v. State*, 40 Okl. 417, 138 Pac. 1033; 2 Black, Judg. § 732; 23 Cyc. 1172-1189; 15 R. C. L. §§ 450, 452.

Formerly a plaintiff was not permitted to recover for mesne profits in an action of ejectment, but was given a remedy for the damages involved by a separate action known as an action for mesne profits. *Newell on Ejectment*, p. 614; *Warville on Ejectment*, § 526; *Sedgwick & Walt's Trial of Title to Land*, § 646.

Under the Code it is now permissible to join with an action of ejectment an action for the rents and profits of the land involved. Section 4738, Rev. Laws 1910, subd. 6; *Scarborough v. Smith*, 18 Kan. 399; *Black v. Drake*, 28 Kan. 482; *Scantlin v. Allison*, 32 Kan. 376, 4 Pac. 618. The two causes of action, however, are still separate, and the Code merely permits them to be joined in order to prevent a multiplicity of suits. *Coburn v. Goodall*, 72 Cal. 493, 14 Pac. 195, 1 Am. St. Rep. 75; *Warville on Ejectment*, §§ 526-536.

And where plaintiff in ejectment fails to allege a cause of action for rents and profits, proof thereof is ordinarily not admissible. *Newell on Ejectment*, p. 345; *Warville on Ejectment*, § 536; *Sedgwick & Wait's Trial of Title to Land*, § 655. And a judgment upon the issues in ejectment constitutes no bar to a separate action for rents and profits. *Newell on Ejectment*, p. 625; *Sedgwick & Wait's Trial of Title to Land*, § 662.

It follows that the plea of former adjudication was not sustained by the evidence, and the court committed error in so holding. The judgment is therefore reversed, and the cause remanded for new trial. All the Justices concur.

(67 Okl. 63)

CITY OF ENID v. McCANN. (No. 9382.)

(Supreme Court of Oklahoma. Oct. 9, 1917.

Rehearing Denied Nov. 20, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR §566, 567(1)—**CASE-MADE—AMENDMENTS—TIME.**

The time within which to suggest amendments to a case-made begins to run from the expiration of the time allowed within which to serve same, and not from the actual service thereof; and a case-made, signed and settled before the expiration of the time to suggest amendments, is a nullity.

Error from District Court, Garfield County; James B. Cullison, Judge.

Action between the City of Enid and Lillian L. McCann. Judgment for the latter, and the former brings error. Dismissed.

Chalmers B. Wilson, of Enid, for plaintiff in error. Charles N. Harmon and M. C. Garber, both of Enid, and P. T. McVay, of Oklahoma City, for defendant in error.

OWEN, J. Defendant in error moves to dismiss the appeal in this case for the reason that an order was entered in the lower court extending the time for the service of case-made until July 1, 1917, and providing that plaintiff be given ten days after service of case-made for suggesting amendments, same to be settled on five days' notice. The case-made was actually served on June 18, 1917, and signed and settled on notice on July 6, 1917. It is urged by plaintiff in error that the time in which to suggest amendments be-

gan to run from the date of service, June 18th, and not from July 1st, the expiration of the time in which to serve the case-made. This case is ruled by the cases of *Sov. Camp of W. O. W. v. Chumley*, 161 Pac. 1175, and *Frey v. McCune*, 153 Pac. 409, and the motion must be sustained.

The appeal is therefore dismissed. All the Justices concur.

(68 Okl. 38)

STATE ex rel. HAMILTON et al. v. TAYLOR. (No. 8933.)

(Supreme Court of Oklahoma. March 5, 1918.)

(Syllabus by the Court.)

1. JUDGES §16(1) — **DISQUALIFICATIONS** — **JUDGE PRO TEMPORE—STATUTE.**

Where the county judge certifies his disqualifications to try a particular case, or any proceeding therein, the judge pro tempore must be elected under the provisions of section 5814, Rev. Laws 1910. Sections 1830, 1831, of this statute have application to the election of a temporary judge whenever the county judge is unable to perform the duties generally of the office.

2. STATUTES §159 — **IMPLIED REPEAL** — **IRRECONCILABLE CONFLICT.**

Since repeals by implication are not favored, statutes must be construed so as to give effect, if possible, to each section, and an earlier statute will not be held to have been repealed by a later one, unless the apparent conflict between the two is irreconcilable.

Original action for writ of prohibition by the State of Oklahoma, on the relation of B. F. Hamilton, executor of the estate of Samuel Bailey, deceased, and Sherman Spencer, legatee, against McLain Taylor, acting as Special Judge of the County Court of Pottawatomie County, Okl. Writ denied.

Embry, Crockett & Johnson and F. H. Reilly, all of Oklahoma City, for plaintiffs. T. G. Cutlip and John L. Arrington, both of Tecumseh, for defendant.

OWEN, J. This is an original action filed in this court for writ of prohibition to prohibit McLain Taylor acting as judge pro tempore of the county court of Pottawatomie county in the trial of certain issues pertaining to the administration of the estate of Samuel Bailey, deceased. It appears from the petition and response that the regular county judge, having been of counsel and having a claim against the estate, entered his disqualifications to hear and determine a motion to set aside a former order of the court, made by his predecessor, affecting the administrator's bond. Upon entering this order of disqualification the clerk of the court proceeded to hold an election for a special judge, at which election McLain Taylor was elected. It appears this election was held under section 5814, Rev. Laws 1910, and no contention is made as to the regularity of the proceedings under the provisions of this section. But the petitioner insists that the

election should have been held under section 1831 of this statute. Section 12, art. 7, of the Constitution (section 197, Wms. Ann.), provides:

"When the county judge is disqualified in any case pending in the county court, a judge pro tempore may be selected in the manner provided for the selection of judges pro tempore in the district court."

It is conceded that the election was held under the procedure prescribed, in section 5814, for district courts.

[1, 2] Section 1830 of this statute provides for the election of a temporary judge of the county court whenever the regular judge is unable to perform the duties of his office because of illness, absence from the county, or other disqualifications, and further provides that such temporary judge shall have the same authority and the same power as the regular judge.

Section 1831 of this statute makes it the duty of the clerk of the county court to fix a time for the election of such temporary judge, and to serve a written notice on each member of the bar of the county at least 48 hours prior to such election. These sections apply to the election of a temporary judge to act in all cases and all matters properly coming before the county judge. The provisions of the Constitution referred to and section 5814 of the statute, under which the election of this case was held, applies to the election of a judge pro tempore where the regular judge is disqualified in a particular case. To hold otherwise would be to say that section 1830, the later act, is in conflict with the provision of the Constitution and with section 5814 of the statute. The well-settled rule is that where two acts, or parts of acts, are reasonably susceptible of a construction that will give effect to both and to the words of each, without violence to either, it should be adopted in preference to a construction which leads to the conclusion there is a conflict. Repeals by implication are not favored. *Matthews v. Rucker*, 170 Pac. 492 (No. 8398, not yet officially reported); *K. C. So. Ry. Co. v. Wallace*, 38 Okl. 233, 132 Pac. 908, 46 L. R. A. 112; *Sackett v. Rose*, 154 Pac. 1177, L. R. A. 1916D, 820.

It is urged by counsel for petitioner that the notice of the clerk, in effect, amounted to a notice for the election of a judge to hear and determine the entire case, and for that reason should be held void. It appears that the county judge certified his disqualification to try the issues raised by a motion to cancel and set aside a certain order made by the county court on the 4th day of January, 1917, purporting to discharge the executor, Hamilton, and his sureties on his bond for \$125,000. That part of the notice posted by the clerk, necessary for consideration, is as follows:

"I will hold, in the county court room in the city of Tecumseh, Okl., at the hour of 1:30 o'clock p. m. of said day, an election of special

judge to hear and determine all issues raised in the said motion of T. G. Cutlip et al., filed in said cause aforesaid, and to hear and determine any and all other questions that may be raised hereafter while said estate is within the jurisdiction of said county court."

It is insisted that the language, "to hear and determine any and all other questions that may be raised hereafter while said estate is within the jurisdiction of said county court," renders the election void. The only matter pending before the court at the time his disqualification was certified was the determination of the motion. Taylor was elected judge pro tempore for the purpose of disposing of that motion. The language complained of may be treated as surplusage, and his jurisdiction under that election will be confined to the determination of the issues presented by the motion, and not to a final disposition of other issues that may arise in the administration of the estate.

It appearing that the election was regular for the purpose for which it was had, the writ will be denied. All the Justices concur.

(68 Okl. 40)

WILLIAMSON-HALSELL-FRAZIER CO. v.
STATE ex rel. TRADESMEN'S STATE
BANK. (No. 8001.)

(Supreme Court of Oklahoma. March 5, 1918.)

(Syllabus by the Court.)

EVIDENCE — 83(1) — SALE OF ASSETS BY BANK COMMISSIONER — PRESUMPTION OF AUTHORITY.

Where the bank commissioner took charge of an insolvent bank, and where in winding up its affairs he sold certain of its assets, it will be presumed, in the absence of an affirmative showing to the contrary, that he obtained authority for such sale from the district court or a judge thereof.

Error from District Court, Oklahoma County; E. D. Oldfield, Judge.

Action by the State of Oklahoma, on relation of the Tradesmen's State Bank, against the Williamson-Halsell-Frazier Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Blake, Boys & Shear, of Oklahoma City, for plaintiff in error. Harris & Nowlin, of Oklahoma City, for defendant in error.

HARDY, J. The state, upon the relation of the Tradesmen's State Bank, brought an action in the district court of Oklahoma county to compel a transfer upon its books of certain shares of its corporate stock and the payment to relator of certain sums as accrued dividends. Plaintiff claims title to the stock through a sale thereof as collateral security to certain notes of one W. G. Hager, which, it alleged, came into its possession in due course and for value. Defendant made return that Hager denied the title of relator to the stock and had notified it not to transfer same or pay the accrued dividends there-

on to relator. Hager made application to be made a party to this proceeding, which application was denied. Judgment was rendered, directing the transfer as prayed, and the payment to relator of accrued dividends, and respondent prosecutes error.

Counsel have expressly waived all assignments of error, except the assignment that the court erred in finding that relator had title to the stock and was therefore entitled to have the same transferred on the books of the company. It is the contention that relator acquired no title thereto because said notes had been executed to the Oklahoma State Bank, and the stock pledged as collateral for the payment thereof, and that the bank became insolvent and was taken in charge by the bank commissioner, who sold said notes, with the collateral attached thereto, to relator, without first having obtained authority from the district court or a judge thereof, as required by sections 302 and 304, R. L. 1910. It appears that the stock was indorsed in blank by Hager, and, together with the notes for the payment of which it was pledged, passed into the possession of relator through the sale by the bank commissioner, and upon default in the payment of said notes, was sold to Frank J. Wyckoff, and by him resold to relator, who was in possession at the time the action was commenced. Upon this state of the record the court properly held that the burden of proof was upon respondent to show that relator had no title to said stock. No error being urged upon this ruling of the court, for the purpose of this case we shall assume that the burden of showing want of authority in the bank commissioner was properly placed upon defendant, and that, when possession of the Hager notes, with the stock attached thereto, was acquired by relator, and this fact was made to appear, the duty of relator to adduce evidence establishing *prima facie* its title to said notes was satisfied. *Jones v. Wheeler*, 23 Okl. 771, 101 Pac. 1112; *Southwest Gen. Elec. Co. v. Riddle*, 168 Pac. 436; *Jones*, Ev. § 74; 1 *Daniel*, Neg. Inst. § 812.

The title of relator to said notes being *prima facie* established, it necessarily followed that a presumption arose that relator, as the owner of the notes for the payment of which said stock had been pledged, was authorized, under the terms of the pledge, to sell said stock upon failure to pay the notes when due. Section 266, R. L. 1910; section 4513, R. L. 1910; *Ardmore State Bnk. v. Mason*, 30 Okl. 568, 120 Pac. 1080, 39 L. R. A. (N. S.) 292; *Dunbar v. Commercial Elec. Sup. Co.*, 32 Okl. 634, 123 Pac. 417. To overcome this *prima facie* case, defendant offered evidence to show the terms of the agreement of sale between the bank commissioner and relator, whereby relator acquired said notes with the collateral, and went no further, and contends that the sale was void because the bank commissioner had not previously

obtained an order authorizing such sale from the district court or judge thereof.

With this contention we cannot agree. The bank commissioner was a state official, and in administering the affairs of the defunct bank was acting in the discharge of important duties imposed upon him by law, and his official acts were entitled to the same presumption which applies to the acts of public officials generally, which is that, in the absence of evidence to the contrary, the law presumes that such officers have properly performed their duties, and that they have complied with all the forms of law necessary to qualify them to act as they have done, and where some preceding act or pre-existing fact is necessary to the validity of an official act, the presumption in favor of the validity of the official act is presumptive proof of such preceding act or pre-existing fact, for the law will not presume that the bank commissioner or any other public official has acted in excess of his lawful authority or in an illegal manner. *Southern Surety Co. v. Waits*, 45 Okl. 513, 146 Pac. 431; *Southwestern Surety Ins. Co. v. Davis*, 156 Pac. 213; *Lusk v. Porter*, 156 Pac. 224; *Board Com'rs v. Field*, 162 Pac. 733; 4 *Wigmore*, Ev. § 2534; 2 *Chamberlayne*, Mod. Law, Ev. § 1201; 1 *Jones*, Ev. § 41 et seq.; 22 *A. & E. Encyc.* 1267, 1269; *Lawson on Presumptive Evidence*. In *Territory v. Sellers et al.*, 15 Okl. 419, 82 Pac. 575, it is said:

"The law is well settled that, in the absence of proof, it will be presumed that the official acts of a public officer were regular, and that the officer acted within the scope of his powers."

In *Leedy v. Brown*, Judge, et al., 27 Okl. 489, 113 Pac. 177, it was held:

"When an action is commenced in the district court in the name of the state by the Attorney General, in the absence of an affirmative showing to the contrary, he is presumed to have brought such action after having been requested by the Governor or one of the branches of the Legislature."

That the Oklahoma State Bank became insolvent, and that the bank commissioner took charge thereof and was administering its affairs, and sold said notes to relator, plainly appears, and the one element of proof lacking is that in making the sale he did not obtain an order authorizing same from the district court or judge thereof. The Oklahoma State Bank has at no time, so far as the record appears, made any objection to the sale, and has at all times acquiesced therein. Hager was not deprived of any property or other rights by the sale made by the bank commissioner, as his liability on said notes and his right to redeem his stock by payment thereof remained the same, and was not at any time affected.

Everything else appearing regular, and the defendant attacking the title of relator to the stock in question, and basing its whole attack upon the alleged invalidity of the sale by the bank commissioner, the burden was

upon it to show the lack of authority, and in the absence of such showing we will presume that such order was obtained. The defendant was deprived of no rights by the act of the bank commissioner; neither was its liability to the holder of said stock increased or diminished in the least. After the sale of the notes, the stock was still the property of Hager, subject to the lien of the holder of the notes as pledgee thereof for the payment of said notes.

When relator was selecting the loans that were to become its own absolutely, and before the purchase of the notes in question, Hager was consulted with reference thereto, and consented that the relator might purchase them, and agreed to give additional security for the payment thereof. Later, in pursuance of this agreement, he gave additional security and paid \$1,500 on the notes. Being unable to make further payments, he was notified by the bank of its intention to sell the collateral, when he insisted that the stock was worth \$150 per share, and should not be sold for less than \$140. The stock was sold for \$150 per share. It is not contended that this sale was not legally conducted, nor the price received a fair one.

Hager testified as a witness in the case, and did not deny any of the above facts. E. E. Blake, Esq., one of the attorneys for defendant in this case, was attorney for Hager at the time of the sale, and, after service of notice upon Hager by the bank of its intention to sell the stock, called upon the bank in the interest of his client, and said, if the stock sold for \$150, that all was he asked, and that he did not think there would be any objection. The agreement with the bank commissioner was dated August 11, 1913, and the stock was sold August 14, 1914, and this action was commenced November 22, 1915. At no time prior to its commencement had Hager taken any steps to have said sale set aside, nor, redeem the stock, or pay the notes held by relator.

Being of the opinion that the sale by the bank commissioner, under the circumstances, should be upheld, in the absence of a showing of want of authority upon his part to make the sale, the judgment is affirmed. All the Justices concur.

(68 Okl. 73)

MISSOURI, K. & T. RY. CO. v. LENAHAN.
(No. 7133.)

(Supreme Court of Oklahoma. Dec. 11, 1917.
Rehearing Denied March 19, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 1201(7)—LIMITATION OF ACTIONS \S 121(2)—REVERSAL—REMAND—AMENDMENT—NEW CAUSE OF ACTION. A judgment for the plaintiff in an action for damages for wrongful death cognizable under the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]), commenced

by the widow of the deceased in her personal capacity, was reversed by the Supreme Court of the state upon the ground that the plaintiff could not, although sole beneficiary, maintain the action, except as personal representative, such reversal being without prejudice to such rights as the personal representative might have. *Held*, not error for the trial court upon remand to allow the petition to be amended by joining the widow as personal representative of the deceased, as party plaintiff, without in any way enlarging or modifying the facts upon which the action was based. *Held*, further, that such amendment of the petition is not equivalent to the commencement of a new action, for the purpose of applying the two-year limitation provided by the statute.

2. MASTER AND SERVANT \S 248—DEATH OF SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—DUTY OF ENGINEER—DISCOVERED PERIL.

In an action for damages for wrongful death commenced by the personal representative of a deceased employe under the federal Employers' Liability Act, it was alleged, in substance, that the death of the deceased was caused by a head-on collision between a south-bound passenger train, drawn by an engine of which one H. was engineer, and a north-bound freight train, drawn by an engine of which one L., the deceased, was engineer; that engineer H. wholly failed, after discovering that said freight train was so approaching, to get his train under control, but kept running in the direction of the train operated by said L. at a high and dangerous rate of speed; that said engineer H. actually discovered the condition of the train being pulled by said L. in ample time to have avoided the collision, but that said engineer H. took no steps to avoid the same, but allowed the train operated by him to violently collide with the engine said L. was running in such a way as to cause the instant death of the latter. The evidence, which upon this point was in no material part conflicting, disclosed that at the time of the collision, the passenger train, which had the right of way over the freight train, was proceeding south 40 minutes late, pursuant to orders to that effect previously received, and that the freight train was proceeding north on the time of the passenger train in disregard of orders previously received by it and the well-known rules of the railway company. *Held*, that the duty of engineer H. to engineer L., the deceased, did not begin until he actually discovered the peril of L. *Held*, further, that notwithstanding the negligence of L. the railway company would be liable if it appeared that engineer H., after discovering the peril of L., did not use such precaution as an ordinarily prudent person would use under like circumstances to avoid the collision.

3. NEGLIGENCE \S 65—CONTRIBUTORY NEGLIGENCE.

Before the question of contributory negligence on the part of the plaintiff can arise, primary negligence on the part of the defendant must be shown.

4. MASTER AND SERVANT \S 296(13)—TRIAL \S 252(11)—MISLEADING INSTRUCTIONS—PLEADINGS AND EVIDENCE.

Record examined, and *held* that instructions Nos. 12, 16, 17, given by the court, are erroneous and misleading, for the reasons pointed out in the opinion.

5. MASTER AND SERVANT \S 296(9)—DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE.

Under the well-known rules of the railway company, the deceased, L., the engineer of the freight train, was equally responsible with his conductor for the safety of their train, and it was error to refuse to instruct the jury to that effect upon the request of the defendant.

6. MASTER AND SERVANT ¶204(1), 227(2)—
ACTION FOR DEATH—FEDERAL EMPLOYERS’
LIABILITY ACT—CONTRIBUTORY NEGLIGENCE
— STATE CONSTITUTION — ASSUMPTION OF
RISK.

This being an action for damages for wrongful death arising under the federal Employers’ Liability Act, section 6, art. 23, Williams’ Constitution, which changes the common-law rule as to assumption of risk and contributory negligence, is inapplicable.

7. APPEAL AND ERROR ¶1064(1) — **REVERSIBLE ERROR.**

After an examination of the entire record, it appears that the errors complained of, and herein pointed out, have probably resulted in a miscarriage of justice.

Error from District Court, Craig County; Preston S. Davis, Judge.

Action by Etta Lenahan, and Etta Lenahan as administratrix of estate of James Lenahan, deceased, against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, and cause remanded for a new trial.

Clifford L. Jackson, W. R. Allen, and M. D. Green, all of Muskogee, for plaintiff in error. Edw. H. Brady and W. H. Kornegay, both of Vinita, for defendant in error.

KANE, J. This action was originally commenced in the district court of Craig county by Etta Lenahan in her individual capacity, for the purpose of recovering damages against the plaintiff in error herein for the wrongful death of her husband, James Lenahan. The action as thus commenced was subsequently tried, and resulted in a verdict in favor of the plaintiff in the sum of \$15,000. Upon appeal this judgment was reversed, upon the ground that the widow of a deceased railroad employé cannot prosecute in her own name the action for damages given by the Employers’ Liability Act of April 22, 1908, “to his or her personal representative for the benefit of the surviving widow or husband and children of such employé.” *M., K. & T. Ry. Co. v. Etta Lenahan*, 39 Okl. 283, 135 Pac. 383. The Supreme Court, however, upheld the right of the plaintiff to so amend the petition in the trial court as to permit the action to be prosecuted in the name of the personal representative of the deceased for the benefit of the surviving widow, there being no children. Upon the cause being remanded to the trial court, counsel for the plaintiff amended her petition in pursuance of their understanding of the mandate of the Supreme Court, by adding to the title of the cause the name of “Etta Lenahan, Administratrix of the Estate of James Lenahan, Deceased,” as party plaintiff; she in the meantime having been duly appointed such administratrix. Upon the petition being thus amended, issues were joined substantially as in the former trial, and the cause was again tried to a jury, and resulted in a verdict “in favor of the plaintiffs” in the sum of \$20,000, upon which judg-

ment was duly entered, to reverse which this proceeding in error was commenced.

As a full and complete statement of the pleadings and the issues involved may be found in the opinion formerly handed down, we will not undertake to restate them here, nor to review any of the questions of law that were then passed upon, except in so far as we may find it necessary to a clear understanding of the questions for review growing out of the new trial.

The death of engineer Lenahan was caused by a head-on collision between a south-bound passenger train, known as the “Katy Flyer,” drawn by an engine of which one Hotchkiss was engineer, and a north-bound freight train, of which the decedent, Lenahan, was engineer. The specific act of negligence relied upon for a recovery may be summarized substantially as follows: That said engineer Hotchkiss wholly failed, after discovering that said freight train was so approaching, to get his train under control, but kept running in the direction of the train operated by said Lenahan at a high and dangerous rate of speed; that said engineer Hotchkiss actually discovered the condition of the train being pulled by said Lenahan in ample time to have avoided the collision, but that said engineer took no steps to avoid the same, but allowed the train operated by him to violently collide with the train that said Lenahan was running in such a way as to cause the instant death of the latter; that said Lenahan used all precaution to avoid said collision, and he also used all necessary precaution to avoid being hurt, and that said collision occurred by reason of the fact that the engineer on the passenger train took no steps to get his train under control after discovering the approach of the engine on which said Lenahan was engineer.

The defense of the railway company was, in brief, that the Flyer was proceeding south 40 minutes late, pursuant to orders to that effect previously received, and that the freight train was proceeding north upon the time of the Flyer in disregard of orders previously received by it; that, the collision being caused by this act of negligence and disobedience of orders on the part of Lenahan, his administratrix was not entitled to recover. Counsel for plaintiff in error state their grounds for reversal in their brief as follows: (1) The defendant in error, Etta Lenahan, is not the proper party to maintain this suit in her individual capacity. (2) The injuries for which the defendants in error are seeking damages were not due to any negligence on the part of the plaintiff in error, but were due solely to the independent negligence of the deceased, James Lenahan. (3) The trial court erred in refusing to instruct the jury to return a verdict in favor of the plaintiff in error, and in denying to the plaintiff in error a new trial. (4) The

trial court should have instructed the jury that it was the duty of engineer Lenahan to obey the rules and orders of the company. (5) The doctrine of the last clear chance is not properly involved in this case. (6) The trial court erred in admitting opinion evidence as to within what space a train could be stopped and the space within which other trains had been stopped. (7) The court should have given the requested instructions on the question of proximate cause. (8) The court erred in refusing to give to the jury requested instruction No. 24. (9) The instruction given by the court touching the diminution of damages was erroneous and prejudicial to the plaintiff in error. (10) The provisions of our state Constitution, changing the common law as to assumption of risk and contributory negligence, are inapplicable. (11) The trial court erred in charging the jury as it did touching the measure of damages, and in declining to give instructions requested by plaintiff in error. (12) It was error to instruct the jury in this case that three-fourths of their number could return a verdict. It was also error to receive a verdict which was not unanimous. (13) The trial court erred in refusing to instruct the jury to return a verdict in favor of the plaintiff in error and in denying to the plaintiff in error a new trial.

In support of their first assignment of error counsel say in their brief:

"The action of the trial court in permitting Etta Lenahan as an individual to remain as a party plaintiff in this suit is directly contrary to the opinion remanding the case and also to the opinions by the Supreme Court of the United States."

[1, 2] The federal Supreme Court decisions cited in support of this proposition are *American Railway Co. v. Birch*, 224 U. S. 547, 32 Sup. Ct. 603, 56 L. Ed. 879, and *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156. These decisions which were followed by the Supreme Court of the state on the former appeal undoubtedly hold that where, as in this case, the federal statute is applicable, the right of recovery, if any, is in the personal representative, and no one else can maintain the action. But this is not the precise proposition presented by the record in the instant case.

In *M., K. & T. Ry. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134, the action of the trial court in allowing the sole surviving parent of the decedent to amend her petition, wherein she sued for damages under the state law in her individual capacity, by joining the personal representative as a party plaintiff and proceed under the federal Employers' Liability Act was upheld. In distinguishing *American Ry. Co. v. Birch*, supra, Mr. Justice Pitney, who delivered the opinion of the court, said:

"It is true that under the federal statute the plaintiff could not, although sole beneficiary, maintain the action except as personal represen-

tative. So it was held in *American R. Co. v. Birch*, 224 U. S. 547, 56 L. Ed. 879, 32 Sup. Ct. 603. But in that case there was no offer to amend by joining or substituting the personal representative, and this court while reversing the judgment, did so without prejudice to such rights as the personal representative might have. The decision left untouched the question of the propriety of such an amendment as was applied for and allowed in the case before us, an amendment that, without in any way modifying or enlarging the facts upon the which the action was based, in effect merely indicating the capacity in which the plaintiff was to prosecute the action. The amendment was clearly within section 954, Rev. Stat. U. S. Comp. Stat. 1901, p. 696 [U. S. Comp. St. 1916, § 1591]."

It seems to us that this case furnishes authority for the practice followed herein of amending by joining the plaintiff in her representative capacity as party plaintiff, instead of by substitution. The change made by the amendment, as in the *Wulf* Case, was in form, rather than in substance, and, even if it were conceded that it would be a better practice to make the amendment by substituting rather than by joining, we are unable to perceive how in the circumstances of this case, the plaintiff being the sole surviving beneficiary, any substantial right of the plaintiff can be affected by the amendment as made. Aside from the capacity in which the plaintiff brought her action, there is no difference between the original and amended petitions. In the former, as in the latter, it was sufficiently averred that the deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce; that his death resulted from the negligence of the company, and that the plaintiff is the sole surviving heir and beneficiary. In these circumstances, there is slight probability that the error complained of, if error at all, resulted in a miscarriage of justice.

The next assignment of error is one of considerable seriousness, as it involves a decision of the case upon its merits. We are convinced from the evidence in the record that there is no room for any reasonable doubt that at the time of the collision the *Flyer* was proceeding south 40 minutes late pursuant to its orders, and had the right of way, and that the freight train was proceeding north on the time of the *Flyer*, contrary to its orders and the rules of the company. It is true that there is some contention on the part of counsel for the defendant in error in their brief that the freight train left the yards at Muskogee in ample time to clear the *Flyer* at the next siding north of that point, but it is not alleged, nor is there any attempt to show, that the *Flyer* was running ahead of time, so, even if this contention is conceded, the most that can be said is that the freight train must have lost time after leaving the Muskogee yards, for certainly it was on the main line on the time of the *Flyer* without flagging against it, contrary to the well-known rules of the company, at the time the collision occurred. In these circum-

stances, the duty of Hotchkiss, the engineer of the Flyer, which had the right of way, toward the engineer and crew of the freight train commenced when he first became aware of the peril of the deceased, and it is from this standpoint that we will examine the remaining assignments of error.

The applicable rule, we think, may be gathered from the following cases which, while not precisely in point, are somewhat analogous in principle, and illustrate the point now under consideration: *New York, N. H. & H. R. Co. v. Kelly*, 93 Fed. 745, 35 C. C. A. 571; *Ackerman v. Union Traction Co.*, 205 Pa. 477, 55 Atl. 16; *Louisville, H. & St. L. R. Co. v. Hathaway*, 121 Ky. 666, 89 S. W. 724, 2 L. R. A. (N. S.) 498; *L. R., M. R. & T. Ry. Co. v. Haynes*, 47 Ark. 497, 1 S. W. 774; *A. T. & S. F. Ry. Co. v. Baker*, 21 Okl. 51, 95 Pac. 433, 16 L. R. A. (N. S.) 825; *Clark v. St. L. & S. F. R. Co.*, 24 Okl. 764, 108 Pac. 361. Under the doctrine announced in some of these cases, notwithstanding the absence of primary negligence on the part of the company, the negligence of Lenahan would not prevent the plaintiff from recovering if it be shown that engineer Hotchkiss, by the exercise of reasonable care and prudence, might have avoided the consequences of the negligence of the deceased after discovering his peril. In the *Haynes Case*, supra, the action was brought by the plaintiff, who was using the railroad track as a foot-path, to recover damages for being run over by a passing train. The evidence showed that the plaintiff, while drunk, started out to walk down the railroad track; that when he had gone a half mile he was, according to his own statement, overtaken by a blind spell, fell upon the track, and knew no more until he was run over. The court held:

"The railway company is not responsible, unless its trainmen had a clear opportunity, after discovery of the plaintiff's peril, to avoid striking him."

Keeping this rule in mind, let us now examine the evidence, with the view of determining its sufficiency to take the case to the jury on the one material issue of fact involved: Engineer Hotchkiss testified concerning the collision substantially as follows:

"I reside in Parsons, Kan., and during the month of May, 1908, I was engineer on train No. 5, known as the 'Katy Flyer,' over the Cherokee division. I have been in the employ of the M., K. & T. for 31 years as engineer and have been running train No. 5 ever since it has been on the road. I am still a locomotive engineer for the M., K. & T., but my physical condition at the present is not such that I can run a train. I was the engineer on the Flyer at the time of the collision with freight train No. 412 on May 15, 1908. My run extended from Parsons to Muskogee. I received order No. 34 for the movement of my train at Wagoner. I received it from Conductor Green and also a clearance card. Order No. 34 reads as follows: 'No. 5 engine 312 will wait at Wagoner until 11:45 a. m. for second 404 engine 562. No. 5 will run 40 minutes late Wagoner to Muskogee.' I received no other orders at Wagoner. We left Wagoner at 11:45 a. m., running under the order 40 minutes late. Train No. 5 is a first-class train. The fact that we were run-

ning late did not change the class of the train. Under that order the train I was pulling had the absolute right of way from Wagoner to Muskogee. Jesse W. Emery was my fireman. We met another train between the Arkansas river bridge and Muskogee. I spoke to Emery as we came out of the cut, and saw this train. We had no conversation before that. Nothing was said at the Arkansas river bridge between Emery and me. Coming out of the Arkansas river bridge, I was making at least 60 miles per hour. I noticed some smoke along there, which was a usual occurrence, because there is another road running along there parallel to our road, which is known as the M., O. & G. I expected the smoke was on the other track, as it was a frequent occurrence there. I did not expect to find anything on our track, because I had absolute right. I first discovered the obstruction on our track when I was about 1,000 feet south of the Arkansas river bridge. The first thing I did was to shut off my engine. I then applied my air and gave the sander a turn. There was nothing else that I could do to stop the train. I turned the brake valve to the emergency position; that was all I could do. Fireman Emery jumped from the engine about the engine length and one-half from where we collided. I received a broken leg, and my neck was badly hurt, and I had an enlarged rupture."

Several other witnesses corroborated that part of the testimony of Engineer Hotchkiss to the effect that he turned the brake valve to the emergency position; and all parties agree that this, together with giving the sander a turn, was all that could have been done to avoid the collision. Other evidence, which was not seriously contradicted, shows that when Engineer Hotchkiss first discovered the approaching freight train he was running at the rate of 60 miles an hour; that the two trains were about 1,200 feet apart, and that at the moment of the collision the passenger train had slowed down to about 40 miles an hour, and the freight train, which had been running about 25 or 30 miles an hour, had slowed down to about 15 miles an hour.

Fireman Emery of the Flyer upon whose testimony counsel for plaintiff principally relied to establish the allegations of their petition, testified substantially as follows:

"At the time of the accident I had been fireman on the Flyer for about 5 years, and was on the Flyer on the day of the collision. The steam was not altogether shut off. It was eased off on the throttle, and there was a service application of the air. I noticed the condition of the track over which the Flyer passed. There was no sand on the track. The engine was equipped with sand boxes. A service application is simply to slow down and stop gradually. The emergency application means to put on the full force of the air. The train usually consisted of ten cars. With the emergency application it could have been stopped within 1,000 feet."

On cross-examination he testified substantially as follows:

"I was never an engineer, but served as fireman 9 years. I am not running on the road now. I never had occasion to apply the emergency stop on the Flyer, and never took the train all the way over a division. I have run it for short distances, but under the direction of the engineer. I never did apply the emergency brake only on a single engine."

As all the witnesses agree that the proper thing to do in the circumstances was to ap-

ply the emergency brake and sand the rail, it is obvious that there is a sharp conflict between the evidence of engineer Hotchkiss and the other witnesses for the railway company and Fireman Emery as to whether or not this was done. It is only when the evidence, with all the inferences which the jury could justifiably draw from it, will be insufficient to support a verdict for the plaintiff that the court is authorized to direct a verdict for the defendant; and, unless the conclusion follows as a matter of law that no recovery can be had upon any view that can be properly taken of the facts which the evidence tends to establish, the case should be left to the jury under proper instructions. *Cooper v. Flesner et al.*, 24 Okl. 47, 103 Pac. 1016, L. R. A. (N. S.) 1180, 20 Ann. Cas. 29; *Harris et al. v. M., K. & T. Ry. Co.*, 24 Okl. 341, 103 Pac. 758, 24 L. R. A. (N. S.) 858; *Chestnutt-Gibbons Groc. Co. v. Consumers' Fruit Co.*, 44 Okl. 318, 144 Pac. 591. Applying this rule, the evidence was sufficient to take the case to the jury under proper instructions, although we believe the weight of the evidence supported the testimony of Engineer Hotchkiss.

[3, 4] The instructions complained of in the next assignment of error, which we deem it necessary to notice, read as follows:

"(12) If you find from the evidence that train No. 412, upon which James Lenahan was employed and riding at the time of his death, was under the charge, supervision, and control of the conductor, Robert Daigh, and that Lenahan was subordinate to said Daigh, and subject to his orders, and that said Daigh ordered said train No. 412 to go out upon the main track, and said Lenahan in taking said train out upon the said main track was obeying the orders of his superior, you may consider this as tending to show whether or not James Lenahan contributed, by his own negligence, to the act or acts which caused his death."

"(16) You are further instructed that if the train orders were read to Lenahan and he heard same and understood their import, and that he then took the said train out upon the main line at a time when he knew train No. 5 was due upon the same track and coming in opposite direction, then you may consider these facts as tending to show negligence on the part of the said Lenahan, and you may determine whether such negligence contributed to the collision which caused his death; and, if you determine that it did so contribute to his injury and death, you will find to what extent it so contributed."

"(17) The first question for you to determine is whether or not the defendant railway company, through its agents, servants, or employees, except the deceased, James Lenahan, was negligent, and that through such negligence the collision occurred between train No. 5 and No. 412, and whether such negligence caused the death of the said James Lenahan. If you determine this question against the defendant railway company and find that it was guilty of negligence, then the next question for you to determine is whether or not James Lenahan was guilty of negligence on his part, which negligence contributed to the collision and to his death. If you find that the said James Lenahan was free from negligence on his part and did not, by an act or omission, contribute to the collision which caused his death, then your verdict should be for plaintiffs, and if you further find that James Lenahan was guilty of negligence, and by any act or omission of his own contrib-

uted to the cause which brought about his death, then you may consider the negligence of the deceased, James Lenahan, for the purpose of decreasing the damages you will allow to the plaintiffs; and you will decrease the damages which you allow the plaintiffs in the proportion to which James Lenahan contributed to the collision by negligence on his part which caused his death."

Instructions No. 16 and No. 17, we think, are faulty, as not being applicable to the precise case presented by the pleadings and the evidence. As we have stated elsewhere in this opinion, there can be no doubt from the evidence that Engineer Lenahan, in violation of the well-known rules of the company, was encroaching upon the time of the Flyer at the time the collision occurred; that the Flyer was proceeding south pursuant to its orders, and that if there was any actionable negligence on the part of Engineer Hotchkiss, it consisted wholly in not exercising reasonable care and prudence to avoid the consequences of Engineer Lenahan's negligence, after discovering his peril. No other act of negligence on the part of the defendant is averred, and there was no attempt at the trial to establish any other. In *Barnsdall Oil Co. v. Ohler*, 48 Okl. 651, 150 Pac. 98, it was held that before the question of contributory negligence on the part of the plaintiff can arise, negligence on the part of the defendant must first be shown. If this is sound law, instructions No. 16 and No. 17, touching the contributory negligence of the deceased, should have been omitted.

Instruction No. 12 is objectionable upon another ground. There was some evidence tending to show that the conductor of train No. 412 ordered Engineer Lenahan to leave the yards at Muskogee and go out upon the main line. There is a strong intimation in instruction No. 12 that if this were found to be so, Engineer Lenahan would be justified in obeying the orders of his conductor, rather than those of the train dispatcher and the rules of the company. Certainly the jury were instructed to consider this as tending to show whether or not Lenahan contributed by his own negligence to the act which caused his death. This is an incorrect statement of the law. The uncontradicted evidence was to the effect that the rules of the company were binding upon the engineer and conductor alike, and that Engineer Lenahan had no right to move his train in violation of the established rules of the company, even upon the direct order of his conductor. Rule 105 provides:

"Both conductors and enginemen are responsible for the safety of their trains, and under conditions not provided for by the rules must take every precaution for their protection."

Rule 315 provides:

"All trains will be run under the direction of conductors, except when they conflict with rules or involve risk, in which case the enginemen will be held equally responsible."

[5-7] Rules similar to these were considered in *York v. Chicago, M. & St. P. Ry. Co.*,

98 Iowa, 544, 67 N. W. 574, where the court disapproved the contention that when Graham, the engineer, was ordered by the conductor to start, he had a right to assume that the conductor had some information relating to orders which justified them in running on 92's time, saying that, "such information could only come to Haggerty (conductor) in the form of orders from his superiors." Generally the authorities are uniform that the injured party cannot escape responsibility for his own act by placing the responsibility on another by claiming that he was acting under the direction of another. *Fritz v. M., K. & T. Ry. Co.* (Tex. Civ. App.) 30 S. W. 85; *Martin v. Northern Pacific Ry. Co.*, 87 Wash. 91, 151 Pac. 113; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *Nordquist v. Great Northern Ry. Co.*, 89 Minn. 485, 95 N. W. 322; *Great Northern Ry. Co. v. Hooker*, 170 Fed. 154, 95 C. C. A. 410; *M., K. & T. Ry. Co. v. Collier*, 157 Fed. 347, 88 C. C. A. 127.

Under the next assignment of error counsel contend that the trial court erred in refusing to give the following requested instructions:

"(12) You are instructed that it was the duty of the deceased, James Lenahan, to observe the rules and orders of the railway company with reference to the running of his train."

"(14) You are instructed that the deceased, James Lenahan, the engineer of the freight train, was equally responsible with the conductor of the freight train for the safety of that train."

"(16) Although you may find from the evidence that Conductor Daigh violated the rules and orders of the railway company with reference to movement of the freight train, the railway company is not liable to the plaintiffs by reason of such acts of Conductor Daigh."

"(17) Although you may find from the evidence that Conductor Daigh of the freight train was negligent in permitting the said train to go out on the main track in the direction of Verdard at the time he did permit said train to go out, the railway company is not liable to the plaintiffs on account of such negligent acts of Conductor Daigh."

"(28) You are instructed that under the evidence in this case the passenger train had the right of way at the time of the collision, and that it was the duty of the employees in charge of the freight train to keep said train out of the way of the passenger train."

From what we have already said in our discussion of the last assignment of error in relation to the duty of the engineer to obey the reasonable rules of the company, it follows that instructions to this effect should have been given upon the request of the railway company.

On the next assignment of error it is sufficient to say that we have already held the applicable principle to be that the railway company is not responsible unless it be shown that Engineer Hotchkiss had a clear opportunity, after the discovery of Engineer Lenahan's peril, to avoid the collision. In these circumstances it was not error to instruct the jury as follows:

"You are instructed that it was the duty of engineer Hotchkiss, the engineer on train No. 5,

to use such precaution as an ordinarily prudent person would use under like circumstances to avoid the collision, and if you find from the evidence that the deceased, Lenahan, in pulling his train out upon the main track, was guilty of negligence, this would not exempt the defendant railway company from liability for his death in the event the evidence shows that the engineer on train No. 5, after discovering the position of Lenahan's train, did not use such precaution as an ordinarily prudent person would use under like circumstances to avoid the collision, and if you find that the death of Lenahan would not have happened if such precaution had been used, then you will find for the plaintiffs herein and against the defendant railway company."

The only remaining assignment of error we deem it necessary to notice is that, this being a cause of action arising under the federal Employers' Liability Act, the provision of our state Constitution (section 6, art. 23, Williams' Constitution), changing the common law as to assumption of risk and contributory negligence, are inapplicable. The contention is that, in an action commenced under the federal Employers' Liability Act, no state law applies, as the federal act covers the entire field. We think this is undoubtedly true as to contributory negligence, at least. Under the Employers' Liability Act, the fact that the employé may have been guilty of contributory negligence does not constitute a defense to the action, but the damages shall be diminished by the jury in proportion to the negligence attributable to such employé. We think, therefore, that the jury should be instructed in pursuance of the federal statute upon the theory that contributory negligence is not a defense, but that the damages, if any, shall be diminished by the jury in proportion to the amount of negligence attributable to the injured employé. In *St. L. & S. F. R. Co. v. Snowden*, 48 Okl. 115, 149 Pac. 1083, it was held:

"Under the federal Employers' Liability Act, the law of assumption of risk is that of the common law, as it existed prior to the passage of said act, except where the common carrier violates the provisions of any statute enacted for the safety of its employes; and the assumption of risk, under the facts in this case [the injury not being caused by any violation of such act providing for the protection of employes], was a question of law for the court."

Generally on the points now under consideration see *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1915B, 252.

We think we have noticed all the assignments of error necessary to insure the avoidance of error in the new trial of this case which we find it necessary to grant. In our judgment, there is but one issue of fact to be submitted to the jury, and that is whether, by the exercise of reasonable care and prudence, after the deceased was discovered in a place of peril, Engineer Hotchkiss could have avoided the collision. In our judgment

the great weight of the evidence is against the finding of the jury on that point, although we believe there is evidence reasonably tending to support it. In these circumstances, as we have seen, this being an action at law, we are not at liberty to set the verdict aside on the ground that it is not supported by the weight of the evidence. However, on account of the meagerness of the evidence to support the verdict, and our very grave doubts as to whether the accident could have been averted by any means within the power of Engineer Hotchkiss after he discovered the peril of the deceased, we cannot escape the conviction that the errors we have hereinbefore pointed out probably resulted in a miscarriage of justice.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded for a new trial. All the Justices concur.

(68 Okl. 42)

PARRISH v. SCHOOL DIST. NO. 19 et al.
(No. 9188.)

(Supreme Court of Oklahoma. March 5, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 781(1)—MOOT QUESTION—DISMISSAL.

When the question presented by an appeal has become moot, the appeal will be dismissed.

2. INJUNCTION \S 22—ACTS ALREADY DONE.

A court will not entertain an action to enjoin a party from doing that which he has already done.

Error from District Court, Pawnee County.

Action for injunction by G. W. Parrish against School District No. 19 and others. From an order dissolving the injunction and dismissing the case, after remand from the Supreme Court, plaintiff brings error. Dismissed.

Shoemaker & Rowe, of Pawnee, for plaintiff in error. Redmond S. Cole, of Oklahoma City, for defendants in error.

BRETT, J. The defendants in error move to dismiss this appeal on the ground that the question involved in the appeal has become moot.

The facts are that school district No. 19 of Pawnee county in 1916 was taking steps to condemn a portion of the land of plaintiff in error for a site upon which to erect a school house. The plaintiff in error obtained an injunction, perpetually enjoining the school district from proceeding further with the condemnation proceedings. The school district appealed from this judgment, and this court reversed the same, and remanded the cause for further proceedings. On May 7, 1917, the mandate of this court was spread of record, and the trial court then took the matter up and entered judgment, dissolving the injunction and dismissing the case. Plaintiff in error appealed from the judgment of the court dissolving the injunction, but took

no steps to supersede the judgment. After the injunction was thus dissolved, and the judgment dissolving it was not superseded, the school board proceeded with the condemnation proceedings, had the site condemned, and paid the condemnation money into court. No appeal was taken from the condemnation proceedings, and the school board have erected and completed a school building costing some \$15,000 upon the grounds condemned.

[1] Under these conditions, the appeal now pending can serve no purpose, and presents only a moot question. But the plaintiff in error insists that the question is not moot, for the reason "that the whole proceedings had before the trial court are void; that the court did not have jurisdiction; that the defendants in error did not comply with the statutes, * * * and are proceeding under a void judgment." Assuming without deciding that all this is true, we are unable to see how the pending action could possibly afford the plaintiff in error any substantial relief. For a court will not go through a farce of enjoining a party from doing that which he has already done. For even though the act done may have been unlawful, or, if lawful, done in an illegal way, an action in injunction could not possibly afford any relief after the act has been accomplished.

[2] And even granting the trial court in the instant case erred in dissolving the injunction, it was nevertheless dissolved, and the order dissolving it was never superseded; and thereafter the defendant in error proceeded to do, and did do, the very thing plaintiff in error sought to enjoin. Consequently, since the acts sought to be enjoined have become an accomplished fact, injunction can afford the plaintiff in error no relief, and the question presented by this appeal has therefore become moot.

The appeal is dismissed. All the Justices concur.

(66 Okl. 267)

DWYER et al. v. FARRELL. (No. 7788.)

(Supreme Court of Oklahoma. July 31, 1917.

Rehearing Denied Nov. 20, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 1010(1)—QUESTIONS OF FACT—EVIDENCE.

Where the issue presented in an action at law is a question of fact, and the judgment of the court is reasonably supported by the evidence, the same will not be disturbed upon appeal.

Commissioners' Opinion, Division No. 3. Error from District Court, Okmulgee County; Earnest B. Hughes, Judge.

Action by James H. Dwyer and others against D. E. Farrell. Demurrer to answer sustained, and judgment for defendant, and plaintiffs bring error. Affirmed.

Wm. M. Matthews, of Okmulgee, for plaintiffs in error. Chas. A. Dickson, of Okmulgee, for defendant in error.

HOOKER, C. The plaintiffs in error instituted this action in the lower court to quiet their title to certain real estate, and alleged in their petition that the defendant in error claimed some interest or title to the premises. That part of the answer of the defendant in error necessary to consider here sought to impress a lien upon this real estate to secure the payment of an attorney's fee in the sum of \$2,000.

It appears from the record that in the year 1912 one Robert L. Dwyer, acting for himself and his coplaintiffs, employed the defendant in error as an attorney to quiet the title to certain real estate which had passed to them as the only heirs of their brother, and that the said Farrell had successfully conducted said litigation as their attorney, and had succeeded in having the title to this real estate quieted in them, but that a controversy arose between them as to the amount of the fee for the services rendered. The defendant in error contended that he had a contract with them by virtue of which he was entitled to an undivided one-third interest in the real estate recovered, but this was denied by the plaintiffs in error, and it is contended by them here that the defendant in error is and was entitled only to reasonable compensation for the services performed by him.

The lower court sustained a demurrer to that part of the answer of the defendant in error which sought to recover an interest in the real estate for a fee upon the ground that the agreement was void as being within the statute of fraud, and no appeal was taken from the order of the court sustaining said demurrer, so this cause was tried in the court below upon the sole question as to the reasonable compensation for the services rendered by the defendant in error to the plaintiff in error. A question of fact properly triable by a jury was presented by the issues, but a jury being waived, and the cause having been submitted to the court, the finding of the court is entitled to the same weight as the verdict of a jury properly instructed.

The value of the property involved in the original action is fixed from \$2,000 to \$8,000 and the value of the services performed by the defendant in error for the plaintiffs in error is fixed from \$300 to \$2,000.

The lower court heard the evidence, and arrived at the conclusion that the property involved was reasonably worth \$4,000, and the services performed by the defendant in error for the plaintiffs in error were reasonably worth the sum of \$750. The value of these services was purely a question of fact to be determined by the court from the evidence heard. We have carefully considered this evidence, and we are of the opinion that the judgment of the court is fairly supported by the evidence of the witnesses, and there-

fore, under the established rule of this court, we are not at liberty to disturb the judgment of the court upon this finding of fact. The evidence discloses that the fee was contingent, and the value of the property was a proper item to consider in fixing the value of the services rendered by the attorney to the clients as well as in determining the responsibility resting upon the attorney in the performing of those services.

The judgment of the lower court being sustained by the evidence, it is affirmed.

PER CURIAM. Adopted in whole.

(68 Okl. 44)

VAN NOY et al. v. JACKSON et al.

(No. 8191.)

(Supreme Court of Oklahoma. March 5, 1918.)

(Syllabus by the Court.)

JUDGMENT ~~ON~~400 — VACATION — EFFECT — TITLE OF PURCHASER.

Where a party plaintiff obtained judgment in an action in the district court to quiet title, no motion for new trial having been filed, the term adjourned, and the judgment, having become final, conveys land to a purchaser for value without notice of any defect in the judgment, vacation of the judgment in an independent action under section 5269, Rev. Laws 1910, on a petition filed subsequent to the conveyance, does not divest the purchaser of his title.

Error from District Court, Johnston County; J. H. Linebaugh, Judge.

Suit by Aaron Jackson against T. S. Vandiver, with amended petition making W. D. Diamond a party defendant, with decree for plaintiff, and subsequent petition by Vandiver and Diamond to vacate the judgment, consolidated with the original action, and judgment vacating the decree, after which Mrs. Walter Van Noy and others, grantees of Jackson, were made parties defendant to the consolidated action, and from a judgment canceling the deed from Jackson to Van Noy and quieting title in Vandiver and Diamond, Van Noy and others bring error. Reversed and remanded, with directions.

Cornelius Hardy, of Tishomingo, for plaintiffs in error. John T. Young, John J. Stobaugh, and J. S. Ratliff, all of Tishomingo, for defendants in error Vandiver and Diamond.

OWEN, J. Aaron Jackson on August 27, 1908, brought suit in the district court of Johnston county against T. S. Vandiver to cancel two deeds executed by Jackson, conveying the lands in question to Vandiver, alleging fraud in procuring the deeds and failure of consideration. Vandiver filed answer on the 15th day of September, 1908. On June 14, 1909, Jackson filed an amended petition making Diamond a party, alleging that he was a partner with Vandiver. The case was tried, and decree entered canceling the deeds and quieting the title in Jackson. On June

12, 1911, Vandiver and Diamond filed petition under section 5269, Rev. Laws 1910, to vacate the judgment cancelling the deeds from Jackson to Vandiver, alleging fraud on part of counsel for Jackson in violating an agreement not to try the case during the term of court at which judgment was rendered. This action was docketed as case No. 373 in the district court, and was consolidated with the original action, case No. 69. On June 26, 1909, 12 days after the decree canceling the deeds from Jackson to Vandiver, Jackson conveyed the land to Van Noy. After the actions had been consolidated and judgment had been rendered vacating the decree canceling the deeds, Van Noy was made a party defendant to the consolidated action. Judgment was rendered canceling the deed from Jackson to Van Noy and quieting the title in Vandiver and Diamond under the deeds from Jackson. Van Noy brings the case here.

This case presents but one question necessary for our determination, and that is whether the judgment of the district court vacating its former decree affected the rights acquired by Van Noy under his deed from Jackson, executed after the decree of cancellation had become final. It is not contended that Van Noy had any actual knowledge of any defect in the judgment canceling the deeds to Vandiver and quieting title in Jackson. Counsel insist that he is not an innocent purchaser for the reason that under section 5274, Rev. Laws 1910, Vandiver and Diamond had two years in which to institute proceedings to vacate the judgment quieting the title in Jackson, and for that reason the judgment was not final prior to the expiration of the two years. Black on Judgments, in defining a final judgment, says:

"A final judgment is such a judgment as at once puts an end to the action by declaring that the plaintiff has or has not entitled himself to recover the remedy for which he sues. Final judgment means not a final determination of the rights of parties with reference to the subject-matter of the litigation, but merely of these rights with reference to the particular suit."

The decree canceling the deeds and quieting title was a final judgment determining Jackson's rights to the land. We are not unmindful of the rule that, where one purchases pendente lite, he is subject to all the legal and equitable consequences of an appeal, and must abide by the consequences of a reversal. But that rule has no application here; no steps having been taken to prosecute an appeal. The time in which to file a motion for new trial had expired. The term at which the judgment was rendered had adjourned, and no proceedings were then pending to reverse, modify, or vacate the judgment. While it is true Van Noy is chargeable with notice under the statute that Vandiver and Diamond had two years in which to bring a separate action to vacate the judgment, yet it is not contended that he had any notice they would institute such action.

It is insisted that, because it did not appear from the journal entry that Vandiver and Diamond were present in person at the trial, this was sufficient to put Van Noy upon inquiry and charge him with notice of the fraud complained of and deprive him of the rights of an innocent purchaser. The journal entry also recites the filing of an answer and other facts necessary to give the court full and complete jurisdiction to determine the issues and quiet the title in Jackson. The judgment was not void. It was only voidable as to Jackson, or his grantee with notice, because of the fraud alleged on the part of counsel for Jackson. A different rule prevails where the judgment is based upon a forged instrument or conveyance. The presence of Vandiver and Diamond was not necessary to confer jurisdiction. The recital that they were not present in person or by attorney was not sufficient, in our opinion, to put Van Noy upon inquiry as to their reason for not being present. It occurs to us that, when Van Noy learned from the record that the petition by Jackson, alleging failure of consideration, was filed on August 27, 1908, the answer filed on the 15th day of September, 1908, and when the case came on for trial on August 14, 1909, neither Vandiver or Diamond appeared in person, he was justified in assuming, if he considered such circumstances at all, that Vandiver and Diamond had decided not to prosecute their defense further. This is especially true when we take into consideration the fact that Jackson was in possession of the land and delivered possession to Van Noy under his deed.

Section 5271, Rev. Laws 1910, provides that, where a judgment is vacated or modified on proceedings instituted under section 5269, all liens and securities obtained under the judgment shall be preserved to the modified judgment. Under section 4728 of this statute a judgment rendered on service by publication may be vacated by motion any time within three years, but it is also provided by this section the title to any property, the subject of the judgment sought to be opened, which by it or in consequence of it shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section. Section 5176 of this statute provides that, where land has been sold in satisfaction of a judgment appealed from, but not superseded, the title will not be affected upon reversal of the judgment. The purpose of these statutes is to give full faith and credit to judicial sales and sales made in consequence of final judgments. This is necessary in order to give final judgments the full faith and credit to which they are entitled. These statutes do not change the common-law rule that the rights of innocent purchasers under final judgments will be protected. The case of Howard v. Entreken, 24 Kan. 428, is one in which the rights of third persons were involved, having purchased under a judgment had on service by publication.

After quoting the statute, which is identical with ours, it was said:

"We regard this section and section 467 of the Code, as only declarations of the previous common-law rule; and, like that rule, they were adopted to protect third persons purchasing under the authority of a judgment or decree. They apply to strangers to the judgment, who have purchased under the honest belief that the judgment is valid. If the judgment is afterward reversed, or opened up, the defendant who has lost his property must look to the plaintiff for redress."

In the case of *Guiteau v. Wisely*, 47 Ill. 433, it was held:

"The rights of third parties, acquired under an erroneous judgment, cannot be divested by a subsequent reversal."

In that case the purchaser acquired his rights after the judgment became final and prior to the institution of the proceedings to have the judgment vacated. To the same effect are the cases of *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449; *Hubbell v. Broadwell*, 8 Ohio, 120; *Goodwin v. Mix*, 38 Ill. 115.

In the case of *Taylor v. Boyd*, 3 Ohio, 338, 17 Am. Dec. 603, it was held:

"A party having title to land under decree in chancery, conveys in good faith, before citation on error is served, a reversal of the decree does not divest the purchaser's title."

Under the procedure there, suing out the writ of error was held to be in the nature of a new and original suit, and for that reason rights of persons acquired after the judgment became final, and before the institution of the new proceedings to vacate would be protected. In the instant case the proceedings to vacate the judgment was an independent action, and an entirely different case, taking a different number on the docket from the case in which the decree quieting title in Jackson had been rendered. Original process issued to bring Jackson into court in that action. The relative character of the parties to that action was exactly the reverse of the former action, and judgment rendered in the new action, although it operated upon the original cause, is nevertheless a termination of the new suit, and did not deprive Van Noy of the rights acquired in good faith and for value under the judgment rendered in the action between Jackson and Vandiver, in which title was quieted in Jackson.

The judgment of the lower court is reversed, and the cause remanded, with directions to enter judgment quieting title in the plaintiffs in error. All the Justices concur, except RAINEY, J., not participating.

LOOKABAUGH v. GOURLEY.

(Nos. 8046, 8047.)

(Supreme Court of Oklahoma. March 5, 1918.)

(Syllabus by the Court.)

VENDOR AND PURCHASER — 302 — ACTION FOR PRICE — INSTALLMENTS.

In a suit upon a contract to sell and convey real estate, the purchase price being paya-

ble in installments, it being provided upon a complete payment of the purchase price, the vendor would furnish a good and sufficient warranty deed, held, that the vendor could maintain a suit at law to compel the payment of the installments of the purchase price as they became due, and this, notwithstanding that a later paragraph in said contract provided that the vendor would execute and deliver to any part or subdivision of the property sold a good and sufficient warranty deed any time during the pendency of the contract, upon the payment of such amount of said sale in cash, the amount so paid not to be less than the proportional part of the unpaid balance due under the contract. This clause being for the benefit of the vendee, so that he might sell any lot, block, or subdivision of said tract upon paying for that part in full, would not qualify or limit the right of the vendor to compel payments of installments of the purchase price as they became due under the first paragraph of the contract.

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by A. R. Gourley against H. C. Lookabaugh. Judgment for plaintiff, and defendant brings error. Affirmed.

Warren K. Snyder and J. T. Dortch, both of Oklahoma City, for plaintiff in error. A. R. Gourley and S. A. Horton, both of Oklahoma City, for defendant in error.

WEST, C. The petition in cause No. 8047 was filed in the district court of Oklahoma county, on the 7th day of October, 1911, by defendant in error, seeking to recover three installments alleged to be due upon a contract for the purchase of real estate situated in Cleveland county, state of Oklahoma. The contract calls for the payment of \$2,000 to be paid in installments of \$200 each. Cause No. 8046 involves the same proposition, being a suit to recover another installment claimed under said contract, and we will consider both causes together, as a disposition of one disposes of the other.

A part of the said contract is as follows:

"Contract of Deed.

"This is an agreement made this 21st day of February, 1910, by and between A. R. Gourley of Oklahoma City, Okl., party of the first part, and H. C. Lookabaugh of Blaine county, Okl., party of the second part. Witnesseth: That for and in consideration of \$250, two hundred and fifty dollars, in hand paid to the party of the first part by the party of the second part, the receipt of which is hereby acknowledged, and for and in consideration of the mutual covenants and agreements herein entered into and upon the complete payment to the party of the first part of the sum of money hereinunder specified party of the first part does hereby agree to furnish a good and sufficient warranty deed to the party of the second part the following described tract or parcel of land situated in Cleveland county, Oklahoma, to wit: [Description of certain blocks of land in Elmwood addition to Oklahoma City.] And the said party of the second part does hereby agree in addition to the payment of the above-specified sum of money to pay to the said party the further sum of two thousand dollars (\$2,000.00) to be paid in installments of two hundred dollars (\$200.00) each six months until the full sum of

(\$2,000.00) shall have been paid the first payment to be due August the 21st, 1910, and like sum each six months thereafter.

"First party agrees to execute and deliver to any part or subdivision of the property a good and sufficient warranty deed any time during the pendency of this contract upon payment to the said first party of the full amount of the said sale in cash: Provided, however, the amount so paid shall not be less than a proportional part of unpaid balance due under this contract. It is further agreed and stipulated by and between the parties that time is the essence of this agreement, and upon default upon the party of the second part in payment of two or more payments the said second party shall forfeit to the party of the first part as liquidated damages any such sum or sums as may have been paid under this agreement and all other rights and interests accruing to said second party hereinafter."

The petition alleged the receipt of the first payment, and that said installments sued on, not including the final payment provided for in said above contract, were due and judgment was prayed for the amount of installments due at the time of filing this suit.

Defendant's answer is as follows:

"Answer of Defendant to Third Amended Petition.

"Now comes the defendant, H. C. Lookabaugh, and for his answer to the plaintiff's third amended petition filed in the above-entitled cause says:

"First. Defendant denies each, every, all and singular the allegations, averments, statements, charges and things set forth, stated or contained in the plaintiff's third amended petition, save and except that hereinafter expressly admitted.

"Second. Defendant admits that he made and entered into an agreement with the plaintiff for the purchase of certain real estate described, and says that the contract that was signed up a substantial copy of the same is attached to plaintiff's petition; that at the time he made the contract for the purchase of said real estate that it was specifically understood and agreed and talked over with the defendant that the defendant was to pay two hundred fifty (\$250.00) dollars, and that if he did not make any further payments, that that was to be the measure of damages and he was to only lose said two hundred and fifty (\$250.00) dollars, or accept the title and pay out the real estate, and that that was to be the measure of damage and no further or additional damage other than the payments made by him which was to be in full; that by mutual mistake of the parties and because of the ignorance of this defendant as to the language used, it being represented to the defendant at the time he signed said contract that that was the force and effect of the contract, and that it was expressed the agreement of the parties to the contract that that was to be the sole damage, this defendant signed the said contract. Defendant says that the said contract does not express the contract made between plaintiff and defendant, and, therefore, that the same should be reformed in that particular so that the said contract should read that in the event defendant should not make the full payments that the measure of damage and all thereof was to be and should be the forfeiture of the payments made as liquidated damages.

"Third. The defendant says that the plaintiff has no title to said real estate, and the plaintiff never has at any time tendered to this defendant any deed or title of any kind, and has never offered in any way or manner to perform the contract on his part, and by reason of the fact that no title has been tendered and

no offer to perform is made, defendant says that under the said contract and the law applicable thereto he is not liable to the plaintiff for any damages or sum in addition to the two hundred and fifty (\$250.00) dollars heretofore paid, receipt of which is acknowledged by the contract.

"Fourth. Defendant for further answer says that in this case the plaintiff heretofore filed an amended petition, which is entitled a second amended petition, in which the plaintiff alleged that the said property and real estate being the real estate and property referred to has depreciated in value and is not worth at the time said amended petition was filed to exceed the sum of eight hundred and forty (\$840.00) dollars, and that the plaintiff has been damaged by reason of the failure to carry out said contract the difference between the two thousand (\$2,000.00) dollars and interest thereon; a copy of which said second amended petition with a copy of the contract for deed attached which was filed on the 2d day of March, 1910, together with all indorsements thereon, is here referred to and made a part hereof.

"Fifth. Defendant says that it is provided by section 2859 of the statutes of the state of Oklahoma, Revised Laws of Oklahoma Annotated 1910, otherwise known as the Harris-Day Code, plaintiff's measure of damage, if any he has, is as follows:

"2859. *Breach of Agreement to Buy.*—The detriment of an agreement to purchase an estate in real property, is deemed to be the excess, if any, of the amount which should have been due to the seller under the contract, over the value of the property to him."

"Defendant says that the property at the time said suit was brought by the plaintiff was and is worth the price agreed to be paid therefor; that the property has not depreciated in value, and that in no event is the property worth less than what the defendant agreed to pay for the same, and that the said property was worth to the seller, the plaintiff herein, at the time said action was brought and the market value of the same was and is worth the price agreed to be paid therefor, and that this defendant should not be held to do other than forfeit the two hundred and fifty (\$250.00) dollars.

"Sixth. That there is another action pending between plaintiff and defendant wherein A. R. Gourley is plaintiff and H. C. Lookabaugh is defendant; that the case is pending in the district court of Oklahoma county against H. C. Lookabaugh, and the case is No. 16138, and it involves this same contract sued on in this case.

"Wherefore, this answering defendant prays that upon the final hearing hereof that the plaintiff may be adjudged to take nothing by said action; that the contract set out and pleaded by plaintiff may be reformed by the court to express the agreement and contract of the parties, and that the defendant may recover judgment for his costs, and plaintiff's petition may be dismissed, and that plaintiff may recover nothing thereby, and for such other relief to which the defendant may show himself entitled to in the premises."

Upon the filing of answer by defendant, a motion for judgment upon the pleadings was made by the plaintiff, and sustained by the court. To review this action, defendant perfected his appeal, and this court in an opinion by Commissioner Burford, filed October 24, 1916, reversed the lower court on one proposition, namely, that the petition did not state a cause of action in favor of plaintiff and against defendant. This question is now being considered upon the petition for rehearing filed by plaintiff in error, and the

only question to be determined. That is to say, could the plaintiff maintain a suit at law to recover the installments as they fell due under this contract without tendering to the defendant a deed to the proportionate part of the premises that the installment bore to the entire deferred part of the purchase price? It will be noted that the contract in the first paragraph thereof provided that in consideration of \$250 cash in hand paid, the receipt of which is acknowledged, and in consideration of the further covenants and agreements contained in the contract and upon the complete payment to the party of the first part of the purchase price, the plaintiff would furnish a good and sufficient warranty deed to the land described in the contract. It was agreed that the balance of \$2,000 was to be paid in installments of \$200 each six months, beginning on August 21, 1910, until the full \$2,000 was paid. It was stipulated in the fourth paragraph, or the next to the last paragraph, that the plaintiff would execute and deliver to any part or subdivision of the property a good and sufficient warranty deed any time during the pendency of the contract upon the payment to plaintiff the full amount of said sale in cash, provided, however, the amount so paid would not be less than the proportional part of the unpaid balance due under this contract.

Upon the consideration of the entire contract it seems perfectly plain that it was intended by the purchaser to subdivide said tract of land into lots, blocks, and tracts, and as we understand the last above mentioned paragraph, it was intended by it to provide that after said tract had been so subdivided, and the defendant found a purchaser for a lot, block or subdivision thereof, and desired to have executed a good and sufficient deed to said purchaser therefor, it was agreed that the plaintiff, after the defendant paid him the amount of said sale in cash, the same not to be less than the proportional part of the unpaid balance due upon the contract, then plaintiff would execute a good and sufficient deed to the part of the property so sold. This being true, then under the contract the plaintiff was not bound to furnish a deed to any part of the property purchased until the entire purchase price had been paid, unless the defendant, the purchaser, should demand a deed under the fourth paragraph of the contract, and this contingency is not now before us. If this is true, then under the authority of *Shelton v. Wallace*, 41 Okl. 325, 137 Pac. 694, the syllabus being as follows:

"W. sold S. some city lots; they entered into a written contract in which S. agreed to pay for the lots on the installment plan, he giving his promissory notes, due monthly, for the deferred payments, he also going into possession. W. agreed to convey when all payments should be completed. The contract contained many other provisions, among which was one to the ef-

fect that, in case of default on the part of S. in the payments, W. might keep all money paid, not as a penalty for the breach of the contract, but as liquidated damages for the use of the premises. S. decided to repudiate the contract, and refused to make payment of installments. W. sued on the past-due notes in justice court. Held:

"(a) That such an action would lie in W.'s favor.

"(b) That such contract could not be rescinded except by consent of both parties.

"(c) That W., in addition, might have specific performance as against S., but that he was not compelled to resort to that remedy before enforcing payment, in a court of law, of the unpaid installment notes.

"(d) That W. is not confined to one action for damages for breach of contract, but that that part of the contract providing for the installment notes was an independent and not a dependent or concurrent covenant, and, as such, could be enforced in an independent action"

—and *Ames v. Milam*, 157 Pac. 941, the fourth paragraph of the syllabus being as follows:

"A tender of a deed is not a condition precedent to an action to enforce a vendor's lien"

—the plaintiff could maintain a suit at law for the installments of the purchase price as they became due, and would not be required to execute a deed, and would therefore not be required to tender a deed until the entire purchase price was paid, or until a suit was instituted for the final installment due under said contract. These suits involved installments maturing prior to the final installment. Plaintiff would not therefore be required to make a tender of a deed to the premises or any part thereof in order to maintain a suit at law for installments of the purchase price as they became due under the contract prior to suing for the final installment due.

We are therefore constrained to hold that the proposition announced in the first paragraph of the syllabus handed down by the court in this case, and that part of the main opinion reaching the conclusion announced in said paragraph, is incorrect and misinterpreted the contract in this, to wit, that the court construed the contract to mean that the plaintiff should execute a deed to that part of the land as the installments were paid; that is, that proportional part of the land which the installment paid for in full. We therefore hold that said opinion heretofore filed in this cause should be modified in accordance with this opinion. In the former opinion it was held, and we concur therein, being propositions announced in second and third paragraphs of the syllabus, that the answer filed by defendant did not present an issue which was a defense to the cause of action of the plaintiff. Under said opinion as modified by this opinion we hold that the court was correct in sustaining the motion for judgment upon the pleadings.

Finding no error in the judgment of the lower court, the same is affirmed.

PER CURIAM. Adopted in whole.

(68 Okl. 68)

ST. LOUIS & S. F. R. CO. v. FIRST NAT. BANK OF ELK CITY et al.
(Nos. 6229, 6230.)

(Supreme Court of Oklahoma. Dec. 11, 1917.
Rehearing Denied March 19, 1918.)

(Syllabus by the Court.)

1. CARRIERS — 189 — FREIGHT RATES — MINIMUM CARLOAD RATE.

A carload of broom corn moved out of Elk City over the Wichita Falls & Northwestern Railway Company to Altus, where it was transferred to the St. Louis & San Francisco Railroad Company to be shipped to Wichita, Kan., where the same arrived in due time. S. was both the consignor and consignee, but instructions were noted on the bill of lading to notify the Western Warehouse Company upon its arrival. The bill of lading, with draft attached, was transferred by S. to the plaintiff, who sent the same to a bank at Wichita for collection, which refused to honor the draft on presentation. Thereupon the Western Warehouse Company sued S. and the St. Louis & San Francisco Railroad Company in replevin and recovered 57 bales of said corn, weighing 10,820 pounds, whereupon upon payment of freight on a minimum carload of 25,560 pounds at the rate of 47 cents per hundredweight as noted on the bill of lading issued by the Wichita Falls & Northwestern Railway Co., said 57 bales were delivered to the sheriff and turned over to the Western Warehouse Company. Thereafter S. offered to pay freight on the balance of said shipment of 34 bales in excess of the minimum carload rate already paid, at the rate of 47 cents per hundredweight, and requested that the same be delivered to the Rails Commission Company, which the St. Louis & San Francisco Railroad Company refused to do, and demanded freight on said 34 bales at the minimum carload rate of 25,560 pounds, on the ground that the shipment belonged to S. and another and was governed by the proviso to rule 6 of the Western Classification, which S. refused to pay, whereupon the St. Louis & San Francisco Railroad Company advertised and sold to the highest bidder said 34 bales, deducting from the proceeds thereof as freight thereon the minimum carload rate of 25,560 pounds, and for other charges, and tendered the balance to S. Held that the proviso to rule 6 did not apply; that the carrier had no right to make the ownership of the goods the test by which its charges for carriage is to be measured, and was guilty of a conversion of the 34 bales.

2. CARRIERS — 177(4) — INTERSTATE CARRIERS — LIABILITY.

Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), as amended by Act June 29, 1906, c. 3591, 34 Stat. 584, 595 (U. S. Comp. St. Supp. 1909, pp. 1149, 1166; Comp. St. 1916, §§ 8604a, 8604aa), imposes upon an interstate carrier voluntarily receiving property for transportation from a point in one state to a point in another state liability to the holder of a bill of lading for loss anywhere en route with a right, when sued with a connecting carrier for loss occurring upon its line, by cross-petition to recover over against the connecting carrier for the amount of such loss or damage evidenced by the judgment against it.

3. CARRIERS — 133 — CONTRACT — LOSS OF GOODS — VALUATION — EVIDENCE.

Where the shipping contract provides that in case of loss of, or damage to, the goods, the amount of loss or damage shall be computed at the value of the goods at the place of shipment, and evidence is admitted, in proof of loss, over objection as to the value of the goods at the place of destination, held error.

(Additional Syllabus by Editorial Staff.)

4. CARRIERS — 177(4) — INTERSTATE TRANSPORTATION — CARMACK AMENDMENT — RECOVERY BY INITIAL CARRIER FROM CONNECTING CARRIER — "REQUIRED TO PAY."

The words "required to pay," as used in Carmack Amendment (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended by Act June 29, 1906, c. 3591, § 7, par. 12, 34 Stat. 595 [U. S. Comp. St. 1916, § 8604aa]), authorizing recovery by the initial carrier against the connecting carrier of damages it may be required to pay the shipper for loss or injury occurring on the line of the connecting carrier, mean asked to pay, or asked of right and by authority of law to pay and do not require as a condition precedent to recovery that it shall have actually paid a judgment recovered against it by the shipper.

Error from District Court, Beckham County; G. A. Brown, Judge.

Action by the First National Bank of Elk City against the Wichita Falls & Northwestern Railway Company and the St. Louis & San Francisco Railroad Company, in which the Wichita Falls & Northwestern Railway Company filed cross-petition against the St. Louis & San Francisco Railroad Company, asking a judgment over. Verdict directed for plaintiff against the Wichita Falls & Northwestern Railway Company and in favor of it over against the St. Louis & San Francisco Railroad Company, and the defendant the St. Louis & San Francisco Railroad Company brings error as against plaintiff and its co-defendant, and defendant the Wichita Falls & Northwestern Railway Company brings error as against plaintiff and its co-defendant, which cases were by order of the court consolidated. Reversed and remanded for assessment of damages.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and Fred E. Suits, both of Oklahoma City, for plaintiff in error. C. C. Huff, of Dallas, Tex., and Echols & Merrill, of Elk City, for defendant in error Wichita Falls & N. W. Ry. Co. Ledbetter, Stuart & Bell, of Oklahoma City, for defendant in error First Nat. Bank of Elk City.

TURNER, J. This is an action to recover damages for the conversion of 34 bales of broom corn, brought in the district court of Beckham county by defendant in error First National Bank of Elk City, against defendant in error Wichita Falls & Northwestern Railway Company, and plaintiff in error, St. Louis & San Francisco Railroad Company. The facts are substantially: That one J. H. Seright delivered a carload of broom corn to defendant Wichita Falls & Northwestern Railway Company at Elk City, Okl., for shipment to Wichita, Kan. He was both the consignor and consignee of the car, and gave instructions, which were noted on the bill of lading, to notify the Western Warehouse Company, of Wichita, upon its arrival. The freight rate upon said shipment, as noted on the bill of lading, was 47 cents per hundred pounds. The bill of lading issued by

said defendant was what is commonly known as the standard or uniform bill of lading. The shipment moved out of Elk City over the line of the Wichita Falls & Northwestern Railway Company to Altus, Okl., at which point the shipment was delivered to defendant St. Louis & San Francisco Railroad Company for transportation to Wichita. There was apparently no delay in the shipment, and the same arrived in due time in perfect order to its destination, and the warehouse company was notified of its arrival. In the meantime Seright had drawn a draft on the Western Warehouse Company for the value of said broom corn, attached to which was the bill of lading, which was indorsed by him to the plaintiff, First National Bank of Elk City, and was transmitted for collection to a bank in Wichita. The warehouse company refused to honor the draft on presentation, but instituted replevin in the district court of Sedgwick county, Kan., and under said writ the sheriff of said county removed from the car 57 bales of broom corn, weighing 16,820 pounds. Mr. Seright was promptly notified of the replevin action. Later that suit went to judgment, and in a telegram to the agent of defendant St. Louis & San Francisco Railroad Company Seright instructed said company to deliver the remaining 34 bales, weighing 9,740 pounds, to the Ralls Commission Company, of Wichita, which the agent refused to do, for the reason, he says, the rate of 47 cents quoted by the agent of defendant Wichita Falls & Northwestern Railway Company and noted on the bill of lading did not apply, but that the shipment was governed by rule 6 of the Western Classification, which, under the construction given it by said agent of the St. Louis & San Francisco Railroad Company, would make that portion delivered to the sheriff under the writ of replevin one shipment, and the portion remaining another shipment. At the time the Frisco delivered part of this shipment to the sheriff, it collected the freight upon a minimum carload of broom corn of 25,560 pounds. Mr. Seright, as agent of plaintiff, went to Wichita and offered to pay said agent the proportionate amount of the excess of the minimum carload on the basis of 47 cents, as originally noted on the bill of lading issued to him by the Wichita Falls & Northwestern Railway Company, which the agent of the Frisco declined to accept, whereupon, Seright declining to pay more, the agent of the Frisco advertised and sold the remaining 34 bales, and, after deducting the freight, according to his construction of the rules of the Western Classification, together with demurrage and other charges, he tendered Seright the remainder, or \$59.84, which he declined to accept, and brought this suit.

Plaintiff contended that the Wichita Falls & Northwestern Railway Company was liable, under the Carmack Amendment to the Hepburn Bill, as initial carrier, but also

joined the connecting carrier, St. Louis & San Francisco Railroad Company as defendant, and prayed for judgment against both. Defendants answered and admitted the bill of lading, and defended the action of the agent of defendant St. Louis & San Francisco Railroad Company in refusing to deliver the shipment to the Ralls Commission Company, and the amount of \$59.84 was tendered in court to plaintiff. Defendant Wichita Falls & Northwestern Railway Company also filed a cross-petition against the St. Louis & San Francisco Railroad Company, asking the court, in the event plaintiff recovered judgment against it, for judgment over against the St. Louis & San Francisco Railroad Company for the amount thereof. At the close of the trial, the court directed a verdict in favor of plaintiff against the Wichita Falls & Northwestern Railway Company for \$928.50, with interest thereon at 6 per cent. from October 17, 1911, and in favor of the Wichita Falls & Northwestern Railway Company over against the St. Louis & San Francisco Railroad Company for a like amount. The defendant St. Louis & San Francisco Railroad Company has perfected its appeal against plaintiff and defendant Wichita Falls & Northwestern Railway Company, being cause No. 6229, and defendant Wichita Falls & Northwestern Railway Company has perfected its appeal against plaintiff and defendant St. Louis & San Francisco Railroad Company, No. 6230, which cases have been, by order of this court, consolidated.

[1] It is contended by defendant Wichita Falls & Northwestern Railway Company that the court erred in failing to instruct the jury to return a verdict in its favor, and in peremptorily instructing the jury to return a verdict against it. Both defendants contend that, as it ultimately turned out that this shipment was to be delivered to two consignees, under two expense bills, that rule 6 of the Western Classification applied, and that defendant St. Louis & San Francisco Railroad Company was entitled to demand freight upon the basis of two consignees, or for two minimum carload shipments. Section 6 of the Western Classification provides, in part, as follows:

"Carload freight will be rated and charged according to current rules governing the maximum and minimum weights of merchandise as authorized by companies adopting this classification: * * * Provided, however, the carload rate contained in this classification will apply only upon shipments received in one day from one consignor under one bill of lading, delivered under one expense bill to one consignee. * * * Carriers' agents will not * * * deliver less than carload shipments in order to effect the application of carload rates thereon; less than carload rates will apply on such shipments."

It is admitted that this shipment was received by defendant Wichita Falls & Northwestern Railway Company "in one day from one consignor under one bill of lading." The Frisco, upon its arrival, demanded freight on these 34 bales of broom corn at the mini-

imum carload rate of 25,560 pounds, basing such action upon their construction of said section 6 of the Western Classification, *supra*. The freight was paid on a minimum carload by the sheriff when, under the writ, he took from said car 16,820 pounds, or 57 bales. Mr. Seright offered to pay freight on said 34 bales of corn upon the basis of 47 cents per hundredweight on the excess of the minimum carload, but this offer was refused, and demand made by the Frisco for freight on a minimum carload. Otherwise stated, defendants contend, not that this shipment was not received in one day from one consignor under one bill of lading, and was not, by the terms of the bill of lading, to be delivered under one expense bill to one consignee, but that, as part of the shipment, at its destination, turned out to be the property of the consignee and another who seized his share of it in replevin, and thereby caused the shipment to be split and delivered under two expense bills to two consignees, defendants were entitled to collect for two minimum carload shipments under the proviso of rule 6, *supra*. Not so. When plaintiff aggregated his property with that of the Western Warehouse Company and shipped it as consignor to himself at Wichita as consignee, so as to avail of a carload rate thereon, and took a bill of lading as above set forth, he, as one consignee under one expense bill, was entitled to receive the shipment at its destination. And the fact that part of the goods were seized as stated, thereby disclosing part of the shipment to be the property of another, did not justify the carrier in demanding the charges complained of and in converting the property by a sale thereof to satisfy the claim. This for the reason that the carrier has no right to make the ownership of the goods the test by which his charge for carriage is to be measured.

In *Int. Comm. Comm. v. Del., L. & W. R. R.* 220 U. S. 235, 31 Sup. Ct. 392, 55 L. Ed. 448, the court had under construction certain rules of the Official Classification territory, 1899, similar to the rule under consideration. These rules, in effect, forbade the combination of goods belonging to several owners for the purpose of a carload shipment, and forbade, therefore, not only impliedly, but expressly, the combination of goods for the purpose of carload rating by means of forwarding agents. Rule 5B provided:

"In order to entitle a shipment to the carload rate, the quantity of freight requisite under the rules to secure such carload rate must be delivered at one receiving station, in one day, by one consignor, consigned to one consignee and destination, except that when freight is loaded in cars by consignor it will be subject to the car service rules and charges of the forwarding railroad. * * Rule 5B will apply only when the consignor or consignee is the actual owner of the property."

In the spring of 1907 the Export Shipping Company, a New Jersey corporation doing business in Chicago and in New York, shipped from Chicago to New York, by the sever-

al railroads who were appellees, three cars of freight, consisting of merchandise belonging to various owners which had been aggregated by the Export Company for the purpose of shipment, and thus becoming entitled to the carload rate. The shipments conformed in all respects to the regulations of the companies, except to the extent that they came under the operation of the restrictions above referred to. On the arrival of each car in New York the carrier, instead of collecting the carload rate, exacted the less than carload rate, because of the restrictions in question. In August, 1907, the Export Company petitioned the Interstate Commerce Commission to award it reparation against the three carriers to the extent of the difference between the less than carload rates, which had been exacted, and the sums which would have been paid if the carload rate had been demanded. The right to the relief was based upon the assertion that an unlawful discrimination had been occasioned. The restrictions created by the rules were declared void and reparation was awarded, and the carrier was commanded on or before a certain date to desist from attempting to enforce the restrictions. 14 *Interst. Com. Comn. R.* pp. 422, 437. In an action to enjoin the enforcement of such rules, the circuit court restrained the commission from enforcing the order, and upon final hearing the order and decree of the commission was held void. On appeal, the Supreme Court of the United States, in reversing the circuit court and sustaining the order of the commission, said:

"The contention that a carrier when goods are tendered to him for transportation can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods, is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers, as to demonstrate the unsoundness of the proposition by its mere statement. We say this because it is impossible to conceive of any rational theory by which such a right could be justified consistently either with the duty of the carrier to transport or of the right of a shipper to demand transportation. This must be, since nothing in the duties of a common carrier by the remotest implication can be held to imply the power to sit in judgment on the title of the prospective shipper who has tendered goods for transportation. In fact, the want of foundation for the assertion of such a power is so obvious that in the argument at bar its existence is not directly contended for as an original proposition, but is deduced by implication from the supposed effect of some of the provisions of the second section of the act to regulate commerce."

In the syllabus it is said:

"A carrier cannot make mere ownership of goods tendered for transportation the test of the duty to carry, nor may a carrier discriminate in fixing charges for carriage upon such ownership. Under the act to regulate commerce a carrier cannot refuse to transport carload

lots at carload rates because the goods do not actually belong to one shipper or are shipped by a forwarding agency for account of others."

In *Great Northern Ry. Co. v. O'Connor*, 232 U. S. 508, 34 Sup. Ct. 380, 58 L. Ed. 703, the court said:

"For, although the Boyd Company was a forwarder, engaged in collecting a number of small shipments from various persons in order to fill a car and obtain the lower rates applicable to carload shipments, yet the railroad company was obliged to treat the forwarder as shipper, even though thereby the carrier lost the benefit of the higher rate which would have been applicable to separate and small shipments. This was the ruling in *Int. Com. Comm. v. Delaware, Lackawanna & Western R. R.*, 220 U. S. 235 [31 Sup. Ct. 392, 55 L. Ed. 448], where it was held that the carriers were not concerned with the question of title, but must treat the forwarder as shipper and charge the rates applicable to the quantity of freight tendered regardless of who owned the separate articles. If the forwarder was shipper for the purpose of securing carload rates, it was also shipper for the purpose of classifying and valuing, in order to determine which tariff rate was applicable."

[2, 3] We are therefore of opinion that the mere fact that it ultimately fell out that this broom corn belonged to the consignee and another did not justify the St. Louis & San Francisco Railroad Company in raising the freight rate on this car, and attempting to fix its charges upon the basis of such ownership and class this shipment as it did. Hence the court, so far disclosed by the record, did not err in directing a verdict against the defendant Wichita Falls & Northwestern Railway Company and over against the defendant St. Louis & San Francisco Railroad Company. This for the reason that the twentieth section of the Act of February 4, 1887 (24 Stat. at L. 379, c. 104; U. S. Comp. Stat. 1901, p. 3154), as changed by the Carmack Amendment of June 29, 1906 (34 Stat. 584, 595, c. 3591; U. S. Comp. Stat. Supp. 1909, pp. 1149, 1166), reads:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof"

—which means, when applied to the facts in this case, that the Wichita Falls & Northwestern may recover of the St. Louis & San Francisco Railroad Company such amount

of damages "as it may be required to pay plaintiff," as evidenced by the judgment he has obtained against the Wichita Falls & Northwestern in this case.

[4] "Required to pay" does not mean that the judgment must be paid as a condition precedent to the right to recover, as contended. "Required," when used in this connection, means asked to pay or asked of right and by authority of law to pay (*U. S. v. Armour & Co.* [D. C.] 142 Fed. 808, 822), as evidenced by the judgment in this case in favor of plaintiff and against the Wichita Falls & Northwestern Railway Company, and not by the actual payment of said judgment. In support of our position that such is the proper construction of this act, in the syllabus to *Atlantic C. L. R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, it is said:

"The imposition upon an interstate carrier voluntarily receiving property for transportation from a point in one state to a point in another state, of liability to the holder of the bill of lading for a loss anywhere en route, with a right of recovery over against the carrier actually causing the loss, which is made by the act of February 4, 1887 (24 Stat. at L. 379, c. 104; U. S. Comp. Stat. 1901, p. 3154) § 20, as amended by the act of June 29, 1906 (34 Stat. at L. 584, 595, c. 3591; U. S. Comp. Stat. Supp. 1909, pp. 1149, 1166), in spite of any agreement or stipulation limiting liability to its own line, is a valid regulation of interstate commerce."

We said a while ago that the court did not err in directing a verdict against defendants, as it did. And such is true, unless he erred in so doing on the evidence of plaintiff, who, on the issue of his measure of damages, was the only witness who testified and whose undisputed evidence disclosed, after properly qualifying, that the reasonable market value of his broom corn at Wichita at the time of its arrival was \$200 per ton. This evidence went in over objection of defendants, who insisted and still insist that the court erred in admitting the evidence, because, they say, that the contract of shipment provides:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property. * * * at the place and time of shipment."

As the place of shipment was Elk City, the evidence of the market value of the property at Wichita was inadmissible, and the action of the court in overruling defendant's objection to it and predicated a peremptory instruction upon it was reversible error. In *Wegener v. Chicago & N. W. R. Co.*, 162 Wis. 322, 156 N. W. 201, it is said:

"Such tariffs and bill of lading constituted the contract of shipment, and a stipulation therein that the amount of any loss or damage for which the carrier was liable should be computed on the basis of the value of the property at the place and time of shipment, was valid and binding upon the shipper."

And 10 C. J. 388, says:

"Where the shipping contract provides that in case of loss of, or damage to, the goods the amount of loss or damage shall be computed at

the value of the goods at the place of shipment, evidence as to the value of the goods at the place of destination is properly excluded."

See, also, *Caples v. Louisville, etc., Ry. Co.*, 17 Mo. App. 14.

Let the cause be reversed and remanded, not for a new trial, but for the assessment to a jury of damages for the loss of the property, pursuant to the views herein expressed. All the Justices concur.

(68 Okl. 83)

LANGLEY v. FORD et al. (two cases).
(No. 7392.)

(Supreme Court of Oklahoma. June 6, 1917.
Rehearing Denied March 19, 1918.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD — 107 — SALE OF LAND—COLLATERAL ATTACK.

Where the proceedings of the county court appointing a guardian for certain minors, and thereafter ordering a sale of the lands of said minors, are regular, the record cannot be collaterally attacked in an action to foreclose a mortgage upon said lands, executed by the purchaser at the guardian's sale, in the absence of fraud.

2. GUARDIAN AND WARD — 112 — SALE OF LAND—MORTGAGE LIEN—VALIDITY.

Where all the proceedings are regular upon their face, and the purchaser at such guardian's sale executes a mortgage upon said lands, the lien of the mortgagee may not be defeated for fraud affecting the sale, where the mortgagee did not participate therein or have notice or knowledge thereof.

3. INDIANS — 15(1)—ALLOTMENTS—RESTRICTIONS ON ALIENATION—ACTS OF CONGRESS.

All restrictions upon the alienation of the allotments of minor allottees of the Five Civilized Tribes having less than one-half Indian blood, and the restrictions upon the alienation of all lands except homesteads of said allottees enrolled as mixed blood Indians of one-half or more than one-half and less than three-fourths Indian blood, are removed by Act Cong. May 27, 1908, c. 199, 35 Stat. 312.

4. GUARDIAN AND WARD — 105(1)—SALE OF WARD'S LAND — FRAUD — SETTING ASIDE SALE.

Where a guardian sells the lands of his ward on a secret understanding that the purchaser will not pay for same, and the sale is confirmed by the court, and deed executed and delivered to the purchaser, such facts constitute a fraud upon the estate of the ward, and the sale may be set aside in an action by the ward against the purchaser or any other person who acquires rights in said lands with knowledge or notice of such secret fraud.

5. GUARDIAN AND WARD — 99 — GUARDIAN'S SALE OF LAND—INVALIDITY—SETTING ASIDE SALE.

A sale by a guardian of real estate belonging to his wards, to his wife through the interposition of a third person, is not void absolutely, but may be set aside in an action brought for that purpose against the purchaser or wife of the guardian or some one claiming under him or her, with knowledge of the circumstances of the sale, or one who was not a bona fide purchaser or incumbrancer thereof, for good and sufficient consideration, and without notice.

6. PRINCIPAL AND AGENT — 178(1)—NOTICE TO AGENT—FACT.

One who on behalf of a loan company, takes an application for loans, which application is required to contain a detailed description of the

property and the occupancy thereof, with the applicant's statement as to the condition of his title, which application, accompanied by an abstract showing the condition of the record concerning the title of the applicant to the property offered as security for the loan, is forwarded to the company, where the application and abstract is submitted to its attorney for an opinion as to the title of the applicant, and the necessary papers prepared and sent to the person taking the application to secure the execution thereof by the prospective borrower, is agent of the loan company, and notice of all knowledge acquired by him affecting the subject-matter of the agency, while acting within the scope of his authority, will be imputed to the company.

Error from District Court, Jefferson County; Frank M. Bailey, Judge.

Action to foreclose a mortgage by E. E. Ford against James T. and Lula Rouark, with order making Samuel L. Langley, Matilda Sarah Langley, minor, and Thomas H. Hays parties, and in which J. B. Moore was appointed guardian ad litem for the minor, consolidated with action by E. E. Ford against Clyde Edward Langley, minor, on similar pleadings and issues. Judgment for plaintiff decreeing foreclosure, and motion for new trial overruled, and the minors bring error. Judgment reversed and cause remanded.

R. B. Brown, U. S. Probate Atty., and J. B. Moore, both of Ardmore, for plaintiffs in error. Charles B. Mitchell, of Miami, and H. A. Kroeger and Cottingham & Hays, all of Oklahoma City, for defendants in error.

HARDY, J. E. E. Ford, as plaintiff, commenced an action to foreclose a mortgage upon certain lands theretofore comprising a portion of the allotment of Matilda Sarah Langley, a Choctaw Indian minor, which mortgage had been executed to secure a note of \$1,000, representing the commission for a loan made by the Deming Investment Company on said premises. The defendants James T. and Lula Rouark filed an answer in which they alleged that the guardian's deed executed by Samuel L. Langley, guardian of said minor, to one Hays, and the conveyance from said Hays to Calcie Lee Langley, mother of said minor, were sham and bogus transactions, and each without consideration supporting it, and made for the purpose of defrauding said minor out of said lands; that said facts were known to plaintiff at the time said mortgage was executed, or could have been known by the exercise of care or prudence; and prayed an order making said guardian and Matilda Sarah Langley, the minor, and Thomas H. Hays, parties to the litigation; and further prayed that a guardian ad litem be appointed to represent said minor; whereupon J. B. Moore, Esq., United States probate attorney, was appointed as guardian ad litem for said minor, and filed an answer and cross-petition in her behalf, alleging that she was a member by blood of the Choctaw tribe of Indians, was 13

years of age, and had selected as a portion of her allotment the land described in plaintiff's petition; denied that plaintiff acquired any rights under his mortgage, or that Hays, the mortgagor, had any interest in said premises which he could mortgage, and challenged the jurisdiction of the county court of Jefferson county to appoint a guardian for said minor for the reason that at the time of said appointment said minor was not a resident of that county; and alleged that said sale was brought about at the instance of the agent of plaintiff, for the purpose of defrauding her out of said lands, and that the purchaser at said guardian sale paid no consideration for a deed thereto, and never took possession of said lands, and that the deed from Hays, the purchaser at said guardian's sale, to Calcie Lee Langley, the mother of said minor and wife of the pretended guardian, was void; and prayed an order canceling plaintiff's mortgage, the said guardian's deed, and the order of the county court confirming said sale. To this answer and cross-petition plaintiff filed reply.

At the same time plaintiff filed another action to foreclose a mortgage upon certain lands comprising a portion of the allotment of Clyde Edward Langley, a minor, in which case similar pleadings were filed, joining identical issues. By order of court these two cases were consolidated and tried as one in the trial court, and upon appeal have been so treated. Judgment was rendered, holding that the conveyances made by the guardian were voidable and not void; that plaintiff's mortgages were valid, and that one L. W. Tarkington was the agent of plaintiff and had knowledge of the fraud in said guardian's sale, but owing to his limited scope of agency, and from the fact that he participated in the fraud, notice thereof would not be charged to plaintiff; and judgment was rendered in favor of plaintiff, sustaining the validity of his mortgages, and decreeing a foreclosure thereof, and all other conveyances were declared null and void and canceled. Motion for new trial being filed and overruled, the minors bring the case here.

[1, 2] The first proposition urged for reversal of this case is that the county court of Jefferson county had no jurisdiction to appoint a guardian for said minors because, at the time of the alleged appointment, each of said minors were residents of Love county, and it is contended that this question can be raised in this proceeding, which is characterized as a direct, and not a collateral, attack. It has been held a number of times upon similar facts that the jurisdiction of the court appointing a guardian for a minor cannot be raised in this character of proceeding, which is held to be a collateral attack.

In *Baker v. Cureton*, 150 Pac. 1090, it was held in a cross-action to quiet title, where it appeared upon the face of the record that the minor appeared in court and testified that

he was 18 years old and his father and mother were dead, and that no notice was given to any one before making the appointment of a guardian for said minor, that, the county court being a court of general jurisdiction as to probate matters, it would be presumed from the fact of appointment that the court heard further evidence, and found that the minor was in the care of no one and had no relatives residing in the county, and that there was no one to whom the judge could give the notice prescribed by section 6522, Rev. L. 1910, and that the appointment was good. And it was further held that the records of the county court could not be collaterally attacked by evidence aliunde that the minor was at the time in the care of some one and had relatives residing in the county.

In *Hathaway v. Hoffman*, 153 Pac. 184, plaintiffs brought an action in ejectment, and in support of their claim assailed the validity of the records of the county court appointing a guardian for them, who had, pursuant to an order of the court, sold and conveyed the land in controversy to defendant's grantee, and it was there held that such proceeding was a collateral attack, and that the record, being one of a court of general jurisdiction as to probate matters, could not be impeached by evidence aliunde, and that the court did right in directing a verdict for the defendant notwithstanding the plaintiffs had introduced parol evidence, over objection, that the minors for whom a guardian had been appointed by the court, at the time of the appointment resided in a county other than that in which the appointment was made, as the evidence was held to be incompetent.

If it be sought to distinguish this case from the two cases cited on the ground of fraud in procuring the appointment by offering false testimony in support of the application for such appointment, the claim will not avail anything; for the precise question was presented in *Scott v. Abraham*, 159 Pac. 270, where it was sought to set aside a guardian's deed on the ground that at the time of the appointment the minors were not residents of the county in which the appointment was made. In the opinion by Commissioner Burford it was said:

"If we go further, and say that, since the petition alleged nonresidence of the minors in Haskell county, the finding of the court that they did live there, which finding is conclusively presumed (*Hathaway v. Hoffman*, supra), must have been based upon perjured testimony, still the issue was not triable in this case; for it is fraud or perjury aliunde the record, which may be inquired into, and not perjury involved in the matter actually determined (*Brown v. Trent* [36 Okl. 239, 128 Pac. 895]; *McElrod v. Adair* [153 Pac. 660] supra). Were it not so, there would be no end of litigation, since, in every case where there was a conflict of evidence, the unsuccessful party would immediately sue to set aside the judgment on the ground that his adversary gave perjured testimony."

These decisions declare the rule which has been adopted by this court after full and mature consideration, and which has been adhered to since the decision in *Baker v. Cureton*, and may be said to declare the settled views of this court upon the questions involved.

[3, 4] It is next urged that, inasmuch as the lands embraced in plaintiffs' mortgage constituted a portion of the allotment of Indian minors, the title thereto could not be divested except by proper proceedings in the county court, and that any other attempted alienation would be null and void, and that the title thereto could not be acquired by any other method. Under this proposition it is argued that minority constitutes a restriction which can only be removed by a strict compliance with the law regulating probate sales of the lands of minors in the county court, and that the payment of the purchase price was a condition precedent to the passing of title, and that where the purchase price has not been paid, even though the sale has been confirmed and the record in every way was regular and fair upon its face, the guardian's deed would be absolutely void, and it would be impossible for a person without notice to acquire any rights therein. These questions were presented and fully considered in *Allison v. Crummey*, 168 Pac. 691 (not yet officially reported), where it was held that all restrictions upon the alienation of the allotments of minor allottees of the Five Civilized Tribes having less than one-half Indian blood, and the restrictions upon the alienation of all lands except homesteads of said allottees enrolled as mixed-blood Indians of one-half or more than one-half and less than three-fourths Indian blood, were removed by act of Congress of May 27, 1908, c. 199 (35 Stat. L. pt. 1, 312); and it was further held that where a guardian sells the land of his ward in pursuance of an order of sale regularly made, upon a secret understanding that the purchaser shall pay no consideration therefor, and where such sale was confirmed by the court and a deed executed and delivered to the purchaser, that such facts constituted a fraud upon the estate of the ward, and the sale might be set aside in an action by the ward against such purchaser or any other person who acquires rights in said lands with notice of such secret fraud, and that, while such sale was voidable as to the purchaser or other persons acquiring rights therein with notice, the rights of an innocent purchaser or incumbrancer without participation in or notice of such fraud would be protected. That decision disposes of this contention in the present case.

[5] It is also urged that the deeds made by the guardian are void because the sale was in fact an indirect sale to the guardian through the interposition of a third person. As to the allotments of Matilda

Sarah Langley, it appears that Hays, the purchaser at the guardian's sale, conveyed the premises to Calcie Lee Langley, the mother of said minor and the wife of the pretended guardian. The facts in reference to this allotment are somewhat similar to the facts in *Burton v. Compton*, 150 Pac. 1080, where the guardian sold the estate of his ward to his own wife, and the deed was held to be void regardless of the absence of fraud, the adequacy of price, or the apparent regularity of the proceedings, on the theory that such transactions are prohibited by statute and condemned by public policy, and that one who purchased from the vendee of a guardian's sale must take notice at his peril of the authority of the guardian to make the sale; and where sufficient facts appear or were suggested by the record, in connection with other circumstances brought to his notice, to put a reasonably prudent man on inquiry, and he neglects to make such inquiry, he will be held to have actual knowledge of the channel through which his grantor claims title, and that her grantor in the guardian's deed under which she held was in fact her husband.

The difference between that case and the one now under consideration is that here Langley, the guardian, made a conveyance to Hays, who paid no consideration therefor, and Hays reconveyed to Calcie Lee Langley, the wife of the guardian, while in the *Compton* Case the guardian conveyed directly to his wife, and *Burton*, the purchaser from her, was held to have notice because of the identity in the name of the guardian and his grantee. It is contended that plaintiff is not put upon notice of the relationship between the guardian and Hays, grantee, or of the lack of consideration in the conveyance from the guardian to Hays, or from Hays to the wife of the guardian, and therefore the case of *Burton v. Compton* is not conclusive. Mr. Justice Brett, who wrote the opinion in that case while on the Commission, expressly calls attention to the fact that the rights of no innocent third person had intervened. In *Allison v. Crummey* the guardian had executed a conveyance to a third person, who had in turn reconveyed to the guardian, and the contention was made that such deed was void because it was sold by the guardian to himself indirectly. That contention was rejected, however, and the rule was declared to be that:

"A sale by a guardian of real estate belonging to his ward to himself, through the interposition of a third person, is not void absolutely, but is voidable in an action brought to set aside the sale as against the purchaser or guardian or some one claiming under him with knowledge of the circumstances of the sale, or one who was not a bona fide purchaser or incumbrancer for good and sufficient consideration and without notice."

The present case more nearly comes within the rule quoted, for here the sale was not direct to the wife of the guardian, as in *Bur-*

ton v. Compton, but was to his wife through the interposition of a third person.

[8] The question then remains whether the plaintiff had knowledge of or should be charged with notice of such facts as would avoid the sale, or whether, on the other hand, he was an innocent incumbrancer for value without such notice. The Deming Investment Company was represented in securing the application for the loan by one L. W. Tarkington as local agent. Plaintiff is an employé of the Deming Investment Company, and the notes represented the commissions charged by the Deming Investment Company in addition to interest at the rate of 6 per cent. upon the principal amount of the loan. It was Tarkington's duty to procure from prospective borrowers a written application which should contain minute information concerning the property offered as security, showing the description of the land and the character and amount of crops growing thereon, including the kind and age of fruit trees; the number of acres in meadow and timber; number of acres in cultivation and capable of being placed in cultivation; the character, description, and age of fences and hedges; the character, depth, and quality of the soil; the cash value of the farm improvements; when the buildings were erected, together with the material out of which constructed; the size and description thereof in detail; the amount of insurance on the property; existing incumbrances; purpose for which the money was wanted; also the number and value of agricultural implements and live stock, and by whom and for what purpose the buildings were occupied and used; and a statement by the applicant of the condition of his title thereto and the occupancy of the premises.

It is admitted that, for the purpose of procuring the application, Tarkington was the agent of plaintiff; but it is contended that the knowledge obtained by him should not be imputed to his principal, because it was not within the scope of his authority to acquire such information. This contention is without merit. It was within the scope of his agency in procuring the application to obtain information with reference to all the matters above enumerated, whatever the nature of that information, which, in connection with an abstract submitted therewith, would enable attorneys for the company to pass upon the legal sufficiency of the title in order to permit the company to determine whether a loan should be made, and it was his duty to communicate the same to his principal. *Allison v. Crummey*, supra.

Plaintiff contends, however, that notice of information acquired by Tarkington should not be imputed to him, because Tarkington was acting for himself, and because the circumstances clearly show that he was engaged in a scheme to defraud plaintiff, and

therefore the presumption that he would communicate such knowledge to his principal would not prevail. The rule which imputes notice to a principal of knowledge acquired by his agent, relating to the subject-matter of the agency while acting as such agent and within the scope of his authority, is usually based upon the theory that it is the duty of the agent to communicate to his principal all knowledge acquired by him relating to the subject-matter of the agency which is material to the principal's interests and protection, and the presumption that such knowledge has been communicated to the principal in accordance with this duty. This presumption does not ordinarily obtain, however, where the circumstances are such that it is certainly to be expected that the agent will not communicate his knowledge to the principal, as where the agent is acting on behalf of himself or another and adversely to his principal, or is engaged in some fraudulent enterprise, the success of which would be impaired or defeated by making such disclosure to the principal. *Mechem on Agency* (2d Ed.) § 1815. The mere fact that the agent has knowledge of fraud attending the transaction in which he is engaged does not prevent the general rule from applying where the agent is acting merely for his principal, and is not committing an independent fraud on his own account. *Indianhead Nat. Bank v. Clark*, 168 Mass. 30, 43 N. E. 912.

The notes sued upon were made payable to plaintiff by the direction of the Investment Company. It does not appear that he paid anything of value for the notes. Tarkington was the agent of the plaintiff for the purpose of securing said notes, and had full knowledge of the fraud attending the transaction, at the time the notes were executed and transmitted by him, and when plaintiff sought to recover upon these notes, with notice of such facts, he must accept the knowledge of his agent, and be bound thereby to the same extent as if the note had been taken by him in the light of the knowledge possessed by Tarkington. Plaintiff must be deemed to know what his agent knew, and cannot retain the benefits of that agent's acts without accepting the consequences of his knowledge. He cannot be permitted to obtain any greater rights from the acts of his agent than if he did the thing himself, knowing what the agent knew; that is, he cannot ratify the acts of the agent so far as beneficial to him, and repudiate the remainder. If he accepts any benefit flowing from the acts of the agent after he knows and appreciates what his agent has done, or with notice which the law imputes to him, he will not be permitted to say that the agent acted for him in procuring the note, and repudiate the agency when it is sought to impute to him knowledge of facts affecting the note acquired by the agent within the scope of his

authority and concerning the subject-matter of the agency. *First Nat. Bank v. Dunbar*, 118 Ill. 625, 9 N. E. 186; *Fouche v. Merchants' Nat. Bank*, 110 Ga. 827, 36 N. E. 256; *Morris v. Georgia Loan Co.*, 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506; *Warren v. Hayes*, 74 N. H. 355, 68 Atl. 193; *Bank of New Milford v. Town of New Milford*, 36 Conn. 93; *Loring v. Brodie*, 134 Mass. 453; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 608; *Holden v. N. Y. & Erie Bank et al.*, 72 N. Y. 296; *Fishkill Savings Inst. v. Bostwick*, 19 Hun (N. Y.) 354; *Smith v. Farrell*, 66 Mo. App. 8.

Whatever may be the law with reference to the notes representing the principal amount of the loan which have been negotiated by the Deming Investment Company and are now presumably in the hands of an innocent holder for value without notice, and in the due course of business, plaintiff cannot invoke the rule relied upon and successfully evade notice of that knowledge possessed by his agent which would defeat a recovery herein. Tarkington was not engaged in any independent fraud on his own account, but when taking the notes sued upon was acting for plaintiff, and, by suing on the notes, plaintiff has ratified that agency with all of its consequences.

Another question that enters into this case is that the evidence fails to disclose that plaintiff performed any services in connection with the loan or that he paid any consideration for the notes.

The judgment is reversed and the cause remanded. All the Justices concur.

In re STATE. (No. 8322.)

(Supreme Court of Oklahoma. March 5, 1918.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 773(5) — BRIEFS — REVERSAL.

Where plaintiff in error has completed his record and filed it in this court and has served and filed a brief, in compliance with the rules of this court, and the defendant in error has neither filed a brief nor offered any excuse for such failure, the court is not required to search the record to find some theory upon which the judgment may be sustained; and, where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the plaintiff in error or the rights of the parties.

Commissioners' Opinion, Division No. 3. Error from County Court, Bryan County; J. L. Rappolee, Judge.

Application of the State of Oklahoma for confiscation of 100 gallons of whisky, two automobiles, one wagon and one team, one wagon sheet, and one skillet and one set of tug harness, with interpleader and claim by Mrs. H. McInnes, and the Coalgate State Bank. From a judgment of confiscation,

Mrs. H. McInnes brings error. Reversed and remanded for new trial.

George Trice, of Coalgate, for plaintiff in error.

HOOKER, C. The county attorney of Bryan county filed his petition duly verified in the county court of Bryan county on November 4, 1915, seeking to confiscate certain personal property, among which was the wagon and team involved in this appeal.

Notice of hearing was served on the same day upon several parties in whose possession the property was found at the time of its seizure, and on November 18, 1915, one Mrs. H. McInnes interpleaded and claimed the wagon and team as her own, and that if it was being used for any purpose in violation of law, it was without her knowledge and consent, and likewise the Coalgate State Bank interpleaded and asserted a mortgage lien upon the same, and that it had never given its consent and was without knowledge that the same was to be used in violation of law. Mrs. McInnes and the bank asked that the property be returned to them. The cause was tried by the court without a jury, and a judgment rendered, confiscating said property to the state and denying to Mrs. McInnes and the bank the relief sought by them.

The evidence fails to connect the property involved with any unlawful use.

Mrs. McInnes has appealed here and has briefed the questions of law involved, but the county attorney has filed no brief, nor offered any excuse for not doing so, nor has he sought any time within which to file one, and, inasmuch as the contentions urged by the brief of the attorney for the interpleader seem to be well taken and supported by authority, this cause is reversed and remanded for a new trial, on account of the failure of the county attorney to brief said cause.

PER CURIAM. Adopted in whole.

(66 Okl. 268)

DAVIS et al. v. FARNSWORTH et al.
(No. 7933.)

(Supreme Court of Oklahoma. Oct. 30, 1917.
Rehearing Denied Nov. 20, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 882(14) — RULING ON DEMURRER—ESTOPPEL TO ASSIGN ERROR.

Where a demurrer is interposed to the plaintiff's evidence, and his counsel announces in open court that he is willing that the same should be sustained, he is estopped from assigning the ruling sustaining the demurrer as error upon appeal.

Commissioners' Opinion, Division No. 2. Error from District Court, Okfuskee County; Geo. O. Crump, Judge.

Action by M. L. Davis and another against F. B. Farnsworth and another. Judgment for defendants, and plaintiffs bring error. Affirmed.

Emery A. Foster, of Chandler, for plaintiffs in error. Samuel L. O'Bannon and John L. Norman, both of Okemah, for defendants in error.

GALBRAITH, C. This was an action to cancel an oil and gas lease on account of fraud in securing the execution thereof, and for damages growing out of the placing such lease of record. When the case was called for trial the plaintiffs dismissed the action so far as the element of fraud and the relief of cancellation were concerned, leaving their claim standing as an action for damages. A jury was impaneled and the plaintiffs introduced their evidence, whereupon the defendants demurred thereto, which demurrer was by the court sustained and judgment was entered dismissing the action and against the plaintiffs for costs. It is this ruling that is complained of by the plaintiffs in error on this appeal, as will appear from the following quotations from the brief of plaintiffs in error.

"By Mr. Norman: Come now the defendants and demur to the evidence on the grounds that no cause of action has been proven in favor of the plaintiffs and against the defendants or either of them. Mr. Davis said there was no fact misrepresented to him except one, and that Mr. Miller told him that he was getting the lease for Mr. Farnsworth. And you allege that the lease was taken in Mr. Farnsworth's name, and there is no evidence that any other person owns a single solitary item.

"By Foster: Yes; they admitted that in their answer. Counsel admitted it to the jury.

"By the Court: That might be admitted.

"By Mr. Foster: That he had an interest in it.

"By Mr. Foster: I am willing that the court sustain the demurrer.

"By the Court: Demurrer sustained."

As to the errors complained of the counsel says:

"The only error, if any was committed, was in sustaining the defendants' demurrer to plaintiffs' evidence. The evidence on the part of the plaintiffs was sufficient to take the case to the jury."

It will be seen from the above excerpt that after the demurrer to the evidence was interposed counsel for the plaintiffs expressed his willingness that the same might be sustained, in this, he said, "I am willing that the court sustain the demurrer," thus inviting the action of the court of which he complains on this appeal. This he cannot do. He cannot consent that a demurrer be sustained then assign it as error on appeal. This doctrine is so well established in this jurisdiction that it ought not to be necessary to cite authorities in support of it. However, a few of the cases announcing this rule are: *Territory v. Cooper*, 11 Okl. 699, 69 Pac. 813; *Wallace v. Duke*, 44 Okl. 124, 142 Pac. 308; *Page v. Tryon*, 154 Pac. 526; *Pressley v. Incorporated Town of Sallisaw*, 154 Pac. 660; *C.*

R. I. & P. R. Co. v. Norton, 157 Pac. 917; *St. L. & S. F. R. Co. v. Hodge*, 157 Pac. 60.

The judgment appealed from should therefore be affirmed.

PER CURIAM. Adopted in whole.

(68 Okl. 46)

RICHARDSON v. CARR et al. (No. 6432.)

(Supreme Court of Oklahoma. Dec. 4, 1917.

Rehearing Denied March 12, 1918.)

(Syllabus by the Court.)

1. JUDGMENT §518—"DIRECT ATTACK"—WHAT CONSTITUTES.

A "direct attack" upon a judicial proceeding is any attack within the issues made by the pleadings which has for its purpose the annulment, vacation, correction, modification, declaring void, or avoiding the effect of such proceeding; but the questions raised by and the effect of such attack is determined by the manner of the same, the time of the same, the parties thereto, and the grounds therefor, as well as by point of the attack specified by the attacking party and the relief demanded.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Direct Attack.]

2. JUDGMENT §518—"COLLATERAL ATTACK"—WHAT CONSTITUTES.

A "collateral attack" upon a judicial proceeding is an objection incidentally made to the same in the course of a subsequent proceeding, which attack presents an issue collateral to the issue made by the pleadings in the latter proceedings; and its effect is to affirm that such prior proceedings are void upon the face of the mandatory record in the case in which they were had and to require a decision as to whether this is so.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Collateral Attack.]

3. JUDGMENT §518—DIRECT ATTACK—FORM.

There are different species of direct attack upon judicial proceedings, and each species presents for examination and correction only such errors or defects therein as the law authorizes in the particular attack that is made; that is, such errors and defects as the law authorizes to be examined and corrected, in view of the manner of the attack, the time of the same, the parties thereto, and the grounds alleged therefor.

4. EJECTMENT §1—NATURE OF PROCEEDING.

Where a plaintiff who has never voluntarily parted with his title to real estate brings an action to recover the same under section 4492, Stats. 1893 (section 4928, Rev. Laws 1910), and couples therewith an allegation that certain prior judicial proceedings under which the defendants, who are in adverse possession, claim title, are void upon the face of the mandatory record thereof, and prays for their cancellation, his suit, in so far as it is a direct attack upon such proceedings, is in equity, and presents for determination the question of the validity of such prior proceedings upon the face of the mandatory record therein, and also upon any undisputed fact shown without objection.

5. JUDGMENT §518—COLLATERAL ATTACK—SUIT IN EQUITY—ISSUES.

A suit in equity attacking prior judicial proceedings upon the grounds of defects apparent upon the face of the mandatory record thereof and praying for the cancellation of such proceedings, although direct, presents no question as to such defects except as to whether they show

that such proceedings are void upon the face of such record.

6. PROCESS \Leftrightarrow 82—PUBLICATION—NONRESIDENTS.

Under section 3950, Stats. 1893 (section 4722, Rev. Laws 1910), an action brought against a nonresident of the territory of Oklahoma having property in such territory to be taken by attachment is one of a distinct and independent class of cases in which service of summons may be made upon the defendant by publication.

7. PROCESS \Leftrightarrow 96(4)—PUBLICATION OF SUMMONS—AFFIDAVIT.

An affidavit for service of summons by publication under sections 3950 and 3951, Stats. 1893 (sections 4722 and 4723, Rev. Laws 1910), which shows that it is made in one of the class of cases specified in the first-mentioned section, and states that the plaintiff, with due diligence, is unable to make service of summons upon the defendant otherwise than by publication, is sufficient to support a judgment based upon such service by publication, when attacked in a subsequent and distinct proceeding upon the alleged grounds that the omission of such affidavit to expressly state that the affiant did not know and had no reason to believe that such defendant was at the time of his affidavit within said territory rendered such judgment void upon the face of the mandatory record in such case, as this omitted statement is inferable, and will be inferred from the affidavit as made as against such attack.

8. ATTACHMENT \Leftrightarrow 325—LEVY—RETURN—DESCRIPTION OF PROPERTY—CURE BY JUDGMENT.

Where the return of a sheriff upon a writ of attachment shows that he levied the same upon lots of certain numbers in a certain city in a certain county of Oklahoma as the property of the defendant in such attachment, but omits to show in what block such lots are situated, or to otherwise identify them as against the possibility that such defendant may own other lots of the same numbers in such city, such defect in such description is cured by the judgment of the trial court foreclosing the attachment lien, and describing said lots as in a certain block in such city, in which the defendant in the attachment proceeding then owned lots of such numbers, when the subsequent proceedings, including the order confirming the sheriff's sale, and the sheriff's deed were regular and fully described said lots, as against an attack upon such proceedings in a subsequent and distinct proceeding upon the alleged grounds that such prior proceedings are void upon the face of the mandatory record.

9. ATTACHMENT \Leftrightarrow 208, 322—RETURN—OMISSIONS—VALIDITY.

In an attack upon attachment proceedings as void upon the face of the mandatory record, made in a subsequent and independent proceeding, the mere fact that a sheriff's return upon the order of attachment in the proceeding attacked does not state clearly that, in attaching certain lots in a city, he fully complied with the requirements of section 4076, Stats. 1893 (section 4820, Rev. Laws 1910), by leaving a copy of the order of attachment with the occupant of such lots, or, if there was no occupant in a conspicuous place thereon, does not show want of jurisdiction in the proceedings attacked, and that a sheriff's deed in accord therewith is void.

(a) The testimony of the officer who executed such order of attachment, adduced in such subsequent proceedings by the party defending such prior proceedings more than 15 years thereafter, to the effect that there was a little dwelling house, at which there were some children, upon said lots, and that he thought the same were occupied by a certain party who was then con-

testing the attachment defendant's right to the same under Act Cong. May 14, 1890, c. 207, 26 Stat. 109 (U. S. Comp. St. 1901, p. 1463; U. S. Comp. St. 1916, § 5029), etc., providing for town-site entries in Oklahoma, and referring to a portion of his return which shows that he could not find the attachment defendant in his county, and that he left a copy of the order of attachment upon the premises, that he probably posted the same upon the front of such dwelling house, as a conspicuous place upon said premises, does not show that he so far failed to comply with requirements of said section of the statute as to render such attachment proceeding void upon such attack, if his testimony must be taken as sufficient to show that said lots were in fact occupied.

10. LIMITATION OF ACTIONS \Leftrightarrow 119(3)—"COMMENCEMENT OF ACTION"—SERVICE OF PROCESS.

Where a petition and affidavit for service of summons by publication and affidavit for attachment are filed, and an order of attachment is issued and served upon the same day, but the first publication of summons was not made until the third day thereafter, such action is deemed commenced within the meaning of the provisions of section 4068, Stats. 1893 (section 4812, Rev. Laws 1910), that "the plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant," etc., when tested by the provision of section 3892, Stats. 1893 (section 4659, Rev. Laws 1910), where the service of such summons by publication is duly completed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Commencement of Action.]

11. ATTACHMENT \Leftrightarrow 58—REALTY—ATTACHABLE INTEREST.

Where a claimant of lots in a town site in Oklahoma City under the act of Congress of May 14, 1890, and other acts relating to such town sites has, after all contests have been finally decided in his favor, been adjudged entitled to such lots, and he has paid all fees and charges, although under protest, so that nothing remains to be done on his part to entitle him to a deed from the proper town-site board, conveying said lots to him, which deed has been duly executed by such board, but delivery of such deed to him is withheld pending a decision by the Department of the Interior of the United States upon his protest against the exaction of such fees and charges from him, he has both the legal and equitable title to such lots, and therefore an attachable interest in the same.

Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by W. H. Richardson against Mrs. H. M. Carr, Mrs. Lalla Gray, Mrs. Julia Renaker, H. P. Hickey, Julia K. Goff, H. A. Childs, the Interstate Mortgage & Trust Company, Roy S. Dodd, James D. Kivlehan, Lottie Swatek, Mrs. Willie P. Turney, and Emily Childs for possession of and to remove cloud of certain deeds from the west 50 feet of lots 1, 2, 3, 4, 5, and 6 of Margaret McKinley's subdivision of lots 14, 15, and 16 (originally platted as lots 15 and 16) of block 24 in Oklahoma City as shown by the recorded plat thereof, and for the adjustment of equities between the plaintiff and defendants in respect to the value of the latter's use and occupation of this property and the value of the improvements made by them

thereon in the event of plaintiff's recovery of the same. Judgment upon plaintiff's dismissal in favor of H. P. Hickey as to said part of lot 6. Judgment upon the disclaimer of the Interstate Mortgage & Trust Company dismissing its cross-petition. Judgment against the plaintiff and in favor of Mrs. Willie P. Turney as to said part of lots 1 and 2, and in favor of Lottie Swatek as to said part of lot 3, and in favor of Roy S. Dodd and James D. Kivlehan as to said part of lot 4, and in favor of Julia K. Goff as to said part of lot 5, and also against the plaintiff and in favor of these defendants and each of them for costs of suit. The plaintiff brings error. Affirmed.

S. A. Horton and Roy F. Ford, both of Oklahoma City, for plaintiff in error. Keaton, Wells & Johnston, H. N. Boardman, Ames, Chambers, Lowe & Richardson, and Everest & Campbell, all of Oklahoma City, for defendants in error.

THACKER, J. The plaintiff in error, as plaintiff in the trial court, commenced this action on May 31, 1911, against the defendants in error for the possession of and to remove the cloud of certain deeds from the title to the west 50 feet of lots 1, 2, 3, 4, 5, and 6 of Margaret McKinley's subdivision of lots 14, 15, and 16 (the same being lots that were originally platted as 15 and 16) in block 24 in Oklahoma City as shown by the recorded plat thereof. The plaintiff's petition, treated as amended in a few comparatively unimportant respects in order to make it conform strictly to the agreed or the undisputed facts upon which he predicates his action, and so as to include some of his admissions otherwise than in his pleadings, alleges, in effect:

That he acquired the title to said original lots 15 and 16 under the provisions of an act of Congress of May 14, 1890, entitled "An act to provide for town-site entries of land in what is known as 'Oklahoma,' and for other purposes" (26 Stats. at L. 109, c. 207, the same being U. S. Comp. Stats. 1901, p. 1463; U. S. Comp. St. 1916, § 5029), and other acts to which reference is therein made; that on September 3, 1890, town-site board No. 2 of Oklahoma City made application to purchase the quarter section, including said lots, of the United States for the use and benefit of its occupants; that on September 6, 1890, said town-site board filed its plat of the same, designating all the lots involved in this action as Nos. 15 and 16 in said block 24; that on October 1, 1890, the United States, by and through the President, issued its patent to said board as trustees for the use and benefit of the occupants of said quarter section, according to their respective interests; that the plaintiff, as an occupant of said lots within the meaning of said act of May 14, 1890, was, on September 3 and October 1, 1890, entitled to acquire the title

to the same from the United States through its officers or agents, the said town-site board as such trustees; that plaintiff's acquisition of such title was delayed by a contest for said lot 15 and by another for said lot 16, which were finally decided in his favor on March 28, 1895, except for a motion for review of that decision which was decided in his favor on July 6, 1895; that on July 23, 1895, the Commissioner of the General Land Office ordered each of the two cases of contest against the plaintiff closed, and on July 30, 1895, he was officially notified that the lots in controversy "had been awarded to him, and that upon [his] payment of the fees and assessments fixed against the same a deed" of conveyance to him would be duly executed and delivered; that on August 22, 1895, such deed was executed and acknowledged and ready for delivery to plaintiff upon his payment to said board of fees and charges to the amount of \$52.50, as required by the notice he had received; that on August 31, 1895, the plaintiff deposited with said board said \$52.50 under protest against the said fees and charges against said lots, and appealed from the decision of said board against him in this respect, pending which the board withheld actual delivery of the deed to him; that on September 30, 1895, the Secretary of the Interior had ruled that the said fees and charges were proper, and on that date said deed was mailed to him, and after October 7, 1895, the said deed was actually delivered to him, but was thereafter lost; that on May 31, 1897, a second and substitute deed (bearing a certificate to the effect that the original deed was mailed, and thus delivered to the plaintiff on September 30, 1895) was issued to the plaintiff, and on July 30, 1897, was recorded at page 84 of Book 4 of the Records of Deeds for Oklahoma County; that plaintiff acquired the title to said lots about, but after, October 7, 1895, and not before; that the plaintiff has never conveyed nor otherwise divested himself of the title thus acquired, and is entitled to the possession of the said lots, but the defendants unlawfully keep him out of such possession; that the defendants wrongfully claim title to and right of possession of this property through a succession of pretended, but ineffective, transfers beginning with a pretended, but void, judicial sale in an action commenced on September 3, 1895, in which A. J. Beale was plaintiff and the plaintiff in the instant case was defendant, and which sale was predicated upon a pretended, but void, attachment on said September 3, 1895, of said original lots 15 and 16, and is evidenced by a pretended, but void, sheriff's deed executed on June 18, 1896, in said action, and recorded on July 18, 1896, falsely purporting to convey said lots to said A. J. Beale, who on February 17, 1898, executed a deed purporting to convey the same to one John Summerfield; that defendants also

claim title through a pretended, but void, recorded tax deed of November 22, 1897 (on account of taxes unlawfully assessed for the year 1893 against said lot 15), from the county treasurer of Oklahoma county to Louella Brogan, whose pretended title was passed through the said John Summerfield to some of the defendants, and through another pretended, but void, recorded tax deed of November 22, 1897 (on account of taxes unlawfully assessed for the year 1894 against said lot 15), from the county treasurer to E. H. Cooke, whose pretended title passed through the said John Summerfield to some of the defendants, and through still another pretended, but void, recorded tax deed of February 5, 1897 (on account of taxes unlawfully assessed for the year 1893 against said lot 16), from the county treasurer to one W. J. Patterson, whose pretended title passed through said John Summerfield to some of the defendants; that each of the defendants claim title through the said John Summerfield, as a common source, whose pretended muniments of title were and are dependent upon said sheriff's and said county treasurer's deeds for their effectiveness, and are therefore ineffective; that the said sheriff's deed was and is void, and conveyed no title, because the judgment of November 7, 1895, to satisfy which it was issued, was and is void for want of jurisdiction of the subject-matter and of the person of the defendant, the plaintiff here; that the mandatory record, that is, the record proper of the trial court, shows upon its face that the said judicial proceedings in the Beale case, upon which the sheriff's deed was and is dependent for its validity, were and are void in the following respects, to wit: (1) Void in that the affidavit of September 3, 1895, in the Beale case, for the service of summons upon the defendant there (the plaintiff here) by publication does not show that Beale's case was one of those in which the service of summons by publication is authorized by section 3950, Stats. 1893 (section 4722, Rev. Laws 1910); (2) void in that, although the affidavit of September 3, 1895, in the Beale case, for service of summons upon the defendant there (the plaintiff here) by publication states that the plaintiff "is, with due diligence, unable to make personal service of summons upon the defendant," and "that the defendant is a nonresident of this territory, having in this territory property and debts owing him, sought in the above action to be taken in attachment," it omits to show that defendant (the plaintiff here) was out of the jurisdiction of the court so that personal service of summons could not be had upon him within the territory of Oklahoma, and omits to show the facts constituting the diligence to which said affidavit refers; (3) void in that the pretended levy of the writ of attachment on September 3, 1895, was not in accord with law as appears from the officer's return thereon, which is as follows:

"Received this order September 3, 1895. September 3, 1895, I executed same by going to the place where the property of the within-named defendant, W. H. Richardson, was found, and there at 6 o'clock p. m. of said day, in the presence and hearing of J. L. Lyle and J. H. Miller, two credible persons, declared that by virtue of said order I attached said property, at the suit of the within-named plaintiff, and with J. L. Lyle and J. H. Miller, two householders of the county, who were by me first duly sworn, did make a true inventory and appraisement of all said property attached, which inventory and appraisement was by me and said householders signed, and is hereunto annexed and returned with this order. I left a copy of this order on the premises. I cannot find the within defendant, W. H. Richardson, in my county. I delivered a copy of said order of attachment to —, in whose possession it was found. I cannot find the within-named defendant in my county"

—duly signed by the proper officer, and the appraisement accompanying such return as a part thereof is as follows:

"We, C. H. De Ford, sheriff of said county of —, J. L. Lyle and J. H. Miller, two householders of said county, the said —, being duly sworn, do truly inventory and appraise the following property attached as the property of W. H. Richardson on an order of attachment issued in a suit of the said A. J. Beale against the said W. H. Richardson, now pending in said court for the said county of Oklahoma: Lots 15 and 16 in Oklahoma City, O. T. Appraised at \$500.00. J. L. Lyle, J. H. Miller"

—which return does not sufficiently describe the property levied upon nor show, as required by section 4076, Stats. 1893 (section 4820, Rev. Laws 1910), that a copy of the order was left with the occupant, or, if none, in a conspicuous place thereon; and the officer who served the writ testified, as a witness for defendant, to the effect that, although he thought the attached property was occupied by one of the said contestants of plaintiff's original claim to this property, and there were some little children, but no adults, there when he served the writ, he served the same by posting it (probably in the most conspicuous place), upon the front of the little dwelling house situated thereon; (4) void in that the time of the first publication of summons on September 5, 1895, was the time of the commencement of that action, and the attachment antedated the same and was premature; and (5) void in that the defendant in that action (the plaintiff here) had no attachable right, title, or interest in or to said property when the pretended writ of attachment was pretended to be levied thereon; that the said tax deeds were void and conveyed no title because at the time of the assessments of these lots for taxes the title to the same was in the United States or said board of town-site trustees as its officers and agents, and had not passed to the plaintiff so as to be subject to taxes; that some improvements have been placed upon said property, although the plaintiff does not know who placed the same there, but he should and is willing to reimburse the proper parties; that some taxes have been

paid on said property, although the plaintiff does not know who paid them nor the amount of the same, but he should and is willing to reimburse the proper parties; that the defendants have occupied and used said property during the ten years next preceding the institution of this suit, and the value of such use and occupancy is \$100,000, and that the plaintiff is entitled to the vacation of the Beale judgment, to the cancellation of said sheriff's and said county treasurer's deeds purporting to convey said property, to the possession of said property, and to recover said \$100,000 as the value of defendant's wrongful use and occupancy of the same. The petition prays for such vacation for such cancellation, for such possession, and for an adjudgment of equities in respect to the value of the improvements made and taxes paid upon the premises by the defendants and the value of its use and occupancy by them.

The plaintiff compromised his action against H. P. Hickey and dismissed the same so as to permit him to take judgment for said part of lot 6. The Interstate Mortgage & Trust Company filed a disclaimer, and its cross-petition was dismissed. Some of the other defendants apparently sustain no important relationship to the controversy involved in this case, and there will be no occasion to mention their position in the same. Mrs. Willie P. Turney, the claimant of said part of lots 1 and 2, Lottie Swatek, the claimant of said part of lot 3, Roy S. Dodd and James D. Kivlehan, the claimants of said part of lot 4, and Julia K. Goff, the claimant of said part of lot 5, who appear to be the persons in possession of the property in controversy and the last of the successive claimants of title under said sheriff's deed and said tax deeds, and by virtue of adverse possession, and the only such claimants at the time of and since the commencement of this action, answered separately, each of whose answers is treated as amended in a few comparatively unimportant respects to conform to the agreed or undisputed facts, alleging the same substantive facts as are alleged as above stated in the plaintiff's petition in respect to the source of their alleged title, except that they say in effect that the plaintiff acquired an equitable, and thus an attachable and a taxable, interest in, or title to the property on September 3, 1890, when the town-site board filed its application to enter the same, or, if not, on October 1, 1890, when the same was conveyed to the town-site board in trust for him which ripened into a legal title on August 22, 1895, when said town-site board's deed to him was executed, or, if not, on August 31, 1895, when he had performed all conditions precedent to his right to an actual delivery of said deed, or, if not, on September 30, 1895, when said deed was mailed to him, or, if not, on September 30, 1897, when the second and sub-

stitute deed was mailed to him, or, if not, after October 7, 1897, when the second and substitute deed was actually received by him, and certainly before July 30, 1897, when said deed was by him filed for record in the office of the register of deeds of Oklahoma county, and that the said sheriff's deed and the said treasurer's tax deeds and all the proceedings resulting therein were valid and divested plaintiff of his title to the property in question, and further alleging that at the commencement of this action each, claiming title under said sheriff's and county treasurer's deeds, had continuously been in the quiet and peaceful possession and paid all the taxes upon the property claimed by him or her for 14 years 11 months and 15 days next preceding the commencement of this action, during all of which time the plaintiff herein, W. H. Richardson, has never asserted or made claim of title to the same or any part thereof, so that the latter is precluded by the equitable principles of the doctrine of laches and of estoppel from prosecuting the same in view of the facts herein-after shown; that while in such possession of such property and relying upon the silence and acquiescence of the plaintiff therein they have not only paid said taxes, but have made improvements upon the same as follows: Mrs. Willie P. Turney built and owns a two-story brick business house upon lots 1 and 2 of the value of \$7,500; Lottie Swatek built and still owns one half of a three-story brick building upon lot 3, which building is of the value of \$3,000 or \$3,500, and the other half of the said building is upon lot 4, afterwards sold by her to Roy S. Dodd and James D. Kivlehan; Roy S. Dodd and James D. Kivlehan paid for and own one-half of the last said building, the same being situate upon lot 4; and Julia K. Goff built and owns a two-story brick building upon lot 5 of the value of \$4,000; that plaintiff's action is "for the recovery of real property sold on execution" and is "brought by the execution debtor," more than "five years after the date of the recording of the deed made in pursuance of such sale," within the meaning of the first subdivision of section 3888, Stats. 1893 (section 4655, Rev. Laws 1910), and is brought more than two years after the recording of said tax deeds within the meaning of the third subdivision of said section, and that plaintiff is not entitled to maintain his action because of these provisions of the statute.

The plaintiff replied to the answer of each defendant denying each allegation of the same that is inconsistent with the allegations of his own petition, and further alleging that the sale upon which the aforesaid sheriff's deed was based was and is absolutely void, in that it appears upon the face of the proceedings in the case in which the same was had that the court did not have jurisdiction of the subject-matter nor of the person of this plaintiff as defendant in that case. There was a stipulation as to certain facts

which corrected some error of minor importance in the pleadings as they originally stood, and, in effect, eliminated plaintiff's denial of the substantive facts alleged in defendants' answers, but which need not be incorporated in this opinion, for the reason that we have stated the pleadings as if amended to accord with this stipulation, and, as so amended, the pleadings of the parties show a perfect agreement in respect to the substantive facts in this case.

The judgment in the case of A. J. Beale against the plaintiff in the instant case, among other things, recited:

"And the court finds that due and legal service by publication has been had upon the defendant in this action. * * *

"And the court further finds that the attachment issued in and of this action was justly obtained, and that the same is a subsisting lien upon the property levied upon thereunder, to wit, lots 15 and 16 in block 24 in Oklahoma City, county and territory of Oklahoma."

The deputy sheriff who served the writ of attachment in question testified at the trial as follows:

"Q. I will ask you to state, Mr. De Ford, if you recall in what way or how you left a copy of this order of attachment on the premises, as stated in your return? A. Well, my recollection is that I put a copy on the building. Q. There was a building on the lots, was there? A. Yes, sir. Q. I will ask you to state if there was anybody in that building? A. Yes, sir. Q. At the time that you posted that copy there? A. My recollection is that there was some children there. Q. Some little children? A. Some little children, but no grown person. Q. No adult. What building was it that you posted the notice on, residence or business building, or what? A. It was a residence. Q. Who, if you recall, was then occupying that as a residence? A. Of course, I ain't sure, but I believe it was Butler; I ain't sure; it has been a long time ago, and I never heard of the case until to-day, but it seems to me that that is who was living there; I could not be positive; there was some one living there, but I don't know who it was for sure."

On cross-examination he was asked:

"Q. How large was the house? A. Something like 14x18 or 16, something like that, a small house. Q. Now, you say you tacked it up on the front door? A. I couldn't say for sure, that is what I generally done; if I didn't get them in person, I generally tacked the notice up on the building. Q. Which part of the building did you tack this notice on? A. I would probably put it in the most conspicuous place. Q. And where was that? A. That was probably on the south end of the building. Q. Which way did the building front? A. Fronts south."

Plaintiff, while upon the stand as a witness in his own behalf, admitted in effect upon cross-examination that he removed from Oklahoma City to Kentucky in 1893, and has since resided in that state; that after receiving the information contained in the foregoing letter to him he was not in Oklahoma City until the trial of this case, and it appears inferentially that he was not in Oklahoma after he moved away in 1893 until he came back to the trial of this case; that he had never collected any rents nor paid any taxes on the property in question nor tendered reimbursement to the defend-

ants or their grantors on account of taxes paid by them, and that prior to the commencement of this case he had never communicated to anybody in Oklahoma City occupying or claiming title to these lots or any part of them the information that he owned or claimed them; that in September, 1895, the aforesaid town-site board notified him that it had been served with garnishment summons in a suit against him by the said A. J. Beale; that he learned in 1897 from A. J. Beale that the latter had adversely claimed and had sold the property in question to John Summerfield, and that the same was in the adverse possession of said John Summerfield.

The improvements in question appear to have been made on the lots after plaintiff knew they were adversely claimed, for on January 21, 1903, one G. W. Stevenson wrote him and he received a letter reading as follows:

"Your letter to register of deeds handed me. Replying, will say that the three corner lots you mention are replatted together and worth now about \$13,000 to \$15,000. Just on the N. W. corner stands the county courthouse, leased for four years. Property has advanced very much in the last four years; the streets around the corner are paved with asphalt. No improvements on the lots you inquire of, and price I mention is the price for naked lots. Any information I can give you will be kindly furnished."

Neither A. J. Beale, the judgment creditor, nor any personal representative of his, was made a party to this case; and it appears from the appeal record in the instant case that there are intermediate transferees under the sheriff's deed who may be liable upon their warranties, if the present occupying and defending claimants are ejected, who were not made parties.

The case was tried to the court without a jury. Judgment was given for the defendants Mrs. Willie P. Turney as to said part of lots 1 and 2, Lottie Swatek as to said part of lot 3, Roy S. Dodd and James D. Kivlehan as to said part of lot 4, and Julia K. Goff as to said part of lot 5; and the plaintiff brings the case to this court for a review of alleged errors therein.

It will be seen from the foregoing that, as the plaintiff originally owned and has never voluntarily parted with his title to the property in question, his right to prevail in this case is unquestionable unless defeated by the purported judicial sale of the property, by the purported tax sale of the same, by the running of the five-year period of limitation provided by the first subdivision of section 3888, Stats. 1893 (section 4655, Rev. Laws 1910), or the two-year period of limitation prescribed by the third subdivision of the same section, or by the equitable estoppel of the plaintiff to maintain this action, or by his laches; and the plaintiff contends that each and all of these defensive positions are untenable.

[1-3] The plaintiff contends that his attack upon the Beale judgment is direct, and

the defendant contends that it is collateral; but it seems obvious that his attack is direct only in so far as it demands equitable relief from judicial proceedings alleged to be void upon the face of the mandatory record, that is, the record proper, of the court in which they were had, so the only question raised by his direct attack is identical with the question raised by any collateral attack which may be thought to be involved.

When the pleadings make what can be and is regarded as an issue presenting the question as to whether a judgment or decree should be annulled, vacated, corrected, modified, declared void, or the effect of the same avoided (as, for instance, under sections 5235-5278, Rev. Laws 1910, and subsequent statutes relating to the same subject, or, in an independent proceeding, under the principles of equity), the mere fact that the attacking party's pleadings present an issue involving the question as to whether he is entitled to additional relief predicated upon an annulment, vacation, correction, modification, etc., of the judgment or decree attacked, or independently of the same, does not prevent the attack from being direct. Nor does it matter whether the attack is by appeal, writ of error, prohibition, injunction, mandamus, bill of review, certiorari, audita querela, etc., under the aforesaid statutes, or, as the case may be, in an independent proceeding upon the principles of equity, if such additional relief is demanded, and is of a character demandable in the same proceeding.

Much confusion has resulted from the erroneous assumption that, if an attack upon a judgment is direct, any error therein may be reviewed and corrected, while the truth is that, although the attack may be direct, only such errors in the judgment attacked can be reviewed and corrected as the law authorizes in the particular attack that is actually made, that is, in view of the manner and time of the attack, the grounds therefor alleged, and the parties plaintiff and defendant in such attack, as well as the point of the attack specified by the attacking party and the relief demanded. For example, not all judgments that are vulnerable to attack by appeal are vulnerable to attack by a petition in the court rendering them under sections 4464 and 4466 et seq., Stats. 1893 (sections 5267 and 5269 et seq., Rev. Laws 1910), or section 4465 et seq., Stats. 1893 (section 5268 et seq., Rev. Laws 1910), and not all judgments that are vulnerable to attack in any manner above indicated are vulnerable to attack by a suit in equity to annul, etc., although a direct attack may be made upon the judgment in either of these different ways.

A judicial proceeding is vulnerable to a direct attack when the attack is predicated upon sufficient grounds and directed against the proper parties in a manner and at a time provided by law for the purpose of annulling,

vacating, correcting, modifying, declaring void, or avoiding the effect of such judicial proceeding, whether the same is void or merely voidable; but the same is vulnerable to collateral attack, that is, to an objection incidentally made in the course of a proceeding which presents an issue collateral to the issue made by the pleading, only when it appears from the mandatory record of the court in which it was rendered and without evidence allunde that the same is void. *Brown v. Trent*, 36 Okl. 239, 128 Pac. 895; *Hathaway v. Hoffman*, 153 Pac. 184; *Roth v. Union National Bank of Bartlesville*, 160 Pac. 505. Also see 2 *Hughes on Procedure*, 492; 3 *Jones, Commentaries on Evidence*, §§ 609-612, especially section 611.

As the only question involved in the plaintiff's attack on the judicial proceedings upon which the sheriff's deed is dependent for its validity is as to whether the same is void upon the face of the mandatory record of the court in which it was rendered and the undisputed facts hereinbefore stated, it seems well to call attention at this time to the fact that in *Roth v. Union National Bank of Bartlesville*, 160 Pac. 505, this court quoted with approval from the Supreme Court of the United States in the case of the Lessee of *Grignon v. Astor*, 2 How. 319, 11 L. Ed. 283, as follows:

"But, though the order of the court sets forth no facts on which it was founded, the license to the administrator is full and explicit, showing what was considered and adjudicated on the petition and evidence, and that every requisition of the law had been complied with before the order was made, by proof of the existence of all the facts on which the power to make it depended. * * *

"Nor is it necessary that a full or perfect account should appear in the records of the contents of papers on file, or the judgment of the court on matters preliminary to a final order; it is enough that there be something of record which shows the subject-matter before the court, and their action upon it; that their judicial power arose and was exercised by a definitive order, sentence, or decree."

And in the *Roth Case* this court also quoted with approval from the case of *United States to Use of Hine et al. v. Morse et al.*, 218 U. S. 493, 31 Sup. Ct. 37, 54 L. Ed. 1123, 21 Ann. Cas. 782, as follows:

"If the court was one of general, and not special, jurisdiction, if under its inherent power, supplemented by statutory enlargement, it had jurisdiction under any circumstances to sell the real estate of minors for reinvestment, it had jurisdiction to examine and determine whether the particular application was within or beyond its authority."

The principle underlying the *Roth Case* and the cases from which the foregoing quotations were originally taken is applicable in the instant case; and, keeping in mind that principle in the instant case, it is obvious that the judgment in the *Beale case*, purporting to foreclose an attachment lien upon the property in question, with directions for the sale of the same, followed by an order confirming such sale and directing the sheriff's

deed in question, which is in due form, raises a presumption of all the essential jurisdictional facts, which presumption is here attacked only by setting against it what is affirmatively shown by the mandatory record in the Beale case and the other undisputed facts shown without objection in this case.

[4-6] The foregoing brings us to the inquiry as to whether the mandatory record in the case of A. J. Beale against the present plaintiff, together with the agreed facts, or the undisputed facts to which there is no objection, aside from such record, shows affirmatively that the judgment therein is void.

As to the contention that Beale's affidavit for the service of summons by publication omitted to show and thus negatives the fact that his case was one of those in which such service was authorized by section 3950, Stat. 1893 (section 4722, Rev. Laws 1910), there appears to be no sort of basis for the same, as this statute expressly and explicitly names "actions brought against a nonresident of the state, * * * having in this state property * * * sought to be taken by any of the provisional remedies, or to be appropriated in any way," as a distinct and independent class of cases in which such service is authorized (Richardson v. Howard, 151 Pac. 887), and the affidavit in question shows in the language of the statute itself that Beale's case was one of that class; and our attention has been called to no case so much as tending to support such a contention.

It is claimed by the plaintiff that the judicial sale is void because the affidavit for publication of service of summons upon the present plaintiff in the Beale case does not show and thus negatives the fact that an affidavit was made showing that he was out of the jurisdiction of the court, so that personal service of summons could not be had upon him within the same; but, assuming without deciding that, in the state of the record before us, it should not be presumed that, if such affidavit was insufficient, another and sufficient affidavit was duly made and filed (as to which see Rogers v. Miller, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20; Bradley v. Drone, 187 Ill. 175, 58 N. E. 304, 79 Am. St. Rep. 214; Lyle v. Horstman [Tex. Civ. App.] 25 S. W. 802), it appears that the affidavit in question must here be regarded as sufficient. This affidavit reads as follows:

"A. J. Beale, being duly sworn, says that he is the plaintiff in the above-entitled action; that he is with due diligence unable to make personal service of summons upon the defendant; that the defendant is a nonresident of this territory, having in this territory property and debts owing him, sought in the above action to be taken by attachment."

It would undoubtedly have been better if the affiant had, to avoid all ambiguity, stated in addition to the foregoing statement that he did not know and had no reason to believe that the present plaintiff was within the territory of Oklahoma, but this is infer-

able, and must here be inferred from his affidavit. He could not properly have made affidavit that the present plaintiff, who was then a nonresident defendant, was not within the territory of Oklahoma unless he had known his actual whereabouts outside of Oklahoma so recently that he could not have come to the territory in the meantime; and it would be unreasonable to require such affiant to ascertain the precise whereabouts of such nonresident defendant before making affidavit and proceeding to make service of summons by publication; in many instances it would be exceedingly difficult or impossible as well as very expensive to locate such nonresident party.

It would also be unreasonable to require any active effort or diligence to make personal service of the summons within the jurisdiction of the court upon a nonresident where the affiant has no knowledge nor reason to think that such nonresident is within such jurisdiction, as, if this was necessary, anything less than the issuance of a summons or the addressing of an inquiry to each county in the state in which he might be found would make such effort absurdly incomplete. The following cases, which include the latest expressions of this court upon the question, show that the affidavit under consideration is here sufficient; Reister v. Land, 14 Okl. 34, 76 Pac. 156; Ballew v. Young, 24 Okl. 182, 103 Pac. 623, 23 L. R. A. (N. S.) 1084; Richardson v. Howard, 151 Pac. 887; Harris-Lipsitz Co. v. Oldham, 155 Pac. 865.

[7, 8] It is also claimed by the plaintiff, without the support of sufficient reason or authority, that it appears from the imperfect description of the property in the return on the writ of attachment that the writ was not levied as required by law, and that the attachment and the judicial sale based thereon is therefore void. As to this it is to be kept in mind that the levy of an attachment upon land is merely for the purpose of creating a lien on it so as to give the court issuing the order jurisdiction to the end that it may be thereafter applied by the court's order to the payment of the plaintiff's judgment if he obtains one, and that the court thus having control of the property may in its order of sale enlarge the description so as to accurately identify the land. White v. O'Bannon, 86 Ky. 93, 5 S. W. 346; Price v. Taylor, 110 Ky. 589, 62 S. W. 270, 22 Ky. Law Rep. 1945 (see 111 Ky. 976); Veazle v. Parker, 23 Me. 170; Lombard v. Pike, 33 Me. 141; Perry v. Griefen, 99 Me. 420, 59 Atl. 601; Grier v. Rhyne, 67 N. C. 338; Lisa v. Lindell, 21 Mo. 127, 64 Am. Dec. 222; Whitaker v. Sumner, 9 Pick. (Mass.) 308; Inman v. Kutz, 10 Watts. (Pa.) 90; Webb v. Bumpass, 9 Port. (Ala.) 201, 33 Am. Dec. 310; Moore v. Kidder, 55 N. H. 488.

[9-11] It is also contended by the plaintiff that the officer's return of the attachment does not show, as required by section 4078, Stats. 1893 (section 4820, Rev. Laws 1910),

but negatives the requirement that a copy of the order of attachment was left with the occupant of the premises, or, if there was no occupant, in a conspicuous place thereon, and that the judicial sale under which the defendants claim title is void for that reason. This return, as already shown by our quotation of the same, recites, among other things:

"I left a copy of this order on the premises. I cannot find the within defendant, W. H. Richardson, in my county. I delivered said order attached to —, in whose possession it was found."

This return is obviously incomplete and defective; but, as the law presumes that officers do their duty (*Leedy v. Brown*, 27 Okl. 489, 113 Pac. 117; *Eldridge v. Compton*, 30 Okl. 170, 119 Pac. 1120, Ann. Cas. 1913B, 1055; *Okl. Fire Ins. Co. v. Wagester*, 38 Okl. 291, 132 Pac. 1071; *Board of Com. v. Field*, 162 Pac. 733; *Sou. Surety Co. v. Waits*, 45 Okl. 513, 146 Pac. 431; *S. W. Surety Co. v. Davis*, 156 Pac. 213; *Lusk v. Porter*, 156 Pac. 224), and that a court of such jurisdiction rendering judgment properly found the existence of the essential jurisdictional facts (*Hathaway v. Hoffman*, supra, and *Roth v. Union National Bank*, supra), it must be presumed in the instant case that the officer left a copy of the order of attachment with the occupant, or, if the premises were not occupied, posted the same in a conspicuous place thereon as required by the statute. There is nothing in the return which could be construed to negative a performance of duty in this regard. The officer's testimony, if allowable to impeach the effect of the mandatory record upon the ground that it was adduced by the defendants themselves, tends to throw some, but very little, additional doubt upon the question as to whether he fully performed his duty in this regard; but, in view of the presumptions that must be indulged in favor of these judicial proceedings, it hardly seems susceptible of the construction that he did not do so. He testified more than 15 years after the service of the writ of attachment that he thought the premises were occupied by a party who it appears was contesting the rights of the present plaintiff to the property. He said there were some little children there when he served the writ. He said it was his recollection that he put a copy of the order on the front of the building, and that he probably put it in the most conspicuous place; and, if it required more than this posting to leave a copy with the occupant, it seems that it should here be presumed that he did more, although his testimony indicates that, after so many intervening years, he had no recollection of doing more. This oral testimony is not sufficient to impeach its validity.

It is contended by the plaintiff that, although Beale's petition and affidavit for service of summons by publication was filed on September 3, 1895, and before the attachment

of that date, the time of the first publication of summons on September 5, 1895, was the time of the commencement of this action within the meaning of the provisions of section 4068, Stats. 1893 (section 4812, Rev. Laws 1910), that "the plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant," etc., and that the attachment was therefore premature, and thus affirmatively appears to have been and to be void in view of the provisions of section 3892, Stats. 1893 (section 4659, Rev. Laws 1910), which reads as follows:

"An action shall be deemed commenced within the meaning of this article: * * * Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days."

As will be seen, this section 4659 relates expressly to the article on limitation of actions, and not to the article on attachments; but, assuming that the rule it announces should be followed in determining when an action is commenced to authorize an attachment under section 4812, supra, for the sake of uniformity, we think it clear that it must be presumed in this case that Beale faithfully, properly, and diligently endeavored to procure service so that, if his commencement of his action on September 3, 1895, had amounted to no more than an attempt, it must here be deemed to have been commenced at that time under this rule; and in *Raymond v. Nix, Halsell & Co.*, 5 Okl. 656, 49 Pac. 1110, it is held in the second paragraph of the syllabus:

"An action is commenced when plaintiff files his petition and * * * an affidavit for publication, which is thereafter made good by pursuing the requirements of the statute, * * * within 60 days."

It does not appear from the mandatory record under consideration, as contended by plaintiff, nor otherwise, that he was without an attachable interest, but, to the contrary, it appears from the mutually alleged and agreed facts in the instant case, without the aid of any presumption, that the plaintiff had an attachable interest in this property at the time of the levy of the Beale attachment thereon on September 3, 1895, as on August 22, 1895, his right to this property had been finally adjudicated and determined, and a deed to him was duly executed and acknowledged by the town-site board of trustees and ready for delivery to him upon his payment of the requisite fees, and on August 31, 1895, he paid these fees, so that nothing whatever remained to be done on his part to entitle him to a delivery of that deed, although the same was not mailed to

him until September 30, 1895, which last-mentioned date was 27 days after the seizure of the property upon the Beale attachment. As to whether the present plaintiff acquired an equitable right to, and therefore an attachable interest in, this property as early as October 1, 1890, when the President of the United States conveyed the legal title to the board of town-site trustees in trust for him, and sub modo in trust for the United States, is a debatable question; but, as actual delivery of such deeds is not necessary to the passing of title, there appears to be no ground whatever for a denial of the proposition that he acquired both the legal and equitable title to this property at least as early as August 31, 1895, which was three days before the property was attached in the Beale case. *United States v. Schurz*, 102 U. S. 378, 28 L. Ed. 187; *Hussey v. Smith*, 99 U. S. 20, 25 L. Ed. 314; *Stringfellow v. Cain*, 99 U. S. 610, 25 L. Ed. 421; *Bockfinger v. Foster*, 190 U. S. 116, 23 Sup. Ct. 836, 47 L. Ed. 975; *Flanagan v. Forsythe*, 6 Okl. 225, 50 Pac. 152; *Dist. No. 160 v. Alcott*, 31 Okl. 122, 120 Pac. 562; *Walter Realty Co. v. Jones*, 35 Okl. 272, 129 Pac. 840; *Brown v. Parker*, 2 Okl. 258, 39 Pac. 567; *Chisolm v. Welsse*, 2 Okl. 611, 39 Pac.

467; *Twine v. Carey*, 2 Okl. 249, 37 Pac. 1096; *Block v. Morrison*, 112 Mo. 343, 20 S. W. 340; *Jackson v. Williams*, 10 Ohio, 70; *Winfield Townsite Co. v. Maris*, 11 Kan. 128; *Sherry v. Sampson*, 11 Kan. 611; *Rathbone v. Sterling*, 25 Kan. 444; *Goldberg v. Kidd*, 5 S. D. 169, 58 N. W. 574. Also see *Topeka Commercial Security Co. v. McPherson*, 7 Okl. 332, 54 Pac. 489, receding from the view expressed in the prior opinion in the same case, 52 Pac. 395.

We think it clear that the judicial proceedings upon which the sheriff's deed depends for its validity in the Beale case is not void upon the face of the mandatory record therein nor because of any fact disclosed by the appeal record in the instant case; and this conclusion makes it unnecessary for us to determine whether, if such proceedings were void, the plaintiff would be precluded from prevailing in the instant case by reason of either or all of the other propositions urged by the defendants against his right to do so.

Affirmed. All the Justices concurring, but SHARP, C. J., and KANE and TURNER, JJ., limit their concurrence to the conclusion reached.

(87 Or. 643)

In re GRANTS PASS IRR. DIST.

Appeal of WOODWARD.

(Supreme Court of Oregon. March 5, 1918.)

Department 1. Appeal from Circuit Court, Josephine County; F. M. Calkins, Judge.

In the matter of the Grants Pass Irrigation District. Procedure to secure the approval by the court of the organization and issue of bonds. C. H. Woodward, a landholder, demurred to the petition. From a decree approving the organization of the district, and the bond issue, the demurrant appeals. Affirmed.

Edward S. Van Dyke, of Grants Pass, for appellant. H. D. Norton, of Grants Pass, for respondent.

PER CURIAM. Acting under the provisions of chapter 7 of title 41, L. O. L., and acts of the legislative assembly amendatory thereof, the requisite number of freeholders petitioned the county court of Josephine county to call an election to determine whether there should be established an irrigation district covering land mostly in that county, but to a much less extent in the adjoining county of Jackson. Such proceedings were taken that an election was held, in consequence of which the county court, on January 29, 1917, entered of record its order of that date declaring the result of the election to be in favor of the establishment of the district under the name Grants Pass Irrigation District, and choosing certain named individuals directors and treasurer respectively. The order also proclaimed that the district is duly formed and in operation.

On September 4, 1917, in pursuance of a resolution unanimously adopted by it on that date, all the directors being present, the board of directors ordered an election to be held on October 4, 1917, in the district, to determine whether its bonds should be issued and sold, in the sum of \$290,000, par value, or so much thereof as may be necessary to install suitable irrigation works. The election was held on the day designated. The board canvassed the returns and declared the result to be in favor of the issuance and sale of bonds as the question was submitted to the electors.

On October 17, 1917, the directors instituted this proceeding to procure for the organization of the district and the issue of bonds the approval of the court. Such a step is authorized by section 41 of chapter 357 of the Laws of 1917. That enactment, in common with all preceding statutes on that subject, lays down this rule of construction for the guidance of the judiciary:

"The court hearing any of the contests provided for by this act, or any inquiry into the

legality or correctness of any of the proceedings herein provided for, must disregard any error, irregularity, informality or omission which does not injuriously affect the substantial rights of the parties to said proceeding."

A general demurrer to the petition of October 17, 1917, was interposed by one of the landholders affected by the organization of the district and the transactions in pursuance thereof, to which allusion has been made; but it was overruled, and, as he declined to plead further, the circuit court entered its decree approving the organization of the district and the bond issue. The demurrant appealed.

The briefs filed indicate that the proceeding is amicable, and designed mainly to secure the judicial visé as imparting greater sanction to the bonds, with the possible result of making them more salable. Notwithstanding this, we have given careful scrutiny to the history of the organization of the district and its action culminating in the authorization of the bond issue, as portrayed in the very full record before us, and find it to be singularly free from error, especially when measured by the statutory canon above quoted.

The decree of the circuit court will therefore be affirmed, by one here entered also declaring regular in all respects the organization and existence of the district and the validity of the bonds it proposes to issue.

(100 Wash. 636)

DOYLE v. MODEL BAKERY CO.

(No. 14398.)

(Supreme Court of Washington. March 27, 1918.)

Department 1. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by John Doyle against the Model Bakery Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Danson, Williams & Danson and George D. Lantz, all of Spokane, for appellant. Roche & Onstine and F. W. Girand, all of Spokane, for respondent.

WEBSTER, J. This action was brought by respondent, an employé of appellant, to recover damages for injuries to his hands, alleged to have been caused by washing dishes with soft soap, made and furnished by appellant, which contained an excessive amount of lye or caustic acid, while appellant contends that respondent's injury resulted from burns occasioned by his spilling a tub of freshly made hot soap while engaged

in an act outside the scope of his employment. Upon a trial of the cause before the court without a jury, a judgment in favor of the plaintiff for \$135 was rendered, from which defendant appeals, assigning as error the insufficiency of the evidence to sustain the recovery.

We shall not enter upon a discussion of the testimony. A careful examination of the record convinces us that the findings of the lower court are sustained by a clear preponderance of the evidence.

The judgment is affirmed.

ELLIS, C. J., and FULLERTON, MAIN, and PARKER, JJ., concur.

(15 Okl. Cr. 685)

Ex parte TOOTHAKER. (No. A-3309.)

(Criminal Court of Appeals of Oklahoma. April 20, 1918.)

Application for writ of habeas corpus by William Toothaker to be admitted to bail. Writ granted, and bail allowed.

Giddings & Giddings, of Oklahoma City, for petitioner. S. P. Freeling, Atty. Gen., and Corbett Cornett, Co. Atty., of Pawhuska, for respondent.

PER CURIAM. This is an application on the part of William Toothaker to be admitted to bail in two cases now pending in Osage county, in which he is charged, respectively, with the murders of Louis Baldwin and Mrs. Louis Baldwin. These alleged homicides occurred in the public highway near the homes of the petitioner and decedents, who were husband and wife. An application for bail was heretofore made prior to the preliminary examination before Judge R. B. Boone, of the Twenty-Fourth district, and was at that time very properly denied, because no unnecessary delay was shown in giving the petitioner a preliminary hearing. The undisputed facts appear to be that one of the deceased parties shot the petitioner with a load from a shotgun just prior to the killing. We deem it inadvisable to enter into a discussion of the evidence, but have reached the conclusion, after a careful examination of the record, that these applications for a writ should be granted, and the defendant admitted to bail in each case.

Bail is therefore fixed in the case of State of Oklahoma v. William Toothaker, for the murder of Louis Baldwin, in the sum of \$15,000, for the appearance of the said William Toothaker to answer said charge at the next term of the district court of Osage county, and from term to term thereafter until said charge is disposed of according to law, to be approved by the court clerk of said Osage

county; and bail in the sum of \$10,000 is granted to petitioner in the case of State of Oklahoma v. William Toothaker, wherein he is charged with the murder of Mrs. Louis Baldwin, under the same terms and conditions as above provided.

(14 Okl. Cr. 398)

BRAGG v. STATE. (No. A-2897.)

(Criminal Court of Appeals of Oklahoma. March 23, 1918.)

(Syllabus by Editorial Staff.)

INTOXICATING LIQUORS \Leftrightarrow 236(7)—OFFENSES —SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for unlawful possession of intoxicating liquor with the unlawful intention to sell or otherwise dispose of it held sufficient to sustain a conviction.

Appeal from County Court, Pontotoc County; I. M. King, Judge.

Bill Bragg was convicted of having unlawful possession of intoxicating liquor with the intent to sell or otherwise dispose of it, and he appeals. Affirmed.

John Crawford, of Ada (Stuart, Cruce & Riddle, of Oklahoma City, of counsel), for plaintiff in error. The Attorney General and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, Bill Bragg, was convicted in the county court of Pontotoc county upon an information charging the unlawful possession of certain intoxicating liquors, to wit, 23 gallons of Choctaw beer, with the unlawful intention to sell or otherwise dispose of the same. On the 5th day of October, 1915, by the judgment of the court he was sentenced to be confined in the county jail for a period of 90 days and that he pay a fine of \$100 and the costs. From the judgment he appeals.

The evidence for the state shows that Sheriff Duncan, with two deputies, went to the defendant's tent, located in a pasture southwest of the Frisco depot at Roff, and one of the deputies went into the tent and asked the defendant if he could buy some "Choc." The defendant said he was afraid he was trying to trap him, but finally decided to sell some, and asked him whether he wanted it hot or cold; the hot was in the tent, and the cold was in the ice box. Thereupon the officers took charge and found some Choctaw beer in the ice box with 50 or 60 pounds of ice, and found 16 gallons of Choctaw beer in the tent. They testified that it was a beverage made out of malt and hops, and that it was intoxicating. The sheriff further testified that he drank some of it; that it was strong with alcohol; that he had drunk Budweiser and Pabst, but this Choctaw beer was the strongest beer he had ever drunk. The testimony of Whitson and Chandler, the

deputy sheriffs was substantially to the same effect.

As a witness in his own behalf the defendant testified that he with others made the stuff for their own use, but did not sell it, and did not intend to sell it.

The errors assigned are insufficiency of the evidence to sustain the verdict, error in the instructions given, and error in refusing requested instructions.

It is a sufficient answer to the contentions made to say that the evidence is ample to support the verdict. The instructions fully and fairly cover the law of the case, and the instructions requested were properly refused. Having examined the record, and finding no substantial error therein, and believing that a fair and impartial trial was had, the judgment of the county court of Pontotoc county is affirmed.

(14 Okl. Cr. 388)

BONDURANT v. STATE. (No. A-2886.)

(Criminal Court of Appeals of Oklahoma.
March 23, 1918.)

(Syllabus by the Court.)

CRIMINAL LAW §873(2) — INTOXICATING LIQUORS—PROSECUTION — INSTRUCTION — REPUTATION—EVIDENCE.

On a trial upon a charge that the defendant did have possession of intoxicating liquor with intent to violate provisions of the prohibitory liquor law, where evidence of the general reputation of the defendant's place of business was relied on to show the intent, it was error for the court to refuse to instruct the jury upon the law applicable to reputation evidence, and the purpose for which such evidence was admitted.

Appeal from County Court, Grady County; R. E. Davenport, Judge.

H. C. Bondurant was convicted of a violation of the prohibition law, and he appeals. Reversed.

Holding & Herr, of Chickasha, for plaintiff in error. The Attorney General and R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. This is an appeal from a judgment of conviction upon an information charging H. C. Bondurant did have in his possession intoxicating liquors, to wit, whisky, for the purpose of disposing of the same in violation of the prohibitory law of the state. The verdict, omitting formal parts, was as follows:

"That the jury drawn, impaneled, and sworn in the above-entitled cause do upon our oaths find the defendant, H. C. Bondurant, guilty as charged in the information herein and assess his punishment at a fine of \$50 and confinement in the county jail for 30 days. We, the jury, recommend that the judge eliminate the jail sentence. [Signed by five jurors.]"

To the receiving of the verdict the record shows that the defendant excepts "for the reason that said verdict is insufficient in

form and too indefinite and uncertain as to the penalty assessed." Overruled, and exception allowed.

The evidence shows that Bondurant, the defendant, conducted a lunch counter on Chickasha avenue between Fourth and Fifth streets, Chickasha; that Hodge Bailey, sheriff of Grady county, and two deputies, Rucker and Castleman, went to the defendant's place of business to execute a search warrant, and they found about one-half quart of whisky behind a cook stove in the back room, and found two small glasses there. These officers and witness Marshall, a policeman, each testified that the defendant's place of business was a place of public resort, and that they knew the general reputation of the defendant's place of business as to being a place where intoxicating liquors were sold, and that it had the reputation of being a place where intoxicating liquors were sold. C. C. Leonard testified that the defendant's place of business had the reputation of being a place where intoxicating liquors were sold.

The defendant as a witness in his own behalf testified that he had the whisky there for his own use; that he had been drinking some that day; that he did not sell intoxicating liquors; that he did not intend to sell any of the liquor in question.

The charge of the court contains six instructions, and merely submitted the general issue. Among others the defendant requested the court to give the following instruction:

"Evidence has been admitted in this case relative to the reputation of defendant's place of business. This evidence has been admitted for one purpose only, that is, for the purpose of showing the intent for which the defendant had the liquor in question, and before you can consider said evidence for any purpose, you must find the defendant's place is a public resort, and that such place was used for the sale of intoxicating liquors.

"Refused and exception allowed.

"R. E. Davenport, Judge."

We think that this instruction should have been given for the defendant, and in view of the fact that the evidence was merely technically sufficient to make a prima facie case the court committed error in refusing it. Evidence as to the reputation of the defendant's place of business was competent and admissible only for the purpose of showing the unlawful intent. As a general rule, where evidence is admitted only for the single specific purpose, the court, when requested, should in its charge to the jury limit the purpose for which such testimony was admitted.

For error of the court in refusing to instruct upon the law applicable to the evidence introduced, the judgment is reversed.

ARMSTRONG and MATSON, JJ., concur.

(14 Okl. Cr. 389)

DUPREE v. STATE. (No. A-2346.)

(Criminal Court of Appeals of Oklahoma.
March 19, 1918.)

(Syllabus by the Court.)

1. ATTORNEY GENERAL §7 — POWERS AND DUTIES—STATUTE.

Under section 8067, Rev. Laws 1910, it is the duty of the Attorney General, upon request of the Governor, to appear in the trial court and to institute and conduct the prosecution of particular criminal cases, and by such request the Attorney General is clothed with all the powers and duties of the county attorney in regard to the prosecution of criminal cases generally, but such request and appearance does not abrogate the powers and duties of the county attorney in regard to the particular prosecution.

2. CRIMINAL LAW §168—FORMER JEOPARDY—SUFFICIENCY OF PLEA.

Where the county attorney has instituted a criminal prosecution which is pending in the superior court, and the Attorney General, upon request of the Governor, appears and institutes a prosecution for the same offense in the district court of the county, and the county attorney continues his prosecution in the superior court and secures a trial, resulting in a verdict of "not guilty" before the prosecution by the Attorney General is reached for trial, and when it is called the plea of former jeopardy is urged against the information, *held*, that the plea is well taken and should have been sustained.

Appeal from District Court, Oklahoma County; Frank Mathews, Judge.

James M. Dupree was convicted under the statute making it an offense to keep a place for the purpose and with the intent of unlawfully selling, bartering, or giving away intoxicating liquors, and he appeals. Reversed and remanded, with directions.

Claude Nowlin and William Zwick, both of Oklahoma City, for plaintiff in error. Chas. W. West, Atty. Gen., and Smith C. Matson and Jos. L. Hull, Asst. Attys. Gen., for the State.

GALBRAITH, Special Judge. The disposition of this appeal requires the consideration of only one of the many assignments of error set out in the petition in error, namely, the fifth assignment, which reads:

"The said district court of Oklahoma county, Okl., erred in requiring the defendant to proceed to trial, and in placing the defendant, J. M. Dupree, on trial for said offense in the district court of Oklahoma county, Okl., for the reason that said defendant, J. M. Dupree, had heretofore been duly tried and acquitted of the identical offense charged against him in said information."

It appears from the record that the Attorney General, having been requested so to do by the Governor, on the 7th day of February, 1914, filed a preliminary information in the county court of Oklahoma county charging the plaintiff in error, with numerous other persons named in the information, with the offense of keeping a place, to wit, the second and third stories of a three-story brick building and the appurtenances there-

unto belonging, located at No. 6½ North Broadway, Oklahoma City and Oklahoma county, called the "Elite Hotel," with the unlawful intention and for the unlawful purpose of selling, bartering, and giving away spirituous and malt liquors contrary to the statute; that a preliminary examination was waived by the defendants and they were bound over to the district court of Oklahoma county; that thereafter on the 20th day of February, 1914, the Attorney General filed in the district court of Oklahoma county an information against the plaintiff in error and the other parties named with him, wherein it was charged that on the 1st day of April, 1913, and continuing thereafter up to and including the 14th day of February, 1914, the defendants did keep a place at No. 6½ North Broadway, Oklahoma City, known as the "Elite Hotel," with the purpose and intent of unlawfully selling, bartering, and giving away spirituous liquors, etc. The sufficiency of this information was challenged by demurrer and by plea of former jeopardy in bar. These pleas being denied, the plaintiff in error asked and was granted a severance and proceeded to trial upon his plea of not guilty, resulting in a verdict of "guilty," and a judgment entered therein assessing a fine and a prison sentence. To review which this appeal was prosecuted.

It also appears from the record that on the 3d day of December, 1913, the county attorney of Oklahoma county commenced a prosecution against the plaintiff in error and others charging the offense of keeping a place, to wit, the "Elite Hotel," in Oklahoma City, on April 1, 1913, and continuously thereafter up to a day named in December, 1913; that the preliminary hearing was waived and the defendants were bound over to the superior court of Oklahoma county; that on the 9th day of February, 1914, the county attorney of Oklahoma county filed an information in the superior court of said county against the plaintiff in error charging the offense of keeping a place, to wit, the "Elite Hotel," in Oklahoma City on the 1st day of April, 1913, and continuously thereafter up to and including the 14th day of March, 1914; that this cause was set for trial in the superior court on the 20th day of March, 1914, and the trial thereof was further continued until the 23d day of March, when a trial was had before the court and jury and a verdict returned by the jury of "not guilty," and a judgment entered upon said verdict by the court adjudging the plaintiff in error "not guilty" of the offense charged.

It is admitted that the offense charged in the information filed by the Attorney General in the district court and that filed by the county attorney in the superior court charged one and the same offense. It is urged on behalf of the state, in answer to the plea of former jeopardy set up in bar to the infor-

mation filed by the Attorney General, that when the Attorney General commenced the prosecution, by filing the preliminary information in the county court, the power and authority of the county attorney to proceed with the prosecution on the information filed by him was revoked and superseded, and that any steps he might have taken in the prosecution subsequent to the filing of the information by the Attorney General were ineffectual for any purpose, and that the trial had thereon could not amount to jeopardy, and therefore the plea attempting to set up the former jeopardy was properly denied.

The duties of the county attorney in regard to the prosecution of criminal cases in general are set out in section 1554, Rev. Laws 1910, as follows:

"It shall be the duty of the county attorney to appear in the district, superior and county courts of his county and prosecute and defend, on behalf of the state or county, all actions or proceedings, civil or criminal, in which the state or county is interested or a party; and whenever the venue is changed in any criminal case, or any civil action or proceeding in which his county or the state is interested or a party, it shall be the duty of the county attorney of the county where such indictment is found, or the county interested in such civil action or proceeding, to appear and prosecute such indictment, and to prosecute or defend such civil action or proceeding in the county to which the same may be changed."

Section 8059 of the Rev. Laws of 1910, makes it the duty of the Attorney General to consult with and advise the county attorney when requested by him "in all matters pertaining to the duties of their office."

[1] Section 8057, Rev. Laws 1910, prescribes specific duties of the Attorney General, as follows:

"The Attorney General shall appear for the state and prosecute and defend all actions and proceedings in the Supreme Court and Criminal Court of Appeals in which the state shall be interested as a party, and shall also, when requested by the Governor or either branch of the Legislature, appear for the state and prosecute or defend in any other court or before any officer, in any cause or manner, civil or criminal, in which the state may be a party or interested, and shall attend to all civil cases remanded by the Supreme Court to any district court in which the state is a party or interested. He shall keep an office, to be furnished by the state in the same manner as the other state offices."

It was upon the request of the Governor that the Attorney General appeared and filed the information in the instant case.

This record presents the question of the effect of the appearance of the Attorney General in this prosecution upon the power and authority of the county attorney in regard to the same after such appearance. The Supreme Court of Colorado, in the case of *People v. Gibson et al.*, 53 Colo. 231, 125 Pac. 531, Ann. Cas. 1914A, 138, in discussing a statute almost identical with section 8057 above quoted, quote with approval a statement in regard to the effect of the appearance of the Attorney General in the prosecution upon the power of the county attor-

ney therein, from the opinion of the Supreme Court of Minnesota in *State v. Robinson*, 101 Minn. 277, 112 N. W. 269, 20 L. R. A. (N. S.) 1127, as follows:

"The statute under consideration, imposing specific duties upon county attorneys in the matter of its enforcement, is in no proper view a limitation upon, nor does it exclude, the general authority of the Attorney General upon the same subject."

And the Colorado court proceeds as follows:

"So under the law of this state district attorneys are specifically authorized, *inter alia*, to appear in all indictments, criminal cases, and proceedings which may be pending in the district court of their respective counties. Nevertheless, general authority is imposed upon the Attorney General to appear and prosecute in all cases wherein the state is a party or interested when required so to do by the Governor or General Assembly. The two provisions are not inconsistent. They may stand together. The specific duty imposed upon the district attorneys in no wise limits or excludes the general authority of the Attorney General upon the same subject."

The Supreme Court of North Dakota in *Ex rel. Miller v. District Court of Burleigh Co. et al.*, 19 N. D. 819, 124 N. W. 417, Ann. Cas. 1912D, 935, say in regard to the duties of the Attorney General, when requested by the Governor to appear in the prosecution of criminal cases in the trial court:

"The Legislature stepped further, and, guided by the public interests, announced by another special clause of the statute cited, as one of the Attorney General's duties, that he shall, when required by the public service, or directed by the Governor, assist the county attorney of any county in the discharge of his duties. Here we have a specific direction by which the Attorney General is to do more than to exercise those supervisory powers contemplated by previous requirements of the law. He is to assist the county attorney in the discharge of his duties when the public service requires it, or when the Governor directs him to give such assistance. * * * Nor is there any limit whatever to the assistance to be given—no point where it is to begin or to end, except the bound of the official duty of the county attorney. Just so long as the county attorney has the duty to discharge, and just so far as he may go in discharging it, so long is it the right and obligation of the Attorney General to actively assist him in the discharge of such a duty; and equally far in executing the duties shall he go when the public service requires it, or when directed to assist by the Governor."

The Supreme Court of Oklahoma in *Ex parte Kelly*, 45 Okl. 577, 146 Pac. 444, say in regard to the interpretation of section 8057, above quoted:

"If it be held, as contended by counsel for petitioner, that the authority of the Attorney General is limited to the right of appearing in proceedings already pending, it would amount to a denial of his right to appear in any case where, by reason of the failure, neglect, or refusal on the part of the local authorities to institute proceedings, the same has not been done. The purpose of this statute in our judgment is to clothe the Governor, who is vested by law with the supreme executive authority, and clothed with the power of executing the laws, in a proper case, where from any reason the law is not enforced, to put in motion the machinery of the law to maintain its authority. Conditions might arise where local officials

would refuse to enforce the law, and flagrant violations thereof might occur with impunity, unless there be some power by which these conditions could be remedied; and when, in the judgment of the Governor, the laws are not properly enforced by local officials, it was clearly contemplated by this statute that upon his request the Attorney General might in person take charge of the conditions, and in that situation would be clothed with all the authority of the local officers, and could take any steps necessary to institute any proceeding, or carry the same on to a final determination, notwithstanding the local officials might refuse to do so."

And in the same opinion the court quotes with approval from the syllabus in the opinion of the Supreme Court of Kansas in *State v. Bowles*, 70 Kan. 821, 79 Pac. 726, 69 L. R. A. 176, to the effect that when the Attorney General has been requested by the Governor to act in such a case, the Attorney General then becomes the prosecuting attorney of that county in those proceedings.

We understand the court to mean by this language that in such condition the Attorney General becomes clothed with the same power as the county attorney in regard to the prosecution of such cases. There is nothing in the language of the statute that would justify the inference that the Legislature intended that the request by the Governor and the appearance of the Attorney General in the prosecution of a criminal case operated to relieve or to disqualify or to take away from the county attorney the powers conferred upon him by the statute in regard to the prosecution of criminal causes. The Attorney General being clothed with the same power as the county attorney, this power was not exclusive, but concurrent with the power conferred by the statute upon the county attorney, and was limited by the same power which limits the duty and the powers of the county attorney.

It will be observed that the situation as presented in the instant case differs from that presented in any of the cases above cited. In each of those cases there was a failure, refusal, or neglect to act on the part of the county attorney that was used as occasion for the Governor to make the request upon the Attorney General to act. In the instant case the county attorney had not refused to act, but, on the contrary, he had acted. He had filed an information, had instituted a prosecution, and the same was pending at the time the Attorney General instituted his prosecution.

The record does not disclose why, but the fact appears that the county attorney was more diligent in the prosecution than the Attorney General. At least he got a trial on the information he filed before the Attorney General secured a trial on his information. In the situation such as presented by the record in this case it would seem proper that the Attorney General, by reason of his larger office, and by reason of being clothed with the same authority as the county attorney

by virtue of the statute and the request of the Governor, possibly should have had control in conducting the prosecution. He might have assisted the county attorney in the prosecution of the information filed by him, or he might have caused the dismissal of that information, if for any reason he thought an information filed by himself would be more effective, but he had no right to ignore the county attorney, as he apparently did, and he had no right to ignore the superior court in which the county attorney's information was pending, as he apparently did, and proceed independently upon an information filed by himself in the district court. He was not justified in disregarding the county attorney and the superior court until after the trial had in the superior court on the information presented by the county attorney, and having done so he could not then be heard to say that such proceedings were ineffectual because he (the Attorney General) had presented an information charging the same offense to the district court.

[2] The trouble in this prosecution seems to have been largely a question of dignity. The Attorney General does not seem to have suggested to the county attorney that he should refrain from prosecuting his information since the Attorney General wished to and had filed an information against the parties in the district court. With this question of dignity between these high officials the plaintiff in error has nothing to do, and he seems to have been in no way responsible for this conflict of authority. He had been haled into court by the highest prosecuting officer in Oklahoma county, and also by the highest prosecuting officer of the state of Oklahoma; each pursuing him and seeking to convict him for the same offense.

Section 21 of article 2 of the Constitution of Oklahoma provides:

"No person shall be compelled to give evidence which will tend to incriminate him, except as in this Constitution specifically provided; nor shall any person, after having been once acquitted by a jury, be again put in jeopardy of life or liberty, for that of which he has been acquitted. Nor shall any person be twice put in jeopardy of life or liberty for the same offense."

In this race of diligence in the prosecuting of a crime the county attorney seems to have been the more diligent; but the Attorney General cannot speculate on the result of the efforts of the county attorney to secure a conviction and when it fails contend that the trial was ineffectual, and the accused was not placed in jeopardy, and secure a conviction for the same offense at another trial on an information presented by himself and have the conviction sustained on appeal. The plea of former jeopardy was well taken and should have been sustained.

The judgment appealed from must be reversed and the cause remanded, with directions to the trial court to vacate the judg-

ment of conviction and sustain the plea of the former jeopardy and to dismiss the defendant without day.

DOYLE, C. J., and ARMSTRONG, J., concurring. MATSON, J., disqualified, not participating.

BACA v. STATE (two cases). (Nos. 449, 450.)
(Supreme Court of Arizona. April 18, 1918.)

Appeals from Superior Court, Apache County; Geo. H. Crosby, Judge.

D. B. Baca was twice convicted of selling intoxicating liquor, and he appeals. Affirmed.

George Estes, of Deming, N. M., for appellant. Wiley E. Jones, Atty. Gen., and G. W. Harben and L. B. Whitney, Asst. Attys. Gen., for the State.

PER CURIAM. Appellant was twice convicted of selling intoxicating liquors. The record is all that we have before us. A careful examination of it discloses no error.

The judgment of conviction in each case is affirmed.

CUFF v. STATE. (No. 445.)

(Supreme Court of Arizona. April 18, 1918.)

Appeal from Superior Court, Mohave County; John A. Ellis, Judge.

Ed Cuff was convicted of murder, and he appeals. Affirmed.

Wiley E. Jones, Atty. Gen., and R. Wm. Kramer and Louis B. Whitney, Asst. Attys. Gen., for the State.

PER CURIAM. The appellant appeals from the judgment of conviction of murder. The record was filed June 22, 1917, and the case was ordered submitted thereon at the January, 1918, call of the calendar. Appellant has not called our attention to any error by assignment, brief, or otherwise.

We have carefully examined the information, the transcript of testimony, and the instructions of the court for fundamental error, and, finding none, the judgment is affirmed.

SMITH v. STATE. (No. 446.)

(Supreme Court of Arizona. April 18, 1918.)

Appeal from Superior Court, Mohave County; John A. Ellis, Judge.

Floyd Smith was convicted of murder, and he appeals. Affirmed.

Wiley E. Jones, Atty. Gen., and R. W. Kramer and L. B. Whitney, Asst. Attys. Gen., for the State.

PER CURIAM. The appellant appeals from the judgment of conviction of murder. The record was filed June 22, 1917, and the case was ordered submitted thereon at the January, 1918, call of the calendar. Appellant has not called our attention to any error by assignment, brief, or otherwise.

We have carefully examined the information, the transcript of testimony, and the instructions of the court for fundamental error, and, finding none, the judgment is affirmed.

(14 Okl. Cr. 291)

FRANKS v. CITY OF MUSKOGEE.

(No. A-2893.)

(Criminal Court of Appeals of Oklahoma.
March 23, 1918.)

(Syllabus by the Court.)

JURY §23(1)—RIGHT TO JURY TRIAL—CONSTITUTION—PROVISIONS.

The Bill of Rights of the Constitution of Oklahoma declares that: "The right of trial by jury shall be and remain inviolate, and a jury for the trial of civil and criminal cases in courts of record, other than county courts, shall consist of twelve men; but, in county courts and courts not of record, the jury shall consist of six men." Const. art. 2, § 19. And that: "In all criminal prosecutions the accused shall have the right of a speedy and public trial by an impartial jury of the county in which the crime shall have been committed." Const. art. 2, § 20. Held, that a person prosecuted under a city ordinance for an offense which is also made a misdemeanor by statute, or an ordinance, the punishment for a violation of which is or may be imprisonment, is entitled to a jury trial in the court of original jurisdiction, and to accord to the accused the right to be tried by a jury in the county court on appeal after conviction in the municipal court, does not satisfy the requirements of the Constitution. In such cases a judgment of conviction in the municipal court, not based upon a verdict of guilty by a jury, is void.

Appeal from County Court, Muskogee County; Glenn Alcorn, Judge.

Ed Franks was convicted of violating a city ordinance, and he appeals. Reversed.

Crump, Bailey & Crump, of Muskogee, for plaintiff in error.

DOYLE, P. J. The plaintiff in error, Ed Franks, was convicted in the police court of the city of Muskogee upon a complaint charging him with being an inmate of a disorderly house, and he was adjudged to pay a fine of \$25, from which judgment he appealed to the county court of Muskogee county. Upon his trial in the county court he was again convicted, and his punishment assessed at confinement in the city jail for 45 days, and to pay a fine of \$25. From the judgment ren-

dered in pursuance of the verdict, he appeals. The question of jurisdiction which was raised below in the municipal court and in the county court has been passed upon by this court in *Ex parte Johnson*, 13 Okl. Cr. —, 161 Pac. 1097, wherein it is held:

"That a person prosecuted under a city ordinance for an offense which is also made a misdemeanor by statute, or an ordinance the punishment for a violation of which is or may be imprisonment, is entitled to a jury trial in the court of original jurisdiction, and to accord to the accused the right to be tried by a jury in the county court on appeal after conviction in the municipal court, does not satisfy the requirements of the Constitution. In such cases a judgment of conviction in the municipal court, not based upon a verdict of guilty by a jury, is void."

And further held:

"That in respect to 'offenses' under city ordinances, the punishment for which is or may be imprisonment, conviction of the accused without a jury trial would be in contravention of section 7 of the Bill of Rights, providing that, 'No person shall be deprived of life, liberty, or property, without due process of law,' because under the constitutional provisions a jury is an essential part of every tribunal for the trial of criminal cases, and such constitutional provisions place the right to trial by jury beyond the power of the Legislature to abrogate or abridge it, and it is beyond the power of the Legislature to confer jurisdiction on any tribunal to try criminal cases without providing for jury trials."

For the reason stated in the opinion in the *Johnson Case*, we are of the opinion that the proceedings had upon the trial and conviction of the plaintiff in error were illegal and void, and said court was without jurisdiction to render the judgment appealed from. The judgment is therefore reversed and remanded, with direction to dismiss.

ARMSTRONG and MATSON, JJ., concur.

(31 Idaho, 309)

ALLEN v. WILLIAMS.

(Supreme Court of Idaho. Feb. 28, 1918.)

1. JUDGMENT \S 707 — COMMITMENT OF JUVENILE DELINQUENT—JUDGMENT—RIGHTS OF PARENTS.

Upon a summary statutory proceeding to commit a delinquent child to an industrial school, under the recognized rules of legal procedure the parents are not bound by the judgment, and none of their legal rights are precluded.

2. HABEAS CORPUS \S 99(1) — PARENT'S CUSTODY OF CHILD.

The right of the parent to the custody of an infant may be presented and determined upon a habeas corpus proceeding.

3. CONSTITUTIONAL LAW \S 306 — DUE PROCESS OF LAW—PARENT'S RIGHT TO CUSTODY OF CHILD.

The parent or guardian of a child removed from his custody is not denied due process of law if an adequate remedy is available by which he may afterwards have his rights presented to a proper tribunal and determined.

4. HABEAS CORPUS \S 79, 83 — RETURN—ANSWER.

In habeas corpus proceedings, the return takes the place of the complaint, and the answer may traverse the allegations of the return and contain affirmative matter.

Original proceeding for writ of habeas corpus by Laura Allen against J. Fred Williams, superintendent of industrial training school. Writ quashed, and petition denied.

Edens & Anderson, of Pocatello, for plaintiff. T. A. Walters, Atty. Gen., and A. C. Hindman and J. P. Pope, Asst. Attys. Gen., for defendant.

RICE, J. This is an original proceeding in this court, instituted by Laura Allen to procure the issuance of a writ of habeas corpus directed to J. Fred Williams, superintendent of the state industrial training school, by which it is sought to procure an adjudication of the right to the guardianship, custody, and control of Viola Boyd, minor child of plaintiff.

The petition alleges that Viola Boyd is illegally detained from petitioner by reason of her commitment to the school by the probate judge of Bannock county, and that the commitment is invalid, in that it is in violation of the right of petitioner as parent and natural guardian of the child, and made without any notice or process to petitioner and without petitioner having her day in court. There are other allegations in the petition, setting forth additional facts intended to show the unlawfulness of the detention. The plaintiff further avers, as a reason for filing the petition in this court, that on October 29, 1917, she filed a petition for writ of habeas corpus, based upon practically the same grounds, in the district court of the Ninth judicial district of the state, in and for the county of Fremont; that an order was thereupon made, issuing a writ returnable November 1, 1917, and that upon the return and the hearing thereon the court did erroneously and unlawfully decline and refuse petitioner any relief thereon, denying the writ and remanding the child to the custody of the defendant. The plaintiff further alleges that she is advised that she has no remedy except by application to this court in the manner pursued in this case. A writ from this court was issued, and the defendant made his return, showing that he held the child under and by virtue of a commitment of the probate court of Bannock county, in which court she was adjudged to be a juvenile delinquent. The return also denied that the plaintiff, Laura Allen, the parent and natural guardian of the child, was not present in court at the time said commitment proceedings were had, but, on the contrary, alleged that she had full knowledge of the proceedings and was present in court when said commitment was made.

The statute under which Viola Boyd was committed was before this court in the case of *In re Sharp*, 15 Idaho, 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886. The law was there held to be constitutional. It was further held in that case that if a parent is not made

a party to the hearing and proceeding, under all the recognized rules of legal procedure he is clearly not bound by the judgment, and none of his rights are precluded. See, also, *Farnham v. Pierce*, 141 Mass. 203, 6 N. E. 830, 55 Am. Rep. 452.

[1, 2] Plaintiff demurred to the return, and it is suggested that it is thereby admitted she was present in court when the commitment was made. Conceding this to be true, her presence in court is not sufficient. Provision must be made whereby she may defend her rights if the judgment is to be conclusive as to her. No such provision is made by our statute. The action of the probate court established the status of the child. Plaintiff, never having had her day in court, is entitled to resort to an appropriate remedy in order to have her rights adjudicated. Habeas corpus appears to be an appropriate remedy. *State v. Kilvington*, 100 Tenn. 227, 45 S. W. 433, 41 L. R. A. 284. In the case of *Andrino v. Yates*, 12 Idaho, 618, 87 Pac. 787, this court said:

"This is not the case of an adult appealing to the aid of habeas corpus to obtain his freedom from illegal restraint, but the writ in this case was granted to inquire whether the plaintiff was entitled to the custody of said minor child. The proceeding is not for the purpose of setting the child free, but to determine whether the petitioner is entitled to its custody, and the correct view or rule is that the jurisdiction of the question of the custody of a child under a writ of habeas corpus is of an equitable nature, and courts are given large discretion in the matter."

In this action the right of the parent to the custody of the infant may be presented and determined. The order of the court in such a case is discretionary, and in the exercise of this discretion, in determining to whom the custody of a child shall be awarded, courts will look both to the present and future interests and welfare of the child. It has been said that this rule is the "pole star" by which courts are guided in such cases. The commitment of a juvenile delinquent by the probate court, under our statute, does not therefore leave the parent remediless, but, on the contrary he has ample opportunity to present and have adjudicated his right to the custody of his child. We do not say that a writ of habeas corpus, though an appropriate remedy, is the only one available for a parent in such circumstances.

[3, 4] The plaintiff is proceeding under the impression that due process of law requires that the determination of the parent's rights to the custody of his child must precede any interference therewith. This view cannot be sustained. Our statute was enacted as a matter of protection to the child and for the welfare of the state. The Legislature, in enacting this law, no doubt saw the wisdom of prompt commitment of a child, who is upon the high road to becoming a moral degenerate and perhaps a future charge upon and a disgrace to the state. To drag such a case

through a lengthy and formal criminal or civil proceeding, without prompt detention and commitment of the child, would in many cases thwart the object of the law. It might in many cases be a matter of high importance that action be taken without delay.

The Legislature having determined that a summary proceeding was necessary, requiring the immediate taking of children into custody in the interests of their moral welfare and education and as a protection to the state, the parent or guardian of a child removed from his custody is not denied the due process of law if an adequate remedy is available by which he may afterwards have his rights presented to a proper tribunal and determined. Many instances which are more or less analogous in principle might be cited in support of this conclusion. We quote the following from *McGehee on Due Process of Law*, p. 372:

"Necessity, not to dispense with altogether, but to postpone hearing, may exist in the case of the destruction of houses in the path of a conflagration or of infected articles or animals. Delay, before the destruction of the property condemned, for the purpose of giving notice, and it may be to ascertain who are the parties whose interests will be affected, and further delay for such hearing as the parties may think necessary for the protection of their interests, might defeat all beneficial results from the contemplated action. Having regard to the necessities of this class of cases then, and adjusting the requirements of notice and hearing to it, it is held that local authorities may, when the necessities of the case justify this action, proceed to condemn property and destroy it as a nuisance in advance of notice or a hearing. But the property owner has a right to have a judicial determination of the validity of the regulation and existence of the nuisance upon a review of the matter in the courts. The ex parte determination of the local authorities cannot be made conclusive."

Summary proceedings of a like nature have been upheld in many jurisdictions. *Weber v. Doust*, 84 Wash. 330, 146 Pac. 623; *Mill v. Brown*, 31 Utah, 473, 88 Pac. 609, 120 Am. St. Rep. 935; *State v. Children's Home*, 10 N. D. 493, 88 N. W. 273; *Reeve v. Dennett*, 141 Mass. 207, 6 N. E. 378; *State v. Brown*, 50 Minn. 353, 52 N. W. 935, 16 L. R. A. 691, 36 Am. St. Rep. 651; *Prescott v. State*, 19 Ohio St. 184, 2 Am. Rep. 388.

In the case of *Jain v. Priest*, 30 Idaho, 273, 164 Pac. 364, we held that a judgment of a district court in a habeas corpus proceeding, involving the custody of a minor child, is a final judgment in a proceeding of a civil nature, and that an appeal lies from the district court to this court.

In the case of *Cormack v. Marshall*, 211 Ill. 519, 71 N. E. 1077, 67 L. R. A. 787, 1 Ann. Cas. 256, it was held that issues of fact involved in habeas corpus proceedings, involving the custody of a child, when adjudicated, became res judicata, and that a judgment in such a case is a bar to another habeas corpus action in the same court, or in another court where the facts involved are the same as those previously adjudicated. This case is

in line with the great weight of authority, and many cases are cited and discussed in the opinion.

The record presented in the case at bar, disclosing as it does that plaintiff originally called into exercise the jurisdiction of the district court, an orderly course of procedure would require that the plaintiff do not abandon her action in the district court, but that she proceed to a determination of all the issues involved in that court, and if dissatisfied with the final judgment therein rendered she may bring the whole matter to this court for review on appeal.

Inasmuch as the time for appeal to this court from the judgment rendered and entered in the court below has expired during the time this court has had the matter under consideration, and in view of the fact that the custody and welfare of a minor child, and one of the most sacred rights of a parent, are involved in this proceeding, relief may be had and the judgment of the district court set aside upon a proper showing being made under the provisions of Rev. Codes, § 4229. Upon such relief being granted, we quote from the case of *Ex parte Collins*, 151 Cal. 340, 90 Pac. 827, 91 Pac. 397, 129 Am. St. Rep. 122, as to the procedure to be employed:

"The function of the petition is to secure the issuance of the writ, and, when the writ is issued, the petition has accomplished its purpose. The writ requires a return by the officer or other person having the custody of the prisoner. To such return the petitioner may present exceptions, raising questions of law, or a traverse, raising issues of fact, or both. Where the return is not subject to exception—that is, where it sets forth process which on its face shows good ground for holding the prisoner, such process being produced at the hearing (Pen. Code, § 1480) and the traverse alleges matter tending to invalidate the apparent effect of such process—the burden of proving such new matter is on the petitioner. The remarks in *Re Smith*, 143 Cal. 368, 77 Pac. 180, are to be taken as referring only to the case where, by agreement of the parties and the consent of the court, the petition is treated as a traverse to the return, and its averments are not disputed. This course has frequently been followed in this court; but where it is followed it does not require the respondent to file, in addition to the return, a pleading, specifically denying the affirmative allegations of the petition, treated as a traverse, nor does it shift the burden of proof as to such allegations from the petitioner to the respondent. To adopt the analogy of pleadings in civil actions, the return is the complaint, and the traverse is the answer; new matter set up in the traverse is deemed denied, and must be proved by the party alleging it."

See Rev. Codes, §§ 8347, 8351.

The district court will have power to require the defendant to make proper return to the writ, setting forth, not only the authority under which he has the custody of the child, but also the reasons, if any there be, why the plaintiff is not a suitable person to have the guardianship and custody of her daughter. The plaintiff will thereupon make such answer to the return as she may be ad-

vised is necessary, and the case may be tried upon the issues so framed.

The writ issued by this court will be quashed, and the petition denied.

BUDGE, C. J., and MORGAN, J., concur.

(31 Idaho, 329)

STATE v. MORTON.

(Supreme Court of Idaho. March 12, 1918.)

1. INTOXICATING LIQUORS §147(1) — "PROHIBITION DISTRICT."

In a county in which the sale of intoxicating liquor has not been prohibited by law, which county contained a municipality in which licenses for the sale of intoxicating liquor had been issued and were in force, neither the portion of the county lying outside of the confines of the municipality, nor any precinct outside of the municipality, constituted a "prohibition district," as defined by Sess. Laws 1913, c. 27, § 7.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Prohibition District.]

2. INTOXICATING LIQUORS §147(1)—LOCAL OPTION — PROHIBITION DISTRICT — "TERRITORY."

The word "territory," as used in Laws 1913, c. 27, § 7, providing that a prohibition district is territory in which the sale of intoxicating liquor is prohibited by law, or where no liquor license has been issued, means the state or a political subdivision of it; a unit of country with some sort of government peculiar to itself.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Territory.]

Budge, C. J., dissenting.

Appeal from District Court, Ada County; Charles P. McCarthy, Judge.

Edward E. Morton was convicted of maintaining a common nuisance in a prohibition district, and he appeals. Reversed.

Wood, Driscoll & Wood and S. L. Tipton, all of Boise, for appellant. J. H. Peterson, Ex-Atty. Gen., T. A. Walters, Atty. Gen., and J. P. Pope, Asst. Atty. Gen., for the State.

RICE, J. By the indictment in this case it was charged that the appellant did, on or about the 7th day of December, 1914—

"in a certain brick building located at the south end of Ninth street, known as Joplin's Corner, said brick building being then and there outside of the city limits of Boise City, a municipal corporation of the state of Idaho, and within a prohibition district, willfully and unlawfully occupy, maintain, control and keep open a place where intoxicating liquors were sold, delivered, furnished, given away and otherwise disposed of in violation of law."

It is conceded that at the time specified in the indictment the sale of intoxicating liquor in Ada county had not been prohibited by law; that liquor licenses were granted and saloons and other places where intoxicating liquor was sold were maintained within the limits of the municipality of Boise City; that no liquor licenses were granted under which saloons, or other places for the sale of intoxicating liquor, could be main-

tained in Ada county outside of the corporate limits of Boise City. It is also conceded that the appellant did maintain a place where intoxicating liquor was sold and disposed of at the time and place set forth in the indictment.

[1] The question presented by this appeal is whether the place where appellant conducted his business was in a prohibition district. In the local option law of 1909 (Laws 1909, p. 18), a prohibition district is defined to be:

"Any district or territory in the state of Idaho, in which the sale of intoxicating liquors is prohibited by law."

This definition was in force and effect in 1911, when the Legislature passed the law defining the crime with which appellant is charged as follows:

"All places in a prohibition district of the state of Idaho where intoxicating liquors are sold, furnished, delivered, given away, or otherwise disposed of in violation of law; or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage; or where intoxicating liquors are kept for sale, delivery or disposition in violation of law, and all intoxicating liquors, vessels, glasses, kegs, pumps, bars and other property kept in and used in maintaining such a place, are hereby declared to be common nuisances, and every person who maintains or assists in maintaining such common nuisance is guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars, nor more than five hundred dollars, or by imprisonment in the county jail for not less than ten days nor more than six months, or by both such fine and imprisonment for each offense." Sess. Laws 1911, c. 15, § 2, p. 33.

Thereafter, in 1913, the Legislature passed an act further regulating the disposal of alcohol and intoxicating liquors within prohibition districts, and in said act defined a prohibition district as follows:

"'Prohibition district' within the meaning of this act and all other acts prohibiting the selling of intoxicating liquor in any prohibition district in this state, is territory in which the sale of intoxicating liquor is prohibited by law, or where no liquor license has been issued in accordance with the laws of this state." Sess. Laws 1913, c. 27, § 7, p. 127.

[2] It will be observed that this section is a single sentence composed of two clauses, by the first of which territory wherein the sale of intoxicating liquor was then, or might thereafter be, prohibited by law was made a prohibition district, and by the second, such a district was created of territory wherein no liquor license was issued. The Legislature used the word "territory" in the first clause to mean the state, or a political subdivision of it, wherein the sale of intoxicating liquor might theretofore have been, or might thereafter be, prohibited by law, and since the word was used but once in the section, it undoubtedly has the same meaning when applied to the second clause.

The natural construction of the language of the last-mentioned section would be that by "prohibition district" is meant territory in which the sale of intoxicating liquor is prohibited by law, or territory in which the

sale of intoxicating liquor might have been prohibited by law, but where it was not so prohibited, but notwithstanding it was not so prohibited no liquor licenses had been issued in accordance with the laws of this state. The word "territory," when used in a statute like this, connotes a unit of country with some sort of government peculiar to itself. Bouvier's Law Dictionary defines "territory" as follows:

"A part of a country separate from the rest and subject to a particular jurisdiction."

One of the definitions given by Webster is:

"Any area or tract of a state not invested with full rights of sovereignty, but governed or ruled as a dependency or subject area, or having a legal system more or less peculiar to itself."

These units, so far as the law in force at the time the offense complained of in the indictment is concerned, were counties and municipalities. Hence a portion of a county could not be a prohibition district. Liquor licenses had been issued in Ada county, a political subdivision of the state, wherein the sale of intoxicating liquor might have been prohibited but was not. Therefore it was not a prohibition district.

It is claimed, however, that a precinct of the county lying outside of the municipality is such a unit of territory that it may be a prohibition district. But a precinct has no governing body which could either grant or refuse liquor licenses within its limits. The term "prohibition district," when used in defining the offense with which the appellant is charged, must have the same meaning as "prohibition district" as used in the other provisions of the statutes prohibiting and regulating the sale of intoxicating liquor and alcohol.

By the act of 1913 it is made unlawful for any physician to issue a prescription for intoxicating liquor as medicine in prohibition districts, except in case of actual sickness and after making a thorough examination, and then only by the use of a prescribed form of prescription. By section 2 of the act it is declared to be unlawful to sell or dispose of alcohol in a prohibition district to any person until such person shall subscribe and swear to an affidavit before certain designated officers. By said act it is further provided that no wine shall be sold in any prohibition district within the state, except for sacramental purposes, and it is made unlawful for any person to sell or dispose of any intoxicating liquor of any kind in any prohibition district in the state, except by a regularly licensed pharmacist, and then only upon compliance with the other provisions contained in the act. By the same act it is also made unlawful for any person to bring or deliver into any prohibition district in this state, or to have upon his person, or in his personal baggage, or keep in his residence, if such is not a place of business, for his private use, intoxicating liquors

in quantity in excess of one gallon, or one case of beer containing not more than 24 quart bottles. This last provision was repealed by Sess. Laws 1913, c. 99, p. 416, but it may be considered in determining the true definition of "prohibition district."

In view of these provisions it is difficult to believe that it was the intention of the Legislature that a precinct in which no liquor licenses had been granted should constitute a prohibition district. Doubtless it is true that there were, in many counties of the state which at the time of the enactment of the act were known as wet counties, precincts in which no licenses for the sale of intoxicating liquors had been applied for or granted. It surely was not intended, for instance, that a physician in such a county must change his method of practice when he crossed the precinct line from a precinct in which a saloon was located to one in which no licenses had been granted, in order to avoid rendering himself liable to forfeiture of his license to practice medicine in the state. Similar considerations are applicable to the other provisions of the act referred to above.

In view of these considerations, we are constrained to hold that the place in which it is conceded the appellant conducted his business was not a prohibition district, and the judgment must be reversed.

MORGAN, J., concurs.

BUDGE, C. J. (dissenting). The first and only important assignment of error involves the construction of section 2, c. 15, Session Laws of 1911, and section 7, c. 27, Session Laws of 1913, set forth in the majority opinion.

It is the contention of the appellant that the county of Ada constituted the unit of measurement for a prohibition district within the meaning of the foregoing statutory provisions, and that, since liquor licenses were issued and in effect in Boise City, he did not maintain a common nuisance. It is insisted by the state that all territory outside of Boise City where no liquor licenses had been issued or were in force was prohibition territory. The question therefore arises: What is a prohibition district within the meaning of the statutory provision that a "prohibition district" * * * is territory * * * where no liquor license has been issued in accordance with the laws of this state." The duty devolving upon this court is to place a reasonable construction upon the provisions of the statutes to the end that the evident purpose of the acts be attained.

It is the holding of the majority opinion that the county, as contradistinguished from the precinct, is the unit of territory intended by the statute to comprise a prohibition district; but it would be more reasonable to hold that the precinct is the unit rather than the county. Stress is laid upon the defini-

tions of the word "territory." "Territory" is defined in the majority opinion as "a part of a country separated from the rest and subject to a particular jurisdiction," or "any area or tract of a state not invested with full rights of sovereignty, but governed as a dependency or separate area, or having a legal system more or less peculiar to itself." If there is anything to be deduced from these definitions, it would be not only against rather than in support of the theory that the county is the unit, but in support of the theory that the precinct is the unit, for the following reasons: The precinct was absolutely subject to the "particular jurisdiction" of the board of county commissioners which had the exclusive right to refuse to grant liquor licenses; the precinct was not an "area or tract" invested with full rights of sovereignty; and the precinct had "a legal system more or less peculiar to itself"—these definitions certainly apply as well to a precinct as to a county.

Sections 1507 and 1508, Revised Codes, would seem to strengthen the latter view. Section 1507 provided that an application for a liquor license must specify the precinct within which the place of sale was to be located and, when granted, the license was restricted to such precinct; section 1508 provided that when such application was made for a liquor license, outside of any incorporated city, it was the duty of the board of county commissioners to determine whether or not the liquor license should be granted, "either upon their own motion or upon objections duly filed upon the part of any citizen and resident of the precinct within which it is intended to carry on such sale"; thus making it clear that the rural precincts were entitled to especial consideration so far as the question of issuing liquor licenses was concerned. In fact, the precinct was the only unit recognized, under the law as it stood prior to the enactment of the local option law, by county and state licenses.

As stated in the majority opinion, the local option law of 1909 defined a prohibition district to be "any district or territory in the state of Idaho in which the sale of intoxicating liquor is prohibited by law"; that is, where, by an election held under the local option law, by a majority vote the sale of intoxicating liquor was prohibited, the commissioners had no power to issue liquor licenses. This was the situation in 1911 when the Legislature passed the law defining the crime with which appellant is charged. At that time there were many counties that had not voted to prohibit the sale of intoxicating liquors, and there were municipalities in those counties which were strongly in favor of the sale of intoxicating liquors within the municipalities, thereby overcoming the vote in the county cast by rural districts.

The 1913 session of the Legislature, to fur-

ther restrict and prohibit the sale of intoxicating liquors and afford additional protection to rural districts, passed an act further regulating the disposal of alcohol and intoxicating liquors, and defined a prohibition district as any "territory in which the sale of intoxicating liquor is prohibited by law, or *where no liquor license has been issued in accordance with the laws of this state.*" (Italics mine.) Session Laws 1913, c. 27, § 7, p. 127.

Prior to the 1913 law the commissioners had the power, under section 1508, Revised Codes, to refuse to grant a liquor license in any precinct or unincorporated town or village, or in any incorporated village, town, or city within the county (Anderson v. Board of County Commissioners, 22 Idaho, 190, 125 Pac. 188; Sullivan v. Board, 22 Idaho, 202, 125 Pac. 191); and any such place where no liquor license had been issued would be territory "where no liquor license has been issued in accordance with the laws of this state," and would constitute a prohibition district within the meaning of chapter 27, § 7, p. 127, Session Laws 1913. The very purpose of the latter section was to make all such territory a prohibition district, and to afford the protection of the provisions of the law applicable to prohibition districts to rural sections where no licenses had been issued, and to make it impossible for municipalities, which by reason of a majority vote had made a county "wet," to deprive the rural communities within such county of the protection afforded by the provisions of chapter 15, § 2, p. 33, Session Laws 1911. To hold otherwise it would follow that where a county was voted "wet," and liquor licenses were granted within a municipality, the entire county would be "wet," irrespective of the action of the board of commissioners in refusing to grant liquor licenses, and a common nuisance such as maintained by appellant could not be abated. The abatement of the nuisance was the real object sought to be attained by this legislation. The majority opinion emasculates the amendment, and deprives the rural districts of the added protection the amendment was designed to afford.

The majority opinion urges that by the act of 1913 it was made unlawful for a physician to issue a prescription for intoxicating liquor as medicine in a prohibition district, except in case of actual sickness and after making a thorough examination, and then only by the use of a prescribed form of prescription. Therefore the unit could not consistently be limited to less territory than the county, for the reason that to hold otherwise would work a hardship on the physician by requiring him to change his method of practice when he crossed the precinct line from a precinct in which a saloon was located to one in which no license had been issued and render him liable to forfeiture of his license to practice medicine.

The statute imposed only one burden upon the physician, that in a prohibition district his prescriptions for intoxicating liquors were restricted to "cases of actual sickness and after making a thorough examination of the patient." He need not concern himself with wet or dry territory nor their respective boundaries if he confined his prescriptions of intoxicating liquor to cases of actual sickness, and if he prescribed intoxicating liquor in cases other than actual sickness he fostered the industry the law was designed to curtail. No prescription would be required in wet territory because the patient could get intoxicating liquor there without a prescription.

In my opinion, neither the county unit theory nor the precinct unit theory correctly interprets the sections of the statutes involved. Either view unduly limits and restricts the purpose of the acts, the objects sought to be attained by them, and the broad language used therein. It is clearly apparent that had it been the intention of the Legislature to restrict a prohibition district to the territory comprising a county, precinct, or municipality, these limits would have been prescribed in the act in definite terms; but the act placed no limitations other than "territory in which the sale of intoxicating liquor is prohibited by law, or where no liquor license has been issued in accordance with the laws of this state." The pertinent fact is that no liquor licenses had been issued or were in force outside of the boundaries of the municipality nor in any territory in Ada county outside of Boise City. Liquor licenses had only been issued and were in force within Boise City, the territorial limits of which are well defined. Since Boise City is a municipality and a separate entity, the issuance of liquor licenses therein depended upon the joint action of the municipal authorities and the board of county commissioners, while the issuance of such licenses within the county outside of municipalities rested with the board of county commissioners solely. It was within the power of the board to refuse to grant liquor licenses within a precinct or within any given territory in the county, and where, as in this case, no liquor licenses had been issued or were in force anywhere in the county outside the boundaries of a municipality, all such territory lying without the boundaries thereof *was territory where no liquor licenses had been issued according to law*, and constituted a prohibition district within the meaning of section 7, c. 27, supra, and the maintaining of a place therein where liquors were disposed of, as shown by the admitted facts, constituted it a common nuisance within the meaning of such statutory provisions.

The purpose of the law was to prescribe the means by which a public nuisance might be abated, and to give the statute a restricted construction defeats this purpose.

The judgment should be affirmed.

(64 Colo. 310)

DENVER & R. G. R. CO. v. WRIGHT.
(No. 8795.)

(Supreme Court of Colorado. March 4, 1918.)

1. RAILROADS §430—KILLING ANIMALS—NOTICE—LIMITATIONS.

Under the railroad fencing act (Laws 1911, p. 400), where a railroad kills an animal on its track, compliance by the company with the requirements of sections 5-9 (pages 402-405) as to notification of live stock inspector, etc., being necessary to put into operation sections 10 and 11 (page 406), barring the owner's claim unless he files sworn proof with the station agent within six months from the killing, the company cannot, where it did not comply with such requirements, avail itself of the six-month statute of limitations, because the owner voluntarily filed such claim with the station agent before suit; such filing being unnecessary and merely gratuitous.

2. RAILROADS §441(6)—ANIMALS KILLED—PRESUMPTION.

Where animals were killed on railroad track at points where the road was required, by the railroad fencing act, (Laws 1911, p. 400) to be inclosed, it will be presumed, in the absence of evidence to the contrary, that they came upon the railroad at such points.

3. CONSTITUTIONAL LAW §46(1)—DETERMINATION OF CONSTITUTIONALITY—NECESSITY.

Unconstitutionality of that portion of the railroad fencing act (Laws 1911, p. 400) allowing legal interest on claim for animal killed on railroad track from the date of such killing is immaterial to a railroad defending action on such a claim, where the jury allowed plaintiff no interest.

4. APPEAL AND ERROR §1052(2)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for animals killed on railroad track, any error in allowing plaintiff to introduce, in connection with section foreman's deposition read to the jury, railroad company's records of report made by section foreman to its claim agent and a book kept by the section foreman, was harmless, where the foreman testified orally upon direct and cross examination as to all matters contained in the written documents, and the evidence conclusively showed that the animals were killed by trains on the unfenced portion of the railroad.

En Banc. Error to District Court, Chaffee County; Charles A. Wilkin, Judge.

Action by A. E. Wright, Jr., against the Denver & Rio Grande Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. N. Clark, R. G. Lucas, and T. M. Stuart, Jr., all of Denver, for plaintiff in error. H. L. McGinnis and G. K. Hartenstein, both of Buena Vista, for defendant in error.

GARRIGUES, J. 1. This suit is brought under sections 1, 2, 3, and 4 of the railroad fencing act (Sess. L. 1911, p. 400), to recover the value of stock killed on the railroad. The basis of the action is negligence on account of failing to fence the railroad, and no recovery can be had which is not founded upon such negligence.

Section 1 requires every railway company to fence its railroad, and to construct and maintain good and sufficient cattle guards at public crossings, for the protection of live stock, amply sufficient to prevent it from get-

ting on the railroad, except within the limits of incorporated towns and cities or the yard limits of established stations, or at public road and highway crossings.

Section 2 makes every railway company failing to inclose its railroad with such fences and guards absolutely liable for all live stock running at large killed on the railroad by the engines or cars of the company.

Section 3 provides, if the railroad is inclosed with good and sufficient fences and guards capable of keeping animals off the railroad, the company may plead and prove the same as a defense for any animals killed within the inclosure.

Section 4 makes the killing of any animal by coming in contact with any engines or cars prima facie evidence of negligence, and the company liable for the full value of any animal so killed, unless it shall affirmatively show that the killing was not caused by its negligence.

Plaintiff alleges that the animals were killed by the engines and cars upon an unfenced portion of the railroad at a point where the road was required to be fenced, and that the killing was due to and resulted from a failure of the company to inclose its railroad at the point where the animals were killed.

The evidence shows that the animals were killed by coming in contact with a train on the railroad at a point where the same was not inclosed, and where the law required an inclosure. The road was unfenced, and there was no inclosure where the animals were killed. This established proof of absolute liability until the company showed that the road was inclosed as required by law, or that the killing was at a point where no inclosure was required. The company offered no pleading or proof to establish either, or that the killing was not caused by its negligence. It denied the allegations of the complaint, and pleaded two affirmative defenses; one, the six-month statute of limitations, based on sections 10 and 11 of the act, and the other that plaintiff had not complied with sections 8 and 9 by declining to accept the estimated value of the animals or to arbitrate. These affirmative defenses are laid upon the following sections of the act:

Section 5 provides that the engineer, killing an animal on the railroad, shall notify the company, and that it shall notify the section foreman and the nearest livestock inspector, and they shall go to the point where the animal was killed and inspect it and determine the ownership. The stock inspector must also estimate the probable value of the animal.

Section 6 makes it the duty of the inspector immediately to send a full report of his inspection to the secretary of the state board of inspection commissioners, showing all the facts and his estimated value of the animal,

and the foreman is required to send a similar report to the claim agent.

Section 7 provides that the secretary, upon the receipt of such report from the inspector, shall notify the owner of the facts, and of the inspector's estimated value of the animal, and shall also send a copy of the inspector's report to the company.

Section 8 requires the owner, within 30 days after he has received the report from the secretary, to make proof of ownership and deliver it to the secretary, who shall then notify the company and demand that it pay to the board the estimated value for the benefit of the owner, which, if accepted, shall constitute final settlement. But if the owner is dissatisfied with the estimated value and is willing to arbitrate, he may file a claim with the board in such sum as he thinks justly due him.

Section 9 provides that the parties may then arbitrate such claim before the board, and, if they do, its finding shall be final.

Section 10 provides, in the event the owner, after being notified by the secretary, declines to accept the estimated value or to arbitrate as provided in sections 8 and 9, that he must, within six months from the date of the killing, file sworn proof and affidavit with the station agent, and if he fails to do so, the claim for damages is forever barred.

Section 11 provides if the company fails, for 30 days after the owner has filed such demand, to pay the actual value of the animal, the owner may, within six months from the date of filing such sworn proof and affidavit of claim, sue and recover the actual market value of the animal, with legal interest thereon from the date the animal was killed.

2. There is no evidence that the railway company complied with the conditions precedent, which required the owner to be notified by the secretary and given an opportunity to accept, arbitrate, or decline, as provided in sections 8 and 9. The provisions of sections 5, 6, 7, 8, and 9 are conditions to be complied with precedent to the owner being required to file a claim with the station agent, as required in section 10. It is too plain to admit of discussion that it is only in the event the owner declines to accept or arbitrate that he is required to file such claim. Plaintiff was given no opportunity to decline; therefore he was not required to file sworn proof and affidavit with the station agent.

[1] The six-month statute of limitations is unavailing to defendant, because it did not comply with the law relating to the killing of stock, setting sections 10 and 11 in operation and making them effective as to plaintiff. There is no pleading, proof, or claim that the company complied with such conditions. Plaintiff's voluntary act in filing such claim with the station agent before bringing suit was unnecessary, merely gratuitous, and fixed no limitation upon his right to sue and

recover the full value under sections 1, 2, 3, and 4. We have held that a compliance with the act was a necessary condition precedent to putting sections 10 and 11 into operation. *C., R. I. & P. Ry. Co. v. Eyster*, 160 Pac. 1181.

[2] We cannot allow admissions of counsel to control as to the construction of an act of the Legislature. The foundation of the suit is not a failure to pay a demand filed with the station agent. The action is based upon negligence for failure to fence the railroad at a point where it was required to be inclosed. The complaint pleads the ultimate facts constituting such negligence, which is clearly established by the evidence. Defendant makes no attempt by pleading or proof to overcome this liability by showing that the railroad was inclosed, or that the stock got on the track at places where the company was not required to fence, or to exonerate the company in any way from negligence. At the points where the animals were killed, the road was required to be inclosed, and, in the absence of evidence to the contrary, it will be presumed these points were the points where they came upon the railroad. 33 Cyc. p. 1281 (c).

3. But if we concede, for the sake of the argument, that the owner by filing his claim with the station agent waived the conditions precedent and voluntarily brought himself within the provisions of sections 10 and 11, defendant is in no better position because the suit was brought within six months from the date of filing such claim.

[3] 4. Defendant claims that portion of the statute allowing legal interest on the claim from the date the animal was killed is unconstitutional. If that be conceded, which it is not, it makes no difference. The jury allowed plaintiff no interest.

[4] 5. The evidence showed that the section foreman found the dead animals along the side of the track, skinned them, and burned the carcasses as required by law, and sent a report of his acts to the claim agent. Plaintiff procured an order from the court, allowing him to inspect these records, and the company, under protest, produced them in open court on the trial in response to such order. The deposition of the section foreman was taken by plaintiff and read in evidence, in which he testified, both upon direct and cross examination, to finding the dead animals along the track at places where the road was required to be fenced and was unfenced, and that the marks and bruises upon them, hair upon the ties and marks in the snow and upon the banks and ground, showed that the animals had been killed by coming in contact with a train. The evidence was conclusive that the animals were killed by engines or cars upon the unfenced portion of the railroad where it was required to be fenced. In connection with the section fore-

man's deposition read to the jury, plaintiff was allowed to introduce in evidence these reports made by him to the claim agent and apparently some kind of a book kept by the section foreman, to the admission of which error is assigned. Plaintiff claims that these were properly admitted as a part of the res gestæ, in which we do not concur. *Salas v. People*, 51 Colo. 461-464, 118 Pac. 992, 37 L. R. A. (N. S.) 252. The book was not preserved in the record or bill of exceptions; it is not before us, and we have no way of knowing its contents. Conceding, but not deciding, that it was error to admit in evidence these section foreman reports, the error was harmless, because he testified orally upon direct and cross examination to all the matters contained in the written documents, and the evidence shows so conclusively that the animals were killed by coming in contact with trains on the unfenced portion of defendant's railroad, where the law required it to be fenced, and about which there is no controversy, that the error, if any, was harmless. Judgment affirmed.

Affirmed.

SCOTT, J., not participating.

(64 Colo. 306)

DENVER & R. G. R. CO. EMPLOYÉS' RELIEF ASS'N et al. v. RISHMILLER et al. (No. 8750.)

(Supreme Court of Colorado. March 4, 1918.)

MASTER AND SERVANT—78—EMPLOYÉS' RELIEF ASSOCIATION—ULTRA VIRES ACTS.

Where railroad employés' relief association was incorporated to collect monthly dues to create a fund to treat and care for injured and diseased members, and to run a hospital and employ physicians, etc., but there was no provision in its certificate, constitution, or by-laws prohibiting the admission of nonmembers, and the association was able to secure services of competent surgeons at small salaries by allowing them, when there was room in the association hospital, to take in nonmembers and collect from such patients fees for medical services, such receiving of nonmember patients was within the general scope of the purposes of association, by implication, and was not ultra vires.

En Banc. Error to District Court, Chaffee County; Charles A. Wilkin, Judge.

Action by George H. Rishmiller and another against the Denver & Rio Grande Railroad Company Employés' Relief Association and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

E. N. Clark, R. G. Lucas, and T. M. Stuart, Jr., all of Denver, for plaintiffs in error. G. K. Hartenstein and H. L. McGinnis, both of Buena Vista, for defendants in error.

GARRIGUES, J. All the officers and regular employés of the Denver & Rio Grande Railroad Company constitute the members of an association or corporation, not for pecuni-

ary profit, called the Denver & Rio Grande Railroad Company Employés' Relief Association, which was defendant below and is plaintiff in error here. The association was established in 1888 under section 224, p. 155, Gen. Laws 1877. The certificate filed in the office of the secretary of state states the purposes of the association are to collect monthly dues from the members for the creation of a fund to be used for the employment of every proper and desirable agency in the treatment of all such injuries and diseases of the members as it may see fit to undertake, to build, lease or rent, furnish and equip hospitals, employ physicians and surgeons and nurses, and to purchase medical and hospital supplies.

The constitution and by-laws provide that the general object of the association is to create a fund for the purpose of furnishing medical and surgical treatment to its members under certain provisions and restrictions. The membership is involuntary, and includes all officers and regular employés of the railroad company. All contributing employés of the company are entitled to the benefit of the relief fund; members who work less than one-half a month paying 25 cents, and those who work one-half month or more contributing 50 cents a month, which is deducted from their pay roll and turned over to the treasurer of the association. This fund must be devoted exclusively to the payment of legitimate expenses and the furnishing of relief to sick and disabled employés. The treasurer of the railroad company is ex officio treasurer of the association, and disburses its funds under direction of a board of trustees consisting of eleven members, six of whom are chosen by the employés and five are appointed by the general manager of the company. These trustees have general supervision over the affairs of the association, and are required to make such rules and regulations respecting the treatment of patients in the hospitals as they deem proper in furthering the objects of the association. All hospital and medical and surgical treatment are under the control and direction of the medical department of the Denver & Rio Grande Railroad Company, the chief surgeon of which is ex officio chief surgeon of the association, and, as such, has the management of its hospitals and medical service and appointing of the medical staff. The hospitals are required to be open at all times for the reception of sick or injured employés, but to secure admission to the hospitals and be entitled to the benefits of the relief fund the applicant must be a contributing employé of the company. Any such employé at his request is entitled to be admitted to the hospital, where his board, care, and treatment shall be free. The division surgeons have charge of the hospitals established in their respective divisions, and it is their duty to

see that no patient remains in the hospital after he is in a condition to be discharged.

In 1888 the association constructed a hospital at Salida, in Chaffee county, which it has since maintained and operated. Two division surgeons were appointed to take charge of this hospital; one, the head surgeon, to receive a salary of \$150, and the other \$125, per month. These amounts have never been increased because the funds of the association did not justify the payment of larger salaries. To induce competent surgeons to accept the positions, the chief surgeon and the board of trustees permitted them to take or admit nonmember patients who paid to the association the regular or usual hospital charges; the operating surgeon being permitted to charge and collect from the patient a fee for the operation or treatment, the amount of which was a matter of agreement between the patient and doctor. No physician or surgeon is permitted to have patients or to operate at the hospital except members of the hospital staff, and no nonmember patient is admitted, to the detriment of any member patient. This system has been followed since 1888 to the present time.

This suit was brought in equity by defendants in error to enjoin plaintiffs in error from receiving or treating medically or surgically in the hospital at Salida persons who are not members of the association. The court found with defendants below upon all disputed questions of fact, but entered judgment for plaintiffs, basing its decision entirely upon the certificate of incorporation filed with the secretary of state and holding as a matter of law that the reception of nonmembers into the hospital for medical or surgical treatment was *ultra vires*; that is, was unlawful and in violation of the charter powers of the association as evidenced by the certificate.

1. But one question will be considered: Is the admission and treatment of nonmember patients at the association hospital at Salida *ultra vires*? No doubt the ultimate object of the association is to treat and care for injured members. There is nothing, however, in the certificate, constitution, or by-laws which provides that the hospital shall be for the exclusive use of the members of the association, or prohibiting the admission of nonmembers. The evidence shows that since its organization in 1888, the association has paid the members of the medical and surgical staff at the Salida hospital very small salaries, and that the surgeons have accepted the positions under an agreement and understanding with the association authorities that they should be permitted to take into the hospital nonmember patients and collect from such patients medical and surgical fees for their services. No part of the association funds are expended upon such patients; they have been admitted only when there was ample room in the hospital for receiving and treating them, and no member patient has been

neglected or inconvenienced by reason of their admission and treatment.

The receiving of such nonmembers as patients was not carrying on or transacting a separate and distinct business from that for which the association was formed, and was not forbidden by the certificate, constitution, or by-laws. We do not propose to enter into a lengthy discussion concerning the implied powers of such an association. We think, under the circumstances of this case, that the treatment of nonmembers in the manner pursued comes within the general scope of the purposes of the association, by implication, and there is no express restriction against it. The lower court erred in holding the act to be *ultra vires*. *Union Gold M. Co. v. Rocky Mt. Bank*, 2 Colo. 248-256; 10 Cyc. pp. 1096, 1097, 1155; 1 *Cook on Corporations* (7th Ed.) par. 3; *Gas & Fuel Co. v. Dairy Co.*, 60 Ohio St. 96, 53 N. E. 711.

The judgment is reversed, and the cause remanded, with directions to dismiss the action.

Reversed and remanded.

SCOTT, J., not participating.

(24 N. M. 331)

STATE v. CRUMP. (No. 2194.)

(Supreme Court of New Mexico. March 4, 1918.)

(Syllabus by the Court.)

FINES $\$17\frac{1}{2}$ —DEATH OF DEFENDANT PENDING APPEAL—ABATEMENT.

A judgment imposing a fine in a criminal case abates on the death of the defendant pending an appeal or writ of error, and the fine imposed cannot be enforced against the estate.

Appeal from District Court, Roosevelt County; Richardson, Judge.

Thomas Crump was convicted of assault with a deadly weapon, and he appeals, and, upon his death pending appeal, his administratrix, Bessie L. Crump, applied to be substituted as appellant. Proceeding ordered to abate.

George L. Reese, of Portales, for appellant. Harry L. Patton, Atty. Gen., for the State.

HANNA, C. J. Thomas Crump was convicted of assault with a deadly weapon in the district court for Roosevelt county. He was fined \$200 and costs and from that sentence he has perfected this appeal.

During the pendency of this appeal Crump died. Bessie L. Crump, administratrix of the estate of Thomas Crump, has applied here to be substituted as appellant.

The general rule is that a judgment imposing a fine in a criminal case abates on the death of the defendant pending an appeal or writ of error, and the fine imposed cannot be enforced against the estate. 8 R. O. L. "Criminal Law," § 283. See, also, *United*

States v. Dunne, 178 Fed. 254, 97 O. C. A. 420, 19 Ann. Cas. 1145, and cases collected in note thereto. The reasons which underlie the rule are discussed therein.

For the reasons stated, the proceedings in this action will abate; and it is so ordered.

PARKER and ROBERTS, JJ., concur.

(24 N. M. 332)

ESCHILMAN v. VERNON et al. (No. 2050.)
(Supreme Court of New Mexico. March 6, 1918.)

(Syllabus by the Court.)

ANIMALS §50(1) — HERD LAW—CONSTITUTIONALITY.

Chapter 94, Laws 1909, known as the "Herd Law," was a constitutional enactment. *Scarborough v. Wooten*, 170 Pac. 743, adhered to.

Appeal from District Court, Quay County; Leib, Judge.

Action by D. R. Eschilman against W. R. Vernon and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Catron & Catron, of Santa Fé, for appellants. H. H. McElroy, of Tucumcari, for appellee.

HANNA, C. J. This case involves the constitutionality of chapter 94, Laws 1909, known as the "Herd Law." The trial court held the act valid, and entered judgment for appellee. The objections urged to the act were fully considered by this court in the recent case of *Scarborough v. Wooten*, 170 Pac. 743, decided at the present term. Adhering to that opinion, the judgment in this case will be affirmed; and it is so ordered.

PARKER and ROBERTS, JJ., concur.

(24 N. M. 274)

MORGAN v. DOUGHTON. (No. 2076.)
(Supreme Court of New Mexico. Feb. 23, 1918.)

(Syllabus by the Court.)

1. PLEADING §34(1) — CONSTRUCTION — PRAYER—CAUSE OF ACTION.

The prayer is no part of the pleading, and cannot be used as a test to determine the nature of the cause of action stated.

2. PLEADING §34(7) — CONSTRUCTION — ON APPEAL—COMPLAINT.

Attacks upon the sufficiency of a complaint, made for the first time on appeal, will be determined in the light of the rule that the complaint will be liberally construed in order to uphold the judgment, and if it contains allegations from which every fact necessary to maintain the action may be inferred, it will be sustained.

3. APPEAL AND ERROR §1010(1)—REVIEW—FINDINGS.

Where there is substantial evidence to support findings and judgment of trial court, same will not be disturbed on appeal.

Appeal from District Court, Curry County; Richardson, Judge.

Action by J. W. Morgan against C. F.

Doughton. Judgment for plaintiff, and defendant appeals. Affirmed.

W. A. Havener and Rowells & Reese, all of Clovis, for appellant. A. W. Hockenhull, of Clovis, for appellee.

PARKER, J. From a judgment rendered against him in the district court for the county of Curry, the appellant, C. F. Doughton, has perfected this appeal.

The complaint, eliminating surplusage and matter of evidence, alleged, in substance and effect, that appellant and appellee, W. J. Morgan, about November 20, 1914, entered into a verbal contract by the terms of which appellant agreed to deliver to appellee 100 head of cattle, and appellee agreed to feed the same on premises controlled by him; that appellant was to "shrink" said cattle for 24 hours prior to delivery to appellee, then weigh the same and deliver same to appellee; that appellee was to feed said cattle from stock feed then owned by him and in his possession, the same constituting appellee's 1914 crop, until the same was consumed, whereupon said cattle were to be weighed and returned to appellant; that for such service appellee was to receive compensation sufficient, appellant assured him; to pay off and discharge a certain note and mortgage held by appellant against the appellee; that 60 head of cattle were delivered to appellee, under the terms of said contract, and fed by the latter until his crop was consumed, whereupon an additional verbal contract was made by the parties, by the terms of which appellee continued in the possession of said cattle, the appellant agreeing to pay for feed purchased by appellee for the continued feeding of said stock, appellee agreeing to haul the same; that appellee was compelled to haul said feed, employ labor and two teams, at a reasonable cost of five dollars per day, which he did for 55 days, when said cattle were shipped to market by appellant. Numerous other facts are alleged tending to show, among other things, that the cattle were watered immediately preceding the time when they were first weighed and delivered to appellee; that appellant asserts that appellee is indebted to him in the sum of \$112 on account of this transaction, and that he refuses to cancel said note and mortgage. Cancellation of the note and mortgage was prayed, as well as an injunction restraining the foreclosure thereof, and a money judgment in the sum of the said note and mortgage, together with \$100 on account of appellant's failure to shrink said cattle and \$275 for labor performed in feeding and caring for said cattle for said 55 days. An accounting was also prayed.

Appellant answered, denying the material allegations of the complaint, and alleging that appellee agreed to feed said cattle at his

own expense, and receive as his compensation therefor the market value of the flesh put on said cattle by such feeding as such market price existed in Kansas City, Mo., when the cattle were delivered there; that after appellee's feed was exhausted appellant loaned appellee a sum of money to purchase additional feed; that a settlement was subsequently made between the parties, whereby it was found that appellee was indebted to the appellant in the sum of \$112, which has not been paid. Appellant asked that he have judgment for that sum.

[1] 1. The appellant contends that the complaint stated no cause of action because it pretended to state facts showing an equitable cause of action to exist in favor of appellee, without disclosing that he did not have an adequate remedy at law. But little need be said in this regard. The complaint does not seek equitable relief. The facts stated therein indicate that appellee was attempting to recover upon two causes of action, both in law, and not in equity. There was a misjoinder of causes, in that two causes were stated in a single count. Advantage was not taken of this, however. One count was for money due under the first contract; the other for the value of labor under the second contract. The prayer, it is true, sought relief which could only be given in a court of equity, but the prayer is no part of the pleading, and cannot be used as a test to determine the nature of the cause of action stated. *Burnham-Hanna-Munger Dry Goods Co. v. Hill*, 17 N. M. 347, 354, 128 Pac. 62.

[2] 2. Appellant argues that the complaint does not allege that there is anything due to appellee on account of the increased weight placed on said cattle by his feeding of them, and that no contract is alleged to exist whereby appellant became bound to pay \$5 per day for labor connected therewith. Neither proposition was urged against the complaint in the trial court, and consequently the complaint will be liberally construed in order to uphold the judgment, and if it contains allegations from which every fact necessary to maintain the action may be inferred, it will be sustained. *Cleveland v. Bateman*, 21 N. M. 675, 683, 158 Pac. 648.

The complaint alleges facts sufficient to show that appellee, under the first contract, was to receive compensation for his feed and services in an amount sufficient to pay off and discharge the note and mortgage held by appellant, the fixing of the compensation being based upon the value of the increased weight put upon the cattle by appellee. The facts inferable from what is alleged disclose that such sum was due and unpaid. With reference to the second verbal contract having to do with the care and feeding of the cattle after the first contract had expired, there is sufficient alleged to entitle appellee to recover at the value of the labor performed

in connection therewith. The same conclusion follows with reference to appellant's argument that the complaint does not sustain the judgment with reference to damages under the first contract.

[3] 3. Appellant attacks the sufficiency of the evidence to support the findings and judgment to the extent of holding that appellee was entitled to compensation for feeding and taking care of said animals for about 60 days after the expiration of the first contract. There is substantial evidence to support the finding and judgment; hence the same will not be disturbed on appeal.

4. Exception is taken to the refusal of the trial court to accept the second finding proposed by appellant. It constituted a statement of appellant's version of the second verbal contract. The terms thereof were in dispute, and there was a conflict of evidence thereon. It was a matter of fact for the determination of the trial court, and conclusion of the trial court thereon, being sustained by substantial evidence, will not be disturbed on appeal. The finding as tendered contained matter which the trial court determined was not true, and consequently it properly refused to accept it.

5. The trial court, in effect, held that appellee was entitled to the reasonable value of labor made necessary in caring for said cattle after the expiration of the first contract. Appellant argues that he was entitled to a judgment for the difference between the value of the feed purchased by him and the value of the gain in weight placed on the cattle, amounting to \$62, because no contract was made by the parties with reference to caring for the cattle at that time. The argument is based upon a false premise, in that the trial court held, and the finding its supported by substantial evidence, that while no "specific contract" was made between the parties, still the "plaintiff, at the request of the defendant continued to hold and feed said cattle for about 60 days longer."

For the reasons stated, the judgment of the trial court is affirmed; and it is so ordered.

HANNA, C. J., and ROBERTS, J., concur.

(23 N. M. 696)

COOPER v. HILLS. (No. 2048.)

(Supreme Court of New Mexico. Feb. 16, 1918.)

(Syllabus by the Court.)

1. TAXATION \S 788(9)—TAX TITLE—DEED—PRESUMPTION—BURDEN OF PROOF.

Assuming that section 4101, C. L. 1897, is in force, the prima facie case made thereunder by introduction of tax deed held overcome by proof that assessment was made in the name of a person not the owner of the property.

2. TAXATION \S 734(3)—ASSESSMENT—SALE—VALIDITY.

An assessment made in name of stranger to title is irregular under chapter 22, Laws of

1899, and sale under chapter 84, Laws 1913, based upon such assessment, *held void*.

Appeal from District Court, Chaves County; McClure, Judge.

Suit by Eva M. Cooper against James H. Hills and another. Judgment for plaintiff, and defendant Hills appeals. Affirmed.

R. D. Bowers, of Roswell, for appellant. Ed S. Gibbany and I. S. Epstein, both of Roswell, for appellee.

HANNA, C. J. This suit was instituted in the district court for Chaves county by Eva M. Cooper, the appellee, against J. C. Ellis and Amelia E. Ellis, his wife, upon a promissory note for \$1,250, with interest and attorney's fees, and to foreclose a mortgage upon real estate given to secure the payment of said note. The note and mortgage were executed on June 17, 1910. The appellant James H. Hills was made a party defendant upon the allegation that he claimed some interest in the mortgaged property under an alleged mortgage lien. This the appellant denied, asserting that he owned the property in fee simple and that his title thereto should be quieted as against the alleged interest therein of appellee. Appellee introduced in evidence the note and mortgage and other documentary evidence of ownership thereof, and rested. Appellant introduced in evidence a tax deed, dated June 9, 1916, conveying the property to Lyman A. Sanders, and a quitclaim deed from Sanders and his wife and another to appellant, dated July 8, 1916. The tax deed recited that the property had been assessed for taxation purposes in the year 1911 against S. R. Hobbie, the owner, and the taxes having become delinquent the property was sold, according to law, to the county; the duplicate certificate of sale having been thereafter assigned to Sanders. It was recited that the sale for delinquent taxes took place on March 27, 1913. Thereupon, the appellee rested. A certified abstract of title to said property was then introduced in evidence by the appellee, which disclosed that S. R. Hobbie was never the owner of said property, and that in 1911 the title thereof stood in the name of J. C. Ellis, one of appellee's mortgagors. The proof of appellee also disclosed that Ellis and wife executed their mortgage deed on the lands in question, in favor of appellant on September 5, 1913.

[1] 1. In the opinion and findings of the trial court, it was stated that section 4101, C. L. 1897, had been repealed because not carried forward or inserted in the Code of 1915, and consequently the burden of proving the recitals of a tax deed rested upon the one who was claiming thereunder. But it went further, and, for the purpose of determining the merits of the question presented, assumed that said section was in full force and effect and held that the prima facie case made thereunder by the appellant had been overcome by proof of appellee show-

ing that the property was assessed in the name of a stranger to the title. The case of Mitchell v. Fietze, 20 N. M. 583, 590, 151 Pac. 235, was cited by the trial court as its authority for that holding. In that case one of the defects in the assessment was in making the same against the heirs of named persons. The law required assessment to be made in the name of the owner or against "unknown owners." The court held that proof of the assessment as so made overcame the prima facie case made by the tax deed under section 4101, C. L. 1897. That case is decisive of this proposition and is ample authority for sustaining the conclusion of the trial court on this question, assuming that said section is still in force.

[2] 2. Appellant, however, goes a step farther and contends that the assessment of 1911 was valid when made, because of the force of the curative provisions of section 25, c. 22, Laws of 1899, and consequently cannot be attacked now. That portion of said section material to this inquiry is as follows:

" * * * And if such property is described * * * for any year by such description as will serve to identify the same, the sale of such property for taxes * * * shall not be void or set aside on account of any error or irregularity in listing the same upon such roll * * * either as to the name or names of the owner or owners thereof, or by reason of its being listed in the name of the wrong person. * * *"

This section has been before the court on several occasions. In Straus v. Foxworth, 16 N. M. 442, 117 Pac. 831, and *Id.*, 231 U. S. 162, 34 Sup. Ct. 42, 58 L. Ed. 168, it was considered in conjunction with other provisions of the act and held to preclude the invalidation of a tax sale made thereunder except upon jurisdictional grounds. See, also, Maxwell v. Page, 23 N. M. —, 168 Pac. 492. That an assessment made in the name of the wrong person, where the owner fails to observe his statutory duty in listing the property or seeing that it is properly listed, constituted a defect or irregularity which would not vitiate a sale made under the tax law of 1899, was decided in Knight v. Fairless, 23 N. M. —, 169 Pac. 312. But that case is not decisive of the question now under discussion, because there the sale was made under the act of 1899; whereas, here the sale was made under the act of 1913.

Chapter 22, Laws of 1899, was repealed by chapter 84, Laws of 1913, and the latter act was in effect when the sale was made in the case at bar. The cases of Crane v. Cox, 18 N. M. 377, 381, 137 Pac. 589, and Glasgow v. Peyton, 22 N. M. 97, 101, 159 Pac. 670, are authority for the proposition that, upon said repeal of the laws of 1899, the only law in force for the sale of property for delinquent taxes was chapter 84, supra, with the exception of section 5509, Code 1915, which prescribes a remedy by "judicial proceedings." The assessment in 1911 was irregular, in that the law then required that it should be made in the name of the owner of the property or

in the name of unknown owners. Sections 4028 and 4040, C. L. 1897. But while it was irregular in that respect, the Legislature saw fit to provide that such irregularity should not vitiate the sale made by virtue of such assessment and its delinquency. In 1913, however, this was changed; no healing or curative provisions having been inserted in the act of 1913. Nor did the act contain a savings clause. Consequently, sales for delinquent taxes made after the act of 1899 was repealed are governed by the law in force at the time the sale is made. The appellant, having acquired no rights under the tax sale law of 1899, cannot invoke the provisions of that law in defense of the sale under the act of 1913. If a right had been acquired under the tax sale law of 1899, a different question would be presented. The sale in the case at bar must be held invalid on the ground that the assessment upon which it was founded was irregular. *Territory v. Perea*, 10 N. M. 362, 370, 62 Pac. 1094.

The judgment of the trial court will therefore be affirmed, and it is so ordered.

PARKER and ROBERTS, JJ., concur.

(23 N. M. 704)

In re COAL RATES IN NEW MEXICO.
(No. 2135.)

(Supreme Court of New Mexico. Feb. 16, 1918.)

(Syllabus by the Court.)

1. PUBLIC SERVICE COMMISSIONS ⇐22—PROPOSED ORDER—BURDEN OF PROOF—REASONABLENESS.

The burden of producing evidence, to warrant a proposed order by the state corporation commission, rests upon the commission, where it initiates the proceeding, and the Supreme Court can determine the reasonableness or the lawfulness of an order made by it only upon the evidence adduced before the commission and presented to the court by the record.

2. CARRIERS ⇐12(1, 7)—POWER OF COMMISSION—SUSPENSION OF PROPOSED TARIFF—BURDEN OF PROOF.

Neither by the Constitution nor by statute is the commission given the power to suspend a proposed tariff, and the law does not cast upon a railway company the burden of justifying a rate or proposed tariff.

3. CARRIERS ⇐12(7)—RAILROAD RATES—ORDER OF COMMISSION—BURDEN OF PROOF.

The state corporation commission cannot cast the burden of justifying a rate upon the carrier, by serving it with an order to show cause why a given rate should not be established.

In the matter of the increase of 15 cents per ton over and above the rates now in force for the transportation of coal between points in New Mexico by railroad companies operating therein. Proceeding removed to Supreme Court by state corporation commission to secure enforcement of order. Order of commission declared unenforceable.

Harry L. Patton, Atty. Gen. (H. S. Clancy, of Santa Fé, of counsel), for Corporation Commission. H. C. Reid, C. M. Botts, and George S. Downer, all of Albuquerque, for Atchison, T. & S. F. Ry. Co. and others. Hawking & Franklin, of El Paso, Tex., for El Paso Southwestern R. Co. and Arizona & N. M. Ry. Co.

ROBERTS, J. This proceeding was removed to this court by the state corporation commission pursuant to section 7 of article 11 of the state Constitution, for the purpose of securing the enforcement of an order made by the commission relative to rates for the transportation of coal. The transcript of the proceedings before the state corporation commission shows the following:

First. That on the 8th day of August, 1917, the commission, reciting therein that the defendants, having filed tariffs with the commission showing an increase of 15 cents per ton over and above the rates then in force for the transportation of coal between points in New Mexico, the same to become effective on August 20, 1917, ordered the defendants to show cause before the commission on the 18th day of August, 1917, why the rates then in force for transportation of coal by the defendants between points in the state should not be and continue in effect until otherwise fixed and determined by the said commission.

Second. That the defendants appeared on the date named, when the commission, without any evidence being introduced before it showing, or tending to show, that the proposed increase of the defendants' rates would be excessive, unjust, or unduly compensatory, or that the existing rates were just or fairly compensatory; but, on the contrary, through the chairman of its body announcing substantially that it had already reached a conclusion in the matter, without stating, however, what such conclusion by testimony or other evidence, if they could, stating, among other things "We would not be readily disposed to reconsider the matter."

Third. That the defendants, protesting, among other things, that the commission had no right to enter such an order until the same was properly sustained by evidence before it, with the opportunity on the part of the defendants to rebut the same, declined to introduce any evidence or make such showing until the commission had placed them in that position, and thereupon the commission closed the hearing; but, thereafter, and on the same day, without making any findings upon which to base the same, issued the order requiring the defendants to continue the rates then existing until the further order of the commission.

Fourth. That the commission, on the 10th day of September, 1917, reciting in its order that it was "reliably informed and believes that the said railway companies, on the 20th day of August, 1917, and ever since the said

date, in direct disobedience and disregard of the order of the said commission, have been charging and collecting an amount for the transportation of coal between points in this state, 15 cents per ton over and above the rates which were in force on the 8th day of August, 1917," directed that this cause be removed to this court.

All the common carriers in the state were served with notice and appeared at the hearing.

[1, 2] The Attorney General appearing for the state corporation commission in this court admits that no evidence was introduced by the commission, and there is none in the record, showing that the proposed new rates were excessive or unjust, or that the old rates which were continued in force by the order of the commission were reasonable and proper. The order of the commission is attempted to be justified upon the theory that the burden of proof rested upon the railroads, and that they were required to show that the proposed increase in rates was justifiable; that the railroads having failed to introduce any evidence in support of the increased rates were in default, and being so in default, under section 8 of article 11 of the Constitution, the commission properly entered the order suspending the rates. Section 7 of article 11 of the Constitution gives to the commission the power and makes it its duty to fix, determine, supervise, regulate, and control all charges and rates of railway and other companies. Under the Constitution, orders of the commission, before being enforceable, must be passed upon by the Supreme Court; and in the case of *Seward v. D. & R. G. R. R. Co.*, 17 N. M. 567, 131 Pac. 980, 46 L. R. A. (N. S.) 242, and *Woody v. D. & R. G. R. R. Co.*, 17 N. M. 686, 132 Pac. 250, 47 L. R. A. (N. S.) 974, we held that by such requirement it was intended that such orders could not be held valid and enforced by the court, unless based upon sufficient evidence heard by the commission and preserved in the record. In the latter case we said:

"This court can determine the reasonableness and lawfulness of an order made by the commission only upon the evidence adduced before the commission, and presented to this court by the record. It is the duty of the commission to develop such evidence as will show that the order made by it is reasonable and lawful."

Neither by the Constitution nor by statute is the commission given the power to suspend a proposed tariff, and in no event is the burden cast upon the railway company or public utility corporation to justify a rate or proposed tariff. The burden rests upon the commission to produce evidence warranting its action in fixing a rate, or other action taken. This being true, the common carriers were not in default in this case.

[3] No formal complaint was filed with the commission. The proceeding was instituted by an order served upon the carriers to show

cause why the rates then existing should not be continued in force and effect. The carriers were not, under the practice adopted by the commission in this case, required to file formal answer, for there was no complaint or issue presented which they could answer. They appeared on the date set and announced that they were prepared to introduce evidence to rebut any showing made by the commission as to the unreasonableness of the proposed rates. No evidence was introduced by the commission which tended to show either the reasonableness of the old rates or the unreasonableness of the proposed new rates. For this reason it was not incumbent upon the carriers to introduce any evidence. On behalf of the commission it is contended that because the railroads, by the order issued by the commission, were required to show cause, thereby the burden was cast upon the railroads to introduce evidence in the first instance, showing justification for the proposed increase.

The Constitution casts the burden upon the commission of supporting its orders by proof justifying the same, and if the commission, by serving an order upon a carrier to show cause why certain rates should not be established, or a given act done or performed, could, by adopting such a course, place the burden of proof upon the commission, it could then circumvent the plain intent of the framers of the Constitution that the burden should be upon the commission.

The record in this court contains no evidence supporting the order made by the commission, and we must decline to enforce the same; and it is so ordered.

HANNA, C. J., and PARKER, J., concur.

(24 N. M. 268)

AMERICAN NAT. BANK OF SILVER
CITY v. WOOD et al. (No. 2120.)
(Supreme Court of New Mexico. Feb. 23,
1918.)

(Syllabus by the Court.)

1. PARTNERSHIP ¶52, 55—JOINT OWNERSHIP—RELATION—EVIDENCE.

Evidence of joint ownership in property is not sufficient in itself to prove partnership. Evidence examined, and held insufficient to hold parties liable as partners in fact.

2. PARTNERSHIP ¶56—RELATION—ESTOPPEL.

To charge one as a partner by estoppel or holding out it must be shown that he so conducted himself as to induce a reasonable person to deal with him in the honest belief that the partnership existed. The quantity or degree of proof necessary in such cases depends upon the facts and circumstances of each particular case.

(Additional Syllabus by Editorial Staff.)

3. PARTNERSHIP ¶43—ESTOPPEL—CONTRACT IN NAME OF PARTNERSHIP—LIABILITY.

One entering into a contract in the name of a firm which does not exist may be bound thereby.

Appeal from District Court, Grant County; Ryan, Judge.

Action by the American National Bank of Silver City, N. M., a corporation, against E. J. Wood, E. C. De Moss, and Elizabeth De Moss, partners doing business under the firm name of Wood & De Moss, and against Wood and De Moss. Judgment for plaintiff, against defendants Wood and Elizabeth De Moss, and they appeal. Affirmed as to Wood, and reversed as to Elizabeth De Moss, with instructions to grant her a new trial.

H. D. Terrell, of Silver City, for appellants. Vellacott & Fowler, of Silver City, for appellee.

PARKER, J. This action was brought in the district court for Grant county, by the American National Bank of Silver City, N. M., against Wood & De Moss, a copartnership, E. J. Wood, E. C. De Moss, and Elizabeth De Moss, partners, doing business under the firm name of Wood & De Moss. The action was for damages for breach of contract to deliver Angora mohair. From a judgment rendered against E. J. Wood and Elizabeth De Moss the appellants have perfected this appeal.

In substance and effect the complaint alleged that on August 7, 1916, W. A. Heather and the appellants made and entered into a written contract, by the terms of which "Wood & De Moss," a partnership composed of E. J. Wood, E. C. De Moss, and Elizabeth De Moss, agreed to sell, and Heather to purchase, all mohair clipped from appellants' Angora goats, delivery thereof to be made f. o. b. Lordsburg, N. M., on or before October 20, 1916; that the agreed purchase and selling price of said product was 35 cents per pound for clear, white, and clean mohair, 30 cents per pound for stained or colored, mohair, and 5 cents per pound for "tags"; that Heather made a partial payment of \$550, the balance of the purchase price to be paid upon the delivery of the mohair; that the approximate weight of said mohair was estimated at 5,500 pounds; and that it was agreed that Heather might assign said contract. The complaint also alleged that the said contract was assigned to appellee; that appellants refused to deliver said mohair, or any part thereof; that appellants clipped from said goats about 10,000 pounds of mohair of the market value of 55 cents per pound, and under these allegations the appellee prayed that a judgment might be rendered in his favor and against appellants for actual damages in the sum of \$2,000, punitive damages in the sum of \$1,000, and \$550 partial purchase price paid to appellants by appellee.

The separate answers of the appellants, in effect, denied the material allegations of the complaint, and alleged that no partnership existed between the appellants, and that the Angora goats and the mohair clipped from

them was the separate property of Elizabeth De Moss, and that neither E. C. De Moss nor E. J. Wood had any interest therein, and that Heather knew these facts at the time of the execution of said contract. The answer of Elizabeth De Moss alleged that, notwithstanding this knowledge on the part of Heather he induced Wood to execute said contract. Facts were also alleged showing that shortly after the execution of said contract Elizabeth De Moss advised Heather that she owned said goats and mohair, and that she did not care to sell the same, and therefore tendered to him the \$550, which he had paid to Wood. Heather refused to accept the tender, stating that the contract had been assigned to a third person.

[1] Eliminating for the present a consideration of questions concerning the admissibility of certain evidence, the principal proposition urged by appellants is that the evidence is insufficient to make the appellants liable to the appellee as partners. The evidence introduced on behalf of appellee discloses that Heather made an offer to E. C. De Moss to purchase mohair from him, and that De Moss, in the presence of Heather restated the offer to his wife, Elizabeth De Moss. The latter made no response to the offer, and seemed little interested in the matter. E. C. De Moss then, in the presence of Elizabeth De Moss, stated that they had better wait for Mr. Wood and talk the matter over with him, because he was an interested party. Thereafter negotiations were had between E. J. Wood, E. C. De Moss, and Heather, which resulted in the execution of said contract in the name of "Wood & De Moss." E. C. De Moss advised Heather that whatever he did in the premises was satisfactory to him, and according to the testimony of Heather he was led to believe that Wood, E. C. De Moss, and Elizabeth De Moss were interested in the mohair, and the goats. The evidence of Wood, testifying in behalf of appellee, was to the general effect that he was an employé of Elizabeth De Moss, and received \$20 per month and one-half of the proceeds derived from the sale of the mohair clipped from the goats belonging to Elizabeth De Moss. It also appears that Elizabeth De Moss advanced the money to meet the running expenses incident to the operation of the business, and that this money was deposited in an account in a bank to the credit of "Wood & De Moss." Wood testified that this arrangement was made to obviate his personal account from becoming confused with the account carried to meet the expenses of carrying on the goat business. Some of the checks used to draw money from this account bore the words "Wood & De Moss, by ———," whereas, those subsequently used bore only the words "Wood & De Moss," printed in the upper left-hand margin. It was not shown that Heather had any knowledge of these matters, or

that he relied thereon in dealing with the appellants.

1. We are satisfied that the evidence is insufficient to justify the conclusion that Elizabeth De Moss and Wood were partners in fact in said business. Wood was merely an employé of Elizabeth De Moss. His compensation for his services was fixed at \$20 per month and one-half of the proceeds derived from the sale of the mohair. We doubt that his interest in the mohair, under such circumstances, made him even a joint owner in the mohair. But even were he a joint owner of said property, this alone would not make him and Elizabeth De Moss partners. *Wormser & Co. v. Lindauer*, 9 N. M. 23, 29, 49 Pac. 896. Wood exercised no proprietary rights in the premises. He was a mere employé. Consequently the evidence will not justify the conclusion that Wood and Elizabeth De Moss were partners in fact.

[2] 2. The evidence is likewise insufficient to justify the conclusion that the action of Elizabeth De Moss in the premises made her liable as a partner. The only evidence approaching the fact is that her husband, E. C. De Moss, in her presence, stated to Heather that Wood was an "interested party." There is no evidence that Wood signed the contract at her instance or request, or that she had any knowledge of his action until it was consummated. Nor is there any evidence that she acquiesced in or consented to the arrangement made by Wood. In fact the only evidence on the subject indicates that, immediately after she ascertained that such a contract had been made, she took prompt steps to make it known that she had not given her consent to the sale of the mohair on the terms stated. In 2 Rowley on Modern Law of Partnership, § 906 et seq., will be found a full discussion as to the law concerning the quantum of proof necessary to charge one as a partner by estoppel. Among other things it is stated therein that "no absolute rule can be given as to the quantity or degree of proof necessary in such cases." The test seems to be whether or not the person sought to be charged so conducted himself as to induce a reasonable person to believe that a partnership existed, and deal with him upon that basis. Without restating the evidence on this point it is sufficient to say that it falls far short of a compliance with the rule. But little importance can be ascribed to the statement of Heather that he was led to believe that a partnership existed between appellants, because none of the facts to which he testified support the statement. It is evident that his impression was obtained, and rightly we believe, from the acts and conduct of Wood and E. C. De Moss, but the cause was dismissed as to the latter, so we need not consider his relation to this case. The statements made by E. C. De Moss had no binding effect upon Elizabeth De Moss. There is no

evidence that the latter permitted either her husband or Wood to hold her out as a partner to Heather. And there is no evidence that she was held out to Heather as a partner, nor that if held out as such that she had any knowledge thereof. The judgment as to Elizabeth De Moss must therefore be reversed.

[3] 3. The evidence, however, is amply sufficient to hold Wood liable on the contract. In the name of "Wood & De Moss" he undertook to contract for the sale of mohair to appellee's assignor. He admitted that there was no such firm in existence. He contracted for himself and for some other person named "De Moss," but just who that person was is immaterial so far as his liability is concerned. Evidently he contracted for himself and assumed to contract for Elizabeth De Moss, but was without right or power to contract for her. So far as this case is concerned, no firm was in existence doing business under the name of "Wood & De Moss" at the time Wood executed this contract. Under such circumstances he made himself individually liable. The rule is stated in 30 Cyc. 531, as follows:

"One entering into a contract in the name of a firm which does not exist * * * may be bound thereby."

Consequently there is no doubt as to the liability of Wood to appellee.

4. Appellants contend that the court erred in permitting the introduction of evidence tending to show that "Wood & De Moss" were listed in the official Wool Growers' Association of the United States. In view of our conclusion that no partnership existed between Wood and Elizabeth De Moss, and as this evidence is directed to showing that such relation did exist, it is rendered immaterial. But an additional reason exists for holding that the court did not err in this respect. The record discloses that preliminary proof concerning this matter was admitted, but that proof tending to show the fact itself was rejected.

5. Appellants contend that evidence of general reputation to prove the existence of a partnership is inadmissible, unless shown to have been known or acquiesced in by party to be charged. This likewise is rendered immaterial, in view of our conclusion that neither a partnership in fact nor by estoppel existed between the parties. The same applies to other objections made by appellants.

Several other propositions are argued by appellants, but none of them are of such serious import that our conclusions thereon would warrant a reversal of the case as to Wood.

For the reasons stated, the judgment will be affirmed as to Wood and reversed as to Elizabeth De Moss, with instructions to grant her a new trial; and it is so ordered.

HANNA, C. J., and ROBERTS, J., concur.

(33 N. M. 700)

**TORRES v. BOARD OF COUNTY COM'RS,
SOCORRO COUNTY. (No. 2118.)**(Supreme Court of New Mexico. Feb. 16,
1918.)*(Syllabus by the Court.)***1. COUNTIES ⇨113(4)—PUBLIC PRINTER—
DELINQUENT TAX LIST—REPEAL OF STAT-
UTE.**

Section 1234, Code 1915, which impliedly authorizes the county commissioners of each county in the state to select a public printer and requires all county officers to employ the said printer for all county printing, has no application to the publication of the delinquent tax lists of the county, as later enactments (section 5495, Code 1915, and section 1, c. 58, Laws 1915) impliedly repeal the first-named section, in so far as the publication of such lists is concerned.

**2. COUNTIES ⇨206(3)—REJECTION OF CLAIM
—SUIT.**

A party presenting a claim against a county, to the board of county commissioners for allowance, such claim being rejected, may sue the county thereon, even though a right of appeal exists from such disallowance.

Appeal from District Court, Socorro County; Mechem, Judge.

Action by Anastacio C. Torres against the Board of County Commissioners, Socorro County. Judgment for plaintiff, and defendant appeals. Affirmed.

H. P. Owen, Dist. Atty., of Los Lunas, and W. J. Eaton, Asst. Dist. Atty., of Socorro, for appellant. Bray & Bunton, of Socorro, for appellee.

ROBERTS, J. Appellee sued appellant, the board of county commissioners of the county of Socorro for \$854.68, and interest thereon, alleged to be due and owing for the publication by appellee of the list of delinquent taxes of Socorro county. The publication was made in 1915 on an order of the treasurer and ex officio tax collector of said county and was made in Spanish in a newspaper published by appellee in said county and of general circulation therein. In July, 1915, appellee presented his claim for such services to the board of county commissioners, which claim was rejected, and from which no appeal was taken.

Appellant admitted the publication was made on an order of the county treasurer as alleged, but set up two separate defenses; First, that the board of county commissioners in February, 1915, selected and appointed a county printer under and pursuant to the provisions of section 1234, Code 1915, and that it was the duty of the county treasurer to have published such delinquent tax list in the official newspaper so designated by it; that, the delinquent tax list not having been published in such official paper, the publication thereof was without authority of law, and for which no liability existed on the part of the county. The second defense was that, as appellee had pre-

sented his claim to the board of county commissioners and the same had been disallowed and no appeal was taken from such action, appellee could not maintain a separate suit therefor. The trial court held there was no merit in either of the special defenses and entered judgment for appellee.

[1] It is the contention of appellant that said section 1234, Code 1915, which reads as follows: "When the county commissioners of the several counties have chosen a county printer, each county official shall employ the said printer for all county printing within his control"—authorizes the board of county commissioners to designate a county printer, which it did, and that thereupon the county treasurer was without authority to employ any other person to publish such delinquent tax lists. Appellee contends that this section has no application to the publication of delinquent tax lists.

Section 1234 was originally section 2 of chapter 31, Laws 1891, and as enacted undoubtedly had the effect contended for by appellant. Said section 2 concluded with the words, "including the printing of tax sales and other legal work." These words were dropped out when the Code was adopted by the Legislature in 1915, evidently because of subsequent legislation which was deemed inconsistent. In the tax laws of 1899 (chapter 22, § 15), it was made the duty of the tax collector to prepare and cause to be published in the official newspaper of said county, if one was published therein, the delinquent tax list. In 1913, however, by chapter 84, § 34, it was made the duty of the county treasurer and collector to publish such list "in some newspaper published in the county or if there be no newspaper published in the county, then some newspaper published in the state and of general circulation in the county." By this section the duty was cast upon the treasurer to publish the list in a newspaper published in the county, if one was published therein, and he was authorized to select the medium of publication. For this reason evidently the latter portion of section 2, c. 31, Laws of 1891, which read, "including the printing of tax sales and other legal work," was dropped from section 1234 of the Code of 1915 by the Legislature. And by section 1, c. 58, Laws 1915, enacted at the same session at which the Code was adopted, it was provided that the treasurer and ex officio collector should publish such tax list "in some newspaper published in and of general circulation in his county," if one was published therein, and it was further provided that, in any counties wherein a large proportion of the taxpayers were Spanish speaking, such notice should also be published in the Spanish language "as herein above provided" for the publication of such notice in the English language. Therefore he (the treasurer) was required to determine

whether the newspaper in which he proposed to publish such list fulfilled the requirements of the statute. Under section 1234, the public printer selected by the board of county commissioners was not even required to be the publisher of a newspaper, yet if appellant's contention is sound, if such public printer so selected had not been the publisher of a newspaper, it would be incumbent upon the treasurer to turn over to him the matter of the publication of such tax list, and such public printer would be the party charged with the selection of the newspaper in which such list should be published; but the later enactments plainly cast this duty upon the treasurer. Suppose, for example, there was no newspaper published in the county. Could it be contended that it would be the duty of the county treasurer and collector to turn over the tax list to the public printer selected by the board, and that such public printer should determine the newspaper published outside of the county in which the list should be published? And, further, under the last enactment, if the stated percentage of the inhabitants are Spanish speaking, then the tax list must be published in both English and Spanish. Would the public printer have the authority to select the Spanish paper in which the list should be published? We think not. By the latter statutes on the subject, the Legislature established a new rule for the publication of the delinquent tax list, and this rule so established impliedly repealed section 1234. In *Sutherland on Statutory Construction*, vol. 1, § 249, it is said:

"An affirmative enactment of a new rule implies a negative of whatever is not included or is different; and if by the language used a thing is limited to be done in a particular form or manner, it includes a negative that it shall not be done otherwise."

It is true that the law does not favor a repeal of an older statute by a later one by mere implication, but subsequent legislation repeals previous inconsistent legislation, whether it expressly declares such repeal or not. By the later enactments, we think the Legislature has evidenced a clear intention to take the publication of delinquent tax lists out from under the operation of section 1234.

[2] As to the second special defense, the majority rule, with which we agree, is that where a claim is presented to a board of county commissioners and is rejected, or the creditor is dissatisfied with the amount allowed, he is not confined to his appeal from the decision of such board where the right of appeal is given, but may proceed with his action against the county board, for an act providing an appeal from the action of the board of county commissioners upon a claim against the county is not an exclusive remedy, and does not take away the claimant's right of action against the county, which he possessed before. *R. C. L. p. 964*, and see

note to case of *Gilman v. County of Contra Costa*, 68 Am. Dec. 290.

For the reasons stated, the judgment of the trial court will be affirmed, and it is so ordered.

HANNA, C. J., and PARKER, J., concur.

(41 Nev. 437)

NEVADA INDUSTRIAL COMMISSION v. WASHOE COUNTY. (No. 2179.)

(Supreme Court of Nevada. March 15, 1918.)

1. STATUTES §120(3)—SUBJECTS AND TITLES—SUFFICIENCY.

St. 1913, c. 111, entitled "An act relating to the compensation of injured workmen in the industries of this state and the compensation to their dependents where such injuries result in death, creating an industrial insurance commission, providing for the creating and disbursement of funds for the compensation and care of workmen injured in the course of employment, and defining and regulating the liability of employers to their employes, and repealing all acts and parts of acts in conflict with this act," sufficiently embraces within its title the purpose expressed by section 1, subd. "b," thereof, making counties and other municipal corporations subject to the act, and therefore does not offend Const. art. 4, § 17, providing that every law shall embrace but one subject, which shall be briefly expressed in its title.

2. CONSTITUTIONAL LAW §301 — MASTER AND SERVANT §347—DUE PROCESS OF LAW—WORKMEN'S COMPENSATION ACT.

Workmen's Compensation Act (St. 1913, c. 111) § 1, subd. "b," making counties subject thereto, is not unconstitutional as depriving counties of due process of law, the money required to be paid by the counties going for a public purpose of supporting the indigent, which is a legitimate charge of the people of the state and its various subdivisions.

3. MASTER AND SERVANT §401—WORKMEN'S COMPENSATION ACT—DEFENSES.

A county cannot defeat the state Industrial Commission's action for moneys to compensate an injured employe of the county, on the theory that there is no money in the county treasury available, in the absence of an answer pleading such fact.

4. CONSTITUTIONAL LAW §208(5) — CLASS LEGISLATION — WORKMEN'S COMPENSATION ACT.

St. 1913, c. 111, § 1, subd. "b," making counties liable under the Workmen's Compensation Act, is not unconstitutional as discriminatory; the classification of counties being reasonable.

Appeal from District Court, Washoe County; A. N. Sallsbury, Judge.

Suit by the Nevada Industrial Commission against Washoe County. Judgment for plaintiff on defendant's refusal to plead further after its demurrer to the complaint was overruled, and defendant appeals. Affirmed.

E. F. Lunsford, Dist. Atty., and A. N. Sallsbury, Deputy Dist. Atty., both of Reno, for appellant. George B. Thatcher, Atty. Gen., and E. T. Patrick and Wm. McKnight, Deputy Attys. Gen., for respondent.

COLEMAN, J. The Nevada Industrial Commission brought suit against Washoe county, in the district court of that county,

to collect premiums alleged to be due pursuant to an act relative to the compensation of injured workmen. Stats. 1913, p. 137. A general demurrer was interposed by the defendant, and, upon being overruled, the defendant electing to stand upon its demurrer, judgment was rendered in favor of plaintiff, from which this appeal is taken.

The complainant alleges its right to sue, pursuant to the terms of the act mentioned; alleges the existence of the defendant; that defendant employed in the carrying on of its county government various and sundry persons; and that on account thereof the defendant became indebted to the plaintiff in the sum of \$313.15, which it refused to pay. Subdivision "b" of section 1 of the act in question reads:

"Where the state, county, municipal corporation, school district, cities under special charter or commission form of government is the employer, the limitations of two employes shall not apply, and as to such employes and employers thereof the rights and remedies as by this act provided to pay compensation for personal injury sustained by such employes arising out of and in the course of the employment shall be exclusive, compulsory and obligatory."

In support of its claim that the lower court erred in overruling its demurrer the county maintains that the act in question is unconstitutional, the first contention being that the title of the act is in violation of section 17, art. 4, of the Constitution, which provides that every law enacted by the Legislature shall embrace but one subject and matters properly connected therewith, which subject shall be briefly expressed in the title, in that it is not sufficiently comprehensive to embrace within its scope the counties of the state. It is said that the word "industries" in the title of the act means pursuits in which human exertion is employed for the creation of value and regarded as a species of capital or wealth, and that a county is not thus engaged. Conceding for the purposes of this case, without so deciding, that the contention of appellant as to the meaning of the word "industries" is correct, we are nevertheless of the view that the title of the act is so comprehensive in its scope as not to offend against section 17, art. 4, of the Constitution, without regard to the rule that a liberal construction should be given in considering the objection urged. *State v. State B. & T. Co.*, 31 Nev. 456-473, 103 Pac. 407, 105 Pac. 567. The title of the act reads:

"An act relating to the compensation of injured workmen in the industries of this state and the compensation to their dependents where such injuries result in death, creating an industrial insurance commission, providing for the creating and disbursement of funds for the compensation and care of workmen injured in the course of employment, and defining and regulating the liability of employers to their employes; and repealing all acts and parts of acts in conflict with this act."

[1] We have underscored that portion of the title of the act to which objection is made. We are of the opinion that, had the portion

objected to been entirely omitted, the title of the act would be broad enough to comply with the requirements of the law. Even then it indicates that the purpose of the act is to create an industrial insurance commission, to provide funds to compensate workmen injured in the course of employment, and to define and regulate the liability of employers to their employes. The Supreme Court of Michigan, in *Purdy v. City of Sault St. Marie*, 188 Mich. 573, 155 N. W. 597, Ann. Cas. 1917D, 881, was called to pass upon an objection to the title of an act upon the ground that it was not broad enough to include employes of a municipal corporation. The title of the act under consideration in that case reads:

"An act to promote the welfare of the people of this state, relating to the liability of employers for injuries or death sustained by their employes, providing compensation for the accidental injury to or death of employes, and methods for the payment of the same, establishing an Industrial Accident Board, defining its powers, providing for a review of its awards, making an appropriation to carry out the provisions of this act, and restricting the right to compensation or damages in such cases to such as are provided by this act." (Pub. Acts Mich. [Ex. Sess.] 1912, No. 10.)

In determining the question presented, the court said:

"The title of the act mentions and indicates that its provisions relate to 'liability of employers for injuries or death sustained by their employes.' It is general, as titles of acts must be, and is broad enough to include municipal corporations if they are employers."

[2] Since the act in question is compulsory so far as counties are concerned, it is insisted that it is in violation of the due process of law clause of both the state and federal Constitutions, although nothing peculiarly applicable to our state Constitution is urged under this objection. We think this contention is fully answered by the Court of Appeals of New York in *Jensen v. Southern Pacific Co.*, 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276, where it is said:

"Moreover, upon the question whether an act offends against the Constitution of the United States the decisions of the United States Supreme Court are controlling. The only one of the numerous Workmen's Compensation Acts which appears to have been directly passed on by the United States Supreme Court is the act of Ohio, which contained an optional clause. *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571 [35 Sup. Ct. 167, 59 L. Ed. 364]. The single question decided in that case was that limiting the application of the act to shops with five or more employes did not result in arbitrary and unreasonable classification. This act is compulsory. The employer is subjected to a penalty for not adopting one of the three methods of insurance allowed him, and the employe has no choice at all except possibly as to whether he will enter one of the classified employments. However, except for a feature presently to be considered, the decision in *Noble State Bank v. Haskell*, 219 U. S. 104 [31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487], is decisive. Indeed, upon close analysis it will appear that the taking justified in that case as a proper exercise of the police power was no more in the public interest than that involved

in this case, and that the mutual benefits to the parties immediately concerned were not as direct. In that case an act of the state of Oklahoma requiring every bank existing under the state laws to pay an assessment based on average daily deposits into a guaranty fund to secure the full repayment of deposits in case any such bank became insolvent was sustained not merely under the reserve power of the state to alter or repeal charters, but as a proper exercise of the police power. Solvent banks were thus required to pay money into a fund for the direct benefit of others, the banks benefiting only indirectly from the supposed benefit to commerce and the greater stability of banking. In this case the mutual benefits are direct. Granted that employers are compelled to insure, and that there is in that sense a taking. They insure themselves and their employes from loss, not others. The payment of the required premiums exempts them from further liability. The theoretical taking, no doubt, disappears in practical experience. As a matter of fact every industrial concern, except the very large ones who insure themselves, have for some time been forced by conditions, not by law, to carry accident indemnity insurance. A relatively small part of the sums thus paid actually reached injured workmen or their dependents. With the economic saving of the present scheme, insurance in the long run should certainly be as cheap as under the old wasteful plan, and the families of all injured workmen, not a part only, will receive some compensation for the loss of earning power of the wage-earner. We should consider practical experience as well as theory in deciding whether a given plan in fact constitutes a taking of property in violation of the Constitution. A compulsory scheme of insurance to secure injured workmen in hazardous employments and their dependents from becoming objects of charity certainly promotes the public welfare as directly as does an insurance of bank depositors from loss."

The same question has been passed upon by the Supreme Court of California in the case of the Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398, where the various decisions in point were considered, the court reaching the conclusion that the act did not violate the constitutional inhibition. As has been seen, these statutes are upheld upon the theory that they are but the exercise of the police power of the state.

The Supreme Court of the United States, in considering the compulsory Workmen's Compensation Law of the State of Washington in *Mountain Timber Co. v. Washington*, 243 U. S. 220, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642, where the identical objection was urged, said:

"There remains, therefore, only the contention that it is inconsistent with the due process and equal protection clauses of the Fourteenth Amendment to impose the entire cost of accident loss upon the industries in which the losses arise. But if, as the Legislature of Washington has declared in the first section of the act, injuries in such employments have become frequent and inevitable, and if, as we have held in *New York C. R. Co. v. White*, the state is at liberty, notwithstanding the Fourteenth Amendment, to disregard questions of fault in arranging a system of compensation for such injuries, we are unable to discern any ground in natural justice or fundamental right that prevents the state from imposing the entire burden upon the industries that occasion the losses. The act in effect puts these hazardous occupations in the category of dangerous agencies, and requires that the losses shall be reckoned as a

part of the cost of the industry, just like the pay roll, the repair account, or any other item of cost. The plan of assessment insurance is closely followed, and none more just has been suggested as a means of distributing the risk and burden of losses that inevitably must occur, in spite of any care that may be taken to prevent them.

"We are clearly of the opinion that a state, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability, with consequent loss of earning power among the men and women employed, and occasionally loss of life of those who have wives and children or other relations dependent upon them for support, and may require that these human losses shall be charged against the industry, either directly, as is done in the case of the act sustained in *New York C. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247 [61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629], or by publicly administering the compensation and distributing the cost among the industries affected by means of a reasonable system of occupation taxes. The act cannot be deemed oppressive to any class of occupation, provided the scale of compensation is reasonable unless the loss of human life and limb is found in experience to be so great that, if charged to the industry, it leaves no sufficient margin for reasonable profits. But certainly, if any industry involves so great a human wastage as to leave no fair profit beyond it, the state is at liberty, in the interest of the safety and welfare of its people, to prohibit such an industry altogether."

The Supreme Court of Washington, in *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, held a compulsory insurance act to be constitutional.

But we think there is another and very excellent theory upon which the law may be held to be constitutional, namely, that the money required to be paid under the act by the counties of the state goes for a public purpose which is a legitimate charge upon the people and the state and the subdivisions thereof. The case of *State ex rel. Goodwin v. Nelson County*, 1 N. D. 88, 45 N. W. 33, 8 L. R. A. 283, 26 Am. St. Rep. 609, was one in which the constitutionality of an act was involved which provided that the counties of the state might issue bonds for the purpose of raising money to purchase seed grain for farmers who were unable to purchase it for themselves. We quote therefrom as follows:

"The stubborn fact exists that a class of citizens, numbered by many thousands, is in such present straits, from poverty, that unless succored by some comprehensive measure of relief they will become a public burden, in other words, paupers, dependent upon counties where they reside for support. It is to avert such a widespread disaster that the seed grain statute was enacted, and it should be interpreted in the light of the public danger which was the occasion of its passage. 'The support of paupers, and the giving of assistance to those who by reason of age, infirmity, or disability are likely to become such, is, by the practice of the common consent of civilized countries, a public purpose.' *Cooley, Taxn.* (2d Ed.) pp. 124, 125. 'The relief of the poor—the care of those who are unable to care for themselves—is among the unquestioned objects of public duty.' *Opinion*

of Brewer, J., in *State v. Osawkee Twp.*, 14 Kan. 424 [19 Am. Rep. 99]."

See, also, *Matter of Jensen*, 44 App. Div. 509, 60 N. Y. Supp. 933; *Exempt Firemen's Bencv. Fund v. Roome*, 93 N. Y. 313, 45 Am. Rep. 217.

It was said in *Charlotte, etc., Railroad v. Gibbes*, 142 U. S. 390, 12 Sup. Ct. 255, 35 L. Ed. 1051:

"Where the interests of the public and its individuals are blended in any work or service imposed by law, whether the cost shall be thrown entirely upon the individuals or upon the state or be apportioned between them is a matter of legislative direction."

[3] Counsel for appellant also contend that there are no funds in the county treasury available for the payment of the demand pleaded in the complaint. As to this, we need only say that, if we were to concede that such a state of facts would constitute a good defense (which we do not), there is nothing upon which to base such a contention, since there is no answer on file pleading such facts.

[4] It is next contended that the act in question is void because it is discriminatory and is not of general and uniform operation. As said in *Ex parte Pittman*, 31 Nev. 43, 99 Pac. 700, 22 L. R. A. (N. S.) 266, 20 Ann. Cas. 1319:

"This court has repeatedly held that the Legislature may enact laws which apply only to certain classes, if the basis for the classification is reasonable."

In the case of *Gulf R. R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, the Supreme Court of the United States said:

"It is not within the scope of the Fourteenth Amendment to withhold from the states the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection."

Is the classification reasonable? We think it is. It is not only within the power, but, as we have shown, it is the duty of the county and state to provide for its indigent, and to care for those who are unable to care for themselves or who are likely to become dependent upon public charity.

If there is any virtue in the old adage that an ounce of prevention is worth a pound of cure, was it not a reasonable exercise of discretion on the part of the Legislature to impose upon the counties the duty of contributing to a fund which can be drawn upon to prevent those injured in its employ from becoming paupers? We think it was.

Perceiving no prejudicial error, it is ordered that the judgment be affirmed.

SANDERS, J., concurs.

MCCARRAN, C. J. (concurring). I concur. In my judgment, the one question most vital here is that which refers to the constitutional provision (section 17, art. 4):

"Each law enacted by the Legislature shall embrace but one subject, and matter properly

connected therewith, which subject shall be fully expressed in the title."

The title of our Workmen's Compensation Act is thus couched:

"An act relating to the compensation of injured workmen in the industries of this state and the compensation to their dependents where such injuries result in death, creating an industrial insurance commission, providing for the creation and disbursement of funds for the compensation and care of workmen injured in the course of employment, and defining and regulating the liability of employers to their employes; and repealing all acts and parts of acts in conflict with this act."

Subdivision "b" of section 1 of the act provides:

"Where the state, county, municipal corporation, school district, cities under special charter or commission form of government is the employer, the limitations of two employes shall not apply, and as to such employes and employers thereof the rights and remedies as by this act provided to pay compensation for personal injury sustained by such employes arising out of and in the course of the employment shall be exclusive, compulsory and obligatory."

As to this section the appellant county contends that, inasmuch as a county is not an "industry," the title of the act is not sufficiently broad to embrace counties within its scope and operation.

Following the general proposition that the provision of the Constitution here invoked should be liberally construed (*State v. Ah Sam*, 15 Nev. 27; *McBride v. Griswold*, 38 Nev. 56, 146 Pac. 756; *First National Bank v. Nye County*, 38 Nev. 123, 145 Pac. 932, Ann. Cas. 1917C, 1195), I am of the opinion that the general language of the title is sufficient to contemplate and give notice of the substance of subdivision "b" of section 1. The title declares that the act is, among other things, one "defining and regulating liability of employers to their employes."

Unquestionably the county is an employer of workmen. In my judgment, the spirit, as well as the letter, of the whole act manifests an intention to provide for a systematic arrangement for compensation for injured or afflicted workmen in whatever capacity such might be employed and to provide that where, as in counties and municipalities, the state is sovereign, such arrangement should be compulsory. This is but following out the fundamental idea, basic to all compensation acts; i. e., that the industry or employment which requires human agency for its operation should look to the care and upkeep of that agency, no less than to other elements of efficiency.

Again appellant urges that, as counties are not liable for tortious actions this statute imposes a compulsory burden which was not formerly in existence. This contention rests on the theory that workmen's compensation laws are enacted to meet the rule of the employers' liability for injury to employes. The premise is fallacious. The proper theory, and that on which the original Bla-

marckian compensation acts were founded, and that which appears as the spirit underlying all such laws subsequently created, is rather that the thing which requires human labor and consumes human energy in its operation shall bear an equitable share by way of compensation to those or the dependents of those who are deprived of the fruits of their labor, where such deprivation grows out of or is sustained in the course of employment.

(51 Utah, 514)

STATE ex rel. LORNTZEN v. HANSEN et al.
(No. 3184.)

(Supreme Court of Utah. March 1, 1918.)

APPEAL AND ERROR \S 351(1) — TIME FOR TAKING—JURISDICTION OF SUPREME COURT—DISMISSAL—STATUTE.

Under Comp. Laws 1907, \S 3301, providing that an appeal may be taken within 6 months from the entry of the judgment or order appealed from, appeal from a judgment entered May 28th, notice of appeal having been filed and served December 8th, was taken at least 11 days late, the Supreme Court is without jurisdiction, and the appeal will be dismissed. 1

Appeal from District Court, Cache County; A. E. Pratt, Judge.

Proceeding by the State of Utah, on the relation of Margaret I. S. Lorntzen, against George D. Hansen and Andrew M. Hammond. From a judgment for plaintiff, defendants appeal. On motion to dismiss. Motion granted, and appeal dismissed.

A. A. Law, of Logan, for appellants. J. C. Walters and M. C. Harris, both of Logan, for respondent.

GIDEON, J. The relator, plaintiff below, was awarded judgment. Defendants appeal to this court. A motion to dismiss challenges the jurisdiction of this court on the ground that the appeal was not taken within six months from the date of the entry of judgment.

It appears from the record that judgment was entered May 28, 1917. No motion for a new trial was made. The notice of appeal was filed and served December 8, 1917. Comp. Laws 1907, \S 3301, is as follows: "An appeal may be taken within six months from the entry of the judgment or order appealed from." It will thus be seen that the appeal was not taken for at least 11 days after the six months had expired. Under the former rulings of this court construing that section we are without jurisdiction to consider the appeal. Jones v. Evans, 39 Utah, 291, 116 Pac. 333; Lindley v. Bradshaw, 45 Utah, 83, 141 Pac. 300; Fuller v. Ferrin, 168 Pac. 1179. The motion to dismiss is therefore granted,

¹ Jones v. Evans, 39 Utah, 291, 116 Pac. 333; Lindley v. Bradshaw, 45 Utah, 83, 141 Pac. 300; Fuller v. Ferrin, 168 Pac. 1179.

and the appeal is dismissed; respondent to recover costs.

FRICK, C. J., and McCARTY, CORMAN, and THURMAN, JJ., concur.

(51 Utah, 543)

INTERSTATE TRUST CO. v. HEADLUND.
(No. 3100.)

(Supreme Court of Utah. Jan. 30, 1918.
On Petition for Rehearing,
March 22, 1918.)

1. BILLS AND NOTES \S 357 — "HOLDER IN DUE COURSE"—PLEDGE.

Under Comp. Laws 1907, $\S\S$ 1604, 1611, defining holders in due course, a pledgee accepting an unmatured note as collateral security held a holder in due course.

2. BILLS AND NOTES \S 520—FRAUD—SUFFICIENCY OF EVIDENCE.

Evidence that plaintiff personally investigated a corporation's affairs before purchasing its stock by giving the note sued upon, his letter stating that his failure to pay the note was due to lack of funds, etc., held not to establish that the note was secured by fraud.

On Petition for Rehearing.

3. PLEDGES \S 44—COLLATERAL SECURITY—RENEWING DATE.

Renewing a negotiable bill or note for the payment of which collateral securities have been pledged does not affect the creditor's right to retain or enforce such security.

4. BILLS AND NOTES \S 140—RENEWAL—EFFECT.

Renewing a note by another note does not extinguish the original debt unless such clearly appears to be the intention of the parties.

5. PLEDGES \S 44—COLLATERAL SECURITY—RENEWING NOTE.

Where defendant's note was pledged as collateral security for the pledgor's present and future debts, the fact that the pledgor gave a renewal note for his indebtedness did not prevent the plaintiff pledgee from realizing upon the collateral security.

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Action by Interstate Trust Company, a corporation, against J. A. Headlund. Judgment for plaintiff, and defendant appeals. Affirmed and petition for rehearing denied.

H. Van Pelt, of Salt Lake City, for appellant. Booth, Lee, Badger & Rich, of Salt Lake City, for respondent.

McCARTY, J. Plaintiff brought this action to recover upon a collateral note executed by defendant, payable to himself, and indorsed by him in blank, being negotiable in form. From a judgment rendered in favor of plaintiff, defendant appeals.

The facts of this case are as follows: On or about December 19, 1911, one George P. Mason, who was the general manager and sales agent of the International Engineering Corporation, with its principal place of business in Denver, Colo., sold to J. A. Headlund, defendant, 100 shares of the preferred and 100 shares of the common stock of the said corporation for \$1,000. Headlund gave

his two promissory notes, of \$500 each, in payment of the stock. He returned the certificates of the stock, indorsed in blank, to Mason as collateral security for the payment of the two notes given in payment of the stock. Mason represented to Headlund that the corporation, which was engaged in building and installing furnaces, was "on a sound financial basis." He also explained to Headlund somewhat in detail the amount and character of its assets. Mason testified in part as follows:

"I told him that the company had many contracts for the sale and installation of furnaces, which contracts were worth many thousands of dollars in profits to them."

He further testified and his evidence is not disputed:

"I told him the profits that were in it and the prospective business that could be done, in my opinion, and gave him the privilege of coming on to Denver and making a thorough investigation."

* * * In response to my suggestion, Mr. Headlund came to Denver in January, about a month after I sold him the stock, to look into the proposition. I paid his expenses. He called on the president, the secretary, and the treasurer, saw the books and the contracts we had on hand. He made an investigation of the books of our company, and spent a day going over the matters of the company very carefully, and then investigated the furnaces in operation—two or three of them. He was so well pleased that he subscribed for fifteen hundred dollars more of the stock while he was in Denver."

The record shows that it was agreed that if it should be inconvenient for Headlund to pay for the stock last subscribed by him, his subscription would be canceled. This last subscription was later on canceled. This transaction is not in any sense an issue in the case. Our reason for referring to it is that we think it has a bearing on the question of fraud raised by defendant and referred to later on in this opinion.

On December 1, 1912, Headlund made and delivered to Mason a new note covering the indebtedness (\$1,000) represented by the two notes mentioned, which note is in words and figures as follows:

"\$1,000.00. Denver, Colorado, Dec. 1, 1912.

"Ninety days after date I promise to pay to the order of myself at —, one thousand dollars in gold coin of the United States, with interest at the rate of 6 per cent. per annum from date, for value received. J. A. Headlund."

Headlund indorsed the note in blank as follows: "J. A. Headlund." This note and the two certificates of stock issued to Headlund, and delivered by him to Mason, were pledged by Mason, in writing, to plaintiff, the Interstate Trust Company, a Colorado Corporation, as collateral security for a loan of \$500, on December 9, 1912, "and also all other present and future demands of any nature or kind of the holder hereof against the undersigned now owing, or which may hereafter be owing, and whether now or hereafter contracted." Before the maturity of the Headlund note plaintiff loaned Mason, as new loans, sums aggregating \$750, and when the notes given by Mason to plaintiff matur-

ed new notes were executed by him and the old notes were marked "Paid by renewal." In September, 1913, Mason's entire indebtedness was merged in and covered by one note of \$3,500. When Mason executed the new note for that amount his old notes were, as stated, marked "Paid by renewal." The Headlund note of \$1,000 and certificates of stock have been held by plaintiff ever since they were first pledged by Mason, and were attached to the note of \$3,500 as collateral security for the payment of the same.

On December 24, 1915, plaintiff commenced this action against Headlund to recover judgment for the balance due and unpaid on his note. The complaint is in the form usually adopted and followed in the bringing of actions of this character. In his prayer plaintiff asks that the stocks pledged by Headlund as collateral security for the payment of the note "be sold according to law, and the proceeds of said sale applied to the account of costs and expenses, and the balance be applied on account of said indebtedness represented by said note, and the balance, if any, * * * go to defendant."

Defendant, in his answer, admits that he "signed and indorsed in blank the note described in the complaint, and that the same has not been paid except as stated in the complaint, and that no proceedings have been had at law for the recovery of said alleged debt." As an affirmative defense, defendant alleged that the note was obtained from him through false and fraudulent representations made to him by Mason respecting the market value of the capital stock of the International Engineering Corporation at the time the note was executed in payment of the 200 shares of the capital stock of the corporation as hereinbefore set forth. It is also alleged in the answer that "the said note was not indorsed or delivered to the plaintiff before maturity thereof," and that if the note were "indorsed to plaintiff in consideration of a loan, that said loan has been paid."

[1] There is not a scintilla of evidence in the record tending to support the two allegations of the answer last mentioned, but, on the contrary the evidence affirmatively shows that the note was indorsed, and, together with the collateral pledged to secure the payment thereof, was delivered by Mason to plaintiff before the note matured. And the evidence, without conflict, shows that the loan obtained by Mason, on the note and the other collateral mentioned, had not been paid at the time the cause was tried.

Section 1604, Comp. Laws, Utah 1907, so far as material here, provides that—

"A holder in due course is a holder who has taken the instrument under the following conditions: * * *

"(2) That he became the holder of it before it was overdue; * * *

"(3) That he took it in good faith and for value;

"(4) That at the time it was negotiated to

him he had no notice of any infirmity in the instrument or defect in the title of the party negotiating it."

Section 1611: "Every holder is deemed prima facie to be a holder in due course," etc.

These provisions of the statute and the undisputed evidence in this case entitles plaintiff to recover in this action; but, since fraud is pleaded and relied on by defendant as a defense, we shall briefly consider that issue.

[2] As we have pointed out, the evidence shows that defendant, at Mason's suggestion, went to Denver, immediately after he purchased the stock in question, and made a thorough personal investigation of the business affairs of the International Engineering Corporation. He had access to and examined the books of the corporation and the contracts it had entered into for the building and installation of furnaces. He also examined the furnaces the company was engaged in manufacturing and offering to the public, and was so well pleased with the result of the investigation that he subscribed for an additional block of the stock of the corporation, valued at \$1,500. Mason, as proof of his good faith in the enterprise, paid the expenses of the defendant's trip to Denver. It appears that from the time defendant returned home from Denver until the bringing of this action there was considerable correspondence carried on between Mason and the defendant in regard to the indebtedness represented by the note in question.

On September 17, 1913, nearly two years after Headlund purchased the stock, giving the note in question in payment thereof, he wrote Mason in part as follows:

"I have your letter of the 12th inst., for which I thank you. I know I have not treated you fair and square, but my own circumstances have been such that I could not do otherwise. I shall send you on the 25th of this month check for \$100. Let me know if that will do, and shall after that pay \$100 now and then," etc.

He wrote other letters of the same import. In none of them did he claim, or even intimate, that he had at any time been dealt unfairly with by Mason. Not until this suit was commenced was the cry of fraud—"Stop thief!"—raised, and there is not a scintilla of evidence in the record that tends, in the remotest degree, to support the plea of fraud. In fact, there is but little, if any, merit in the appeal.

The judgment of the trial court is affirmed, with costs to respondent.

FRICK, C. J., and CORFMAN, THURMAN, and GIDEON, JJ., concur.

On Petition for Rehearing.

McCARTY, J. Appellant has presented a petition for a rehearing. His counsel, in a brief filed in support of the petition, complains with much feeling and considerable earnestness that the principal ground upon which appellant relied for a reversal of the judgment is not discussed or referred to in

the foregoing opinion. Counsel seems to contend, if we correctly understand his position, that the execution of the note for \$3,500 by Mason, in lieu of the other notes mentioned in the opinion, theretofore executed by him to the plaintiff, extinguished—paid—the indebtedness represented by the old notes, and that a new contractual relation was thereby created between Mason and the plaintiff, and that the note in question "was released from all lien," and that plaintiff is not "the real party in interest."

The principles of law applicable to the undisputed facts relating to this point are so well established and universally recognized and adhered to by the courts we deemed it unnecessary to discuss the question. Since counsel vigorously insist that this defense is not without merit and is deserving of careful attention by this court, we shall briefly consider it.

We again invite attention to the note executed by Mason to plaintiff, to secure the payment of, which he pledged to and deposited with plaintiff, as collateral, the note in question. The Mason note contains a provision which, so far as material here, is as follows:

"There is hereby and herewith pledged and deposited by and for the undersigned, as collateral security for the payment of this note, and also all other present or future demands of any nature or kind of the holder hereof against the undersigned now owing or which may hereafter be owing, and whether now or hereafter contracted, the following property, viz.: Note J. A. Headlund of \$1,000.00 with stock attached."

[3] It will be noticed that the part of the written pledge which we have italicized expressly provides that the note in question is given as collateral security for the payment of all other "present or future demands," etc., and, as stated in the foregoing opinion, it was transferred and pledged by Mason to plaintiff before maturity. Plaintiff was therefore, as stated, "a holder in due course." It is a well-established, and we might add elementary, rule of law that—

"The renewal of a negotiable bill or note representing the principal indebtedness, for the payment of which collateral securities have been deposited does not affect the right of the creditor to retain or enforce the collaterals. He is equally entitled to the benefit of the collateral securities as a means of obtaining payment of the note or bill given in renewal as in the case of the original evidence of indebtedness." *Colebrooke on Collateral Securities* (2d Ed.) § 14.

Many cases, both state and federal, supporting this rule are cited in a note to the foregoing text.

In *Jones on Collateral Securities* (3d Ed.) § 541, the author says:

"A renewal of a note secured by a pledge merely extending the time of payment does not extinguish the debt, and is not a payment of it which will discharge the creditor's claim upon the collateral securities" (citing many cases).

[4] Nor does the giving of a new note in renewal of another note extinguish the debt

for which the original note was given unless it clearly appears that it was the intention of the parties that the execution of the new note and the cancellation of the old note should extinguish the debt represented by the old note.

In 7 Cyc. 877, the rule is stated as follows:

"Renewal Does Not Extinguish or Change Debt.—Where a note is given merely in renewal of another note, and not in payment, the renewal does not extinguish the original debt, or in any way change the debt, except by postponing the time of payment, and as a general rule, therefore, the holder of a renewal note is entitled to the same remedies as if he were proceeding upon the original note. But if a new note is taken in payment, the original debt is extinguished and a new debt created. Whether a note is paid by the taking of a new note or merely renewed depends upon the intention."

In 8 C. J. § 793, it is said:

"In so far as the taking of a renewal or new bill or note for an existing bill or note is concerned, it is generally held that the new bill or note is not a payment of the original instrument, in the absence of an understanding or agreement to that effect."

The Supreme Court of California has repeatedly held that the execution of a note for a debt does not discharge the debt unless the parties expressly agree that the giving of the note shall be deemed payment. *Comptoir de Paris v. Dresbach et al.*, 78 Cal. 15, 20 Pac. 28; *Dellapiazza v. Foley*, 112 Cal. 380, 44 Pac. 727; *Grangers' Bank of Cal. et al. v. Shuey et al.*, 55 Pac. 682; *Bridge v. Connecticut Mut. Life Ins. Co.*, 167 Cal. 774, 141 Pac. 375; *Welch v. Allington*, 23 Cal. 322.

In the case last cited the court says:

"The law will not presume such an agreement and it must be proved by the party relying upon it."

In the case of *Fidelity State Bank v. Miller*, 29 Idaho, 777, 162 Pac. 244, cited and relied on by appellant in support of his contention on this point, it was expressly agreed that the new note should be an absolute payment of the indebtedness represented by the old note. In the course of the opinion it is said:

"The evidence shows that the plaintiff's officers refused to accept any renewal notes, and that old notes were marked paid, canceled, and returned to the defendant; that the officers of said bank, under instructions of the bank examiner, stated to the defendant that they must have a new loan to be secured as an original transaction, and that the bank would not make any extension of old notes. * * * The defendant was told at the time of making the new note that it was understood that it was a new loan and that he could have money to pay the old note. * * * The bank made no renewals whatever."

[5] In this case there was no express agreement that the execution of the note for \$3,500 by Mason should be deemed payment of the indebtedness represented by the old notes, nor is there any evidence from which

such intention can be inferred. The question, however, of whether the giving of a new note in renewal of another note is payment of the debt represented by the old note is not of controlling importance in this case, as counsel for appellant seems to contend. The contract under which the note in question was held by plaintiff as collateral security provided that the note was "pledged and deposited * * * as collateral security for the payment of * * * all present and future demands * * * now or hereafter contracted," etc. Counsel for appellant also cites *Woodsum v. Cole*, 69 Cal. 142, 10 Pac. 331; *Chase v. Whitmore*, 68 Cal. 545, 9 Pac. 942. In each of these cases the note was transferred after maturity and the rights of the transferees were acquired after maturity. Moreover, in the case last referred to fraud of the rankest character was an important element in the case. In the case at bar appellant abandoned the defense based on fraud. His counsel in the brief filed in support of the petition claims that he is put in a false or untrue light because of the reference made in the foregoing opinion to that issue. Were it not that the element of fraud in *Chase v. Whitmore* is one of the features of that case that distinguishes it from the case at bar, we would be impelled to modify the opinion by eliminating therefrom the reference made to that issue, as appellant in his petition for a rehearing expressly abandons it. By eliminating or abandoning the allegations of fraud in the answer, the defense on the merits, in the face of the undisputed facts, is frivolous and entirely without merit.

For the reasons stated, the petition for a rehearing is denied.

FRICK, C. J., and CORFMAN, THURMAN, and GIDEON, JJ., concur.

(100 Wash. 570)

McLEAN v. BURGINGER. (No. 14447.)

(Supreme Court of Washington. March 15, 1918.)

1. HUSBAND AND WIFE ⇐268(2)—COMMUNITY DEBTS—LOANS.

Where notes were given by husband for loans made for benefit of community, the community was liable therefor.

2. HUSBAND AND WIFE ⇐270(10)—NOTES—JOINT JUDGMENT—COMMUNITY—DIVORCE.

Where husband during existence of relation gave notes for loans made for benefit of community, and after divorce a joint judgment was rendered against the former spouses in action thereon, the judgment was erroneous, as neither the wife personally, nor her separate estate, is liable for community debts either before or after divorce.

3. HUSBAND AND WIFE ⇐268(8)—COMMUNITY DEBTS—LIABILITY OF WIFE.

Neither the wife personally nor her separate estate is liable for payment of community debts contracted by the husband.

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 122 Cal. xviii.

4. HUSBAND AND WIFE ⇐268(2)—COMMUNITY DEBTS—EFFECT OF DIVORCE.

On dissolution of community by divorce, the common property, unless disposed of by the decree, passes to the former spouses as tenants in common, subject to community debts, but the wife personally, or her separate estate, would not be liable for community debts contracted by the husband.

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action on notes by C. E. McLean against Patrick O'Toole and Bertha Burginger, his former wife. From a joint judgment against the defendants, Bertha Burginger appeals. Reversed, with directions.

Walter B. Allen, of Seattle, for appellant. Eugene A. Childs, of Seattle, for respondent.

WEBSTER, J. This action was brought by respondent to recover a judgment against Patrick O'Toole and the appellant, his former wife, for the amount of four certain promissory notes executed by the husband alone during the existence of the marriage relation which was thereafter and before the commencement of this action dissolved by decree of divorce. The cause was tried before the court without a jury and findings made in plaintiff's favor upon which the court rendered a joint judgment against both defendants and a several judgment against defendant Patrick O'Toole. The defendant Bertha Burginger has appealed, assigning as error the finding that the debts evidenced by the notes were community obligations and the entry of the joint judgment.

[1] From the record it appears that the notes were given for loans made by respondent to Patrick O'Toole for the benefit of the community. There was no evidence to the contrary. The finding, therefore, that the notes were community obligations was the only one the court could make.

[2] The second assignment of error is well taken. The judgment as rendered was a joint judgment against appellant and her former husband, Patrick O'Toole, and as such could be satisfied out of the separate property of either of them. 23 Cyc. 1103; 15 R. C. L. p. 804.

[3, 4] It is well settled in this state that neither the wife personally nor her separate estate is liable for the payment of community debts contracted by the husband. Upon the dissolution of the community by divorce the common property awarded to the parties is subject to the payment of community debts. If not disposed of by the decree, the common property passes to the former spouses as tenants in common, likewise subject to the satisfaction of community obligations. In neither event, however, does

the divorced wife or her separate estate become liable for community obligations contracted solely by the husband. Such obligations must thereafter be satisfied out of the same property or fund against which the creditor would have had the right to proceed during the existence of the community. Judge Ballinger in his work on community property, at section 120, states the rule in this language:

"As heretofore stated, the debts of the community are likewise the husband's debts. All debts contracted by him he is liable to pay, not only from the community estate, but also from his separate property, and is subject to be sued therefor both before and after the dissolution of the community. These debts are his debts, but are not ordinarily the debts of the wife, except in the sense that her interest in the community is burdened with the liability for their payment. * * * The separate estate of a wife by mere operation of law can never be made liable for community debts, while both the community estate and the separate estate of the husband will be liable for any debt he may contract."

In *Anderson v. Burgoyne*, 60 Wash. 511, 111 Pac. 777, Judge Rudkin said:

"It is not seriously contended on this appeal, nor could it be successfully contended, that the original judgment against the wife was authorized or proper, for in an action on a promissory note executed by the husband alone the utmost relief the plaintiff is entitled to, as against the wife, is a judgment establishing the community character of the indebtedness."

To the same effect are the following: *Clough v. Monroe*, 86 Wash. 507, 150 Pac. 1190; *Bimrose v. Matthews*, 78 Wash. 32, 138 Pac. 319; *Bird v. Steele*, 74 Wash. 68, 132 Pac. 724; *White v. Ratliff*, 61 Wash. 383, 112 Pac. 502; *Phillips & Co. v. Langlow*, 55 Wash. 385, 104 Pac. 610; *Freundt v. Hahn*, 28 Wash. 117, 68 Pac. 184; *Goodfellow v. Le May*, 15 Wash. 684, 47 Pac. 25; *Sweet, Demster & Co. v. Dillon*, 13 Wash. 521, 43 Pac. 637; *Ambrose v. Moore*, 46 Wash. 463, 90 Pac. 588, 11 L. R. A. (N. S.) 1103; *McKay on Community Property*, § 413.

The judgment appealed from, so far as it affects the appellant Bertha Burginger, is reversed, and the cause remanded with directions to enter a judgment adjudicating the community character of the indebtedness, and providing that the joint and several judgment rendered against the defendant Patrick O'Toole may be satisfied out of any common property owned by him and appellant, and which constituted community property prior to the dissolution of the marriage, and also out of such of the community property, if any, as was awarded the former spouses, or either of them, by the divorce decree, which is otherwise subject to execution.

ELLIS, C. J., and FULLERTON, MAIN, and PARKER, JJ., concur.

(100 Wash. 555)

MILLER v. AMERICAN UNITARIAN ASS'N. (No. 14384.)

(Supreme Court of Washington. March 15, 1918.)

1. COVENANTS \Leftrightarrow 49 — **RESTRICTIONS — CONSTRUCTION.**

Words in a deed of conveyance, restricting the use of property by the grantee, are to be construed strictly against grantor and those claiming benefit of restriction, and will not be extended beyond clear meaning of language so used.

2. COVENANTS \Leftrightarrow 103(2) — **RESTRICTIONS — "PORCH" — ENTRANCE GATE.**

Under a restrictive covenant, prohibiting the construction of the outer line of any "porch" closer than 25 feet to inner line of sidewalk, an entrance gate, built at street entrance to church grounds, the church building being 53 feet back from the sidewalk line, is not a "porch," which is always a part of the building proper.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Porch.]

3. COVENANTS \Leftrightarrow 103(2) — **RESTRICTIONS — STRUCTURES — ENTRANCE GATE.**

An entrance gate to church grounds, the church being more than double the required distance back from street line, is not violative of a restrictive covenant against erection of a building within 25 feet of street line, even conceding that it was intent of parties, collected from entire conveyance and attendant circumstances, to have unobstructed view and afford space for lawns as an embellishment.

Department 1. Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by George Miller against the American Unitarian Association. From a judgment of dismissal entered after refusal of plaintiff to plead over after demurrer sustained, plaintiff appeals. Affirmed.

Howard O. Durk and V. A. Montgomery, both of Seattle, for appellant. Wm. H. Gorham, of Seattle, for respondent.

FULLERTON, J. The appellant and the American Unitarian Association are each the owners of lots in the University Park addition to the city of Seattle, their titles being derived from a common source under certain building restrictions declared to be covenants running with the land. The covenant is expressed in the deeds of each in the following terms:

"To have and to hold said premises * * * to said second party, his heirs and assigns forever subject to the following covenants, limitations and restrictions: That said second party his heirs and assigns will not for a period of twenty years after date hereof, erect or maintain or suffer to be erected or maintained on said premises any flat, apartment, store, business, or manufacturing building, or to allow any building erected, either in whole or in part, to be used for business or manufacturing purposes; nor erect or maintain or cause or permit to be erected or maintained or permit any building erected to be used for the sale or traffic in intoxicating liquors or for any other dangerous, vexatious or offensive purpose or establishment whatever. That neither said second party his heirs or assigns will erect or suffer to be erected on any part of said premises a dwelling of less

value than \$ — nor less than two stories high. Nor shall the outer or front line of any porch be constructed closer than 25 feet to the inner line of the sidewalk in front of said lot, nor any barn or stable, except as is appurtenant to a private residence, which stable or barn, if erected, shall stand at least 60 feet from the outer or street front; nor erect more than one residence on a single lot, nor erect any building across any lot; all the foregoing conditions, covenants agreements and restrictions shall be deemed covenants running with the land and binding upon said second party, his heirs, assigns and personal representatives."

The respondent erected a church building on the back of its lots some 53 feet distant from the street line; but at the street entrance to the grounds, within 3 feet of the inner sidewalk line, it erected a sort of open gate from which a wooden walk led to the church building. This structure was composed of two high concrete bases which supported four wooden columns on which rested a shingled roof presenting a square expanse on each side of about six feet. The structure occupied a horizontal plane surface 12 by 6½ feet, the 12-foot extension fronting the street. The appellant brought an action to abate and remove the structure and to enjoin its continuance. The respondent demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the court. The appellant having elected to stand on its complaint, judgment on the demurrer was rendered against him dismissing the action. Error is assigned upon the sustaining of the demurrer and the dismissal of the action.

[1, 2] The question of law raised by the demurrer is whether the erection of the structure complained of violates any of the restrictions contained in the deed. The rule for the construction of this class of covenants has been announced by this court in the case of *Jones v. Williams*, 56 Wash. 588, 106 Pac. 166, as follows:

"It seems to be well-settled law that words in a deed of conveyance, restricting the use of the property by the grantee, are to be construed strictly against the grantor and those claiming the benefit of such restrictions, and will not be extended beyond the clear meaning of the language so used."

No question is raised as to the right of the appellant to prosecute this character of action. The only issue involved is whether the gate erected by respondent comes within the covenant:

"Nor shall the outer or front line of any porch be constructed closer than 25 feet to the inner line of the sidewalk in front of said lot."

We think it clear that the modern acceptance and understanding as to the meaning of the term "porch" is that it is an attachment, either covered or uncovered, to a building, and commonly used for an entrance to the main building or as a lounging or decorative feature of it. The term is defined in the Century Dictionary as:

"An exterior appendage to a building, forming a covered approach or vestibule to a doorway or entrance, whether inclosed or uninclosed."

Webster's International Dictionary defines the word as meaning:

"A covered entrance to a building, commonly inclosed in part and projecting out from the main wall with a separate roof; it may be large enough to serve as a covered walk."

In modern architecture, whatever it may have been in ancient times, a porch is always part of a building, and the weight of authority is that, where such an appendage extends beyond the main building into territory upon which there is a restriction against the erection of a dwelling house, the porch falls within the restriction. In the deed under which respondent holds there is no mention of gates as prohibited structures; and, even allowing that the structure in question might be a porch if it had been attached to the main building, the fact that it is nearly 50 feet distant from the church building utterly excludes any assumption that it is a porch. It is in the nature of a gate, though more exactly, it seems, a monument marking the entrance to the church property. However opinions may differ as to the necessity, utility, or beauty of such a structure, the position assumed by appellant would deprive an owner of property in that addition from marking the entrance to his grounds by raising ornamental posts or really beautiful statuary of the highest quality of art. Bearing in mind the rule that:

"Covenants of this character are to be strictly construed against the covenant, and there must be shown to be a clear and plain violation of them to justify the interposition of a court of equity to restrain" (*McDonald v. Spang*, 105 N. Y. Supp. 617)

—we must hold that an entrance gate to the grounds is not included within the restrictive covenant.

[3] But the appellant carries his argument beyond specific and literal expressions in the covenant, and contends that the rule for construction of such covenants is that "the intention of the parties as collected from the entire conveyance and the circumstances attending its execution" is a matter for consideration. In other words, the contention is that the evident purpose of the covenant was that no structure of any kind should occupy the lot within 25 feet of the inner sidewalk line. In support of this position the appellant presents several decisions of other courts. In *Hyman v. Tash* (N. J. Ch.) 71 Atl. 742, under a covenant forbidding the erection of a dwelling within 15 feet of the street line, it was held that the erection of a store building on the street line was prohibited. In *Sanders v. Dixon*, 114 Mo. App. 229, 89 S. W. 577, where the covenant was that not more than one dwelling should be erected on each lot, it was held that a building for dwelling purposes which was divided into four flats was a violation of the restriction. In *Godfrey v. Hampton*, 148 Mo. App. 157, 127 S. W. 626, it was held that a cove-

nant against the erection of buildings "of the character known as flats or tenement houses" forbade the remodeling of a house for occupancy of two families, one on each floor. In *Buck v. Adams*, 45 N. J. Eq. 552, 17 Atl. 961, the covenant required the outer projections of every building to be set back at least 30 feet from the street line, and this was construed as excluding the erection of any character of building within that space. In *Bagnall v. Davies*, 140 Mass. 76, 2 N. E. 786, the restriction was that no building should be erected within 20 feet of the street, and it was held that a piazza and dormer window which were parts of the building and projected into the forbidden space were a violation of the covenant. The same construction was given in *Reardon v. Murphy*, 163 Mass. 501, 40 N. E. 854, where the piazza of a house was within the restricted area, and the covenant provided that "no building" shall be placed at a less distance than 20 feet from the street line. As we gather the purport of these decisions, the only one which applies the restrictive covenant beyond the express terms employed is the case of *Hyman v. Tash*, supra. Inasmuch as that decision is in direct conflict with our own holding in *Jones v. Williams*, 56 Wash. 588, 106 Pac. 166, and with the weight of authority in other jurisdictions, we would not be inclined to follow it, even if it were based upon a state of facts corresponding to those of the instant case. A decision at odds with *Sanders v. Dixon*, supra, will be found in *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391, where a restriction that "only a single dwelling is to be constructed or placed upon each fifty-foot lot" was held not to prevent the building of a flat or apartment house to be occupied by more than one family. We think the construction adopted in the *Sanders Case* is more in accord with reason than is the case which it opposes.

The decisions are practically unanimous in holding that steps leading to a building are not such a part of it as to be prohibited by a building line restriction. See *Meaney v. Stork*, 80 N. J. Eq. 60, 83 Atl. 492; *Id.*, 81 N. J. Eq. 210, 86 Atl. 398; *Adams v. Howell*, 58 Misc. Rep. 435, 108 N. Y. Supp. 945; *Alderson v. Cutting*, 163 Cal. 503, 126 Pac. 157, Ann. Cas. 1914A, 1; *Ogontz Land, etc., Co. v. Johnson*, 168 Pa. 178, 31 Atl. 1008; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206.

It seems to us that an entrance gate to grounds would be no more violative of a restriction against the erection of a building within a certain distance of the street line than would be the placing of steps to the building within the limits of a restricted space. Conceding that the object of the covenant in the case at bar was the establishment of an open space in front of all the buildings with the object of affording a more extended view and providing for lawns as an embellishment, such an intent of the cove-

nant is not violated by the structure in question. The space for the lawn still exists, and the view remains unobstructed in all material respects. We think the reasoning of the court in *Meaney v. Stork*, supra, is pertinent here. In that case steps had been built within a 10-foot space required by the deed to be kept "open and unincumbered, except that light, open fences, not more than six feet in height, may be built to inclose said strip as a courtyard, if so desired." The court said:

"I incline to the opinion that the obvious purpose of the covenant was to have in front of each house a strip of land 10 feet wide across which the vision of the neighbors would be unobstructed, and that the prohibition was against the erection of anything upon or within the said 10 feet which would prevent free observation across it. Read in this way the restriction is entirely reasonable; the obvious purpose of it is served, and the owner of each lot is not deprived unreasonably of a perfectly proper use of his property. Read in the broad way that the complainants insist it should be read, giving the most extreme meaning to each word of which each word is capable, the said strip of land would have to be left absolutely unimproved in any way, because anything placed upon it which nature had not placed there would then 'incumber it,' in the broadest sense of the word, and this is so entirely unreasonable that we discard it and search for the more reasonable construction."

The foregoing decision accords with appellant's theory that the obvious purpose of the covenant should be looked to, but reaches a conclusion that the invasion of the restricted area by structures which do not substantially affect the outlook is not prohibited. In the instant case the church building is set back from the street more than double the required distance, affording abundance of outlook to the neighbors, which is broken only by an entrance gate at the street line, which interferes very little with the view, in fact less than would a common ornamental tree set at the same place. We are satisfied that the structure is a violation of neither the express words of the covenant nor of any apparent purpose deducible as the obvious intent of the covenant.

The judgment is affirmed.

ELLIS, C. J., and PARKER, MAIN, and WEBSTER, JJ., concur.

(100 Wash. 626)

CORKRELL v. POE et al. (No. 14460.)

(Supreme Court of Washington. March 22, 1918.)

1. MORTGAGES §—273 — LIABILITY OF MORTGAGOR ON TRANSFER OF PROPERTY.

Where a mortgagor conveyed the premises, covenanting that he would pay the mortgage theretofore given, and the mortgagee believing that extension was requested, by the mortgagor on request of one who had previously acted as the mortgagor's agent, extended the mortgage, there was no valid extension which would discharge the mortgagor from his primary liability on the theory that by his conveyance he had

become only a surety for the payment of the mortgage debt, for his covenant to discharge the incumbrance showed that he was still primarily liable.

2. MORTGAGES §—463 — SALE OF PREMISES — ASSUMPTION OF DEBT—EVIDENCE.

In an action to foreclose a mortgage, evidence held to show that remote grantees assumed payment of the mortgage, notwithstanding that their grantor, who took immediately from the mortgagor, had not assumed payment.

3. MORTGAGES §—291 — SALE OF PREMISES — ASSUMPTION OF DEBT.

Grantees of one to whom mortgaged premises had been conveyed under covenant by the mortgagor to discharge the incumbrance, having covenanted with their grantor to assume the mortgage, are liable, deficiency having resulted on foreclosure to the mortgagee, notwithstanding their covenant to assume the mortgage was with their own grantor, who was in no way liable.

Department 2. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by Harriet E. Corkrell against James F. Poe and George B. Burke and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Williamson, Williamson & Freeman, M. J. Gordon, and Wesley Lloyd, all of Tacoma, for appellants. E. D. Hodge, of Tacoma, for respondent.

HOLCOMB, J. Respondent sued to foreclose a mortgage given by appellant Poe upon 44 lots in Tacoma on December 15, 1909, for the sum of \$2,500, with interest as stipulated remaining unpaid, and for deficiency judgment against appellant Poe and appellants Burke and wife, who are subsequent and remote grantees of Poe.

[1] 1. On December 27, 1909, Poe sold and conveyed the mortgaged premises to the Robert Wingate Estate, a corporation, and covenanted in his deed that he would assume and pay the mortgage theretofore given by him to respondent. On August 6, 1915, the Robert Wingate Estate sold and conveyed the mortgaged premises to appellant Burke, with general covenants of warranty. The deed did not contain an agreement made between Burke and his grantor, the Wingate Estate, that the covenant of warranty should apply as against the mortgage, and thereafter, in order to cover that matter at the request of an agent of the Wingate Estate, Burke, on August 28, 1914, executed an instrument prepared by the agent, reciting that, for the purpose of correcting the deed to him and for the further consideration of one dollar, "the said George B. Burke hereby assumes and agrees to pay the mortgage." In her complaint respondent alleged that subsequent to the execution and delivery of the mortgage, on or about December 15, 1913, she and appellant Poe agreed upon an extension of the time of payment of the note and mortgage to December 15, 1916, subject to the terms and conditions thereof, etc.

This allegation appellant Poe denied in his answer, and at the trial contended that the extension made by respondent was not made to and with him, but to and with the Robert Wingate Estate, the then record owner of the premises, and that such extension of the mortgage operated in law to release appellant Poe from any further liability thereunder. As to the extension the court found that it was not a valid extension of the mortgage, and therefore rendered judgment for the deficiency against appellant Poe. Respondent testified that, at the time the extension was made, the request therefor was made by Opie & Co., who had always sent the interest on the mortgage from the time that the premises were mortgaged by Poe, and she supposed that Opie & Co. acted for Poe; that when the request for an extension of time was made she believed that it was made on behalf of Poe, and that in granting it she granted it to Poe. The instrument sent her for execution to extend the time of the notes and mortgage did not disclose the name of the grantee to whom the extension was granted, but provided as follows:

"This is an extension of the above mortgage until the 15th day of December, 1916, interest to be paid semiannually and all conditions of the mortgage as recorded above to be complied with by the mortgagor."

Poe was certainly the mortgagor. But appellant Poe contends that, since the deed from him to Wingate Estate, made 12 days after the mortgage by Poe to respondent, was duly filed of record, and that the statute (Rem. & Bal. Code, § 8781) provides that deeds so filed shall be notice to all the world, therefore respondent was bound to take notice, even though notice was constructive only, that Poe had conveyed the land to the Wingate Estate, and that any extension of the mortgage upon the premises was necessarily granted to the Wingate Estate. This, however, does not take into consideration the express terms of the deed of Poe to the Wingate Estate, which contained the express covenant that he still assumed and agreed to pay the mortgage. The Wingate Estate did not take his place as mortgagor, and he did not stand in the comparable relation of a surety for his grantee as most of the authorities consider such situation. If respondent took notice of the deed as recorded, she at the same time took notice that Poe was still the only mortgagor, and bound himself anew to satisfy the debt and mortgage. Respondent had no actual notice of the transfer of the premises from Poe to another grantee until 1915, when it had been conveyed to appellant Burke. Therefore under the notice of record by the deed to the Wingate Estate that Poe still assumed the mortgage and her belief that the extension was asked in behalf of Poe, when the extension was granted, if it was not in fact granted to Poe, it was not a valid extension, and the court was right in thus dealing with the contention of appellant Poe. His position

had to be like that of a surety, for his grantee, who assumed his primary obligation in order to be released by a valid extension of the mortgage to his grantee unauthorized by him. He would therefore still be personally liable upon the notes and mortgage, and the deficiency judgment against him was proper.

[2] 2. Appellants Burke contend: (1) That they did not assume and agree to pay the mortgage; and (2) that had they assumed and agreed to pay the mortgage, in view of the fact that the Wingate Estate, their immediate grantor, was not liable to a deficiency judgment, and had not assumed and agreed to pay the mortgage, they would not be liable to a deficiency judgment.

As to the first of these contentions the court found that they did assume and agree to pay the mortgage. This finding is sustained by the instrument of record purporting to be an instrument correcting the deed from the Wingate Estate to Burke, in which he agreed in writing, on August 28, 1914, that the deed was incorrect, and that it should have provided that he assumed and agreed to pay the mortgage, and that it should be so corrected; and by further testimony on the part of the agent of the Wingate Estate, although controverted by Burke, to the effect that it was agreed between the Wingate Estate and Burke that he should assume and agree to pay the mortgage on the premises. The finding is thus amply sustained.

[3] The remaining question then to be determined is, the Wingate Estate not having been liable for any deficiency judgment because of not having assumed and agreed to pay the mortgage, would its grantee, the remote grantee of the mortgagor, be liable to a deficiency judgment? There is a line of decisions holding that the grantee of mortgaged premises who purchases subject to a mortgage which he assumes and agrees to pay is not liable for a deficiency arising on foreclosure unless his immediate grantor is also liable, the basis for which ruling is the principle that, where the grantor is liable for the mortgage indebtedness and the deed under which he conveys contains an assumption clause, the grantee becomes the principal debtor by virtue of the agreement, and the grantor occupies the situation of a mere surety for him as to the payment of the mortgage indebtedness, and, since the grantor was not himself liable, the relation of principal debtor and surety between the grantor and grantee would not exist, and no deficiency judgment could be had. That view is sustained by the following principal cases: *King v. Whitely*, 10 Paige (N. Y.) 465; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Mount v. Van Ness*, 33 N. J. Eq. 262; *Biddle v. Pugh*, 59 N. J. Eq. 480, 45 Atl. 626; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Ward v. De Oca*, 120

Cal. 102, 52 Pac. 130; *Y. M. C. A. v. Croft*, 34 Or. 106, 55 Pac. 439, 75 Am. St. Rep. 568.

In *Hicks v. Hamilton*, 144 Mo. 495, 46 S. W. 432, 66 Am. St. Rep. 431, that principle was also followed. But later in *Crone v. Stinde*, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907, the Hicks Case was expressly overruled. In the Crone Case the opinion declared that the view therein expressed was in line with the great weight of authority and supported by the better reasoning. Some of the cases cited are put upon the ground that a third party cannot sue upon the agreement made between two other persons for his benefit. But we have taken a different view as to that matter, and in *Gilmore v. Skookum Box Factory*, 20 Wash. 703, 56 Pac. 934, adopted the principle that the beneficiary of a new promise made between two other parties for his benefit, creating a liability on the part of the promisor to pay the beneficiary of the promise in any event, and irrespective of any debt due from the promisor to such beneficiary, can maintain such action and recover.

In *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467, the Supreme Court of Illinois said that the New York cases heretofore mentioned, and others following them, were predicated upon the principle that, where the grantor is liable for the mortgage indebtedness and the deed under which he conveys contains an assumption clause, the grantee becomes the principal debtor by virtue of the agreement, and the grantor occupies the situation of a mere surety for him as to the payment of the mortgage indebtedness. The Supreme Court of Illinois, however, did not approve of the application of the principle adopted by the New York and other courts, but adhered to the principle that, where one person makes a promise to another based upon but one consideration for the benefit of a third person, such third person may maintain an action upon it. The Colorado Supreme Court has adhered to the same doctrine and, in *Cobb v. Fishel*, 15 Colo. App. 384, 62 Pac. 625, held that there was no difference, whether the grantor is himself obligated or not, as both promises are based upon a consideration, in the one case there being a manifest consideration, and in the other it being a mere matter of deduction and proof; the legal presumption being that the amount assumed is but a portion of the purchase price of the property.

The identical question was passed upon, and a most instructive opinion written, in *McDonald v. Finseth*, 32 N. D. 400, 155 N. W. 863, L. R. A. 1916D, 149. In that case the court held that the grantee of the mortgaged premises, who purchases subject to a mortgage which he assumes and agrees to pay for a deficiency arising on a foreclosure and sale, will be held liable even though his

grantor is not personally liable for the payment of the mortgage. The authorities for and against this proposition were there collated and reviewed, and we think the better reasoning sustains the principle there adopted. We have ourselves held in *Harbican v. Chamberlin*, 82 Wash. 556, 144 Pac. 717, that the deed in which it is affirmatively found that the grantee expressly assumed the mortgage imports a consideration, affirming the decision of the lower court granting a deficiency judgment. As was said in *McDonald v. Finseth*, supra, we must assume that the amount assumed by the remote grantee was deducted from the purchase price of the land.

We feel that reason and principle sustain the proposition that a remote grantee should be held liable under an assumption of another's debt and mortgage upon the conveyance of premises. See, also, in addition to the cases heretofore cited, the following: *Harberg v. Arnold*, 78 Mo. App. 237; *Heim v. Vogel*, 69 Mo. 529; *Birke v. Abbott*, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474; *Hare v. Murphy*, 45 Neb. 808, 64 N. W. 211, 29 L. R. A. 851; *McKay v. Ward*, 20 Utah, 149, 57 Pac. 1024, 46 L. R. A. 623; *Marble Savings Bank v. Mesarvey*, 101 Iowa, 295, 70 N. W. 198; *Merriman v. Moore*, 90 Pa. 78; *Enos v. Sanger*, 96 Wis. 150, 70 N. W. 1069, 37 L. R. A. 862, 65 Am. St. Rep. 38; *Bay v. Williams*, 112 Ill. 91, 1 N. E. 340, 54 Am. Rep. 209.

From the foregoing considerations, the decree of the lower court is in all respects affirmed.

MOUNT and CHADWICK, JJ., concur.

(100 Wash. 586)

STATE v. MILLER. (No. 14615.)

(Supreme Court of Washington. March 15, 1918.)

1. RAPE \Leftrightarrow 14—CONSENT—FEAR.

Where accused took prosecutrix motorcycle riding, in order that he and some 10 other men might have intercourse with her, under arrangement that they were to follow him, and prosecutrix was taken into the woods by accused and the men, who had caught up to her when accused had a pretended break in motorcycle, the fact that she did not resist, through fear of what they might do to her, actual threat of drugging being made, does not constitute consent.

2. RAPE \Leftrightarrow 6—CONSTRUCTIVE FORCE.

The force necessary to be used to constitute crime of rape need not be actual, but may be constructive or implied.

Department 1. Appeal from Superior Court, King County; John S. Jurey, Judge. Albert Miller was convicted of rape, and he appeals. Affirmed.

Alfred H. Lundin and T. H. Patterson, both of Seattle, for appellant. El. F. Kienstra, of Seattle, for the State.

FULLERTON, J. The appellant was convicted of the crime of rape, under an infor-

mation based upon Rem. Code, § 2435, providing that:

"Rape is an act of sexual intercourse with a female not the wife of the perpetrator, committed against her will and without her consent. Every person who shall perpetrate such an act of sexual intercourse with a female of the age of ten years or upward not his wife: * * * (3) When her resistance is prevented by fear of immediate and great bodily harm which she has reasonable cause to believe will be inflicted upon her, * * * shall be punished by imprisonment in the state penitentiary for not less than five years."

From the judgment of conviction this appeal is prosecuted.

The sole question involved is whether the evidence supports the charge laid in the information. The evidence shows that the prosecutrix was lured into taking a motorcycle ride with a young man, who had arranged with some 10 other young men to follow him on motorcycles; the object of the party being to have sexual intercourse with the prosecutrix. She was in ignorance of their design. After going some distance into the country, the conductor of the girl stopped his machine at a crossroad under pretense that something was wrong with the motor. Some of his confederates arrived at this juncture, and her conductor and one of the new arrivals took the girl by each arm and led her to a place some distance from the highway, where she was subjected to the successive assaults of her conductor and several members of the accompanying party. The girl did not forcibly resist or make an outcry. After the first man had accomplished his purpose, she tried to escape; but others took hold of her and held her, while the subsequent assaults were made. The girl testified she was afraid of the men, and that she felt it useless to resist, because she knew the others were there to help the one engaged in assaulting her; that she was afraid to make resistance because (as she stated) "I little knew what these men would do to me if I did." At one stage of the proceedings, when the girl was not so submissive as desired, one of the party suggested giving a hypodermic to quiet her. While there was no evidence of physical violence, there was also no evidence of consent on the part of the girl, other than the fact of submission.

But submission, due to a yielding to fear, does not constitute consent. The girl realized she was in the presence of a number of men in a lonely spot, gathered together to aid one another in accomplishing their purpose, and in addition to a realization of helplessness against numbers was the threat of drugging her if she resisted. The force necessary to be used to constitute the crime of rape need not be actual, but may be constructive or implied. An acquiescence in the act, obtained through duress or fear of personal violence, is constructive force, and the consummation of unlawful intercourse by the

man thus obtained would be rape. *Shepherd v. State*, 135 Ala. 9, 33 South. 266. In the case of *Doyle v. State*, 39 Fla. 155, 22 South. 272, 63 Am. St. Rep. 159, the defendant in a prosecution for rape requested the court to charge the jury:

"Unless you are satisfied beyond any reasonable doubt that she did not during any part of the act yield her consent, you must acquit."

The refusal of the trial court to give this instruction was sustained on appeal, the Supreme Court declaring such instruction erroneous—

"because it requires a greater degree of resistance upon the part of a woman than the law and common sense demand, where the offense is accomplished, as in this case, with an exhibition of weapons and threats, calculated to produce in the mind of the woman a reasonable fear of death or great bodily harm in case of resistance. Consent of the woman from fear of personal violence is void, and though a man lays no hands on a woman, yet if by an array of physical force he so overpowers her that she dares not resist, his carnal intercourse with her is rape."

The version of the evidence we have given is largely that of the prosecutrix. It is at variance in many of its material particulars with that of the appellant's witnesses. But the question whether the truth lay with the side of the prosecution or with the side of the appellant was for the jury, and we can but conclude that the evidence on the part of the prosecution, if believed, was sufficient to sustain a conviction.

The judgment is affirmed.

ELLIS, C. J., and PARKER, WEBSTER, and MAIN, JJ., concur.

(100 Wash. 546)

BOOK et ux. v. CELLEYHAM et al.

CELLEYHAM et al. v. BOOK et ux.

(No. 14478.)

(Supreme Court of Washington. March 13, 1918.)

VENDOR AND PURCHASER ⇐335—FORFEITURE AND RESCISSION—RIGHTS OF PARTIES.

Where defendants purchased land on installment contract, entitling the vendor to declare a forfeiture for default in payments, and the vendor's agent gave collateral contract entitling purchasers to rescind and be repaid the amounts paid by them at any time after six months from the sale, and the purchasers defaulted in payment, and the vendor gave notice of forfeiture, the purchasers could not then give notice of rescission for dissatisfaction with the land, since, when an election was once made under either of such clauses, the contract was for all purposes at an end.

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Two actions by J. V. Bock and wife against Alice J. Celleyham and husband, and by Alice J. Celleyham and husband against J. V. Bock and wife. The actions were consolidated. Judgment for Bock and wife, and Celleyham and husband appeal. Affirmed.

Tucker & Hyland and Robert C. Saunders, all of Seattle, for appellants. Andrew J. Ballet and Farrell, Kane & Stratton, all of Seattle, for respondents.

PARKER, J. These actions were consolidated and tried as one in the superior court for King county. The Bocks commenced their action seeking a decree quieting their title to certain land in King county, and removing a cloud thereon consisting of a recorded contract for the sale thereof by them to the Celleyhams, whose rights thereunder the Bocks claim had been forfeited. Soon thereafter the Celleyhams commenced their action seeking recovery of the amount paid by them to the Bocks upon the purchase price of the land. The trial of the actions upon the merits resulted in a judgment and decree denying to the Celleyhams recovery of the amount paid by them to the Bocks upon the purchase price, quieting the title of the Bocks to the land, and removing the cloud thereon consisting of the recorded contract of sale. From this judgment and decree the Celleyhams have appealed to this court.

The cause was tried to a jury in so far as concerned the claim of the Celleyhams for recovery of the amount paid by them upon the purchase price of the sale contract. The only question of fact in dispute and the only issue submitted to the jury was whether or not the provision of the contract upon which the Celleyhams rested their right to recover the amount they had paid upon the purchase price was in fact a part of the contract. The verdict of the jury was in effect a finding in favor of the Celleyhams upon that question of fact. Timely motion was made for judgment notwithstanding the verdict, in favor of the Bocks, upon the question of the right of the Celleyhams to recover the amount they had paid upon the purchase price of the contract. This motion was granted, and judgment and decree rendered as above noticed.

On December 30, 1910, the Bocks, being then owners of the land in question, entered into a contract for the sale thereof for \$10,000 to appellant Alice J. Celleyham. Two thousand dollars of this purchase price was then paid in cash, and the balance of \$8,000, with interest, agreed to be paid on December 30, 1912. The contract contained among other provisions the following:

"Time is the essence of the contract, and in case of failure of the said party of the second part [Alice J. Celleyham] to make either of the payments or perform any of the covenants on her part, this contract shall be forfeited and determined at the election of the said parties of the first part, and the said party of the second part shall forfeit all payments made by her on this contract, and such payments shall be retained by the said parties of the first part in full satisfaction and liquidation of all damages by them sustained, and they shall have the right to re-enter and take possession of said land and premises and every part thereof."

This sale contract was brought about through the efforts of Corinne Simpson, as

agent of the Bocks. On January 5, 1911, Corinne Simpson signed and delivered to Alice J. Celleyham the following writing:

"Whereas, Alice J. Celleyham has purchased from John V. Bock and wife, through my office, the following described land, situate in King county, state of Washington: * * *

"Now therefore, I, Corinne Simpson, do hereby agree with said Alice J. Celleyham, in consideration of her purchasing said tract through my office, and other valuable considerations, that I will, at any time after six months from date, upon notice to me in writing signed by said Alice J. Celleyham, stating that she is dissatisfied with her said purchase, pay and refund to said Alice J. Celleyham the said sum of \$2,000 paid by her on account of said purchase price, together with such additional sum or sums as she may have paid thereon subsequently, upon a proper conveyance to me of all the right, title and interest of said Alice J. Celleyham and husband in said land."

This writing was claimed by the Celleyhams to have been executed by Corinne Simpson for the Bocks and as a part of the sale contract. We shall assume for argument's sake that the verdict of the jury establishes this as a fact binding upon the court, rather than merely as advisory. No part of the balance of the \$8,000 of the purchase price of the sale contract has ever been paid or tendered. Nor has any interest been paid thereon since December 31, 1914, when interest maturing thereon up to that date was paid. On May 27, 1916, the Bocks duly notified the Celleyhams in writing as follows:

"You and each of you are hereby notified and required to pay, on or before the 20th day of June, 1916, at 505 American Bank Building, Seattle, Wash., the principal sum of \$8,000, together with interest thereon in the sum of \$840, according to the contract made and entered into on the 30th day of December, 1910, between Alice J. Celleyham and the undersigned for the purchase and sale of the following described real estate: * * * You and each of you are hereby further notified that unless you made said payments on or before said 20th day of June, 1916, the undersigned will declare a forfeiture of the said contract under its terms, and all payments heretofore made on said contract will be retained by the undersigned as liquidated damages."

This notice and demand was never complied with. On June 28, 1916, the Bocks, having elected to declare the contract of sale canceled and the payments made thereon forfeited to them, commenced their action seeking a decree quieting their title to the land and removing the cloud thereon consisting of the recorded sale contract. On June 29, 1916, Alice J. Celleyham notified Corinne Simpson in writing that she was dissatisfied with her purchase of the land, and elected to have the amount paid by her upon the purchase price repaid to her. On June 30, 1916, the Celleyhams commenced their action seeking to recover from the Bocks the amount paid upon the purchase price of the sale contract. The two actions being thereafter consolidated were tried in the superior court with the result above noticed. The facts above summarized are all conceded or conclusively established, so the rights of the

respective parties are determinable as matters of law.

There is but little here to be considered other than the meaning of the sale contract, of course reading as a part thereof the writing executed by Corrine Simpson for the Bocks. The contention made by counsel for the Celleyhams is in substance that no condition could arise, and no limit of time elapse short of some possible statute of limitation, which would take away their right to give notice of their dissatisfaction with their purchase and claim repayment of the amount of the purchase price paid by them upon the contract of sale. In other words that, notwithstanding the Celleyhams have failed to make payment of any part of the balance due upon the purchase price for a period extending long past the time for the making of such payment, and the Bocks have elected to declare the rights of the Celleyhams under the contract forfeited, such default and election does not destroy that provision of the contract which gave to the Celleyhams the right to elect to have repayment of the amount they paid upon the purchase price. We cannot agree with this contention. It seems to us that, just as the forfeiture provision of the contract enabling the Bocks to put an end to it upon default in making payment by the Celleyhams was inserted for the benefit of the Bocks, so was the provision therein, enabling the Celleyhams to elect to have the amount of the purchase price repaid to them upon giving notice of their dissatisfaction with their purchase and claiming repayment of the amount of the purchase price paid by them, inserted for their benefit. It seems to us that both of these provisions are to be given full force and effect, but that, when an election has been lawfully made under one of them, the contract thereby becomes extinguished for all purposes. While it would seem that the right of the Celleyhams to elect to give notice of their dissatisfaction with their purchase, and claim repayment of money paid by them upon the purchase price, would remain unimpaired as long as the contract was alive, we are quite unable to understand how they can have any such right when by their own default, and the election of the Bocks rested thereon, the contract and all rights thereunder have been brought to an end. To allow the Celleyhams to now recover would be in effect allowing them to recover upon a contract which for all purposes, as we view it, has ceased to exist.

The only decision called to our attention which might seem to lend some support to the contentions here made in behalf of the Celleyhams is that of the Iowa court in *Bradford v. Limpus*, 10 Iowa, 35. The court there had under consideration a land sale contract with a forfeiture clause somewhat similar to that here involved, but with this difference: \$1,700 was paid down upon the purchase price, and the deferred payments evi-

denced by promissory notes. The forfeiture clause of the contract provided among other things:

"* * * If the failure shall be in the payment of the first above-described note, the contract shall be void, and said Bradford shall take possession of the premises, and refund to said Limpus or order the sum of \$1,200, without interest, out of the \$1,700 so paid in hand, \$500 thereof having been forfeited by reason of said failure on the part of said Limpus to comply with the terms of said contract."

This language was construed to mean that, by the mere failure on the part of the grantee to pay the first note when due, it became an election on his part to put an end to the contract and require Bradford, the grantor, to take the land back and repay \$1,200 of the amount paid down on the purchase price. In the case before us the election which might have been made by the Celleyhams, to exercise their right to have the amount paid upon the purchase price repaid to them, was by the very terms of this contract required to be evidenced by written notice given to Corrine Simpson, and of course until that was done there was no election on the part of the Celleyhams; and this coming after forfeiture of all their rights under the contract because of their default and the election of the Bocks, such election and notice by the Celleyhams was of no avail to them. It seems to us that these two provisions of the contract, one inserted for the benefit of the Bocks and the other for the benefit of the Celleyhams, are but provisions for two different methods for the termination of the contract and all rights thereunder; that each is to be exercised by parties entitled to exercise it before the contract has been terminated; and when the contract is terminated by the lawful election of either party, it ceases to exist for all purposes. Observations made by Judge Hadley in *Jennings v. Dexter Horton & Co.*, 43 Wash. 301, 306, 86 Pac. 576, lend support to this conclusion.

The judgment is affirmed.

ELLIS, C. J., and WEBSTER, MAIN, and FULLERTON, JJ., concur.

(100 Wash. 552)

STATE ex rel. EILERS MUSIC HOUSE v. FRENCH, Judge, et al. (No. 14627.)

(Supreme Court of Washington. March 13, 1918.)

1. TRIAL \S 388(3)—FINDINGS AND CONCLUSIONS—DISMISSAL.

Under Rem. Code 1915, \S 367, providing that on trial of an issue of fact by the court its decision shall be given in writing, and facts and conclusions of law shall be separately stated, findings and conclusions are necessary on the dismissal of an action.

2. TRIAL \S 388(5)—FINDINGS AND CONCLUSIONS—DUTY TO MAKE.

Under Rem. Code 1915, \S 367, providing that on trial of issues of facts by the court its decision shall be in writing, and facts and conclusions of law shall be separately stated, it is

the duty of the judge to make such findings and conclusions, though a general custom had arisen for attorneys to prepare them and submit them to the judge for signature.

3. JUDGMENT \Leftrightarrow 272—DELAY IN ENTRY—LOSS OF JURISDICTION.

Delay in entry of judgment does not work a loss of jurisdiction, and unless some independent right has intervened which will be adversely affected by the judgment, it is the right of a litigant to have judgment entered, unless lapse of time is unreasonable.

4. JUDGMENT \Leftrightarrow 273(8)—ENTRY—LAPSE OF TIME.

Where, in an action, decision was rendered by an acting judge of another county, but no judgment was then entered, motion to enter judgment, made a year and a half later before the same judge, again acting for the regular judge, no rights of third persons intervening, is not made after an unreasonable lapse of time.

5. MANDAMUS \Leftrightarrow 32—ENTRY OF JUDGMENT.

Mandamus lies to compel a judge to enter judgment on his decision.

Department 1. Application for writ of mandamus by the State, on the relation of Ellers Music House, against Walter M. French, acting Judge of the Superior Court for Kings County, George J. Mackenzie, and Robert Grass. Writ issued.

James R. Chambers, of Seattle, for plaintiff. Robert Grass, of Seattle, for respondents.

FULLERTON, J. The relator on September 25, 1915, brought an action against George J. Mackenzie and Robert Grass to recover possession of a piano delivered to Mackenzie under a conditional sale contract. The possession of the piano had been transferred to defendant Grass in satisfaction of an indebtedness due him from Mackenzie. The cause was tried on February 17, 1916, before Hon. Walter M. French, judge of the superior court for Kitsap county, who at that date sat as an acting judge in the superior court of King county. The court orally announced its decision, which was in effect a finding for the defendants, but no formal findings of fact, conclusions of law, or judgment was entered. On October 9, 1917, the relator through other than his original counsel served on the attorneys for defendants proposed findings of fact, conclusions of law, and judgment in the case, and a hearing was had thereon before Judge French on October 17, 1917, when he was again sitting as judge in King county. The defendants objected that the attorney representing relator in such application for entry of judgment was not the attorney of record for the relator, and further objected to the entry of findings and judgment at that time. Thereupon the court made the following ruling:

"Defendants' objections to signing of findings, conclusions, and decree sustained. Court refuses to sign same on the grounds that one and one-half years had elapsed between time of court's decision and presentation of said findings, conclusions and decree for signing."

A proper substitution of attorney for relator was made of record, and on November 20, 1917, there was served upon defendants a motion to compel the entry of final judgment, which was brought on for hearing before Judge French on December 10, 1917, as he was again sitting as judge in King county; whereupon a ruling was made by the judge, as shown by the records of the court, as follows:

"December 10, 1917. Entd. Plt's motion for entry of final judgment. The court refuses at this time to consider the above motion. Exception allowed."

The court at the same time refused to enter any character of final judgment, and further refused to sign a formal order denying motion for the entry of such judgment. The relator has applied to this court for a writ of mandate directed to Judge French, as visiting and acting judge in the superior court of King county, commanding him to proceed to final judgment in the cause, and to sign, file, and enter his findings of fact, conclusions of law, and judgment thereon.

[1] The refusal of the trial court to make, sign, and enter findings, conclusions, and judgment is rested upon the failure of the litigants to present them to him for action until the lapse of one year and a half after his oral decision of the cause. While a custom has grown almost into settled practice for the attorneys to present findings, conclusions, and judgment for the signature of the judge, and the latter has come largely to depend on such assistance, it is the statutory duty of the judge himself to perform these functions. The statute declares:

"Upon the trial of an issue of fact by the court, its decision shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly." Rem. Code, § 367.

[2] Findings and conclusions are just as essential on the dismissal of an action as where an affirmative judgment is entered. *Slayton v. Felt*, 40 Wash. 1, 82 Pac. 173.

[3, 4] The failure of the judge to perform one of the administrative duties pertaining to the judicial functions of his office ought not to be chargeable against a losing party upon whom it was not incumbent to see that a proper judgment was entered. The respondents now seek to burden the relator with their own omissions, and argue that the relator cannot extend the time for taking an appeal by neglecting to have findings and judgment entered. But the question of relator's right of appeal is not an issue at this time. It is conceded that no final judgment has ever been entered in the cause, and the question is whether the judge is now chargeable with that duty. We have no doubt that he is. Delay in the entry of a judgment does not work a loss of jurisdic-

tion. (*Moylan v. Moylan*, 49 Wash. 341, 95 Pac. 271); and unless some independent right has intervened which will be adversely affected by the judgment, it is the right of a litigant to have a judgment entered, unless the lapse of time is unreasonably great. 23 Cyc. 838. The delay was not unreasonable in this instance. *State ex rel. Calhoun v. Superior Court*, 86 Wash. 492, 150 Pac. 1168.

The court erred in refusing to enter a judgment, and the writ should issue. It is so ordered.

ELLIS, C. J., and PARKER, MAIN, and WEBSTER, JJ., concur.

(100 Wash. 632)

STATE ex rel. BERGER et al. v. HAIMAN et al. (No. 14556.)

(Supreme Court of Washington. March 22, 1918.)

1. INJUNCTION \S 230(1)—CONTEMPT—ORIGINAL ACTION—"JURISDICTION."

Where defendants, proceeded against for contempt in disobeying injunction restraining them from taking any part in affairs of a corporation, as not being members thereof, appeared in the original action, they cannot attack the court's jurisdiction in original action because members of corporation sued alone without making corporation party plaintiff or defendant, since "jurisdiction" of the particular matter does not mean simple jurisdiction of particular case, but jurisdiction of particular class of cases to which particular case belongs.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

2. INJUNCTION \S 225—CONTEMPT—DEFENSE—CHANGED CONDITIONS.

Where defendants, enjoined from taking any part in affairs of a corporation as not being members thereof, had themselves elected as members after decree for purpose of evading decree, and did not apply to court to have decree modified because of such changed condition, they could not defend contempt proceedings for violation of decree, though a different rule exists, where changed condition was due to operation of law.

Department 2. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Contempt proceedings by the State, on relation of E. B. Berger and others, against Lewis Haiman and others. From a judgment imposing fines, defendants appeal. Affirmed.

H. P. Burdick and James J. Anderson, both of Tacoma, for appellants. Huffer & Hayden and Fred G. Remann, all of Tacoma, for respondents.

MOUNT, J. The appellants in this action were found guilty of disobeying an order of the trial court, were adjudged in contempt, and fines were imposed upon them. They have appealed from that judgment.

They make two contentions in this court, to the effect: First, that the trial court did not have jurisdiction of the original action; and, second, that, after the decree

in the original action, conditions were changed so that they did not violate the decree. We shall consider these points in their order.

The original action was brought by a number of members of a corporation against the appellants to restrain the appellants from taking any part in the business and affairs of that corporation. Upon issues joined in that action, the court entered a decree, restraining the appellants from taking any part in the affairs of the corporation, upon the ground that they were not members of the corporation.

[1] It is argued by the appellants that the trial court had no jurisdiction of the original action, by reason of the fact that the corporation of which the parties plaintiff were members was not made a party plaintiff or defendant. The appellants do not contend that the court did not have jurisdiction of the subject-matter, or of the parties plaintiff or defendant who appeared in that action; but their contention, if we understand it correctly from their brief is that the corporation itself was a necessary party and that without the corporation being made a party plaintiff or defendant, the court had no jurisdiction of the case. Conceding, if we may, that these appellants may, in this case, now question the decree which was rendered in that case, we think it is apparent that the trial court had jurisdiction both of the subject-matter and of the parties who appeared in the action. As was said in *O'Brien v. People*, 216 Ill. 354, at page 363, 75 N. E. 108, at page 112 (108 Am. St. Rep. 219, 3 Ann. Cas. 966):

"Jurisdiction of the particular matter does not mean simple jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs. * * * Whether a complaint does or does not state a cause of action is, so far as concerns the question of jurisdiction, of no importance, for if it states a case belonging to a general class over which the authority of the court extends, then jurisdiction attaches, and the court has power to decide whether the pleading is good or bad."

And in *Board of Supervisors v. Mineral Point Railroad Co.*, 24 Wis. 93, it was said, at page 131:

"The force or efficacy of a decree, as between the parties before the court, does not depend upon the fact that there may be other persons, proper or necessary parties, who are not before it."

So it seems clear that, even though the corporation of which the parties plaintiff and defendant in the original action were members was a necessary party, it does not follow that the court did not have jurisdiction of the subject-matter of the complaint in that action or of the parties who appeared and answered to that complaint. We are satisfied, therefore, that this question is not open to these appellants in this proceeding.

[2] Upon the question of changed condition, it appears that the trial court entered a decree restraining these appellants from participating in the affairs of the corporation. After the decree was entered, and after these appellants had notice of it, they pretended to have themselves elected members of the corporation, and then proceeded to transact business of the corporation. When they were cited to show cause why they should not be adjudged guilty of contempt, they proceeded to show that they were elected members of the corporation after the decree. The court, in determining that question, found that the acts which the appellants testified to—

"were not had or made in good faith, but for the studied and designed purpose of evading the order and decree of this court. * * *

We think there can be no doubt, upon the record, that the court was justified, from the evidence, in arriving at this conclusion. Even if it were a fact that the appellants became members of the corporation after the decree restraining them from interfering with the business and affairs of the corporation, it was still the duty of the appellants, before violating the decree of the court in the original action, to apply to the court to have the decree modified upon the changed condition, and not to violate the decree of which they had notice. If the changed condition had been brought about by operation of law, and not by the act of the parties themselves, a different question might be presented. In that event, the cases of *State of Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. (59 U. S.) 421, 15 L. Ed. 435, and *Gardiner v. Ross*, 19 S. D. 497, 104 N. W. 220, cited by appellants, would be in point. But in this case the change of condition was not brought about by operation of law. It was brought about by act of the parties themselves, which the trial court found was not an act of good faith, but was for the designed purpose of evading the order and decree of the court. Under such a condition, it is clear that the rule of the cases cited by the appellants does not control.

We find no error in the judgment of the trial court, and it is therefore affirmed.

ELLIS, C. J., and CHADWICK and HOLCOMB, JJ., concur.

(100 Wash. 580)

LUEDINGHAUS v. PEDERSON et ux.
(No. 14508.)

(Supreme Court of Washington. March 15, 1918.)

1. TRESPASS \S 61—PERSONS LIABLE—CONTRACTOR.

One who contracted to clear and grade a right of way, the contract prohibiting assignment without the consent of the railroad company and no record of the assignment appearing, must be deemed primarily liable for the un-

lawful cutting of timber in connection with work, notwithstanding his contention that he assigned the contract to a corporation of which he was president.

2. TRESPASS \S 61—CUTTING OF TIMBER—TREBLE DAMAGES—"CASUAL OR INVOLUNTARY TRESPASS."

Where employes of a railroad contractor, in violation of directions of foreman, cut timber on plaintiff's land at places other than that included within the right of way, which timber plaintiff authorized the contractor to cut, the trespass must be deemed casual or involuntary, and within Rem. Code, §§ 939, 940, providing for treble damages for the willful cutting of timber, but for only single damages where the trespass is casual or involuntary.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Involuntary Trespass; Second Series, Casual and Involuntary.]

3. TRESPASS \S 61—ACTIONS—DAMAGES.

In an action for treble damages for cutting and removing timber, plaintiff can be awarded only single damages, the evidence showing that the trespass was involuntary or casual, and not willful, even though defendant's answer consisted only of a general denial.

Department 2. Appeal from Superior Court, Lewis County; W. A. Reynolds, Judge.

Action by F. W. Luedinghaus against Hans Pederson and Marie Pederson, his wife. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with instructions.

Roberts, Willson & Skeel and Lee Johnston, all of Seattle, for appellants. A. A. Hull and W. M. Urquhart, Jr., both of Chehalis, for respondent.

MOUNT, J. This action was brought to recover treble damages for cutting and removing certain timber from the lands of the plaintiff. The plaintiff alleged in his complaint that the defendant Hans Pederson—"through his authorized servants and agents trespassed upon the lands described herein without any license or permission from the owners thereof, and wrongfully and unlawfully removed certain valuable timber standing thereon, in the amount of 149,317 feet, of the reasonable value of \$3 per thousand feet, whereby the owners thereof lost said timber, and the land and timber belonging to them was greatly damaged, and lessened in value in the amount of \$950, and thereby the said defendant, by force of the provisions of the laws of the state of Washington, became liable to pay to the owners thereof treble the amount of said damages."

The answer was a general denial.

Upon the trial of the case to the court without a jury, the court found that 68,131 feet of timber was removed by authority of the owners of the land, that 59,952 feet was removed by willful trespass, and that 19,832 feet was taken by casual or involuntary trespass. The court thereupon trebled the value of the 59,952 feet, and found that the reasonable value of 19,832 feet was \$6.50 per thousand feet, and excluded the 68,131 feet from the judgment. Judgment was entered in favor of the plaintiff and against the defendants for \$668.36, besides the costs. The defendants have appealed.

Appellants make two contentions, to the effect, first, that they are not liable for the acts of the corporation, of which they are merely stockholders; and, second, that the court erred in finding a willful trespass and in trebling the damages.

[1] Upon the first point it appears that appellant Hans Pederson took a contract for clearing and grading for a railway across the lands in question. This contract was placed of record in the county in which the lands were located. Thereafter the work was done by the Hans Pederson Construction Company, of which it is claimed that Hans Pederson was president. It is argued that a mere stockholder in a corporation is not liable for an act of the corporation. We find no competent evidence in the record to show that the Hans Pederson Construction Company was in fact a corporation. The work of clearing and grading for the railway was done under a contract between the railway company and Mr. Pederson. That contract was in writing. It provided that no assignment thereof should be made without the written consent of the railway company. While it is claimed that the contract was assigned by Pederson to the Hans Pederson Construction Company, there is no record of that fact and it was not proved. We are satisfied, therefore, that, when it was shown that the work was done according to the contract which was taken in the name of Hans Pederson, he is primarily liable for whatever was done under that contract.

[2] It is next argued by the appellants that there is no evidence that the trespass was willful on the part of the appellants, and that the court erred in finding that the trespass was willful. It is conceded by the respondent that he gave permission to the foreman, who had charge of the work of clearing and grading for the railway, to use certain timber within the right of way, and that under this agreement some 68,000 feet of the timber was used. The evidence shows that some of the employees of the construction company, who were doing work upon the clearing and grading, went off the right of way, and took certain timber, which was used about the work. This was no doubt sufficient to show a trespass; but it was also shown that Mr. Pederson knew nothing of this trespass and did not authorize it. The foreman who had charge of the work had instructed the men under him not to go off the marked-out right of way to take any timber. It is apparent, therefore, that there was no willful trespass on the part of the appellants or their authorized agents. The statute provides, at sections 939 and 940, Rem. Code, that whenever any person shall cut down or carry off any timber on the land of another person without lawful authority, in an action by such person against the person committing such trespasses, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or

assessed therefor, as the case may be. But if, upon trial of such action, it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, judgment shall only be given for single damages. In *Skamania Boom Co. v. Youmans*, 64 Wash. 94, 116 Pac. 645, in construing these sections, we held that they did not provide—

“that one who cuts the timber of another without regard to the place of cutting or to the ownership of the land from which it is cut shall be holden in treble damages. To fall within the statute the timber must be cut upon the land of another person, and the trespass must not have been casual or involuntary, but, as was said in the *Gardner Case*, ‘the intent to commit trespass must appear.’”

And in *Bailey v. Hayden*, 65 Wash. 57, at page 61, 117 Pac. 720, at page 721, after considering these same two sections, we said:

“The statute is penal in its nature, not merely remedial. As such it should be strictly construed. * * * We are constrained to hold that the statute, construing the two sections together according to their most obvious intent, contemplates but one measure of damages—the actual and compensatory—which shall be trebled as against the willful wrongdoer and allowed singly as against the casual or involuntary trespasser.”

And in *Tronsrud v. Puget Sound Traction, Light & Power Co.*, 91 Wash. 660, 158 Pac. 348, in referring to these same two sections, we said:

“That section (section 939) itself multiplies the recovery only when the mischief is done ‘without lawful authority,’ besides which the next imposes that, if the act be ‘casual or involuntary,’ the damages shall be but single. Now, it is undisputed that there was permission given for this thing, and, though the jury did find that as to cutting the tops no permission had been given, the right to do some lopping and trimming is clear. Defendant may, indeed, have gone further in plaintiffs’ absence than it would have done in their presence, but it would be misusing this law to visit upon the mistaken a penalty intended for the wanton. The bad faith or degree of willfulness necessary to set in motion the first section is made clear in *Bailey v. Hayden*, 65 Wash. 57, 117 Pac. 720; *Skamania Boom Co. v. Youmans*, 64 Wash. 94, 116 Pac. 645, and *Gardner v. Lovegren*, 27 Wash. 356, 67 Pac. 615. In this case plaintiffs should have been confined to compensation under the second.”

In *Harold v. Toomey*, 92 Wash. 297, 158 Pac. 986, we said:

“While it is true that this court construes the statute (section 939, supra) strictly, and will discountenance any trebling of damages except in cases where the trespass is voluntary and an element of willfulness or malice is combined therewith, nevertheless the statute was enacted for a just, double purpose—to punish a voluntary offender and to provide, by trebling the actual present damage, a rough measure of compensation for future damages not generally ascertainable.”

In this case it was an admitted fact that the respondent authorized the taking of certain timber, conceded to be more than 68,000 feet. Some of the servants of the appellants, with-

out their knowledge or consent, and against the advice of their foreman, took certain other timber. It is plain, we think, that this trespass was casual and involuntary, and under the statute should not have been trebled.

[3] The respondent asserts that it was the duty of the appellants to allege in their answer that the trespass was involuntary and casual as a defense, and that, since the answer alleged a general denial only, they ought not to be heard to say that the trespass was casual and involuntary; but under the decisions which we have referred to above it is apparent that, if it appeared upon the trial of the case that the trespass was casual or involuntary, that was sufficient to defeat a recovery for treble damages. We are satisfied, therefore, that the trial court erred in trebling the damages. There is no evidence of damage to the land aside from the timber. The judgment should have been for single damages only, or for \$243.55.

The judgment appealed from is therefore reversed, and remanded to the lower court, with instructions to enter a judgment in favor of the respondent for \$243.55; the appellants to recover their costs in this court.

ELLIS, C. J., and CHADWICK, J., concur.

(100 Wash. 608)

TRUITT v. TRUITT. (No. 14298.)

(Supreme Court of Washington. March 22, 1918.)

1. DEEDS \S 196(2) — **VALIDITY — HUSBAND AND WIFE—BURDEN OF PROOF.**

Rem. Code 1915, \S 5292, providing that, in every case where any question arises as to the good faith of any transaction between husband and wife, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith, does not apply to aid a devisee, but only creditors.

2. DEEDS \S 196(1) — **MENTAL COMPETENCY — BURDEN OF PROOF.**

A devisee or heir has the burden of proving that his ancestor, in deeding his property while on his deathbed, was not physically or mentally competent.

3. DEEDS \S 211(1) — **MENTAL COMPETENCY—SUFFICIENCY OF EVIDENCE.**

Evidence held insufficient to support a finding that one executing a deed while on his deathbed was mentally or physically unable to execute such deed.

Department 2. Appeal from Superior Court, Pierce County.

Action by Frank Edward Truitt, individually and as executor of the Estate of George Truitt, deceased, against Margaret Truitt. Decree for plaintiff, and defendant appeals. Reversed, with directions.

Gordon & Easterday and R. L. Sherrill, all of Tacoma, for appellant.

MOUNT, J. This action was brought by the respondent, in his individual capacity

and as executor of his father's estate, to set aside a deed to lot 3, in block 16, South Tacoma addition to Tacoma, upon an allegation as follows:

"That said George Truitt, deceased, was on his deathbed at the County Hospital, as a pauper, and both physically and mentally incapable of executing the deed, or conveying property, and was induced and coerced by the said defendant, who knew well that he was in such a weak condition physically and mentally, that he was incapable of any intelligent action, and plaintiff alleges that if said purported conveyance was ever signed by him, by mark, that it was not in fact, and could not have been by reason of his weak and dying condition, his voluntary act."

Upon this issue the case was tried to the court without a jury. At the conclusion of the evidence, the court made no findings of fact, but entered a decree setting aside the deed. The defendant has appealed.

It appears that the respondent, Frank Edward Truitt, is the son of the deceased, George Truitt, by a former wife. On the 1st day of July, 1908, George Truitt was married to the appellant, and they lived together thereafter until his death. In 1911 George Truitt made his will, in which his son Frank was named as residuary legatee. In the year 1916 Mr. Truitt was very ill, and went to the County Hospital of Pierce county. While there, on the 24th day of June, 1916, Mr. Truitt executed and delivered to his wife, the appellant, a deed to the lot in question. On the 6th day of July, 1916, he died. Thereafter the respondent, Frank Edward Truitt, was appointed executor of his father's will, and subsequently brought this action.

The record shows that, at the time the deed was executed, George Truitt was a very sick man. He was weak physically, and there is some evidence that he slept a good part of the time, and that, when he talked, he talked with difficulty, and mostly in whispers. There is some evidence to the effect that at times he was mentally irresponsible; but there is no evidence that, at the time the deed was signed, he did not know what he was doing. We think the evidence is almost conclusive that he knew what he was doing when he executed the deed. We find no evidence in the record that there was any undue influence brought to bear upon him to cause him to execute the deed. We find nothing in the record to show that there was anything unnatural in the fact that he executed the deed to his wife. So far as the record shows, Mr. Truitt and his wife had lived together happily during the eight years of their married life. It is conceded that Frank Edward Truitt had not seen his father for two years prior to his death. We are at a loss to know upon what the trial court based his conclusion that the deed should be set aside; for, as we have said, there is no evidence of undue influence, and we are satisfied that there is not sufficient evidence in the record to show that Mr. Truitt, at the time he made the deed, did not

know the full purport thereof and intend to do what he did.

[1] No appearance has been made on behalf of the respondent, by brief or otherwise, in this court. It is said in the brief of the appellant that the trial court was of the opinion that the case was controlled by section 5292, Rem. Code, which reads as follows:

"In every case where any question arises as to the good faith of any transaction between husband and wife, whether a transaction between them directly or by intervention of third person or persons the burden of proof shall be upon the party asserting the good faith."

There is nothing in the record to show, and it is not claimed therein, that George Truitt, at the time he made and executed the deed in question, had any creditors; and it is not claimed that the respondent, Frank Edward Truitt, was a creditor of his father. So it is apparent, we think, that this section of the statute has no bearing upon this case. The deceased had a right, no doubt, to dispose of his property as he saw fit. At the time he made this deed he could have made another will, and that will would certainly have been valid, if Mr. Truitt, at that time, was in his right mind and knew what he was about. The question of good faith in making such will could not enter into a contest of the will, because, if the testator knew what he was doing, and intended what he did, the will would have been valid. Instead of making a will, he executed a deed, giving this piece of property to his wife. The good faith of the transaction may not be questioned by any person other than a creditor; and, since there were no creditors, the question of good faith cannot be made. In the case of *Deering v. Holcomb*, 26 Wash. 588, at page 600, 67 Pac. 240, at page 244, we said upon this question:

"It is immaterial whether such real estate stands in the name of the husband or wife. The conveyance of such real estate to the wife is not even evidence of fraud. The husband could give his interest in such real estate to the wife, and no one could question the good faith of such a transaction but the creditors of the community. The appellant is not such a creditor, and a transfer of such property is a matter of no concern to him."

See, also, 12 R. C. L. page 513.

[2, 3] So that the only question left in the case is whether Mr. Truitt, at the time he made this deed, was conscious and knew what he was about; for there is no evidence of any undue influence practiced upon him. The respondent alleged in his complaint that, at the time the deed was made, Mr. Truitt was both physically and mentally incapable of executing the deed or conveying the property. The burden was upon the respondent to show these facts. While there is evidence in the record that Mr. Truitt, the grantor in the deed, was a very sick man at that time, and died 12 days after the execution of the deed, and that at times he was probably unconscious, there is also evidence of the fact that at other times he was perfectly rational,

knew what he was doing, and talked intelligently, but with difficulty. There is no evidence that at the time he executed the deed he was incapable of executing it, except a mere inference. There is evidence, sufficient, we think, to show that at the time the deed was executed he was mentally capable of so doing, and that he understood and intended the purport and effect of it. We are satisfied, therefore, that the trial court erred in setting aside the deed.

The judgment is reversed, and the cause remanded, with instructions to dismiss the action.

ELLIS, C. J., and CHADWICK and HOLCOMB, JJ., concur.

(100 Wash. 542)

GRASS et ux. v. CITY OF SEATTLE.
(No. 14452.)

(Supreme Court of Washington. March 13, 1918.)

1. NEW TRIAL \S 41(1) — GRANT OF NEW TRIAL—HARMLESS ERROR.

Where under the evidence no verdict other than that for defendant would be allowed to stand, it is improper for the trial court to grant a new trial to plaintiff after verdict for defendant on account of the erroneous refusal of instructions or improper comments by the court.

2. MUNICIPAL CORPORATIONS \S 768(3)—INJURIES TO PERSONS ON SIDEWALKS—LIABILITY OF MUNICIPALITY.

A city is not an insurer of the personal safety of every one who uses its walks, nor is it bound to keep them in such repair that accidents cannot possibly happen. Hence a city is not liable for injuries received by plaintiff who tripped over a break in a cement walk which was 1½ inches high at one side of the walk and tapered to nothing at the other, particularly where plaintiff regularly used the walk for several weeks.

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Martin M. Grass and Catherine Grass, his wife, against the City of Seattle. There was a verdict for defendant, and, motion for new trial being granted, defendant appeals. Reversed and remanded, with instructions to enter a judgment upon the verdict.

Hugh M. Caldwell and Patrick M. Tammany, both of Seattle, for appellant.

FULLERTON, J. The respondents Grass brought an action against the city of Seattle to recover for personal injuries received by Mrs. Grass from a fall caused by tripping over a defective place in a sidewalk on one of the city streets. The defect consisted in a straight break across a cement sidewalk, leaving one side elevated above the other. The elevation at the inner line of the walk was 1½ inches high, gradually tapering to nothing at the curb. The exact location of the part of the walk over which the respondent tripped does not appear in evi-

dence. The cause was tried to a jury, which returned a verdict for the city. A motion for a new trial was interposed by the respondents on the grounds of irregularity in the proceedings of the court, accident and surprise, insufficiency of the evidence, and error in law occurring at the trial. The trial court granted the motion for reasons which are stated in the order in the following language:

"The court, having heard the arguments of counsel and being fully advised, is of the opinion that error in law was committed by the court's refusal to give certain instructions which were proposed and submitted by plaintiffs, and also owing to the irregularity in the proceedings on the part of the trial court which consisted of comment by the trial court during the progress of the case, as is more clearly evidenced and shown by the statement of facts; and the trial court recognizing and being of the opinion that the comment by the trial court during the progress of the trial, and the demeanor of the trial court, might very easily have prejudiced, and in all probability did prejudice, the jury against the plaintiffs, by reason whereof the plaintiffs were prevented from having a fair trial, and as a consequence the trial court concludes that in fairness to all parties plaintiffs should be granted a new trial."

From the disposition made of the case by the court, the city appeals.

[1] While the appellant discusses the case from the viewpoint of the trial court and attempts to show that there is no error in the record even from that point of view, it also makes the contention that under the evidence no other verdict could be permitted to stand than that returned by the jury. The respondents have not favored us with a brief, but we have nevertheless examined the evidence with care, not only from the very complete abstract furnished by the appellant, but from the statement of facts as well. This examination has forced us to the conclusion that the last contention made by the appellant is well founded. So concluding, it is unnecessary to notice the questions upon which the trial court rested its finding of error, as the other necessarily concludes the matter.

[2] As to the condition of the walk at the place where the injured respondent tripped and fell, there is no substantial dispute in the evidence. While the respondent and certain of her witnesses estimated the drop in the walk as ranging from 2 to 2½ inches at the inner side and tapering to nothing at the curb, exact measurements, made by different persons shortly after the accident and again immediately preceding the trial, showed its actual drop to be 1½ inches at the inner side, tapering to nothing at the curb. Indeed, the respondent testified that, notwithstanding she had passed over the walk on an average of twice a week for several weeks preceding the accident, she did not know of the existence of the defect. One of her witnesses also testified that, when walk-

ing in the direction the respondent was going, the break would not be observable unless one "looked right at the spot as you came down." Manifestly, it seems to us, a city cannot be held negligent for suffering to remain in a sidewalk a defect so inconsequential as this one was shown to be. A city is not an insurer of the personal safety of every one who uses its public walks. It owes no duty to keep them in such repair that accidents cannot possibly happen upon them. Its duty in this respect is done when it keeps them reasonably safe for use—safe for those who use them in the exercise of ordinary care—and we cannot but conclude that this one was thus reasonably safe.

It follows that the court erred in granting a new trial. The judgment is reversed, and the cause remanded, with instructions to enter a judgment upon the verdict.

ELLIS, O. J., and PARKER, WEBSTER, and MAIN, JJ., concur.

(100 Wash. 573)

NEW YORK LIFE INS. CO. et al. v. ORPHEUM THEATER & REALTY CO.

et al. (No. 14475.)

(Supreme Court of Washington. March 15, 1918.)

1. TRADE-MARKS AND TRADE-NAMES ⇨39 — UNFAIR COMPETITION—PRIOR USE OF NAME—CONTRACT.

Where respondents used the name "Orpheum" to designate and identify their theater in Seattle long before making a contract with the Orpheum Circuit Company for seven years' use of building, the use of such name was not by license from such Orpheum Circuit Company, and particularly where the contract was silent thereon, although specific as to other details.

2. TRADE-MARKS AND TRADE-NAMES ⇨32 — UNFAIR COMPETITION — ABANDONMENT OF NAME.

Where the respondents were using the name "Orpheum," and did not transfer the name to the Colosseum Theater until about four months after abandoning their old "Orpheum" Theater, and it was for all such time their intention to transfer and keep such name, such delay does not indicate intention to abandon its use.

3. TRADE-MARKS AND TRADE-NAMES ⇨71 — UNFAIR COMPETITION.

Where it appears that the character of the electric signs and manner of their display were such as to lead the public to believe appellants' theater was the "Orpheum" of respondents, rather than one in which the Orpheum Circuit vaudeville was being given, their use was unfair competition, and the court properly ordered their removal.

4. TRADE-MARKS AND TRADE-NAMES ⇨98 — DAMAGES—SPECULATIVE.

Where an examination of the record shows that the claim for substantial damages for unfair use of name of respondent's theater by appellant was too speculative and indefinite to be fixed, no award therefor can be made.

Department 1. Appeal from Superior Court, King County; John S. Jurey, Judge.

Suit by the New York Life Insurance Com-

pany and others against the Orpheum Theater & Realty Company and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Tucker & Hyland, of Seattle, for appellants. Winfield R. Smith, Miller & Lysons, and Peters & Powell, all of Seattle, for respondents.

WEBSTER, J. From 1903 to April 3, 1908, Timothy D. Sullivan and John W. Considine, the organizers and owners of substantially all of the capital stock of Sullivan & Considine, a corporation, held under lease and operated through the medium of a corporation known as the Orpheum Theater Company, a small theater on a portion of what is now the site of the Leary Building in the city of Seattle, which was named by them and known to the public as the Orpheum Theater. On the last-named date the theater was closed in order that the building in which it had been conducted could be razed preparatory to the erection of the Leary building. Prior thereto and until the latter part of July or the fore part of August, 1908, Sullivan & Considine also operated a theater known as the Colosseum, at Third avenue and James street on a part of what is the present site of the City-County building, at which time its name was changed to the Orpheum Theater, under which name it was operated until 1911, when a modern theater building erected by them at Third avenue and Madison street was completed, equipped, and furnished. The name "Orpheum" was given to the new theater; it being engraved on an onyx tablet permanently built in over the main entrance to the theater and otherwise prominently displayed on the building.

On January 20, 1908, an agreement was made between Sullivan & Considine, as party of the first part, Martin Beck, as party of the second part, and the Orpheum Circuit Company, as party of the third part, whereby the first party agreed to organize a corporation to be engaged exclusively in the business of conducting one high-class vaudeville theater in the city of Seattle, 40 per cent. of the capital stock of which to be delivered to the second party. The first party further agreed to obtain for the corporation a theater building suitably located and equipped for the presentation of such vaudeville performances, for which a reasonable rental was to be paid by the corporation. The second and third parties, for a stated consideration, were empowered to book all acts and attractions to be given in the theater during the life of the agreement.

Pursuant to this contract Sullivan & Considine organized the Seattle Orpheum Company, the corporation therein provided for, and issued and delivered to Beck 40 per cent. of the capital stock thereof, retaining the remainder. They also sublet to the Seattle Orpheum Company the theater building theretofore operated as the Colosseum Theater,

in which the vaudeville performances stipulated in the contract were given. Upon the completion of the theater building at Third avenue and Madison street in 1911 it was leased by Sullivan & Considine to the Seattle Orpheum Company, where the entertainments were thereafter given until the contract was terminated in 1915.

For many years prior to January 20, 1908, the Orpheum Circuit Company and its predecessors in interest, to whose rights the appellant Orpheum Theater & Realty Company has succeeded, owned and controlled a circuit of vaudeville theaters in many large cities of the United States and the Dominion of Canada, designated and known to the public as the "Orpheum Circuit," in which theaters high-class vaudeville entertainment was presented. No such attractions, however, had been given in the city of Seattle prior to the making of the agreement above referred to, and none were thereafter exhibited in that city during the life of the contract, except in accordance with the provisions of such contract; nor had the name "Orpheum" been used in the city of Seattle for the purpose of designating vaudeville attractions, or as the name of any theater situate therein, prior to the making of the above-mentioned contract, except as the name had theretofore been used and applied by Sullivan & Considine in the manner hereinbefore stated.

On June 24, 1915, after the cancellation of the contract of January 20, 1908, the Seattle Orpheum Company sublet the Orpheum Theater to the appellant Orpheum Theater & Realty Company for the season of 1915-16, during which time the attractions booked by the appellant from its Orpheum Circuit were exhibited.

Upon the termination of the sublease the Orpheum Theater & Realty Company leased the Alhambra Theater, located at Fifth avenue and Pine street, to which it transferred all Orpheum Circuit vaudeville performances, the Orpheum Theater at Third avenue and Madison street being leased to respondent Thomas Wilkes, who thereafter, through the stock company known as "Wilkes Players," produced theatrical plays therein.

On September 20, 1916, respondents commenced an action in the superior court to enjoin appellants from naming, describing, or in any wise designating the Alhambra Theater by any name in which the word "Orpheum" is an essential, conspicuous, or prominent part, or by displaying advertisements calculated to lead the public to call or know that theater by the name "Orpheum," and for damages in the sum of \$5,000 for the alleged wrongful acts of the defendants in the use of such name.

Upon the trial the court entered a decree enjoining the appellants from so using the name "Orpheum" in connection with any theater in the city of Seattle as to lead the public to know such theater by the name "Or-

pheum," or to confuse the same with plaintiffs' Orpheum Theater at Third avenue and Madison street, and specifically ordered defendants to remove from the theater at Fifth avenue and Pine street two large electrically lighted street signs bearing the word "Orpheum." The decree, however, reserved to defendant Orpheum Theater & Realty Company the right to use the word "Orpheum" as descriptive of the vaudeville attractions produced by it provided such use is not inconsistent with or in violation of the injunctive relief granted. Nominal damages in the sum of one dollar was awarded the plaintiffs. The defendants have appealed from the portion of the decree awarding the injunctive relief, and the plaintiffs from that portion thereof denying the claim for substantial damages.

Appellant Orpheum Theater & Realty Company disputes respondents' right to the exclusive use of the word "Orpheum" as the designation of their theater at Third avenue and Madison street, upon the grounds: First, that the theater was so named by license or permission of its predecessor, and that the privilege had been revoked; and, second, that the theater was operated by a copartnership composed of Sullivan & Considine and the Orpheum Theater & Realty Company's predecessor, and that upon the termination of the contract of January 20, 1908, the right to use the word "Orpheum" reverted to it. It is further insisted that, even though the general injunction was proper, the court erred in directing the removal of the electric signs. Of these contentions briefly in the order stated:

[1, 2] From what has already been said it clearly appears that the prior right of respondents to use the name "Orpheum" to designate and identify their theater was acquired long prior to the execution of the January 20, 1908, contract; hence appellant could not have licensed its use by respondents. Moreover, the contract is significantly silent as to the name of the theater Sullivan & Considine was to furnish pursuant to its terms. If it had been the intention of appellant to grant or of the respondent to acquire the right to use the word "Orpheum" as the name of the theater then contemplated, the contract, which in all other respects was minute and particular of detail, would have so provided; especially so in view of the fact that at the time of its execution Sullivan & Considine was operating a theater in the city of Seattle under that name. Some contention is made that, because the name "Orpheum" was not transferred to the Colosseum Theater until about four months after the closing of the theater on the site of the Leary building, that its use was abandoned. It appears, however, that it was the intention of Sullivan & Considine all the while to make the change and preserve its right to the use of the name. In the light of the attendant cir-

cumstances we do not think so short a delay indicated any purpose to abandon its use.

What has been said would seem to answer the second contention; for, unless the name "Orpheum" was contributed to the alleged partnership by appellant, such name would not revert to it upon the dissolution of the firm. However, there was no partnership. A corporation was organized, and the capital stock thereof distributed in accordance with the agreement of the parties.

[3] With respect to the removal of the electric signs we are satisfied from the testimony and the numerous photographs introduced as exhibits that the character of the signs and the manner of their display were such as to lead the public to believe appellants' theater was the Orpheum Theater, rather than the theater in which Orpheum Circuit vaudeville was being given. This being true, the use of the signs amounted to unfair competition, and the order directing their removal was proper. *Wright Restaurant Co. v. Seattle Restaurant Co.*, 67 Wash. 690, 122 Pac. 348; *Martell v. St. Francis Hotel Co.*, 51 Wash. 375, 98 Pac. 1116, 16 Ann. Cas. 593.

[4] This brings us to the question presented by the cross-appeal. An examination of the record convinces us that the evidence relating to the claim for substantial damages was altogether too speculative and indefinite to warrant the granting of such relief. So many uncertain elements are involved in determining the extent of plaintiffs' damage occasioned by the acts of defendants that it is impossible to fix any definite award.

The decree of the lower court carefully and correctly defines the rights of the parties in the premises. Finding no error, the judgment is affirmed.

ELLIS, C. J., and PARKER, MAIN, and FULLERTON, JJ., concur.

(100 Wash. 562)

STATE v. LAZZARO. (No. 14407.)

(Supreme Court of Washington. March 15, 1918.)

1. CRIMINAL LAW §1159(2)—REVIEW—SUFFICIENCY OF EVIDENCE.

The weight and sufficiency of the evidence was for the jury.

2. PROSTITUTION §4—ACCEPTING EARNINGS OF PROSTITUTE—EVIDENCE—SUFFICIENCY.

In a prosecution for accepting a sum of money, the earnings of a prostitute, evidence held sufficient to sustain conviction.

3. WITNESSES §406—IMPEACHMENT.

In a prosecution for accepting a specific sum of money, the earnings of a prostitute, where defendant testified as to receiving an adequate income, as a special deputy sheriff, testimony that the records of the sheriff's office showed that his income was most inadequate was not admissible in impeachment, because relating to an immaterial and collateral matter.

4. PROSTITUTION §4—ACCEPTING EARNINGS—EVIDENCE OF INCOME.

Where defendant asserted that he received the money to give to one who was maintaining

the woman's children, and testified that he had an adequate income as sheriff's deputy, the admission of testimony that his income for the year in which the offense was committed was practically negligible, offered not only for the purpose of impeachment, but on the question of the likelihood of his commission of the crime, was erroneous and highly prejudicial, for there is no greater probability of a poor person committing a crime than a richer one.

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Dominique Lazzaro was convicted of accepting a sum of money, the earnings of a prostitute, and he appeals. Reversed, and cause remanded for new trial.

Vanderveer & Cummings, of Seattle, for appellant. Alfred H. Lundin, John D. Carmody, and Joseph A. Barto, all of Seattle, for the State.

WEBSTER, J. The appellant, by an information filed in the superior court of King county, was charged with accepting \$5 on June 15, 1916, the earnings of Mary Medaini, a prostitute. He was convicted, and appeals.

[1, 2] In support of the charge the state introduced testimony tending to establish these facts: Mary Medaini, a coal miner's widow, with her two small children, moved to Seattle from Ravensdale, Wash., February 5, 1916, and rented a rooming house. This venture proving unprofitable, she gave it up, and with her children went to live with Mrs. Dilauro on Ranier avenue, with whom appellant was rooming. Thereafter appellant volunteered to find her employment at a lodging house conducted by Mrs. Olson, telling her:

"I know lots of girls make lots of money; you nice woman, you make lots of money too. You talk Italian, French, and I think you going to make good money there."

Later she went to this house where she practiced prostitution, the appellant coming to see her frequently and taking her earnings, promised her protection by virtue of his position as special deputy sheriff. On June 15, 1916, while Mary Medaini and her friend Mrs. Jovanelli were in the Columbus Restaurant in Seattle, appellant demanded of her \$5, stating that he wanted it for gambling, which amount she gave him from money earned in the practice of prostitution. This is the transaction upon which the information is based. The defendant admitted requesting and receiving this money, but claimed that Mrs. Dilauro, who was then caring for and boarding the Medaini children, had instructed him to collect from Mary Medaini money to pay for the children's keep, and that the \$5 so paid to him had been delivered to Mrs. Dilauro. In this he was corroborated by the testimony of Mrs. Dilauro and Mrs. Jovanelli. Appellant further testified that on another occasion he had received from Mary Medaini \$3 with which to buy a pair of shoes for Mrs. Dilauro in part payment of her claim for boarding the children. He

also testified that on January 5, 1916, he loaned Mary Medaini \$35 to defray her expenses in moving to Seattle; in all of which he was corroborated by other testimony. No claim is made by appellant that the \$5 paid by Mary Medaini in the Columbus Restaurant was exacted or received in part payment of the loan.

It is first contended that the evidence is insufficient to sustain the verdict. From what has already been said, it is manifest that there was competent evidence tending to establish every essential element of the crime. The weight and sufficiency of the evidence was for the jury.

[3, 4] During the course of the trial Lila Watkins was called by the state as a witness in rebuttal. After showing that she was a bookkeeper in the sheriff's office and was familiar with the records of that office, she was asked this question:

"I will ask you whether or not you have examined the records of your office recently and know from that examination what, if any, moneys were paid to Dominique Lazzaro."

The defendant seasonably objected to the question, and, after a lengthy argument in the presence of the jury, the court observed:

"Now this goes to the motive and to the probability of the crime having been committed by this plaintiff [defendant] as to whether or not he had means himself of support, or whether he was likely by reason of his own negligence, or his own lack of means and support, to resort to a matter of this sort to raise money. He stated before the jury, under oath, the amounts of money which he received from time to time from the county, indicating thereby there was no reason why he should attempt to secure money the way it is charged he did try to secure it. I think it would go more than to the credibility of the witness. It would go to the question of the probability of whether he would commit a crime of this sort for the purpose of obtaining money to ascertain what amount of money he was receiving. He says he received no funds from any source; that he got his entire living from his salary or his perquisites from the sheriff's office. Now, I think the jury should have the opportunity of being informed both as to the matter of credibility, and also as to his own financial resources, as to what money he did receive, and what money he had."

The objection was overruled and exception noted, and the witness was permitted to testify that during the year 1915 appellant had received in the aggregate \$199.70, as salary and expenses as deputy sheriff, and that for the year 1916, to the 1st of October, he had received the sum of \$3. The admission of this testimony is assigned as error. The record discloses that during his examination in chief the appellant testified as follows:

"Q. What kind of work did you do under Mr. Hodge? A. I do whatever work he told me to do. Q. Were you a regular deputy, or a special deputy? A. Well, he give me \$3 a day. Q. You didn't draw pay unless you worked, however? A. Yes, that's right. Q. What is it? A. Yes, I have to work to get pay, sure. Q. You didn't draw a salary? A. No."

On cross-examination the state's attorney went at length and in detail into the amounts received by appellant during the time he was

special deputy sheriff in an effort to show that appellant had not earned a living in that employment. As no claim was made by appellant that the \$5 paid to him was received in part satisfaction of the loan alleged to have been made to Mary Medaini on January 5, 1916, the sole legitimate purpose of the cross-examination was to affect the credibility of the witness. Had such claim been the theory of the defense, it would perhaps have been competent to show in rebuttal the defendant's financial condition at or about the time of the loan as bearing upon the question whether in fact such loan had been made. In any event the amount of compensation received by appellant to October 1, 1916, was incompetent to refute the making of the loan, were that a material issue in the case. The facts elicited upon cross-examination related to an immaterial and collateral matter which, under elementary principles, is not a proper basis for impeachment. But conceding, for the sake of argument, that the rebuttal testimony was competent as tending to affect the credibility of appellant, the court, in the presence of the jury, ruled that it was admissible for a much broader and altogether different purpose when it said:

"This goes to the motive and to the probability of the crime having been committed by this defendant, as to whether or not he had means himself of support, or whether he was likely by reason of his own negligence, or his own lack of means and support, to resort to a matter of this sort to raise money. * * * I think it would go more than to the credibility of the witness."

This statement of the court related to the admissibility of evidence showing appellant's income at a time nine months subsequent to the making of the alleged loan, and more than three months after the commission of the crime charged; moreover, it suggested to the jury this process of reasoning: Appellant was not earning a living income in the sole occupation in which he was engaged. He therefore needed money. In order to get it he committed the crime of accepting the earnings of a prostitute. No other construction can be placed upon the language than that the rebuttal testimony furnished a motive for and rendered probable the "resort to a matter of this sort to raise money." This assumes that a poor man is more likely than a rich man to commit a crime for the purpose of obtaining money, and is as contrary to human experience as it is to the law.

The rule is stated by Professor Wigmore in this language:

"The lack of money by A. might be relevant enough to show the probability of A.'s desiring to commit a crime in order to obtain money. But the practical result of such a doctrine would be to put a poor person under so much suspicion and at such a relative disadvantage that for reasons of fairness this argument has seldom been countenanced as evidence of the graver crimes, particularly of violence." 1 Wigmore on Ev. § 392.

Another author has said:

"Evidence that the defendant had always been poor, or was living extravagantly and beyond

his means, or that he was generally reputed to be in good circumstances, or as to the wages he was receiving either before or after the larceny, is likewise inadmissible." Underhill on Crim. Ev. (2d Ed.) § 304.

The Supreme Court of Indiana, in *Reynolds v. State*, 147 Ind. 3, 46 N. E. 31, observes:

"If evidence that appellant was worth \$800 in real estate was admissible for the purpose of showing that he had no motive, then it would seem that it would be competent for the state to prove, as showing motive, that he had no property, or only a small amount of property. It would resolve itself into the proposition that men who are poor are constantly under the temptation to rob their more fortunate neighbors, and that they need only the opportunity to yield to the temptation. In other words, proof of poverty tends to show a motive for the crime of larceny or robbery, while proof of riches tends to show a want of motive. Among the motives recognized as impelling men to commit crime is the desire of gain. * * * This motive, however, has influenced the conduct of rich persons as well as poor persons. Men do not rob or steal except as they have a desire to do so; but such desire does not come so much from the poverty of the individual as from the absence of a moral sense, and desire to possess at all hazards something that does not belong to him. The evidence was properly excluded from the jury."

The Supreme Court of Massachusetts, in considering this question, said:

"It is argued by the defendant that before the law the rich and the poor stand alike, and that the poverty of the defendant is not admissible to show a motive in him to commit the crime with which he is charged. All this may be conceded to be true. As stated by Bigelow, C. J., in *Commonwealth v. Jeffries*, 7 Allen [Mass.] 548, 565, 566 [83 Am. Dec. 712], 'It is doubtless true that in a large class of cases the poverty or pecuniary embarrassments of a party accused of crime cannot be shown as substantive evidence of his guilt. The reason for the exclusion of such evidence is, that in those cases there is no certain or known connection between the facts offered to be proved and the conclusion which is sought to be established by it. To render evidence of collateral facts competent, there must be some natural, necessary or logical connection between them and the inference or result which they are designed to establish. It does not follow because a man is destitute that he will steal, or that when embarrassed with debt and incapable of meeting his engagements he will commit forgery.' Mere poverty considered apart from all other facts tending to connect the accused with a crime never can tend to show criminal intent or criminal motive." *Commonwealth v. Tucker*, 189 Mass. 457, 466, 76 N. E. 127, 129 (7 L. R. A. [N. S.] 1056).

See, also, *Snapp v. Commonwealth*, 82 Ky. 173; *Dorsey v. State*, 110 Ala. 38, 20 South. 450; *Commonwealth v. Stebbins*, 8 Gray (Mass.) 492.

It must be borne in mind that the appellant is not charged with living off the earnings of a prostitute, but with a specific offense—the acceptance of \$5 on June 15, 1916, earned in the practice of prostitution. His means of livelihood therefore was purely collateral to the issue in the case. The rebuttal testimony, in the respect complained of, was clearly inadmissible and highly prejudicial, necessitating a reversal of case.

In view of the conclusions reached, a discussion of the other assignments of error is

unnecessary. The judgment is reversed, and the cause remanded for a new trial.

ELLIS, C. J., and PARKER, MAIN, and FULLERTON, JJ., concur.

(100 Wash. 502)

FOSTER v. COMMISSIONERS OF COWLITZ COUNTY et al. (No. 14648.)

(Supreme Court of Washington. March 7, 1918.)

1. COUNTIES \S 153½—LOANING MONEY OR CREDIT—DIKING IMPROVEMENT DISTRICT—"ASSOCIATION, COMPANY OR CORPORATION."

Under Const. art. 8, \S 7, forbidding county to loan money or credit to "association, company or corporation," a diking improvement district, being public in its nature, is not included, so that Laws 1917, pp. 522-545, which in sections 14-17, 19-23, 25, 26, 30, 32, 33, casts certain duties on county commissioners and other county officers, does not violate such constitutional provision conceding that services are moneys or credits.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Association; Company; Corporation.]

2. CONSTITUTIONAL LAW \S 63(1)—DELEGATION OF POWER—SPECIAL ASSESSMENTS—DIKING IMPROVEMENT DISTRICTS.

Const. art. 7, \S 9, conferring on cities, towns, and villages power to make local improvements by special assessments, is not prohibitory, so that a diking improvement district may be delegated such power, and Laws 1917, pp. 522-545, establishing diking improvement districts and providing for special assessments on property benefited, is not invalid.

3. COURTS \S 93(1)—STARE DECISIS—RULE OF PROPERTY.

Where a decision has become a rule of property, the doctrine of stare decisis is of controlling force.

4. CONSTITUTIONAL LAW \S 280—LEVEES \S 2—DUE PROCESS—TAKING PROPERTY—DIKING IMPROVEMENT DISTRICT.

Laws 1917, pp. 522-545, establishing diking improvement districts, is not violative of due process clause of state and federal Constitution in so far as it takes and damages property, where the law provides for condemnation proceedings with ample notice, etc., and with opportunity to be heard as to necessity with trial by jury as to amount of damages.

5. CONSTITUTIONAL LAW \S 290(1)—LEVEES \S 2—DUE PROCESS—SPECIAL ASSESSMENTS.

Such law is not violative of such provisions of Constitution in so far as it charges cost on property benefited, where owners of property within the district are given notice and opportunity to be heard on question of creation of district and construction of improvement, the assessments are to be laid in proportion to benefits, with no charge in excess of benefits, and notice is given of question of benefits and apportionment of the charge, and assessment after levy cannot be enforced except by foreclosure in court.

6. STATUTES \S 47—LEVEES \S 2—CERTAINTY—DIKING IMPROVEMENT DISTRICT.

Laws 1917, pp. 522-545, authorizing establishment of diking improvement districts and providing the procedure therefor is not invalid as uncertain or indefinite because the statute does not, in terms, provide for the making and recording of a final order in form establishing the district, where, though it is doubtful just when the district comes into being, it does come into existence by the terms of section 20 of the act, which gives county commissioners on the

hearing provided power to decide nature and extent of improvement or dismiss proceedings.

7. LEVEES \S 17—DIKING IMPROVEMENT DISTRICT—NOTICE.

Where Laws 1917, pp. 522-545, authorizing establishment of diking improvement districts, and providing in section 20 that, if on hearing before county commissioners any changes are made in the "boundaries of the district" or in "plans of the proposed improvement," a new notice should be given to property owners, changes in reference only to the estimated damages and benefits made by the engineer accruing to certain land in the district would not require a new notice.

Department 1. Appeal from Superior Court, Cowlitz County; Wm. F. Darch, Judge.

Suit for injunction by Grant Foster against the County Commissioners of Cowlitz County and others. From a judgment denying relief plaintiff appeals. Affirmed.

Homer Kirby, of Kalama, for appellant. A. H. Imus, of Kalama, for respondents.

PARKER, J. The plaintiff, Foster, commenced this action in the superior court for Cowlitz county, seeking an injunction to restrain the officers of that county from taking further steps towards the incurring of indebtedness looking to the construction of the diking improvement proposed to be constructed in diking improvement district No. 4 of that county at the expense of the property therein situated. The case being heard and submitted to the superior court upon the merits, judgment was rendered therein, denying the relief prayed for by the plaintiff, from which he has appealed to this court.

[1] The contentions made in appellant's behalf seem to render it necessary to here notice at considerable length the terms of the statute under which the county officers are proceeding. For present purposes they may be summarized from chapter 130, Laws of 1917, pp. 522-545, as follows:

Section 14 provides that proceedings looking to the creation of a diking improvement district and the construction of a diking improvement therein may be initiated by petition of the owners of property which will be benefited thereby, filed with the clerk of the board of county commissioners.

Section 15 reads:

"Upon the filing of the petition and the approval of the bond, the clerk of the board shall deliver a copy of said petition to the county engineer, who shall at once proceed to view the line and location of the proposed improvement and the property to be affected thereby and determine whether the improvement is in his opinion necessary or will be conducive to public health, convenience or welfare and whether in his opinion the location and route described are the best for the proposed improvement, what, if any, part of the proposed system of improvement mentioned in the petition should in his judgment be omitted, and what, if any additions should be added thereto or changes made therein, and shall report to and file his findings in writing with the board of county commissioners."

Section 16 reads in part:

"If the report of the county engineer shall be in favor of said improvement, the board of county commissioners shall give the improvement district a number, * * * and thereafter such district shall be designated as drainage (or diking) improvement district number * * * of * * * county, and the board shall cause to be entered on its journal an order directing the county engineer to go upon the lines described in the petition, or as changed by him in his report, and survey, and take levels on the same * * * and make a report, profile and plat of the same; also to make an estimate of the cost of construction of such system itemized so as to be reasonably specific as to the various parts thereof: Provided, that such estimate of the cost shall be held to be preliminary only and shall not be binding as a limit on the amount that may be expended in constructing such system."

Section 17 reads in part:

"The board shall also by order entered on the journal, direct the county engineer to make and return a schedule and estimate of all property that will be damaged, or both damaged and benefited by the proposed improvement, and to estimate and report the total number of acres that will be benefited by the proposed improvement and to specify the manner in which the proposed improvement is to be made. * * * Schedules of property to be damaged or damaged and benefited shall be arranged in parallel columns, with appropriate headings, * * * the right-hand column of the schedule shall be sufficiently wide for the signature of the owner, and shall bear the heading: 'I, the undersigned owner of the property opposite which I have signed my name, accept and agree to the estimated amount of benefits and damages that will accrue to my property by reason of the proposed improvement.'"

Section 19 reads in part:

"Upon the filing of the report of the county engineer, the board of county commissioners shall immediately fix a date for a hearing on such report, and the clerk of the board shall give notice thereof by publication for at least once a week for three successive weeks, in the official newspaper of the county. * * *"

Section 20 reads in part:

"On the date set for said hearing the board of county commissioners shall meet at the place designated in the notice, and if it appear that due notice of such hearing has been given, shall proceed with the hearing on the report of the county engineer, and any objections thereto, and may adjourn said hearing from time to time and from place to place. At said hearing the board shall hear all pertinent evidence, including any evidence offered concerning the probable cost of the system and the probable benefits to accrue therefrom, and may change, add to or modify the plans for such system of improvement and the boundaries of the improvement district, and change the estimate of damages and benefits in any case, and may review, change and modify any of the findings and estimates of the county engineer, and may, in its discretion, employ another engineer to make separate findings on any or all of the matters hereinbefore required to be included in the report of the county engineer, and may adjourn said hearing and await such report; or may discontinue proceedings in regard to the proposed improvement, at the cost of the petitioners therefor, if the board shall determine that the construction of the proposed improvement is not warranted by the benefits to be derived therefrom. In case the board shall determine to enlarge the boundaries of the district, a date shall be fixed for a new hearing and notice therefor shall be given and such hearing shall be held as provided for the hearing on the report of the

county engineer. In case any change in the plans of the proposed improvement is made at said hearing, and such change will cause additional damage to any property, or will damage any property not damaged under the original plans, the county engineer shall prepare and file a schedule, showing the estimated damages and benefits under such changed plans, and notice of the filing of such schedule shall be served upon the owners of the properties affected, and settlements made as hereinafter provided."

Section 21 confers upon counties the power of eminent domain to be exercised in behalf of the proposed improvement district for acquiring the necessary rights of way and the right to damage property necessary to the construction of the improvement. This power would, of course, need to be exercised only as against those owners who do not sign the waiver specified in section 17, above noticed. Section 22 reads in part:

"When the board of county commissioners shall have finally determined and fixed the route and plans for the proposed system of improvement and the boundaries of the improvement district, and when it shall appear that the damages for property to be taken or damaged have been settled in the manner hereinabove provided, * * * thereupon such system of improvement * * * shall be constructed in the manner hereinafter provided."

Section 23 provides that the cost of the improvement shall be paid by assessment upon the property benefited thereby, that the payment of the assessments may be made in annual installments, and for the issuance of warrants or bonds evidencing the indebtedness to be so paid.

Sections 25 and 26 provide that "upon the determination by the board of county commissioners to proceed with the work" they shall call an election, at which all electors of the state owning land in the district may vote, to choose two electors of the county owning land in the district who, with the county engineer, shall constitute the first board of supervisors of the district, and shall have charge of the construction and maintenance of the improvement, and also prescribe the terms of office of the elected supervisors and of the election of their successors. Section 30 reads in part:

"When the improvement is fully completed and accepted by the county engineer, the clerk of the board shall compile and file with the board of county commissioners an itemized statement of the total cost of construction, including engineering and election expenses, the cost of publishing and posting notices, damages and costs allowed or awarded for property taken or damaged, including compensation of attorneys [here follows other items]. Upon the filing of such statement of costs and expenses the board of county commissioners shall revise and correct the same if necessary * * * and unless the same have been previously appointed, shall appoint a board of appraisers consisting of the county engineer and two other competent persons, to apportion the grand total as contained in said statement as hereinafter provided, * * * and said board of appraisers shall proceed to carefully examine the system and the public and private property within the district and fairly, justly and equitably apportion the grand total cost of the improvement against the property * * * within the dis-

trict, in proportion to the benefits accruing thereto."

Section 32 provides that, upon the filing with the county commissioners of a report of the apportionment, which is in effect an assessment roll, made by the appraisers, they shall fix a time for a hearing thereon, notice of which hearing is to be given by publication.

"At such hearing, which may be adjourned from time to time and from place to place, until finally completed, the board of county commissioners shall carefully examine and consider said schedule and any objections filed or made thereto and shall correct, revise, raise, lower, change or modify such schedule or any part thereof, or strike therefrom any property not benefited, or set aside such schedule and order that such apportionment be made de novo, as to such body shall appear equitable and just. * * * When the board of county commissioners shall have finally determined that the apportionment as filed or as changed and modified by the board is a fair, just and equitable apportionment, and that the proper credits have been entered thereon, the members of the board approving the same shall sign the schedule and cause the clerk of the board to attest their signature under his seal, and shall enter an order on the journal approving the final apportionment and all proceedings leading thereto and in connection therewith, and shall levy the amounts so apportioned against the property benefited, and the determination by the board of county commissioners in fixing and approving such apportionment and making such levy shall be final and conclusive."

Section 33 provides for the collection and foreclosure of the assessment in the same manner as for general taxes.

It is first contended in appellant's behalf that the law under which the county officers are proceeding is in violation of section 7, art. 8, of our Constitution, which reads in part:

"No county, city, town, or other municipal corporation shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, company, or corporation. * * *"

Counsel proceed upon the theory that the county is giving services, and therefore in effect giving "money or property," in aid of the improvement district, in that the county officers, as the law provides, render a considerable service in the organization of the district, the construction of the improvement, and in the administration of the affairs of the district after its organization, without compensation to the county. We assume for argument's sake only that this would be in violation of section 7, art. 8, of our Constitution, if a diking improvement district such as is contemplated by this law is an "association, company, or corporation" of the kind this constitutional prohibition contemplates that the county shall not aid. In *Rands v. Clarke County*, 79 Wash. 152, 157, 139 Pac. 1090, 1092, we held that by this constitutional provision counties were only prohibited from aiding—

"individuals, associations, companies and corporations engaged in purely private enterprises, or enterprises only quasi public, not to enterprises carried on by the corporations whose

functions are wholly public, such as the federal or state government, or some branch thereof."

Is the organization of a diking district, and the construction and maintenance of a diking improvement under this law, the exercise of a public function? If so, it would seem to plainly follow that the county is not lending aid to the district in violation of the constitutional prohibition invoked. In *Pierce County v. Thompson*, 82 Wash. 440, 144 Pac. 704, considering the prior diking statute of which this statute is amendatory, but without material change as to the nature of the improvement in so far as its public character is concerned, we held that the improvement was a public improvement in the sense that a city local improvement, constructed and paid for by special assessment against property benefited thereby, is a public improvement. It seems too plain to admit of argument to the contrary that there is no valid constitutional objection to a city or county aiding in the construction of such an improvement to any extent it may by statute be authorized so to do. Recurring to section 15 of the law above quoted, we find that, whether or not the improvement "will be conducive to public health, convenience and welfare" is to be considered in determining the question of creating the district and constructing the improvement. We conclude that the statute in no way violates the provisions of section 7, art. 8, of our Constitution.

[2] It is next contended that the statute in question violates the provisions of section 9, art. 7, of our Constitution, which reads:

"The Legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same."

It is argued that this constitutes an implied prohibition against the making of local improvements by special assessment, except as such power may, by the Legislature, be conferred upon the corporate authorities of "cities, towns, and villages." In other words, that no other public authorities can be constitutionally granted such power.

The early decision of this court in *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. 332, holds to the contrary of this contention. Therein was considered a special assessment charged against property benefited by a diking improvement, under the diking district statute of 1895 then in force, which assessment was levied, as that law provided, by authorities other than those of "cities, towns and villages." Following the holding of the Supreme Court of Nebraska in *State v. Dodge County*, 8 Neb. 124, 30 Am. Rep. 819, Judge Scott, speaking for this court, 15 Wash. at page 318, 46 Pac. at page 333, said:

"While the effect of holding that it [section 9, art. 7, Const.] is not a prohibition may be to give little or no effect to the first clause in the provision, and while the general rule is that a constitution should be interpreted, if possible, to give effect to all parts of it, yet, considering the fact that this provision in our Constitution is more like the one in the Nebraska Constitution than any other to which our attention has been called, and that, at the time our Constitution was adopted, the Supreme Court of Nebraska had construed the same in the case cited, and furthermore, in view of the possible effect upon prior legislation and constructed improvements above mentioned, we are somewhat compelled to the conclusion that it should not at this time be held to be a prohibition. * * *

[3] That holding has become in effect a rule of property, upon the faith of which a large amount of indebtedness has been incurred in the construction of both diking and drainage improvements under our diking and drainage district statutes, the payment of which indebtedness depends upon the power to levy and enforce special assessments of the nature here involved. Manifestly, therefore, the doctrine of stare decisis should be of controlling force in the deciding of this and other like cases. We conclude that we must now hold that this statute does not violate the provisions of section 9, art. 7, of our Constitution.

[4] Upon the question of the constitutionality of the statute counsel for appellant finally contends that it violates the due process of law guaranties of both our state and federal Constitutions. In so far as the taking and damaging of property incident to the construction of the improvement is concerned, it seems plain to us that there is scarcely room for argument in support of this contention, since, as we have seen, the improvement is public in its nature, and under this law no one's property can be taken or damaged against his will, except by condemnation proceeding in which he is furnished opportunity to be heard in court both as to the necessity for the taking or damaging of his property and as to the amount which he is entitled to be awarded therefor. As to the latter he is accorded the right of trial by jury. It is not suggested that there is in the prescribed condemnation proceeding any want of fair notice to the property owner to be heard, nor that he is not accorded such a trial as amounts to due process by the terms of the statute.

[5] In so far as the question of due process in the charging of the cost of the improvement to the property benefited thereby is concerned, counsel's contention is also untenable. Owners of property within the district are given notice and opportunity to be heard upon the question of the creation of the district and the construction of the improvement. When it comes to charging the cost of the improvement against the several tracts of land within the district, such charge must be "in proportion to the benefits accruing thereto," and we think the statute also means that no tract of land can be

charged in excess of the benefits accruing thereto. Owners of land within the district to be charged with any portion of the cost of the improvement are given notice and opportunity to be heard upon the question of benefits and the apportionment of the charge to be made therefor against the several tracts. Not until all this is done is the assessment finally levied. And even after the assessment is levied it cannot be enforced against any of the property except by foreclosure in court, as the liens of general taxes are foreclosed under our general tax laws.

In *State ex rel. Latimer v. Henry*, 28 Wash. 38, 49, 68 Pac. 368, 372, there is quoted with approval from *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369, the following:

"Whenever by the laws of the state or by state authority a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law. * * *

It seems quite clear to us that this statute is not in violation of the due process of law guaranties of either our state or federal Constitution.

[6] It is contended in appellant's behalf that this law "is indefinite, uncertain, and void, for want of form." The argument seems to be that, because the statute does not in terms provide for the making and recording of a final order or determination, in form, establishing the district, the district never comes into being. There may be room for argument as to just when during the course of the proceedings the district becomes established, but we think it becomes established in any event not later than when the county commissioners decide upon the nature and extent of the proposed improvement following the hearing provided for, touching that question, in section 20 of the law above quoted. This we think forms a sufficient foundation to support all subsequent proceedings in the construction and maintenance of the improvement, in so far as the creation of the district and deciding upon the construction of the improvement is concerned.

[7] It is finally contended in appellant's behalf that, at the hearing provided for in section 20 of the law, the county commissioners made such changes in the report of the engineer that a new notice to the property owners of hearing thereon was necessary to enable the commissioners to lawfully make such changes. These changes had reference only to the estimated damages and benefits made by the engineer accruing to certain land within the district, and were made upon hearing the objections of the own-

er thereof to the engineer's estimates. No changes were made by the county commissioners in the "boundaries of the district," nor in the "plans of the proposed improvement," which are the only changes requiring a new notice and a new hearing under section 20. We think the changes made by the county commissioners were not such as to require further notice.

The judgment is affirmed.

ELLIS, C. J., and FULLERTON, MAIN, and WEBSTER, JJ., concur.

(100 Wash. 613)

NATIONAL SURETY CO. et al. v. DENNY-RENTON CLAY & COAL CO.

(No. 14386.)

(Supreme Court of Washington. March 22, 1918.)

1. APPEAL AND ERROR ⇨1011(1)—REVIEW—FINDING ON CONFLICTING EVIDENCE—CONCLUSIVENESS.

The findings of a court as to the quality of brick furnished under a contract based on voluminous and sharply conflicting evidence, unless not sustained by a preponderance of such evidence, will not be disturbed.

2. APPEAL AND ERROR ⇨1099(1)—REVIEW—SUBSEQUENT APPEALS—LAW OF CASE.

Where, on a former appeal, it was determined that a rebate of 50 cents per 1,000 was to be calculated on the basis of No. 2 brick, that became the law of the case, and precludes appellant from insisting on a different basis for rebate.

3. APPEAL AND ERROR ⇨1099(1)—REVIEW—SUBSEQUENT APPEAL—LAW OF CASE.

A contention that interest was not correctly calculated, and for such reason a tender was insufficient, cannot be heard where foreclosed by former judgment on appeal.

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by the National Surety Company and another against the Denny-Renton Clay & Coal Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Ballinger, Battle, Hulbert & Shorts, of Seattle, for appellant. Roberts, Wilson & Skeel and C. B. White, all of Seattle, for respondents.

WEBSTER, J. This case is now before the court for the second time. A complete statement of the facts will be found in the former opinion (89 Wash. 141, 154 Pac. 123), and need not be repeated. It was there held that the shipping order in question expressed the true contract between the parties and excluded the reception of parol evidence for the purpose of varying or contradicting its terms. This contract provided for the delivery of "highway paving brick" at the stipulated price of \$17.25 per 1,000. Upon the former trial in the court below the purchaser was denied the right of showing that the brick actually furnished was not highway paving brick, but was of the grade known as No. 2 brick—which, according to the seller's price

list, was of the value of \$13.75 per 1,000. For this error the judgment was reversed, this court holding that the purchaser was entitled to prove that the article delivered was not the article contracted for, but one of inferior quality and less value. The cause was remanded for a trial of this issue—the quality of the brick actually furnished—the amount thereof not being in dispute. Upon the retrial before the court without a jury the respective parties submitted their evidence upon this issue, and the court, with the consent of all parties, made a personal examination of the premises. Thereafter findings were made to the effect that the brick furnished was No. 2 brick, and judgment in favor of Peterson and his surety was entered accordingly, from which Denny-Renton Clay & Coal Company has appealed.

[1] It is first contended that the court erred in finding that the brick furnished was not of the quality stipulated in the contract. With respect to this question of fact we have made a careful and painstaking examination of the voluminous record, including the numerous exhibits submitted—the statement of facts alone covering 690 pages. The evidence is in sharp and irreconcilable conflict, and we cannot, without unduly extending this opinion to no purpose, enter upon a detailed analysis thereof. It is sufficient to say that from our investigation we are unable to conclude that the findings of the trial court are not sustained by a preponderance of the evidence. We have repeatedly held that upon a close question of fact the judgment of the trial court is entitled to weight, and will not be set aside, unless we can say that it is not sustained by a preponderance of the evidence.

[2] It is next insisted that if it be assumed that the brick furnished was of the No. 2 grade, the court erred in deducting from the list price a rebate of 50 cents per 1,000; it being contended that the rebate was only allowable upon highway paving brick at \$17.25 per 1,000. By reference to the former opinion in which the shipping order is set forth in full it will be seen there is no mention made of any rebate. It is admitted that contemporaneously with the making of the written contract it was orally agreed that Peterson should be allowed a rebate of 50 cents per 1,000 on the brick furnished. No evidence was taken concerning the terms of this oral agreement, and we have no means of knowing whether the rebate was limited to highway paving brick, at the stipulated price, or related to such brick as was actually furnished by the seller. In the answer and cross-complaint of Denny-Renton Company, it is alleged that Peterson had paid on account of the brick the sum of \$25,215.90, which amount it now appears included a rebate of 50 cents per 1,000 on the brick delivered. Upon the first trial in the lower court

Peterson admitted a balance due for the brick, and tendered that amount to Denny-Renton Company, which amount was calculated on the basis of No. 2 brick at the list price, less a rebate of 50 cents per 1,000. Upon the former appeal we said:

"A price list of the respondent was introduced in evidence showing the price of No. 2 brick as \$13.75 per 1,000 and the amount tendered by Peterson would be the correct amount due the respondent for the brick delivered if it was No. 2 brick."

Thus it will be seen this court finally determined on that appeal that the true basis of settlement for No. 2 brick was \$13.75 per 1,000, less the rebate, and that the tender made by Peterson was sufficient in amount. Such holding is the law of this case, and precludes appellant from now insisting that the calculation should be made upon a different basis, or that the tender was insufficient. As we have already noted, the only issue to be determined upon the retrial was the quality of the brick actually furnished, and this seems to be the theory upon which the cause was tried. In the memorandum opinion of the trial court, with which we are favored, it is said:

"It was stipulated by all parties at the trial that 3,823,900 brick had been furnished to and accepted by Peterson in his construction of the highway. It was likewise stipulated that prior to the commencement of the action Peterson paid to the Denny-Renton Clay & Coal Company on account of this brick the sum of \$25,215.90 in cash, and that thereafter and prior to the filing of any pleading or the cross-complaint by the Denny-Renton Clay & Coal Company in this action, Peterson tendered to the Denny-Renton Company the sum of \$27,500, which he claimed to be in full of his entire indebtedness on account of this brick. It was likewise stipulated that this sum was afterwards in fact paid, prior to the trial of this action, to the Denny-Renton Company, without prejudice to the further prosecution of the action. Peterson and his surety contend that these payments fully satisfied the indebtedness under the shipping order. The Denny-Renton Company contends that even though the brick furnished was in fact No. 2 brick instead of highway paving brick the price to be paid therefor was \$13.75 per 1,000. Peterson and his surety contend that from this charge of \$13.75 per 1,000 for No. 2 brick there should be deducted a rebate of 50 cents per 1,000. Of course, unless this rebate of 50 cents per 1,000 should be allowed Peterson, the Denny-Renton Company would be entitled to a judgment for the amount of this rebate. The main bone of contention in this case at the trial was whether the brick furnished was highway paving brick or No. 2 brick. If there was any contention that the amount of the tender by Peterson, on the theory that he was furnished with No. 2 brick, was insufficient, I cannot recall it. It was the impression upon my mind throughout the trial that the quarrel was not as to the amount of the tender on that theory, but as to the quality of the brick. That a rebate of 50 cents per 1,000 on the schedule price was to be allowed for whatever brick was furnished under the shipping order seems to have been the common understanding."

Our examination of the record convinces us that the observations of the trial court are correct.

[3] Some further contention is made that interest had not been correctly calculated, and for that reason the tender was insufficient. But from what has already been said, it is apparent that this contention also is foreclosed by the former opinion, in which it is expressly held that the tender was sufficient.

When the trial court found that the brick furnished was not highway paving brick, but was in fact No. 2 brick, the entire controversy was determined. We do not feel justified in disturbing this finding. The judgment is therefore affirmed.

ELLIS, C. J., and PARKER, MAIN, and FULLERTON, JJ., concur.

(100 Wash. 589)

TRIBBLE et al. v. YAKIMA VALLEY
TRANSP. CO. (No. 14081.)

(Supreme Court of Washington. March 22, 1918.)

1. WORK AND LABOR ⇨28(1) — ABANDONMENT—EVIDENCE—SUFFICIENCY TO SUPPORT VERDICT.

In an action on quantum meruit by railroad contractor to recover for labor and materials after alleged abandonment of contract evidence held sufficient to sustain a verdict that contractor contracted on basis of first profile as submitted, without knowledge of radical changes making his work more costly.

2. WORK AND LABOR ⇨30(2)—CONSTRUCTION—RADICAL CHANGE—QUESTION FOR JURY.

Whether under a railroad construction contract on unit basis providing for change in the work and no allowance for profit on work eliminated, a change, requiring the wasting of 40,000 cubic yards of dirt to conform to demands of another railroad, was not contemplated in contract, and contractor could collect therefor under quantum meruit, was for the jury.

3. APPEAL AND ERROR ⇨193(8)—QUESTIONS NOT RAISED ON TRIAL—PLEADING.

A defendant, having failed to demur or request special verdict, cannot object on appeal that a complaint, setting up one cause of action, pleads damages as separate items, and that a general verdict thereon was rendered under the general issue.

4. APPEAL AND ERROR ⇨930(1)—REVIEW—VERDICTS—PRESUMPTIONS.

All presumptions are to be indulged in favor of verdicts.

5. APPEAL AND ERROR ⇨930(2) — PRESUMPTIONS—VERDICT.

Where the jury were instructed upon each item of damages that, unless they found that the railroad company had made a change substantially extending contractor's obligations, they should find for the company, it will be presumed the jury rejected all changes inconsequential or within contemplation of contract.

6. TRIAL ⇨331—VERDICT—CERTAINTY.

Where verdicts rest on mixed fact and opinion, or even estimates by engineers, reasonable certainty is sufficient, since engineers assume or find a different basis for their conclusions from the same set of physical facts.

7. WORK AND LABOR ⇨12—PERFORMANCE—DECISION OF ENGINEER.

The certificate of an engineer as to matters going to the meaning of contract may be final, but upon a quantum meruit arising out of a departure so radical as to form a new contract,

the umpire clause will not bar resort to the courts.

Department 1. Appeal from Superior Court, Yakima County; Thomas E. Grady, Judge.

Action by W. L. Tribble and others against the Yakima Valley Transportation Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

A. C. Spencer, of Portland, Or., Richards & Fontaine, of North Yakima, and C. E. Cochran, of Portland, Or., for appellant. H. J. Snively, of North Yakima, for respondents.

OHADWICK, J. Respondents are contractors engaged in railroad construction. They were awarded the contract to build a certain line of railroad for the appellant. The line extended from the city of Yakima through Selah Gap, through the town of Selah and into the Selah Valley. The work was done, but the parties disagreed upon final settlement. Without reviewing the vast detail with which the record abounds, it may be said that the cause of action set up by respondents rests in allegations that after the contract was entered into it was so radically changed by the appellant as to furnish ground for a recovery upon a quantum meruit for the extra cost of the work and labor performed and for profits lost by reason of the omission of material items. Some of the things performed and done are alleged to have been made necessary by the change in plans and to have been done under the direction and at the instance and requirement of the engineer in charge.

Briefly stated, respondents contend that their bid was made upon a profile showing certain cuts and fills, which, if carried out, would make what counsel calls a "balanced job," that is, the cuts would balance the fills with a possible excess of waste material amounting to about 2,000 yards; that after the contract had been entered into the engineer in charge furnished another profile map, which had been made to conform to the demands of the Northern Pacific Railway Company, over whose right of way the line was to be constructed, and which fixed the tangent of the line at 54 feet from the main line of the Northern Pacific, and directed that the work should be done accordingly. It is insisted that this necessitated a change of the line to the south and west of about 4 feet; that by reason of the character of the ground, which was a very steep hillside with outcropping basaltic rock, the wastage was very much greater than was contemplated by the parties when the contract was entered into; that it became necessary to waste the excess material over and to the north side of the Northern Pacific Railway tracks; that this was accomplished by the

erection and use of an overhead trestle; that the change in the work demanded and the respondents did by direction of the engineer in charge waste approximately 50,000 yards across the Northern Pacific tracks; and "that the reasonable value of wasting such material over the grade and across the tracks of the Northern Pacific Railway Company and into the Yakima river was 51 cents per cubic yard, or \$24,000."

It is also contended that because of the change in the line of the road appellant's engineer directed respondents to reduce the cuts from 18 to 16 feet; that this change prevented respondents from excavating blasted material with a steam shovel, as they had contemplated and compelled them to employ hand labor at an extra cost of \$12,500.

Other contentions are that, by reason of the change respondents were put to the expense of changing, maintaining, and reconstructing the telegraph lines of the Northern Pacific Railway Company and the Western Union Telegraph Company, to their damage in the sum expended, that is, \$734.25; that they were required to pay out for flagmen, operators, and watchmen for the protection of the Northern Pacific Railway Company the sum of \$3,654.50; that they were required to tunnel under a rock crusher belonging to the state of Washington; that the amount of material excavated was 1,000 yards, which under the contract would have brought \$840 to respondents, but estimated as tunnel work would have been as 100 feet at \$45 per lineal foot or \$4,500. Respondents credit upon this item the sum of \$840, and demand judgment for the balance of \$3,660.

Respondents further allege that they were compelled, by reason of the change and the direction of appellant, to level 7,000 yards of material which had been wasted along the Yakima river and along the track of the Northern Pacific Railway Company; that the cost of leveling this material was 50 cents per cubic yard, or \$3,500.

It is alleged that because of the change of plans after the contract was entered into a certain fill to the south of the Naches river was reduced from 17,427 cubic yards to approximately 5,000 cubic yards; that respondent's profit on making said fill would have been 7 cents per cubic yard, but the elimination of the fill caused them loss and damage in the sum of \$869.89.

Respondents sue for other items, but these were allowed on the admitted settlement between the parties, and will not be further noticed. Respondents submitted claims covering these several amounts. The chief engineer allowed the sum of \$8,622.36, being 10 per cent, on the final estimates allowed by the engineer, and the sum of \$4,466.07 on other claims made by respondents.

Appellant denies that there were changes

except such changes as were provided for in the contract, or, if so, that the change was either material or radical. It insists that the profile upon which the bid was offered was no more than an approximation of the amount of material to be moved; that the legend on the profile:

"(NOTE: The quantities, distribution and classification shown on this profile are calculated from slopes and estimated from surface indications. No provision is made for swell or shrinkage except in solid rock. The figures therefrom are entirely approximate and will be altered in accordance with the cross-sections when taken, and also such changes made in distribution as may be found necessary or desirable")

—Is a part of the contract, and was notice to the respondents that the profile upon which the bid was made was not binding, but that the line of the road was subject to change at the will of appellant; that the profile was, and was so understood by the parties, to serve no other purpose than as a basis for estimating bids; that the contract provided in terms that changes might be made, and if such changes were made, they were made in accordance with and to be paid for under the terms of the contract. That part of the contract relied upon is as follows:

"The right is reserved by the railroad company to change the line of grade at any stage of the progress of the work. If such change should increase the amount of work to be done, such increased amount will be paid for at the prices herein provided, for the class or classes of work so increased, and if, on the other hand, the work shall be diminished, no allowance will be made on account of anticipated profits on the portion which is eliminated. The quantities shown on maps and profiles upon which the estimate of work to be done is based are exclusively for the purpose of preparing such estimate and canvassing the bids and are not represented as correct. They may be either increased or diminished in amount or classification, as the engineer shall determine, after the work is opened up and during its progress or when the same shall be completed."

[1] Appellant takes the further position that, if it be held to be otherwise, respondents well knew at the time of making their bid that appellant's road was to be built 54 feet on tangent from the main line of the Northern Pacific tracks, and that it was actually so built by them in keeping with that understanding.

We shall pass the last proposition first. We are convinced that it was understood by appellant and the Northern Pacific Railway at the time the contract was entered into that the new road should be constructed 54 feet on tangent from the Northern Pacific line, but we are not convinced that it was so understood by respondents. Testimony is quoted by appellant, which might, if taken alone, indicate that one of the partners so understood it. But when considered in its setting, and in connection with other testimony, more especially that of the engineer having the work in charge, we are constrained to hold that the jury was warranted in its finding that respondents contracted on the basis of

the first profile, and with no present understanding that a change would be made that would necessitate the wastage of any material over the Northern Pacific Railway tracks. We are not unmindful of the charge that the testimony of the engineer, who is not now in the employ of appellant, is unreliable and contradictory of itself, but the weight of the testimony, and the credit of the witness, were all matters for the jury. The material inquiry is not whether the engineer, who was a witness for the respondents, knew, or ought to have known, of the demands of the Northern Pacific Railway Company, but whether he brought that knowledge home to the respondents.

[2] Upon the next proposition we think the question whether the change was so radically material as to give to respondents a right of recovery for the work done by them in excess of that which would be required under the contract was a question of fact for the jury. It is the contention of the appellant that the contract was let upon a unit basis; that it provides in terms that the company shall have the right to make changes, the extra work to be paid for as agreed upon, and if work is omitted, "No allowance will be made on account of anticipated profits on the portion which is eliminated." Counsel cite Waite on Engineering Jurisprudence, § 577:

"As a general rule, it is well settled that deviations and changes in the plans of a structure will not imply abrogation or abandonment, whether the contract provides that such changes or deviations may be made or not."

They also cite the following cases: *Wilkins v. Ellensburg Water Co.*, 1 Wash. 236, 24 Pac. 460; *Kiebertz v. Seattle*, 84 Wash. 196, 146 Pac. 400; *McGrann v. North Lebanon R. R. Co.*, 29 Pa. 82; *Dorsey v. McGee*, 30 Neb. 657, 46 N. W. 1018; *Bozarth v. Dudley*, 44 N. J. Law, 304, 43 Am. Rep. 373; *Williams v. Chicago, S. F. & C. Ry. Co.*, 153 Mo. 487, 54 S. W. 689; *Huckestein v. Nunnery Hill Incline Plane Co.*, 173 Pa. 169, 33 Atl. 1108; *Beers v. North Milwaukee Town-Site Co.*, 93 Wis. 569, 67 N. W. 936; *Wells v. Milwaukee Railway Co.*, 30 Wis. 605. The contention being that the principal object of making a contract on a unit basis is to guard against a charge of abrogation or abandonment, and that if such changes are not to be paid for, or deducted from the contract, according to its terms, the right of contract is lost to the builder, and he is made subject willy-nilly to a suit upon a quantum meruit.

Respondents contend that, where a change is made that is so radical as to materially increase the cost of the work and compel the doing of something not within the reasonable scope of the contract, a recovery may be had upon a quantum meruit. *Kiebertz v. Seattle*, 84 Wash. 196, 146 Pac. 400; *Atwood v. Smith*, 64 Wash. 470, 117 Pac. 393; *Meacham v. Seattle*, 69 Wash. 238, 124 Pac. 1125; *Mc-*

Master v. State, 108 N. Y. 542, 15 N. E. 417; Henderson Bridge Co. v. McGrath, 134 U. S. 260, 10 Sup. Ct. 730, 33 L. Ed. 934; Salt Lake City v. Smith, 104 Fed. 457, 43 C. C. A. 637; Seymour v. Long Dock Co., 20 N. J. Eq. 306; Wolff v. McGavock, 29 Wis. 290; Cincinnati Southern Ry. Co. v. Cummings, 6 Ky. Law Rep. 442; Wood v. Ft. Wayne, 119 U. S. 312; 7 Sup. Ct. 219, 30 L. Ed. 416; Chicago & Great Eastern Ry. Co. v. Vosburgh, 45 Ill. 311; Wright v. Wright, 11 Ky. (1 Litt.) 179; Dubois v. Delaware & Hudson Canal Co., 4 Wend. (N. Y.) 285; McCormick v. Connolly, 2 Bay (S. C.) 401; Gammino v. Inhabitants of Dedham, 164 Fed. 593, 90 C. C. A. 465; Cleveland, C. & St. L. Ry. v. Moore, 170 Ind. 328, 82 N. E. 52, 84 N. E. 540; Erfurth v. Stevenson, 71 Ark. 190, 72 S. W. 49; Boody v. Rutland & Burlington R. R. Co., 24 Vt. 660, Fed. Cas. No. 1,635; Philadelphia, Wilmington & Baltimore R. R. Co. v. Howard, 13 How. 307, 14 L. Ed. 157.

Respondents further contend that their right of recovery rests in the direct authorization of the president of the company and its engineer, and that out of these authorizations an express promise to pay a reasonable price or damages arises independent of the contract.

The cases cited are generally denied or distinguished by counsel on either side. It would unduly extend our opinion to follow their discussion. The real merit of the case is whether the change in the line of the railway made it necessary for the contractors to waste excess material amounting to approximately 40,000 cubic yards in a way not contemplated by the contract, and which, if no change had been made, might have been used to make fills, balance the job, to their cost and damage in the sum of 51 cents per cubic yard, and the extra cost of leveling this waste material to conform to the demands of the Northern Pacific Railway Company. We cannot say as a matter of law that the thing done was within the reasonable contemplation of the parties at the time the contract was entered into, or that it is embraced within the scope of the contract as written. It will be noticed that both sides rely upon *Kieburz v. Seattle*, 84 Wash. 196, 146 Pac. 400. Appellant quotes that part of the opinion pertaining to the first item, and respondent relies upon our discussion of the second item. The one declares the general rule applying to contracts let upon a unit basis that:

"Where the contract price is based on a unit system, we cannot think a right of recovery can be grounded upon a loss caused by reason of the performance of work required by the contract merely because a change in the plans of the work increased the number of units of work of one class and decreased the number in another, especially where, as in the present cases, the city is empowered by the contract to make 'variations in the quantity of the work to be done.'"

The other as emphatically declares the exception that:

"An engineer in charge could not make such radical and material changes in the plans of work as would result in material loss or damage to those participating in or affected by the performance of the contract."

The jury having found that the change made was beyond the intent of the contract, it seems clear to us that the case falls within the discussion of the second item. It is also saved under the suggestion made in the first part of the opinion:

"They [appellants] do not contend that the city ordered or required them to perform any work not designated or contemplated by the contract."

The court held in the *Kieburz* Case that the work, in so far as the first item was concerned, was designated and contemplated by the contract. It is upon the contention that the work done was not contemplated by the contract that respondents rest their case, and to again refer to the discussion of the second item in the *Kieburz* Case:

"It is our opinion that it is a radical and material change such as the city [company] had no right to cause to be made without rendering itself liable to the contractors for the loss it caused them."

We cannot say that the changes were either minor or inconsequential, or that they were made necessary to overcome engineering difficulties arising in the progress of the work. The jury has said that the parties contracted upon the profile and as the line was staked out on the ground; and when the company by its changes made it impossible for the contractors to do the work in the manner in which it might have been done, and put them to the expense of wasting material instead of using it to fill excavations, it made itself liable to pay the reasonable cost of the extra work.

[3.4] Respondents asked judgment for \$60,491.99. The jury returned verdicts as follows:

"We, the jury in the above-entitled cause, find for the plaintiffs and assess the amount of recovery in the sum of thirteen thousand and eighty-eight dollars & 43/100 (\$13,088.43/100) dollars."

"We, the jury in the above-entitled cause, find for the plaintiffs, and assess the additional amount of recovery in the sum of \$25,780, twenty-five thousand seven hundred and eighty dollars."

"Question: Did the defendant by its president, Mr. O. N. Richards, on or about April 11, 1913, offer to pay to the plaintiffs, or either of them, the ten per cent. of the estimates retained under the contract amounting to the sum of \$8,622.36, together with the sum allowed by Mr. Roschke, amounting to \$4,466.07 or a total of \$13,088.43?" "Yes."

The first verdict was returned under the direction of the court, and is made up by an allowance of the \$8,622.36 on final estimates and the \$4,466.07 allowed for extra work. The second verdict was the amount allowed by the jury under the direction of the court to fix the additional amount to which respondents were entitled, if any, and the third verdict was taken as a special verdict and is self-explanatory. While it would have been

the better practice to have directed the jury to return a verdict for such amount as it found to be due, but in no event for a sum less than \$13,088.43, the same result follows from the practice adopted by the court.

Assuming that there was a material change in the contract, and granting that respondents are entitled to recover upon the general issue, and that there could be no legal recovery upon some of the items claimed by respondent, appellant contends that if there was no sufficient evidence to sustain any one, or more, of the items submitted, or, if no cause of action could be stated on one or more of them, the verdict being a general verdict, it is impossible to tell what the jury allowed on each item, or on what items it found for respondents, and for that reason the verdict must fail. It is quite generally held that where two inconsistent causes of action are set up, and one is sustained by the evidence and the other is not, a general verdict will not be allowed to stand, the theory being that the court cannot say whether the jury based its verdict upon the cause sustained, or the one not sustained. In such cases the verdict is held void for uncertainty. At common law a motion in arrest of judgment would lie. 2 Tidd's Practice, 894. But here there is but one cause of action. It grows out of a change in the contract made by the parties. From that change certain damages resulted to respondents. For convenience in pleading, they have set these damages up as separate items under one cause of action.

No objection was made that causes of action had been improperly joined, or that they should be separately stated, so while each item became an issue of fact, the case went to the jury upon a general issue. It was within the province of the jury, indeed it became its duty, to measure the testimony going to each item. It necessarily rejected some wholly, or in part, for the recovery is far below that demanded, or which might have been returned in favor of respondents. All presumptions are to be indulged in favor of verdicts. No motion to separately state causes of action was made. No demurrer was directed to any item of the complaint, and no request for special verdicts upon the several items was made in the court below. In the absence of either motion, or demurrer, or a request for special verdicts, we must presume that appellant was willing to rest its case upon the general issue tendered in its pleadings, that is, whether there had been a change in the contract, or whether under the contract it had a right to make the changes, and not upon a plea of uncertainty if it should transpire that a general verdict unfavorable to it was returned. Appellant had at the trial every weapon which it now employs, and it might have avoided the present situation by invoking the remedies afforded by statute as well as a practice sanctioned at common law and generally recognized by statute. *Walker v. N. M. & S. P. Ry. Co.*,

165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837. Nor does the record show that the form of verdict was objected to when it was received, and it was still within the power of the trial judge to save the question now presented and avoid the consequence which is now complained of.

To avail itself of the rule, appellant must assume that it has been charged upon two or more distinct and inconsistent causes of action. Thus treated, appellant is not now in position to take advantage of the objection. The improper union of several causes of action is made a ground of demurrer under Rem. Code, § 259, and, if no objection be taken in the manner provided by law (section 263) the objection is waived. By joining upon the general issue, appellant was content to treat the action as one upon a general cause of action resting in breach of contract, and cannot, upon motion for a new trial, urge a position which can only be sustained by treating the several items of damage as independent causes.

"The verdict, * * * being general, found all the essential facts and issues in favor of appellee, and all reasonable presumptions and intendments must be made to sustain it." *Central Union Tel. Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64.

"It is a settled rule [in England] that if the same count contains two demands or complaints, for one of which the action lies, and not for the other, all the damage shall be referred to the good cause of action, although it would be otherwise if they were in separate counts." *Doe v. Dyeball*, 1 Lord Ray. 70.

Although this rule may seem technical, it is, as said in *Northern Central Railway Co. v. Mills*, 61 Md. 358, supported by very high authority.

In the state of the record, the verdict being for respondents upon the general issue of a radical change in the work, it is certain that they are entitled to recover upon some items, if not upon all, and, appellants having passed a demurrer, and not having asked for special verdicts upon the several items, and, there being foundation in law and ample testimony to sustain the verdict upon the two items of wasting material over the tracks of the Northern Pacific, and leveling it, we think there is no sound reason why it should not now be intended that the verdict is supported by the actionable items rather than upon those which may admit of doubt or discussion.

[5] Moreover, the court instructed the jury upon each item, to the effect that, unless they found from the evidence that a change had been made with reference thereto which substantially extended the obligation of the contractors beyond the scope and intent of the contract, they should find for appellant. This being so, we are not without authority in our own reports for indulging in the presumption that the jury rejected all inconsequential changes and those which were within the right of appellant to make, and based the verdict upon changes which the

testimony would sustain as radical. *Miller v. Eastern Ry. & Lbr. Co.*, 84 Wash. 31, 146 Pac. 171.

The largest claim of the respondents, and the one upon which the verdict must in the main rest, is the one for carrying the excess waste over the Northern Pacific tracks. For the work of excavating and blasting respondents were allowed 84 cents per cubic yard. They alleged that the reasonable value of carrying the waste, over the contract price, was 51 cents. It is complained that the testimony of respondents to sustain both the amount of waste and the cost of moving it is so vague, conjectural, and uncertain that it will not support a verdict. Measurements and estimates were made by both parties, and other evidence of less convincing character was introduced by respondent. The jury was warranted in coming to some conclusion. It evidently gave more weight to the testimony of respondents than that of appellants.

[8] When verdicts rest in mixed fact and opinion, or even in estimates made by engineers, absolute certainty is not essential. Reasonable certainty is all that is required, for it is known that men who give opinions reason from different premises, and engineers assume, or find, a different basis for their conclusions out of the same set of physical facts.

Nor do we think that it follows, because respondents were allowed 84 cents for excavating under the contract and were bound to waste excavated material, or, to be plainer, to dispose of it at their own cost within the contract price, that an allowance of 51 cents for carrying it over and wasting it beyond the Northern Pacific tracks would result in a double payment in degree, or at all. Under the theory of respondents, and they seem to have established it to the satisfaction of the jury, appellant had done away with the places where the excavated material would have been wasted if the original plan had been adhered to.

The recovery sought was for "the reasonable value of wasting said material from said grade across the tracks of the Northern Pacific Railway Company and into the Yakima river." No motion or demurrer was directed to this item of the complaint. It was not only by a general denial. Appellant stood upon its construction of the contract, the legal effect of the final estimate by the engineer, and a plea of estoppel not now necessary to be considered. Requested instructions were drawn upon the theory that appellant had a right to change the plan; that there was in fact no change; and that if the change were made, it was not a radical departure from the original plans. No request was made for a credit, or that the jury consider the difference in cost. The issue was clear-cut, win or lose, upon the respective theories of the parties. The jury was so directed that it could not evade or confuse

the issue. It found that the line had not been built as it had been staked upon the ground, and that the cost of wasting the excess material was not within the contemplation of the parties at the time the contract was entered into.

Under this state of the record, we do not see our way to overturn the case upon a consideration to which the attention of the trial judge and jury was not invited. We must presume rather that the jury was mindful of the written contract, and gave no more than the reasonable cost of wasting the material over and above the cost of the work which would have been necessary if the original plan had been adhered to.

[7] The claims of respondent were all submitted to Mr. Pitman, who had charge of the work. Before he had acted upon them a Mr. Boschke was appointed chief engineer. The latter, after the lapse of some time, during which negotiations and correspondence were carried on, finally made the awards hereinbefore referred to. His decision was put in writing after this case had been begun. The question whether Mr. Boschke could make the award, the difference having been submitted to Mr. Pitman, is raised. But we think it unnecessary to decide the question whether an award must be made by the engineer or architect to whom the dispute is submitted, or by the one in charge when the decision is made. The contract provides:

"It is mutually agreed between said parties that to prevent or settle all disputes or misunderstandings between them in relation to any of the stipulations contained in this agreement, or their performance by either of said parties, the engineer shall be, and is hereby made, umpire to decide all matters arising or growing out of this contract.

"It is further agreed and expressly understood that the decision of the engineer on any point or matter touching this agreement shall be final and conclusive between the parties hereto, and each and every of said parties waives any and all right of action, suit or suits, or other remedy, in law or equity, under this contract, involving decisions made and to be made by the engineer."

Provisions of this character, when contained in building contracts, have been readily sustained by the courts, but they are never extended beyond their terms. The power of the architect to act as a final arbiter is limited to the settlement of such matters as arise in or grow out of the contract. The premise of all the reasoning to which courts have resorted to sustain these stipulations is that the architect may decide what is within an admitted contract, but we know of no cases holding that an engineer or architect may, under such a provision, decide what the contract is, or, as in this case, defeat by his certificate the well-established principle that a radical departure from a contract releases the parties from its obligations and leaves them to their remedies and defenses under the law of quantum meruit or quantum valebat.

If the contract be admitted, the certificate of the engineer as to all matters going to the meaning of terms or nonperformance may be final, but where the suit is not upon the written contract, but upon a quantum meruit arising out of a departure so radical as to be in legal effect a new contract, the umpire clause will not be held to bar a resort to the courts by an aggrieved party.

To hold that the certificate of the engineer is final and conclusive upon the parties would be to hold that there had been no departure from the original contract contrary to what seems to us to be an evident fact: a fact confirmed by the verdict of the jury. It would be to hold that it is within the power of an engineer under an umpire clause to determine the legal rights of the parties, for the certificate of the engineer was drawn under the theory, and is now depended upon to sustain the position of the appellant that the right of the parties rests in the original contract. That an engineer or architect cannot determine the legal rights of the parties under a contract or bind them to the performance of a written contract in the event of a radical departure is well settled.

"When it is established that a contract may be abandoned, and a suit upon quantum meruit or quantum valebat be maintained, it follows that this provision in regard to the persons selected to decide on the compliance with its specifications is of no avail as a defense. Their testimony stands on the same ground as that of other witnesses." *Yeats v. Ballentine*, 58 Mo. 530.

See *Elliott on Contracts*, § 728; *King Iron Bridge & Mfg. Co. v. St. Louis (C. C.)* 43 Fed. 768, 10 L. R. A. 826; *G., H. & S. A. R. Co. v. Henry*, 65 Tex. 685; *McAvoy v. Long*, 13 Ill. 147; *Alton, etc., R. R. Co. v. Northcott*, 15 Ill. 49; *Atlanta & Richmond, etc., R. R. Co. v. Manghan & Prickett*, 49 Ga. 266; *Scott v. Parkview Realty & Imp. Co.*, 241 Mo. 112, 145 S. W. 48; and to the same effect *Atwood v. Smith*, 64 Wash. 470, 117 Pac. 393; *Welfenbach v. Smith*, 97 Wash. 391, 166 Pac. 613.

In cases where the architect's certificate would otherwise be held to be a prerequisite to the bringing of a suit, it has been held that an abandonment or radical departure will overcome the umpire clause of the contract. It was so held in *Sweatt v. Bonne*, 60 Wash. 18, 110 Pac. 617, where reliance was put upon a contract and apt authority cited to sustain the position of the owner, but the court held:

"These decisions would seem to support this contention made in behalf of appellants, if this was an action to recover a balance due upon the first contract only, and the building had not been so changed by the other contracts and the extra work as to become a building very materially different in kind and structure from the building originally contracted for. By these changes the cost of the building was increased more than one-half, and its size was practically doubled. We think that this is not the building contemplated in the original contract, and the architect was not, by agreement of the par-

ties, made the final judge of its completion. Both of the later contracts, which resulted in the building being so changed as to become a substantially different building, are silent upon that subject. Whatever the authority of an architect may be as an agreed arbiter between an owner and a contractor, the law will not regard the owner bound by a decision of the architect, except in so far as the owner has unmistakably agreed to be so bound."

This rule is noticed by Clark in his *Architect, Owner, and Builder Before the Law*, at page 177:

"Where a contract partly executed is abandoned by agreement of the parties, or by the fault of one of them, or where such alterations and changes have been made as to obscure totally the original agreement, it sometimes happens that the contract is treated by the court as no longer existing, and the builder is held to be entitled to recover quantum meruit for his work and materials; that is, what they can be proved to have been really worth, without regard to the contract price for them. In such a case, it becomes important to know whether it is still necessary to produce the architect's certificate, in order to recover payment on the new basis. The law appears to be that it is not necessary, in such cases, to produce the certificate."

See, also, *Dinsmore v. Livingston County*, 60 Mo. 241; *Davis v. Badders*, 95 Ala. 348, 10 South. 422; *Elliott on Contracts*, § 3771.

We can see no difference between the cases cited and the case at bar. If the action is not upon the written contract, but upon a quantum meruit or quantum valebat, it would follow that the certificate of the engineer would be no more than an opinion, and would stand upon no higher ground than the opinion of other witnesses equally competent.

Our holding is that respondents are not concluded by the findings of the chief engineer.

Appellant makes many assignments of error going to instructions given and refused, but they all rest in appellant's theory of the case. This being rejected as without merit, it will be unnecessary to extend this opinion with a discussion of them.

Affirmed.

ELLIS, C. J., and MAIN, and MOUNT, JJ., concur.

(37 Or. 669)

ALLIANCE TRUST CO., Limited, v. HUBBARD et al.

(Supreme Court of Oregon. March 12, 1918.)

1. APPEAL AND ERROR §1106(2)—NECESSITY OF REMAND—RECEIVER'S ACCOUNTS.

In suit to foreclose mortgages, the court, pursuant to their stipulations, having appointed a receiver to take charge of and collect the rents and profits of the property, and such receiver having collected the rents and paid current expenses, it will be necessary for the trial court to ascertain the amount the receiver has to apply on plaintiff's mortgages, and the suit will be remanded for final decree after making deduction of the amount available.

2. ATTORNEY AND CLIENT §21—ACTING FOR DIFFERENT PARTIES.

Where an owner contracted for the erection of a building, and gave mortgages to secure the

money, there was no impropriety in her attorney's acting as attorney for the contractors against the bank which advanced the money for construction after his relations with the owner, as her attorney, had ceased.

3. MORTGAGES ~~Sec~~ 151(1)—PRIORITY OF LIENS—ASSIGNMENT OF LEASE.

A note executed by the owner of a building and secured by her assignment of a lease of part thereof created a lien which must be postponed to the liens of the owner's mortgages, except in so far as one of the mortgages, subsequent to the assignment, may be affected by the rentals that have been or may be collected on the lease.

In Banc. Appeal from Circuit Court, Marion County; William Galloway, Judge.

Suit by the Alliance Trust Company, Limited, against Fannie E. Hubbard, W. M. Welch, and C. R. Welch, as partners doing business under the firm name and style of Welch Bros., John Bayne, and the United States National Bank of Salem, Or. From the decree, plaintiff and defendants Welch Bros. and John Bayne appeal. Reversed in part, and cause remanded for an accounting and entry of decree therein in accordance with the opinion.

On May 14, 1912, plaintiff, the Alliance Trust Company, Limited, loaned to defendant Fannie E. Hubbard \$45,000, and as security for the payment thereof she executed and delivered to it a mortgage upon the east half of lots 1 and 2 in block 20 in the city of Salem, upon which the Hubbard Building is situated at the southwest corner of State and High streets; the mortgage covering other city property and also a farm of 202 acres near Salem. On June 7, 1912, the mortgagor repaid \$15,000 of this loan, and the property in block 30 of the city of Salem was released from the mortgage and the principal of the debt was reduced to \$30,000. The loan was to be used in the erection of the Hubbard Building. Subsequently the mortgagor changed her plans in regard to the building and concluded to add two additional stories to the original plan, making four stories. To enable her to finance her larger plans she applied to the plaintiff for an increase of loan. On September 18, 1912, plaintiff loaned her an additional sum of \$30,000, and to secure the same she executed to plaintiff a second mortgage covering the Hubbard Building property and the farm. This loan was evidenced by a series of nine principal notes, eight for \$2,000 each, one maturing on the 1st day of May and November of each year from November 1, 1913, to May 1, 1917, and one for \$14,000, maturing November 1, 1917. Upon the completion of the building Mrs. Hubbard found herself unable to meet her obligations to her contractors, the defendants Welch Bros., and in order to prevent lien foreclosures she applied to plaintiff for a third loan of \$10,000. On July 28, 1913, plaintiff loaned her this sum, taking her note for the same, and as security

she executed a third mortgage covering the Hubbard Building property and the farm. Each of the principal notes was so drawn as to bear interest after maturity at the rate of 8 per cent. per annum. The loan secured by the first mortgage was to bear interest from date until the maturity of the principal note at the rate of 7 per cent. per annum, as evidenced by a series of ten interest notes representing semiannual installments of interest, payable May 1st and November 1st of each year from November 1, 1912, to May 1, 1917. The loan secured by the second mortgage was to bear interest from date until maturity at the rate of 7 per cent. per annum, as evidenced by a series of eleven interest notes representing semiannual installments of interest, payable May 1st and November 1st of each year from November 1, 1912, to November 1, 1917. The loan secured by the third mortgage was to bear interest from date until maturity at the rate of 8 per cent. per annum, as evidenced by a series of nine interest notes representing semiannual installments of interest, payable May 1st and November 1st of each year from November 1, 1913, to November 1, 1917. Among other covenants contained in plaintiff's mortgages was one that the mortgagor would keep the buildings upon the mortgaged premises insured against loss or damage by fire in the sum of \$50,000, and it was provided that if the mortgagor should fail to procure such insurance or fail to pay the premiums therefor, the mortgagee might procure such insurance and at its option pay the premiums therefor, and any amount so paid with interest at 10 per cent. per annum should be added to and become a part of the debt secured by said mortgages. The mortgagor failed to keep up her insurance as agreed, and in order to protect its lien the plaintiff on May 15, 1915, advanced and paid insurance premiums to the amount of \$927, no part of which was ever paid by the mortgagor.

The mortgagor wholly failed to comply with the conditions of said mortgages. She defaulted in the payment of taxes for the year 1914, in the payment of interest on all of said loans, and in the payment of installment principal notes secured by the second mortgage. By reason of these defaults on August 18, 1915, plaintiff commenced this suit in the circuit court for Marion county for the foreclosure of all of said mortgages. At that time, in addition to the arrears of \$927 in insurance premiums, the mortgagor was in default to the amount of \$1,050 interest on the first mortgage, \$2,100 interest on the second mortgage, \$8,000 principal on the second mortgage, and \$800 interest on the third mortgage, besides a large amount of accrued interest on the delinquencies. In each of plaintiff's mortgages the mortgagor expressly agreed that in case of foreclosure she would

pay such a sum as the court might adjudge reasonable as attorney's fees to be allowed the plaintiff in such suit. In the complaint it was alleged that \$2,000 was a reasonable sum to be allowed as attorney's fees for the foreclosure of the first mortgage, \$2,000 for the second mortgage, and \$1,000 for the third mortgage. Plaintiff asked for \$927 for insurance premiums paid by it. On August 30, 1915, defendant Fannie E. Hubbard filed an answer admitting every allegation of plaintiff's complaint, except certain portions not material to this appeal, and except as to the reasonableness of the attorney's fees, admitting that \$500 would be a reasonable fee for each of said mortgages. On April 20, 1916, she filed an amended answer expressly admitting all the other allegations of the complaint. She withdrew her admission as to the \$927 insurance item, and denied that plaintiff had been compelled to advance more than \$630 for such insurance premiums, and so amended her answer as to admit \$250 a reasonable fee for foreclosing each of the three mortgages, or a total of \$750. After considerable delay, on December 21, 1916, a decree was entered in favor of the plaintiff and against the defendants.

Plaintiff was given judgment against defendant Fannie E. Hubbard for all amounts prayed for upon the several notes and secured by the respective mortgages. But upon the item of insurance premiums plaintiff was only allowed judgment for \$630, and an aggregate sum of \$750 as attorney's fees. By the terms of the decree it was further provided that no execution should be issued to enforce the same before November 1, 1917. From the provisions of the decree relating to the items of insurance and attorney's fees and the inhibition concerning the issuance of execution, the plaintiff appeals. None of the defendants appealed from the decree in favor of plaintiff.

Earl C. Bronaugh, of Portland, for appellant Trust Company. John Bayne and John H. McNary, both of Salem, for defendant-appellants Welch Bros. Guy O. Smith, of Salem (Smith & Shields, of Salem, on the brief), for defendant-appellant John Bayne. A. O. Condit, of Salem, for respondent Hubbard. Thos. Brown, of Salem (Carson & Brown, of Salem, on the briefs), for defendant-respondent U. S. Nat. Bank of Salem.

BEAN, J. (after stating the facts as above). After reading the 411 pages of typewritten testimony, much of which is immaterial, and a recitation of which would be of no value to any one, we will consider the plaintiff's appeal before taking up those of the defendants Welch Bros. and John Bayne. As to the premiums for the insurance it is shown that while it would have been possible to obtain a less rate, that paid by the plaintiff was the regular rate for property of that kind in the city of Salem at that time. It

may be that the plaintiff could have obtained insurance for a term of three years at a less rate, and Mrs. Hubbard complains that this was not done. It is nowhere shown, however, that at the time of her request for insurance she suggested that the plaintiff obtain an insurance policy for a longer time, and it does not appear that plaintiff was aware that a long time would elapse before the matter would be in some way adjusted. The amount of insurance premiums of \$927 paid by plaintiff according to the terms of the mortgages was reasonable as a valid claim to be added to plaintiff's mortgages and is allowed. According to the judgment of practicing attorneys, the evidence as to a reasonable sum for attorney's fees, foreclosing the three mortgages for the principal sums of \$70,000, and interest and insurance premiums, was 5 per cent. on the amount due, for services in the circuit court, and from \$300 to \$1,000 in case of an appeal. Considering all the facts relating to plaintiff and the various defendants, we think the reasonable amount to be allowed plaintiff for attorney's fees in this suit is \$2,500. November 1, 1917, the time limited by the lower court for the issue of execution, has passed, and the matter need not be considered at length. Plaintiff was entitled to have execution issue.

[1] It appears from the record that pursuant to the stipulations of the mortgages the court appointed a receiver to take charge of and collect the rents and profits of the mortgaged property, that the rents have been collected, and the current expenses of the property have been paid by the receiver. It will be necessary for the trial court to ascertain the amount which the receiver has to apply upon plaintiff's mortgages, and the suit will therefore be remanded to the circuit court for a final decree, to be entered after making a deduction of the amount available for such purpose.

Mortgage of Defendants Welch Bros.

On May 28, 1912, defendant Fannie E. Hubbard made a contract with defendants Welch Bros. for the construction of the Hubbard Building, which they immediately commenced. Afterwards the contract was modified and two additional stories, with other alterations, were added to the building. The agreement then was that Welch Bros. should construct the building for the actual cost thereof, plus \$4,800 commission. It was completed about January 1, 1913, when Mrs. Hubbard and Welch Bros. had a settlement as to its cost. On January 29, 1913, Welch Bros. filed a mechanic's lien for the balance which they claimed to be then due therefor. Mrs. Hubbard made some payments before February 18, 1913, when she and Welch Bros. entered into an agreement that the cost of the building under the terms of the contract for the construction thereof, including commission to the contractors, amounted

to \$74,016.74, and that there had been paid on account thereof \$55,584.57, leaving a balance due. Welch Bros. of \$18,432.17; that Mrs. Hubbard would pay interest on such balance at the rate of 8 per cent. per annum from the date of filing the lien; and that Welch Bros. would defer the foreclosure of such lien for five months from the date of filing the same. This was in order to give Mrs. Hubbard an opportunity to secure the money for the payment of the balance. Subsequently Mrs. Hubbard paid \$20 to the Oregon Art Tile Company, which was credited upon the balance, leaving \$18,412.17. Mrs. Hubbard was unable to secure sufficient money to pay Welch Bros., but obtained an agreement from the plaintiff to loan her \$10,000 to be paid them and to be secured by its third mortgage, provided Welch Bros. would release their mechanic's lien and take a note secured by a fourth mortgage for the amount due after applying the \$10,000. A written agreement that this should be done was entered into on July 26, 1913, and on July 28, 1913, after the payment of the \$10,000 to Welch Bros., it was ascertained that the balance due them from Mrs. Hubbard was \$9,148.65, and Mrs. Hubbard executed to them a note and mortgage to secure the payment of the amount. Mrs. Hubbard paid interest to Welch Bros. on that note and mortgage to January 28, 1915, but failed to pay the interest due July 28th of that year. On August 30, 1915, Welch Bros. filed their answer and cross-complaint, setting up their note and mortgage. No answer was filed to this cross-complaint until April 21, 1916, when by leave of court Mrs. Hubbard answered it. The mortgage of Welch Bros. covered the income of the mortgaged premises as well as the premises themselves. In her answer Mrs. Hubbard set up that she had paid Welch Bros. over \$65,000 on account of the construction of the building for which they had never accounted to her, and that by misrepresentations and misstatements they induced her to sign such note and mortgage to them, and that she believed that if an accounting were had it would appear to the court that they misappropriated funds, and that she was not indebted to them in any sum. This was denied by the reply. Defendants Welch Bros. were required by the trial court to make another accounting, which they did.

There are no facts or circumstances alleged in the answer to Welch Bros.' cross-complaint sufficient to impeach the note and mortgage. Passing this, however, the evidence which we have carefully weighed shows that the main difficulty in the construction of the building was that it cost more than Mrs. Hubbard expected, and perhaps she was unable to realize from the income the amount she had expected to be able to apply to the satisfaction of the indebtedness. The evidence, the several settlements, and the accounting made in the trial

court show that the business was conducted on her behalf in a fair businesslike way. The money paid by Mrs. Hubbard to Welch Bros. and the balance due them, for which the note and mortgage were given, are shown to have been expended in the construction of the building, with the exception of their commission of \$4,800. Much of the material for the building was purchased from reliable business concerns at competitive prices. Mrs. Hubbard had the services of an architect against whom there is no complaint, and the erection of the structure was superintended under his direction during all the time consumed in its construction. Mrs. Hubbard understood all the facts and circumstances relating to the construction of the building at the time of the settlements which were evidenced by written agreements with Welch Bros., as well as she or any of her witnesses did at the time of the taking of the evidence. There is in evidence some random guesses made by contractors to the effect that they estimated the cost of the third and fourth stories of the building at a much less figure than the actual cost. There were also figures made by a contractor estimating the cost of the two additional stories from the plans and specifications. Important changes were made in these plans. They were not followed in the construction. A portion of the first story was constructed for a depot for the Oregon Electric Railway Company. The building contains a theater, a photograph gallery, and a barber shop. Radical changes were made in the arrangements for the elevator necessitating a change in the roof thereof, and other alterations were made in order to effectuate the conveniences for the several uses for which the building was designed.

It seems to us that the questions of law involved are too plain for discussion. The trial court rendered a decree canceling the note and mortgage of Welch Bros. executed by defendant Fannie E. Hubbard to Welch Bros. and awarding her costs and disbursements. The decree of the lower court in this respect is reversed, and one will be directed to be entered in that court in favor of Welch Bros. for the sum of \$9,148.65, with interest at the rate of 8 per cent. per annum from January 28, 1915, together with the further sum of \$400, attorney's fees in this suit, and foreclosing their mortgage as prayed for in their cross-complaint. The mortgage of defendants Welch Bros. will be declared to be next in time and right to the mortgages of the plaintiff. Welch Bros.' mortgage covers the income from the mortgaged premises, and provides that the net amount thereof shall be applied to the payment of plaintiff's mortgages, and then to the mortgage of Welch Bros. It is claimed by Welch Bros. that between September 5, 1913, and August 2, 1915, Mrs. Hubbard expended a portion of the income of the mortgaged premises to the

amount of \$759.79 in purchasing furniture and furnishings for the rooms in the Hubbard Building, and that the same are now in said building, and are a part of the income thereof, and subject to their mortgage. The funds mentioned are not traced and the personal property is not segregated nor described in the record so as to enable this court to render a decree in regard thereto.

Mortgage of John Bayne.

During the time of the construction of the Hubbard Building and for a long time prior thereto defendant John Bayne was employed by Mrs. Hubbard as attorney and counsellor, and rendered services in regard to various matters as her attorney and business manager, all of which are detailed in the evidence at great length. On July 23, 1912, Mrs. Hubbard executed to defendant Bayne a promissory note in the principal sum of \$500 due on or before three years from date. On January 2, 1915, she executed another note for \$1,000 in favor of Bayne, with interest at 6 per cent. per annum in consideration of services rendered. On August 3, 1915, to secure these notes Mrs. Hubbard executed a fifth mortgage on the premises mortgaged to plaintiff and defendants Welch Bros. No payment was made on these notes except \$30 interest on the \$500 note on August 2, 1913. On October 6, 1915, defendant Bayne answered the complaint of the Alliance Trust Company, and by a cross-complaint set up his notes and mortgage. Defendant Hubbard filed no answer to this cross-complaint until April 21, 1916, when she applied to answer. Her answer admits that she signed the \$500 note and the \$1,000 note and executed the mortgage, that no payments have been made on the smaller note except \$38 on August 2, 1913, and that no payments have been made on the \$1,000 note, and denies the remainder of the cross-complaint. She further alleges that for many years John Bayne acted as her attorney; that she paid him a large amount of money on account of his alleged services, the amount of which she is unable to state, and that he never accounted to her therefor; that during the years 1912, 1913, 1914, and a part of 1915, while she was engaged in the construction of the Hubbard Building, under contract with the defendants Welch Bros., defendant John Bayne acted as attorney and legal advisor for her, and that she "has been informed and believes that during said time the said defendant John Bayne was acting as attorney for defendants Welch Bros., and that the interests of said Welch Bros. were antagonistic to the interests of this defendant, and that the said defendant John Bayne did not properly safeguard and protect the interests of this defendant, and that through the negligence and inattention of said defendant John Bayne a large amount of money has been lost to this defendant"; that at the time of giving the notes mentioned in Bayne's

cross-complaint he represented to her that the amounts named in the notes were due from her to him; and that this defendant relying upon said representations executed said notes, "but that this defendant is informed and believes that if said defendant John Bayne were required to properly account to this court for the moneys received by him from this defendant and for the services rendered, that it would be ascertained by the court that no money is due to said defendant John Bayne from this defendant."

The allegations of the answer to Bayne are but little more, if anything, than an insinuation. No facts are alleged showing that the notes were executed without consideration or were fraudulent. Neither does the evidence of the case show any defense to the notes or mortgage. The court required an accounting to be made from the evidence in regard to which it appears that every dollar was accounted for by the attorney, and that faithful services were rendered by Bayne in behalf of Mrs. Hubbard. It is plainly demonstrated that there was no foundation existing for the allegations of Mrs. Hubbard in this respect, and that she was ill advised as to the matter upon which to base her belief and frame her answer. The money for which the notes were given was earned by the defendant Bayne, a fair settlement therefor was made with Mrs. Hubbard, and the notes were executed. In an endeavor to protect him she executed the mortgage in question. After the termination of the business relations between defendant Bayne and Mrs. Hubbard and the settlement therefor, at the request of Welch Bros. Bayne acted as attorney for them, and filed an answer in a suit commenced by the plaintiff to foreclose its mortgages. He was no longer in the employ of Mrs. Hubbard, and knew of no contemplated defense to the mortgage of Welch Bros. When controversy arose between Mrs. Hubbard and Welch Bros. in regard to their accounting Mr. Bayne had other counsel appear with him in the case.

[2] We see no impropriety in his acting as attorney for Welch Bros. after his relations with Mrs. Hubbard as her attorney had ceased. The fact that Bayne drew the mortgage to Welch Bros. which was examined by other counsel for the contractors constitutes no defense to either of the mortgages in question. Counsel for Mrs. Hubbard stated at the trial that there was no objection to Attorney Bayne's appearing in the suit for Welch Bros. The trial court rendered a decree canceling the notes and mortgage of defendant John Bayne. This decree is reversed and one directed to be entered in favor of defendant John Bayne for the amount of his notes and the foreclosure of his mortgage as prayed for in his cross-complaint. The sum of \$150, attorney's fees, is allowed as a reasonable amount for foreclosing such mortgage. The mortgage of defendant John Bayne will be declared to be next in time to the mortgage

of plaintiff and the mortgage of defendants Welch Bros.

Claim of United States National Bank.

[3] On April 29, 1914, defendant Fannie E. Hubbard obtained a loan from the defendant United States National Bank amounting to \$4,775, for which she executed a promissory note payable on demand, with interest at the rate of 8 per cent. per annum. In order to secure the payment of the same Mrs. Hubbard assigned a lease made by her to the Oregon Electric Railway Company, a corporation, on February 16, 1912, for a portion of the Hubbard Building, and authorized the company to pay the monthly rentals to the bank. This note has been reduced to the amount of \$1,241, and interest thereon from the date of the note, by payment of such rentals and by payments made by Mrs. Hubbard. It follows that the decree of the circuit court as to the United States National Bank for the sum of \$1,241, with interest at the rate of 8 per cent. per annum from September 30, 1915, and for \$75 attorney's fees, declared to be a lien upon said Hubbard Building and the land upon which the same is situated, will be postponed to the liens of the mortgages above mentioned, save and except in so far as the mortgage of John Bayne may be affected by the rentals that have been or may be collected upon the said lease, which assignment of lease is prior in time to the mortgage of defendant John Bayne. The decree of the lower court as to the defendant United States National Bank will be modified accordingly.

All necessary computation and adjustment not herein specified can be made at the time of the accounting of the receiver herein provided for. The cause will therefore be remanded to the lower court for such accounting and entry of decree therein in accordance herewith.

MOORE and McCAMANT, JJ., took no part in the consideration of this case.

(87 Or. 683)

SMITH v. MEIER & FRANK INV. CO.
(Supreme Court of Oregon. March 12, 1918.)

1. STATUTES — 230 — COMMON LAW.

Statutes in derogation of the common law must be construed strictly.

2. MUNICIPAL CORPORATIONS — 808(1) — SIDEWALKS — NEGLIGENCE.

To constitute negligence predicated on violation of a city ordinance by abutting property owner, there must first be a duty owing by defendant to plaintiff.

3. MUNICIPAL CORPORATIONS — 808(5) — SIDEWALKS — NEGLIGENCE.

Under Portland ordinance, requiring property owners to remove snow from sidewalks, and imposing penalty for failure to do so, where defendant failed to remove snow and ice during period of alternate thawing and freezing weather, and plaintiff fell and was injured, the violation of the ordinance, without any affirma-

tive act against plaintiff, did not imply a cause of action in his favor, and he could not sue as a relator in the city's name.

4. MUNICIPAL CORPORATIONS — 808(5) — SIDEWALKS — NEGLIGENCE.

Portland City Charter, § 398, making abutting owners liable civilly to pedestrians injured by defects in sidewalks, does not impliedly raise cause of action in favor of pedestrian, who fell on walk from which the owner had failed to remove snow and ice, in violation of city ordinance imposing penalty therefor.

Department 2. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by William H. Smith against the Meier & Frank Investment Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The plaintiff alleges and the defendant admits that the latter is a corporation existing under the laws of this state, and that it was the owner of certain unimproved and unoccupied platted lots in the city of Portland, in front of which at the time mentioned in the complaint there was constructed and maintained a sidewalk as part of the adjacent street. The plaintiff states that at the time of and long prior to the injuries of which he complains there was in force in the city of Portland an ordinance, containing among other provisions the following:

"Section 1. The tenant or occupant or any person having the care of a building or of land bordering on a street where there is a sidewalk, within the corporate limits of the city of Portland, or if there is no tenant, occupant, or other person having the care of the whole of such building, or of any such land, the owner thereof shall, within the first four hours of daylight after the ceasing to fall of any snow, cause the same to be removed therefrom the entire length of said premises, and for a space not less than three feet in width."

"Sec. 3. Whenever any portion of a sidewalk is incumbered with ice the tenant or occupant of a building or of land adjoining a street whereon is such sidewalk, or in case there is no occupant of the whole of such building or of any such land, the owner or other person having the care of the same shall cause such sidewalk to be made safe and convenient by removing the ice therefrom, or by covering the same with sand, ashes, or some other suitable substance, within the first three hours of daylight after the formation of said ice."

"Sec. 4. Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof before the police court shall be punished by a fine of not less than five dollars nor more than twenty dollars."

It is averred in substance that there was a heavy fall of snow during the month of January, 1916, which the defendant permitted to lie on the walk and become icy and slippery, on account of the more than two weeks alternate thawing and freezing weather prevalent at the time; and that while walking on the sidewalk plaintiff fell, on account of which his leg was broken and other injuries were inflicted, for which he claims damages. A general demurrer to the complaint having been overruled, all its allegations, except as noted, were traversed by the answer. The de-

fendant alleges that the sidewalk itself was safe and complied with all the specifications and requirements of the legislation of the city of Portland on that subject; that the alleged unsafe and dangerous condition thereof, if any existed, was due to an act of God and without any instrumentality on the part of defendant; and, finally, that the injury sustained by the plaintiff, if any, was due to his negligence in going upon the walk with knowledge of its condition. The new matter of the answer was denied by the reply. A jury trial resulted in a judgment for the plaintiff, from which the defendant appeals.

B. E. Haney, of Portland (Joseph & Haney, of Portland, and P. F. A. Boche, of Lakeview, on the brief), for appellant. Charles A. Hart, of Portland (M. E. Crumpacker, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1-3] The crucial question in this case is the effect to be given to the city law the provisions of which have been quoted. It is axiomatic that statutes in derogation of the common law must be construed strictly. An examination of the ordinance discloses that the only liability thereby established which would affect the defendant is that of a fine. No cause of action in favor of any private person is mentioned. To constitute negligence predicated on the violation of a city law there must first be a duty owing by the defendant to the plaintiff. No such obligation is stated in express terms in the ordinance. If any exists, it must be by implication. We may concede without deciding that the city has the right under certain circumstances, if authorized by its charter, to impose upon an owner of abutting realty the duty of keeping a part or all of the street in front of his premises in suitable condition for the use of the public and may couple with the performance of that duty, primarily resting upon the city, not only a fine but liability to individuals who can trace their injuries to the householder's disobedience of the city enactment. But the question here is whether there is necessarily implied in the requirement to keep the snow removed from the sidewalk any further liability than the prescribed fine. Treating of this point in *Bott v. Pratt*, 33 Minn. 323, 23 N. W. 237, 53 Am. Rep. 47, the principal case relied on by the plaintiff, the court said:

"But whether a liability arising from the breach of a statutory duty accrues for the benefit of an individual specially injured thereby, or whether such liability is exclusively of a public character, must depend upon the nature of the duty enjoined, and the benefits to be derived from its performance."

Cited in support of the text quoted are the following precedents: *Patterson v. Railroad Co.*, 56 Mich. 172, 22 N. W. 260, was an action by a traveler against the railroad company for damages caused by the latter obstructing a highway in violation of the provisions of

a statute forbidding railroads to impede traffic at a street crossing longer than five minutes. Another case was *Parker v. Bernard*, 135 Mass. 116, where the injury arose through the defendant's disregard of a statute calling for the protection of a hatchway by railing. In *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354, the damage was occasioned by the falling of a sign which had been suspended by the defendant over a street, contrary to the city ordinance. *Owings v. Jones*, 9 Md. 117, arose out of the neglect of the defendant to comply with a city ordinance prescribing a mode in which vaults in the public streets should be protected. *Devlin v. Gallagher*, 6 Daly (N. Y.) 494, was an instance where the grievance arose from disregarding a certain statutory precaution required in blasting operations. In *Baltimore City Railroad Co. v. McDonnell*, 43 Md. 552, the railroad company violated the ordinance limiting the speed of cars to six miles an hour, and the jury was allowed to consider whether the accident would have been averted if the cars had not been moving faster than the lawful rate. And, lastly, *Hayes v. Railroad Company*, 111 U. S. 240, 4 Sup. Ct. 369, 28 L. Ed. 410, was predicated upon a hurt inflicted by a train moving on an unfenced track. The fencing was required under a charter empowering the city to compel railroad companies to provide protection against injury to persons and property in the use of such railroads. In all these instances the damages were the result of the operation of some positive agency in the primary control of the defendant, affecting a certain individual, as distinguished from the general public. In the case at bar the condition out of which the injury arose was not caused by any act of agency of the defendant. The plaintiff does not and cannot sue as a relator in the name of the city, and the violation of its ordinance without any affirmative act of the defendant directly affecting him does not imply a cause of action in his favor.

[4] The charter of the city of Portland in force at the time provided among other things:

"It is not only the duty of all owners of land within the city to keep in repair all sidewalks, constructed or existing in front of, along, or abutting upon their respective lots or parts thereof, and parcels of land, but such owners are hereby declared to be liable for all damages to whomsoever resulting, arising from their fault or negligence in failing to put any such sidewalk in repair, after the owner or agent thereof has been notified as provided in this charter so to do; and no action shall be maintained against the city of Portland by any person injured through or by means of any defect in any sidewalk." Section 388.

The limit of the city's power under that charter would be to visit a liability upon the property owner for not putting the sidewalk itself in repair. It has no reference to making him liable for anything further, and remembering the strictness in which statutes in derogation of the common law are to be

construed, it is plain that the excerpt quoted gives no countenance to the implication of a cause of action based upon the ordinance mentioned. The cases of *Morgan v. Bross*, 64 Or. 63, 129 Pac. 118, and *McClagherty v. Rogue River Electric Co.*, 73 Or. 135, 140 Pac. 64, 144 Pac. 569, cited by the plaintiff depend upon a general statute of the state known as the Employers' Liability Law, which not only prescribes the duties of owners, contractors, and others, but also makes their disobedience of its injunctions a basis for an action in favor of sundry persons who may be injured thereby. The right of action is grounded on the express terms of the statute, and does not arise by implication in those cases. In our judgment, the snow and ice ordinance mentioned does not either expressly or impliedly give to an individual any right of action against the persons named therein who fail to obey. The only liability imposed is that of a fine at the behest of the city which had imposed its own primary duty upon them.

The demurrer to the complaint should have been sustained. The judgment of the circuit court is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

MOORE, BEAN, and McCAMANT, JJ., concur.

(88 Or. 95)

GILLARD v. GILLARD et al.

(Supreme Court of Oregon. March 19, 1918.)

1. PARTITION \S 94(3)—REPORT OF REFEREES—PRESUMPTIONS.

In suit to partition 80 acres of land by a wife, who was awarded one-third thereof in a divorce suit, where the referees set off 26 acres to her of the most valuable land, and the remainder containing the buildings and less valuable land to the husband, their award may be sustained by invoking the presumption of L. O. L. § 799, subd. 15, that the official duty was regularly performed.

2. PARTITION \S 94(2)—REPORT OF REFEREES—IMPEACHMENT—AFFIDAVIT—SUFFICIENCY.

Assuming that a referee in partition can impeach the report which he voluntarily signed, affidavit that he did not know that the referees could report that the land should be sold was insufficient for such purpose, since it was a plea of ignorance of the law, which was no excuse.

3. PARTITION \S 94(3)—APPORTIONMENT TO WIFE—EVIDENCE—SUFFICIENCY.

Testimony in partition that land set off to the husband consisting of 60 acres was not worth more than the 20 set off to the wife does not show that by reason of the buildings on the husband's share his land was not worth twice the value of the land set off to the wife.

Department 2. Appeal from Circuit Court, Linn County; Wm. Galloway, Judge.

Suit by Nettie E. Gillard against William H. Gillard and others. Judgment for plaintiff directing partition of property and supplemental decree overruling defendants' exceptions to the report of the referees, and defendant Gillard alone appeals. Affirmed.

This is a suit by Nettie E. Gillard against William H. Gillard, M. F. Hays, James Gerwick, and Charlotte Gerwick to partition real property. The facts are that in a prior suit by the plaintiff against William H. Gillard, one of the defendants herein, she secured a decree of divorce December 30, 1915, and there was also awarded to her an undivided one-third of 80 acres of land which was owned by the defendant in that suit and described as the west half of the east half of the west half of section 36, township 10 south, range 2 west in Linn county, Or. Prior to the commencement of the divorce suit, Gillard, in consideration of \$7,000, of which sum \$1,500 was paid down, executed a contract for the sale of that land and of some personal property to a Mr. Anning, who subsequently assigned all his interest therein to the defendants James Gerwick and Charlotte Gerwick, his wife. After the divorce suit was commenced, the defendant Gillard on October 11, 1915, executed to the defendant Hays a mortgage on such real property to secure the payment of \$2,218.23, as the remainder due upon a promissory note for \$2,500, which mortgage was recorded the day it was given. Two days thereafter Hays also began an action against Gillard in the circuit court for that county on a promissory note of \$1,000, secured a writ of attachment pursuant to which the described land was levied upon and, without any appearance on the part of the defendant therein, obtained against him a judgment December 3, 1915, for that sum, with interest at the rate of 6 per cent. per annum from September 17, 1914, \$100 as attorney's fees, and an order directing a sale of the real property.

The complaint herein states in effect the facts mentioned, and alleges that the 80 acres of land is worth \$7,000; that Hays secured his mortgage and judgment with knowledge of the plaintiff's right to the real property; that Gerwick and his wife have not kept their part of the agreement which was assigned to them; and that their interest in the land was acquired with knowledge of the plaintiff's superior right thereto. The prayer of the bill is that there be set off to the plaintiff and to the defendant Gillard in severalty, quantity and quality to be relatively considered, the interest of each respectively in and to the real property. The joint answer of Gillard and Hays denies that the land is worth \$7,000, or that it is of any greater value than \$3,500; admits that Hays knew of the pendency of the divorce suit, but denies that his mortgage or judgment is subject to the plaintiff's right to the real property, or that the interest of Gerwick and his wife is subordinate to that of the plaintiff in the premises. For a second defense it is substantially alleged that on July 21, 1909, Gillard became indebted to Hays in the sum of \$2,500, which was evidenced by a promissory note, and in

order to secure the payment of the remainder due thereon, Gillard executed to Hays the mortgage mentioned, which was received subject only to the plaintiff's inchoate right of dower in the land; that no part of the debt evidenced by the mortgage has been paid; that on September 17, 1914, Gillard was indebted to Hays in the further sum of \$1,000, evidenced by another promissory note, after the maturity of which an action was instituted thereon, resulting in the judgment hereinbefore mentioned, no part of which has been paid. For a second defense it is alleged that the land so described consists of a narrow strip, a part of which is hilly and without water or road, and the entire tract is so situated that it cannot be equitably divided; and that it is to the interest of all parties that the real property be sold. The prayer of the answer is that Gerwick and his wife be decreed to have no right, title, or claim in or to any part of the land; that the liens in favor of Hays be determined, and that the real property be sold and the proceeds arising therefrom be applied (1) to the payment of the costs and expenses of this suit and of such sale; (2) that the liens in favor of Hays be discharged; and (3) if any money then remain one-third thereof be paid to the plaintiff and the remainder to the defendant Gillard. The reply put in issue the allegations of new matter in the answer, and further averred that after the divorce suit was commenced the defendants Gillard and Hays intending to cheat, wrong, and defraud the plaintiff, entered into a conspiracy for that purpose, pursuant to which Gillard, without any consideration therefor, gave to Hays the pretended promissory notes mentioned, whereby the mortgage so executed to, and the judgment obtained by, Hays, are fraudulent and void as to the plaintiff. The prayer of the reply is that Hays be decreed to have no right, title, or interest in or to the land, and that the plaintiff is the owner in fee of an undivided one-third thereof.

The cause was tried, and from the testimony received findings of fact were made in conformity with the averments of the complaint, and to the effect that as the mortgage was not signed by the plaintiff, Hays took no interest in or lien upon her right to any part of the land; that the \$1,000 promissory note, given by Gillard to Hays, was without consideration and made with the intent to cheat, wrong, and defraud the plaintiff; and that the land could be partitioned without material injury to either party. A decree was thereupon rendered that the plaintiff was the owner in fee of an undivided one-third of such land free from any lien thereon, and that the defendant Gillard was also the owner of the remainder of the estate in the premises; Joseph Funk, Edward Dorgan, and A. L. Geddes were appointed referees to partition the real property by setting apart to the plaintiff in severalty, quantity and quality to

be relatively considered, the part so awarded to her, and the remainder to the defendant Gillard, which tracts were to be surveyed and marked upon the ground by proper monuments; and that the defendant Hays take nothing as against the plaintiff by reason of his mortgage or judgment.

The persons so appointed, having duly qualified, examined the premises, and set off to the plaintiff and indicated by proper monuments a tract commencing at the southwest corner of the real property first hereinbefore described; thence north 53.33 chains; thence east 5 chains; thence south 53.33 chains to the south line of section 36; thence west 5 chains to the place of beginning—and containing 26.66 acres, which land was to be held by her in severalty free from any interest, right, or claim of either of the defendants therein or thereto. The referees also set off and marked in the same manner the remainder of the 80 acres to the defendant Gillard in severalty free from any right therein or claim thereto by the plaintiff. The exceptions of the defendants Gillard and Hays to the report of the referees were overruled, and a supplemental decree was given approving such report, whereupon Gillard alone appeals.

L. M. Curl, of Albany, for appellant. J. K. Weatherford, of Albany (Weatherford & Weatherford, of Albany, on the brief), for respondent.

MOORE, J. (after stating the facts as above.) It is contended that the referees, who were appointed to partition the land, construing the interlocutory decree as mandatory, complied with its terms instead of recommending to the court that such division could not be equitably made, and that in setting off to the plaintiff the quantity of land awarded to her from the best part of the farm, a great injustice was inflicted upon the defendant. An examination of the land described in the complaint will show that it is 10 chains or 40 rods in width and 80 chains or 320 rods in length. The evidence shows that the north part of the premises is elevated, and while about 5 acres on the hill have been cultivated that part of the land is rocky and unproductive. Though the only way of reaching the summit is by a trail which cattle have made, the path is sufficient to enable farming implements to be taken to and from the hill. No water, except the rainfall, is found on that part of the land, which is of no value except for pasturage. A county road extending east and west crosses the land about the middle. A house and barn have been built north of the road, on which side of the highway about 5 acres of level land have been cultivated, and two springs at the foot of the hill afford water for domestic purposes. At the south end of the farm is a slough having brush around its margin. Mr. Gillard testified

that there had been cultivated about 15 or 16 acres of land south of the county road and about a half acre north thereof. M. F. Hays, his witness, stated upon oath, however, that about 30 or 35 acres of the land had been farmed, 5 acres of which were north of the highway. Mr. Gillard insisted that the real property could not be equitably divided, and for that reason the land should be sold. It was therefore to his interest to minimize as much as possible the area of cultivated land, and this being so the testimony of Mr. Hays on this branch of the case is entitled to greater credit. His sworn statement, respecting the quantity of land which was susceptible to farming, will be accepted as a fair estimate.

[1] It will be remembered that the land set off by the referees to the plaintiff consists of a strip 5 chains in width, or one-half of the breadth of the entire tract, and extends north from the south boundary 53.33 chains, thereby leaving to Mr. Gillard the greater part of the poor land on the hill and giving him only the east half of the south part of the premises. A mere comparison of the apparent relative values of the tracts thus segregated would induce the conclusion that the division was very prejudicial to his rights and evidenced a want of proper discrimination on the part of the referees in making what should have been an equitable division of the real property. Though no testimony was given tending to show the reasons which prompted a division of the premises in the manner indicated, by invoking the disputable presumption "that official duty has been regularly performed" (L. O. L. § 799, subd. 15), the referees must necessarily have considered the value of the house, barn, and other improvements upon the land which they set off to Mr. Gillard on the north side of the county road. The plaintiff, referring to these buildings, testified generally that the party receiving one-third of the land measured from the south end would not secure the house or barn. We conclude, therefore, that the real property was equitably partitioned in severalty to the plaintiff and Mr. Gillard.

[2] The affidavit of E. Dorgan, one of the referees, is to the effect that at the time of making the allotment he believed the best interests of the parties would have been subserved by a sale of the land; that he did not then know it was within the powers of the referees to advise such a course; that he understood from the interlocutory decree that the referees were commanded to partition the real property, and for that reason he did not recommend a sale thereof. This sworn statement is equivalent to a plea of ignorance of the law in respect to the questions submitted, which lack of knowledge excuses no person. If Mr. Dorgan alone had reported that the real property of which division had been decreed was so situated that partition thereof could not have been made

without great prejudice to the owners, the court might not have been satisfied from the showing, or made an order directing the land to be sold. L. O. L. § 447. Assuming, without deciding, that a referee under such circumstances can be permitted to impeach a report which he voluntarily signed with two others his affidavit is insufficient for that purpose.

[3] The testimony of A. L. Geddes, another referee, is to the effect that 60 acres of land on the hill was not worth more than 20 in cultivation on the south part of the premises. This sworn statement does not challenge the conclusion hereinbefore reached that the value of the house and barn which were erected upon the tract awarded to Mr. Gillard did not make the land set off to him twice the worth of that appropriated to the plaintiff. No error was committed in confirming the report of the referees.

In support of the judgment which the defendant Hays secured against Mr. Gillard there was received in evidence the original note, purporting to have been executed September 17, 1910, for \$1,000, payable in five years, with interest after date at the rate of 6 per cent. per annum. A certified copy of the mortgage of the land, executed by Mr. Gillard to Hays, was also received in evidence. This sealed instrument contains a copy of the note intended to be secured, which is for \$2,500, dated July 21, 1909, and was made payable in seven years, with interest after date at the rate of 6 per cent. per annum. Though neither of these notes contain a stipulation for the payment of interest until maturity, indorsements of interest were annually made thereon.

The testimony shows that when Mr. Gillard purchased his farm he borrowed \$500 from Hays, for which he gave a promissory note that was received in evidence, but has not been brought up. Several witnesses testified that Mr. Gillard had remarked in their presence and hearing that he had paid off that note. Mr. Hays testified that Mr. Gillard was indebted to him to the extent of about \$2,500, which sum of money was used by the borrower in purchasing stock to be placed on the premises. The \$2,500 so referred to was probably evidenced by the mortgage note, and did not include the \$1,000 judgment besides interest, attorney's fees, etc. Mr. Hays is a day laborer, and he is probably not accustomed to loaning large sums of money, and for that reason ought to remember the circumstance. It seems altogether improbable that he should forget an item of more than \$1,000, if the transaction were other than a mere sham. The answer to the complaint herein avers that the farm is not worth more than \$3,500. It seems doubtful that a sum of money equal to the alleged value of the land would have been loaned by Hays without security at a low rate of interest, which was not payable until five and seven years, respectively. He

testified that at one time he notified the assessor of a credit which he held of \$80, but that for four or five years prior to the trial he had not been assessed, which fact tends to confirm the conclusion that he was a willing party to a deliberate fraud.

It also appears from the testimony that about January 1, 1915, when Mr. Gillard negotiated a sale of the farm, he received on account of the purchase price \$1,500, and soon thereafter loaned \$800, taking a mortgage as security therefor, and that the defendants Gillard and Hays, as witnesses, had an opportunity fully to explain the times, places, and circumstances of the alleged loans and the sources from which the money, designated to be evidenced by the promissory notes, was obtained. Instead of taking advantage of the occasion each seemed studiously to avoid any reference thereto, except in a general way, and from the manner in which they testified on this branch of the case we are satisfied the trial court properly concluded that the alleged loans were fraudulent, the judgment void, and that a conspiracy had been entered into between these defendants, to prevent the plaintiff from securing the fruits of her divorce decree.

After the defendants James Gerwick and his wife had been served with a copy of the summons in this suit, an amended complaint was filed, but no order was made fixing the time within which they should answer, as required by the statute. Section 70, L. O. L. These defendants not appearing in any manner, a finding of fact was made to the effect that they held a contract to purchase the farm for \$7,000, but had not performed their part of the agreement, and that whatever interest they or either of them had or held in or to the real property was subject to the paramount rights of the plaintiff thereto. No decree was made strictly or otherwise foreclosing such contract, and by reason thereof the rights of Gerwick and his wife have not been barred, and the plaintiff and Gillard hold the tracts so allotted to each, subject to the terms of the contract of purchase.

It follows from these considerations that the decree should be affirmed, and it is so ordered.

MCBRIDE, C. J., and McCAMANT and BEAN, JJ., concur.

(88 Or. 106)

RUMBAUGH v. SETTLEMEIER et al.
(Supreme Court of Oregon. March 19, 1918.)

1. PARTNERSHIP §—25—FRAUD.

Where plaintiff was fraudulently induced to enter into a partnership with two others, and was induced by one partner to exchange her interest to him for land, she has no cause of action in rescission against the partnership until

she can first prevail in suit to rescind the second contract.

2. VENDOR AND PURCHASER §—36(1)—FRAUD—VALUE.

Statements by vendor of land as to value of land and the prospective value of fruit crops are merely expressions of opinion, but a statement as to number of trees is a representation of a material fact.

3. VENDOR AND PURCHASER §—44—MISREPRESENTATIONS BY VENDOR—PROOF.

Plaintiff in action to rescind sale of land, held to have failed to sufficiently establish false representations of the vendor as to the number of fruit trees on the land.

Department 1. Appeal from Circuit Court, Wasco County; W. L. Bradshaw, Judge.

Suit by Alice C. Rumbaugh against F. W. Settlemeier, J. D. Riggs, and Paul W. Childers. Decree for defendants, and plaintiff appeals. Affirmed.

A synopsis of the facts narrated in the complaint is about as follows: In December, 1911, plaintiff entered into contracts with defendants Settlemeier and Riggs, as partners, for the purchase of two pieces of land in what is called "Fairbanks Orchard Tracts," upon which she subsequently made payments to the extent of \$3,000. In the autumn of 1913 she returned to Oregon, and on October 6th entered into an agreement with Riggs whereby she was to purchase about 53 acres of productive orchard land from his home place three miles from The Dalles at the price of \$400 per acre, making at the time a payment of \$590 by check, and assigning to Riggs her two contracts for lands in "Fairbanks Orchard Tracts," for which she was to receive a credit in the full amount she had paid thereon. It is also alleged that she was induced to enter into the contracts for the Fairbanks Tracts by the fraudulent representations of Settlemeier and Riggs and their agents, and the alleged false statements are set out in detail. It is further asserted that the false representations of defendant Riggs induced her to enter into the contract for the purchase of the 53 acres of productive orchard land from him. The summary of the fraudulent statements in the latter transaction is as follows: That the land was worth \$400 per acre; that there was upon the land, 1,000 cherry trees, 2,000 peach trees, and 1,000 apricot trees; that the yield of fruit, regardless of variety, would be 100 pounds per tree; and that the total crop would be worth at least \$6,000 annually, and that a reasonable estimate of the cost of cultivation of the trees and harvesting the crop would not exceed \$1,000 per year. It is alleged that these statements were false, in that there were only 432 cherry trees and only 800 apricot trees; that the land is not worth more than \$250 per acre; and that the annual net profit from the operation of the orchard is not in excess of \$2,500. There is an allegation of a demand for rescission of all the contracts referred to; an allegation

that with knowledge of plaintiff's demand, Riggs assigned the Fairbanks contracts to defendant Childers, who took the same with knowledge of all the facts. There are other statements in the complaint which are not necessary to a consideration of the case.

The defendant Settlemeier demurred to the complaint upon the grounds that several causes of suit are improperly united, in that there is one based upon a contract with Settlemeier and Riggs as partners, and another arising upon a contract with Riggs individually, and a second ground is based upon the allegation in the complaint that the contracts with the partnership had been assigned by plaintiff to Riggs. There is also a general demurrer. The defendants Riggs and Childers filed a joint demurrer to the same effect. The demurrers having been overruled, the defendants joined issue, and a trial being had, there was a decree for defendants from which plaintiff appeals.

Francis V. Galloway, of The Dalles, for appellant. W. T. Slater, of Portland, and Paul W. Childers, of The Dalles (Manning, Slater & Leonard, of Portland, on the brief), for respondents.

BENSON, J. (after stating the facts as above). [1] The complaint contains two distinct causes of suit, of which one is against the partnership of Settlemeier & Riggs, in relation to the purchase of the Fairbanks lands, and the other against Riggs alone, in connection with the purchase of 53 acres of his orchard land on Three Mile creek. It is alleged that plaintiff assigned her interest in the Fairbanks lands to Riggs as a part of the purchase price in the latter transaction, and there is not a word in the pleading which connects Settlemeier with this contract in any manner. Under such a state of facts the plaintiff could not, in any event, have a cause of suit against the partnership, unless she could first prevail in a suit to rescind the contract in connection with which she had assigned the contracts for the Fairbanks land. We are not now called upon to say what her rights might be under such circumstances; but it is clear that, as the matter now appears, the demurrer of the defendant Settlemeier should have been sustained, and such an order will be entered here. With this, we dismiss from consideration all matters connected with the alleged fraud in the negotiations for the Fairbanks lands. We think as to the later transaction with Riggs the complaint does state a cause of suit, and, as a sequence, the demurrer of Riggs and Childers was properly overruled.

[2, 3] This brings us to an investigation of the second cause of suit upon the merits. It may at first be remarked that the allegations as to the value of the land and the prospective value of the future crops of fruit could be, at the most, expressions of opinion and

speculation as to matters necessarily dependent to some extent upon future weather and market conditions, and therefore not actionable. It may also be remarked that these alleged fraudulent misrepresentations are not established by a preponderance of the evidence. The allegations as to the number of fruit trees of each variety are in a different category, since, if supported by the evidence, they constitute a misrepresentation of an existing and pertinent fact. The evidence is conflicting in regard to what was said by Riggs regarding the number of each kind of trees. Plaintiff's testimony, which is corroborated by her daughter, is to the effect that he told her there were 1,000 cherry trees, 1,000 apricot trees, and 2,000 peach trees. Riggs says that he told her that he did not know the exact number of each, that he had never counted them, but that there were about 8 acres of cherries, a little over 20 acres of peaches, and about 10 acres of apricots. He further testifies that he pointed out to her where the line would run through the orchard dividing the portion to be purchased by plaintiff from the 50 acres to be retained by him, and that he told her he thought he had about 1,000 cherry trees in his orchard, and that probably half of them would be found in her part of it. In this he is corroborated by his wife who testifies that she heard Riggs tell plaintiff that the entire orchard contained about 1,000 cherry trees. Plaintiff spent three days on the premises, and inspected the orchard before purchasing. She also testifies that prior to entering into the contract she counted eight rows of the cherry trees, evidently as a basis for computation, and also counted the peach trees. She also testifies that she had definitely determined to rescind the contract before she learned the true number of trees.

After a careful consideration of all the evidence, we think the trial court made no mistake in deciding that plaintiff had failed to establish her cause of suit by a preponderance of the evidence. The decree is therefore affirmed.

McBRIDE, C. J., and BEAN and BURNETT, JJ., concur.

(38 Or. 109)

ASHLEY & RUMELIN v. LANCE et al.
(Supreme Court of Oregon. March 19, 1918.)

1. CHATTEL MORTGAGES §264—RIGHTS OF MORTGAGEE.

Under chattel mortgage authorizing private sale, the mortgagee may, on breach, take possession of the property, sell it as agreed upon, pay the costs, and apply the remainder of the proceeds to the diminution of the mortgage debt; and, if there is a deficiency, he may maintain an action at law against the mortgagor or his sureties.

2. PLEADING §180(2)—REPLY—DEPARTURE.

Where defendants gave chattel mortgage and note, and plaintiffs sued on the note, and

the answer alleged a sale of the property under the power in the mortgage, and the reply set forth in detail the money expended in securing a release of the property from liens, the cost of the sale, and the remainder indorsed on the note, there was no departure from the allegations in the complaint, which stated sufficient facts to constitute a cause of action and to render evidence admissible to sustain the allegations.

3. APPEAL AND ERROR ¶1051(4)—HARMLESS ERROR.

Error in permitting the witness to say what was due on a note in suit was harmless, where the note itself showed the amount, since no prejudice could have resulted.

4. TRIAL ¶29(1)—COMMENT OF COURT.

It was not error for the court to ask, "Why take up so much time? this matter is immaterial" and, further, "Why not try the case in an orderly way?" since counsel's knowledge of the law was not challenged nor his motive impugned.

5. EVIDENCE ¶269(1)—DECLARATIONS—REASONS FOR ACTION.

In an action on a note, plaintiff could testify what reasons a surety gave for indorsing the note.

Department 2. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

Action by Ashley & Rumelin, bankers, a corporation, against F. A. Lance and others. Judgment for plaintiff, and Lance appeals. Affirmed.

This is an action by Ashley & Rumelin against F. A. Lance, Charles Weeks, Herman Massman, and George W. Rahskoff, to recover money. The complaint stated, in effect, that at all the times mentioned therein the plaintiff was and is an Oregon corporation; that on August 1, 1912, and prior thereto, the V. D. Smith Fuel Company was a like corporation, on which day it executed to plaintiff a promissory note for \$2,400, payable on demand, with interest thereon, until paid, at the rate of 10 per cent. per annum, of which note plaintiff is the owner and holder; that the defendants, for a valuable consideration, by a written indorsement upon the note, guaranteed its payment and waived protest, demand, and notice of nonpayment; that prior to the commencement of this action demand was made upon each defendant to liquidate the note, no part of which has been paid except \$1,230, and the interest to October 11, 1914; and that \$125 is a reasonable sum to be allowed as attorney's fees, as provided for in the note for maintaining this action. The prayer is for judgment against each defendant for \$1,170 with interest thereon at 10 per cent. per annum from October 11, 1914, the further sum of \$125 as attorney's fees, and the costs and disbursements of the action. The defendant Lance, alone answering, denied that the defendants guaranteed the payment of the note, or waived protest, demand, or notice of nonpayment, but admitted he indorsed the note; denied that any demand had been made for

its payment, or that no other sum had been paid thereon than alleged in the complaint; and denied that \$125 or any other sum was reasonable as attorney's fees.

For a separate defense it is substantially alleged that Lance indorsed the note, which had no writing on the back thereof except his signature; that if the note now contains any guaranty or waiver, such memorandum was placed thereon without his knowledge or consent, after he signed the instrument; and that no demand or notice of nonpayment had ever been served upon him. For a further defense it is briefly alleged that the V. D. Smith Fuel Company executed the promissory note mentioned; that to secure the payment thereof such corporation also executed to the plaintiff a chattel mortgage of 17 head of horses and other property, particularly describing it; that about April 1, 1914, the mortgagor delivered all such property to the plaintiff, which accepted it in full payment and discharge of the note; and that by reason thereof such obligation was fully liquidated. The material averments of new matter in the answer were put in issue by the reply, which alleged generally that about April —, 1913, Lance purchased all the personal property described in his answer, and thereupon, for a valuable consideration, executed to the plaintiff a second chattel mortgage thereof, to secure the payment of the fuel company's promissory note, referred to in the complaint; that the latter mortgage contained a clause, which provided that if any attempt was made to sell such property, or if it should be attached or levied upon under any claim or demand, the note should immediately become due and payable, and thereupon the plaintiff was empowered to sell the property, or any part thereof, to satisfy such note; that about December —, 1913, the plaintiff learned that the horses so mortgaged were advertised for sale to satisfy a claim of \$101.95 for their care, and that another like claim of \$42 was made, and such stock was liable to be sold for the payment thereof, and in order to secure the release of the horses the plaintiff was compelled to pay the respective sums demanded, and also to expend the further sum of \$57 in caring for such animals, whereupon the plaintiff foreclosed its mortgage, realizing from a sale of the personal property, after deducting such payments, and the costs and expenses which were incurred, \$1,260, which was indorsed on the promissory note, thereby leaving \$1,170, with interest thereon at the rate of 10 per cent. per annum from October 11, 1914, no part of which has been paid. The cause was tried and a verdict returned for the amount of the promissory note as demanded, and \$100 as attorney's fees, and from the judgment rendered thereon the defendant Lance appeals.

G. E. Hamaker, of Portland, for appellant. W. S. Hufford, of Portland, for respondent.

MOORE, J. (after stating the facts as above.) A witness for the plaintiff having identified the promissory note referred to, the appellant's counsel objected to the giving of any further testimony on the grounds that the complaint did not state facts sufficient to constitute a cause of action, because no mention was made in the initiatory pleading of any deficiency in respect to an application of the proceeds of the mortgaged property to the debt thereby secured, and that the reply constitutes a departure. In support of the legal principle involved reliance is had upon the case of *Rein v. Callaway*, 7 Idaho, 634, 85 Pac. 63, where it was held that if a mortgagee seized the mortgaged personal property and sold it at private sale under a stipulation in the mortgage authorizing him to do so, he could not maintain an action on the note for the remainder due on the mortgage debt. In deciding that case Mr. Justice Sullivan, speaking for the court, says:

"In this state, as in the state of California, the mortgaged property becomes the primary security, and the personal obligation of the mortgagor a secondary one. The mortgagor, under our statutes, is personally liable only after foreclosure, and then only for the balance shown to be due by the return of the sheriff, unless it is made to appear that the property has been destroyed or otherwise become valueless without the fault of the mortgagee."

Further in the opinion it is observed:

"A mortgagee cannot waive his security and sue upon the debt."

Our statute, regulating the foreclosure of chattel mortgages, reads:

"Whenever in any mortgage of goods and chattels the parties to such mortgage shall have provided the manner in which such mortgage may be foreclosed, such mortgage, upon breach of the conditions thereof, may be foreclosed in the manner therein provided, and not otherwise; and if in any such mortgage the manner in which the same may be foreclosed shall not be provided, then upon breach of the conditions thereof, in case the consideration of such mortgage shall not exceed the sum of \$500, the same may be foreclosed, and the mortgaged property sold by the sheriff or any constable of the county in which such mortgage has been filed, upon the written request of the mortgagee, his agent, or attorney, upon such notice, and in the manner provided by law for the sale of personal property upon execution; and if the consideration of such mortgage shall exceed the sum of \$500, the same may be foreclosed by an action at law in the circuit court of the county in which such mortgage may have been filed." L. O. L. § 7411.

There were received in evidence at the trial the original chattel mortgages executed to the plaintiff by the V. D. Smith Fuel Company, August 1, 1912, by V. D. Smith, its president, and the defendant F. A. Lance as its secretary, to secure the payment of the promissory note for \$2,400, and by the defendants Charles Weeks and H. Massman

May 8, 1913, for the same purpose. These mortgages contain a clause, which so far as important herein reads:

"To have and to hold the said goods and chattels unto the said party of the second part, (plaintiff herein) or its assigns forever. Provided, nevertheless, and these presents are on the express condition, that if the said party of the first part [the mortgagor in the first mortgage and the mortgagors in the second] or its assigns, shall well and truly pay unto the said party of the second part, or its assigns, the sum of twenty-four hundred dollars, and interest thereon at the rate of ten per cent. per annum, in accordance with the terms of a certain promissory note, of which the following is substantially a copy [setting forth a duplicate of the negotiable instrument], then these presents shall be void. But in case default shall be made in the payment of the principal sum or interest, * * * or if any claims, charges or demands which can be made prior liens to this mortgage upon said property, are not paid or discharged at maturity, or if said property is attached or levied upon, taken possession of, or detained by any person other than the mortgagee, for any cause, or is removed or attempted to be removed by any one from the aforesaid premises or be sold, transferred or assigned or attempted to be sold, transferred or assigned, then said promissory note shall, at once, become due and payable, and it shall and may be lawful for, and the said party of the first part does hereby authorize and empower the party of the second part or his assigns with the aid and assistance of any person or persons, to enter the aforesaid premises and such other place or places as the goods and chattels are, or may be placed, and take or carry away the said goods and chattels, and sell or dispose of the same at private sale with or without notice to the mortgagor, or may sell the same at public auction upon giving one week's notice of the said sale in a newspaper of general circulation published in said county [Multnomah] and state, and out of the money arising therefrom, to retain and pay the said sum above mentioned, and interest as aforesaid, and all charges touching the same, and reasonable counsel fees, * * * rendering the overplus, if any, unto the said party of the first part."

Upon a breach of either of these conditions, the plaintiff, under the provisions of the statute hereinbefore quoted, was empowered and legally authorized to take possession of the mortgaged property and to sell sufficient thereof to pay the mortgage debt, or, if as in this instance the property was inadequate for that purpose, to sell the entire chattels, and from the proceeds arising therefrom to pay the costs and expenses incident to the sale, and to indorse the remainder upon the promissory note. A text-writer discussing this subject remarks:

"A sale under a power contained in the mortgage, and purchase by the mortgagee of the mortgaged property, without a resort to court, does not bar the mortgagee's right to look to the mortgagor or other securities for a deficiency, and is not an extinguishment of the debt." Cobbey, Chat. Mort. § 988.

To the same effect, see, also, Griffin and Curtis, Chat. Mort. p. 160. Another author observes:

"In some jurisdictions, by statute, there can be but one action to recover a debt secured by a chattel mortgage; and it is held that the mortgagee cannot waive the security and sue

for the debt, but must bring his action of foreclosure." 11 C. J. 746, note 20.

In support of the text, decisions are cited from the Supreme Courts of California, Idaho, and Montana. The statute thus referred to was first enacted by the legislative assembly of California and subsequently adopted by the lawmaking bodies of the other states. The enactment reads:

"There shall be but one action for the recovery of any debt, or the enforcement of any rights, secured by mortgage upon real estate or personal property, which action shall be in accordance with the provisions of this chapter"

—referring to the part of the Code containing such statute. *Largé v. Chapman*, 18 Mont. 563, 46 Pac. 808; *Rein v. Callaway*, 7 Idaho, 634, 65 Pac. 63. From the care exercised by the editors of *Corpus Juris* in collating in notes lists of cases sustaining every legal principle set forth in the text, it is fair to infer that if the statute mentioned had been adopted in any other state, reference to decisions upon the subject would have been made in that great work, which is such a valuable contribution to universal law.

[1] Whether or not such enactment has been adopted in any other state is unimportant, for our statute does not contain such a provision. In *Page v. Ford*, 65 Or. 450, 131 Pac. 1013, 45 L. R. A. (N. S.) 247, Ann. Cas. 1915A, 1048, it was ruled that the holder of a real estate mortgage might legally waive his lien and maintain an action at law upon the promissory note, which formed the basis of the security and obtain a personal judgment against the mortgagor. The conclusion thus reached shows that the rule prevailing in California, Idaho, and Montana is not controlling in Oregon. Our statute, regulating the foreclosure of chattel mortgages, does not contain a clause which is found in the laws of the states mentioned. When, therefore, a chattel mortgage of property in this state includes a clause similar in import to that hereinbefore quoted, the mortgagee may, upon a breach of the conditions, take possession of the hypothecated property, sell it within a reasonable time in the manner agreed upon, pay the costs and expenses necessarily incurred, apply the remainder of the proceeds of the sale to the diminution of the mortgage debt, which, if not fully discharged, entitles him to maintain an action at law against the mortgagor and any other person who is personally liable to recover the balance due on the obligation.

[2] In the case at bar the cause of action set forth in the complaint was predicated upon the promissory note. The answer alleged inter alia a sale of the personal property under an exercise of power specified in the chattel mortgage, thereby permitting the defendant to show, if he could, that the sale had not been seasonably made, or fairly conducted, or that a greater sum of money had

been received than was admitted by the plaintiff, and hence the proper credit was not made upon the promissory note. The reply put in issue only the averments of new matter in the answer, and set forth in detail the sums of money expended in securing a release of the mortgaged property from the claims of lien thereon, the payments made in conducting the sale, and the remainder which was indorsed upon the promissory note, and in doing so there was no departure from the allegations in the complaint. That pleading, therefore, stated facts sufficient to constitute a cause of action, and no error was committed in receiving evidence tending to substantiate the averments of the complaint.

[3] A witness having identified the promissory note sued on, was asked by plaintiffs' counsel, "What amount, if any, is due upon this note, Mr. Ashley?" The defendants' counsel objected to the inquiry on the ground that the note afforded the best evidence. The objection was overruled, however, and an exception allowed. The witness then answered, in effect, "There is due \$1,170, with interest at 10 per cent. per annum from October 11, 1914;" and it is contended that an error was thereby committed. Though the objection thus made was well taken, it is impossible to see how the defendant was prejudiced in any manner by the answer which was given; and for that reason the assignment is deemed immaterial.

[4] The court, during the trial, referring to the action of the defendants' counsel in questioning a witness, said:

"Why take up so much time with this? It is immaterial whether he told him or not. It doesn't make any difference whether he told him or not."

Upon the cross-examination of one of plaintiff's witnesses, the court further said to defendant's counsel:

"I don't want to interrupt you, * * * but it seems to me you are going clear outside of the direct examination in this case. You are going into this and trying your own case. There was nothing said about this in chief. Why not try the case in an orderly way?"

Exceptions having been taken to the language so employed, it is maintained that errors were committed in making use of the remarks thus quoted. The word "orderly," which in the brief of defendants' counsel is the only part of the quoted language that is seriously challenged, was evidently intended to call attention to the general rule of evidence that the cross-examination of a witness should be limited to a reasonable review of his testimony in chief. In the hasty trial of causes, attorneys who are learned in the law, sometimes in the excitement incident to the importance of the issues involved, overlook these elementary principles, and when this occurs it becomes the duty of the court promptly to call attention to the departure from the prescribed rule. In doing

so in this instance, the counsel's knowledge of the law was not challenged, nor his motive impugned, and hence no error was committed in these particulars.

[5] One of plaintiffs' witnesses, on rebuttal, was directed:

"Tell the jury, Mr. Ashley, what reason there was, if any, for Mr. Lance and Mr. Rahskoff indorsing this note."

An objection to the command made by defendants' counsel was overruled and an exception taken, and it is maintained that an error was thereby committed. It was proper for the witness to explain to the jury the reasons given by the defendants for indorsing the promissory note sued upon, and in doing so no error was committed.

Exceptions were taken by defendants' counsel to some of the instructions given, and to the court's refusal to charge as requested. Without setting forth any of these matters a careful examination thereof convinces us that no error was committed in any of these particulars. The judgment should therefore be affirmed; and it is so ordered.

McBRIDE, C. J., and McCAMANT and BEAN, JJ., concur.

(87 Or. 690)

HILLS v. CAMPBELL

(Supreme Court of Oregon. March 19, 1918.)

Department 1. Appeal from Circuit Court, Multnomah County; H. E. McGinn, Judge.

On petition for rehearing. Denied.

For former opinion, see 170 Pac. 298.

W. E. Richardson, of Portland, and S. T. Richardson, of Salem (A. R. Mendenhall, of Portland, on the brief), for appellant. Frank Schlegal and Claude Strahan, both of Portland (Waldamer Seton, of Portland, on the brief), for respondent.

BENSON, J. Plaintiff's petition for a rehearing contains a renewed and elaborate discussion of the evidence, but as to that feature presents nothing which had not already received our careful consideration, and therefore we have nothing to add to our former opinion. Counsel further urge that the case of Potter Realty Co. v. Bretling, 79 Or. 293, 155 Pac. 179, cited in the original opinion herein, is inconsistent with the holding of this court in Jones v. McGinn, 70 Or. 236, 140 Pac. 994, McGowan v. W. V. I. L. Co., 79 Or. 454, 155 Pac. 705, and Jeffreys v. Weekly, 81 Or. 140, 158 Pac. 522. A careful examination of these cases fails to sustain counsel's contention. In each of these cases there was prompt effort at rescission immediately after discovery of the fraud, while in the case of Potter Realty Company v. Bretling, supra, as in the case at bar, there was lack of promptness in repudiating the

contract and acts inconsistent with an intent to disaffirm.

The petition is denied.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

(88 Or. 120)

CHURCHILL v. MEADE et al

(Supreme Court of Oregon. March 19, 1918.)

1. MORTGAGES \Leftrightarrow 400(1)—FORECLOSURE—DEFAULT—COVENANT—PRIOR INCUMBRANCE.

Where a mortgage provided that the mortgagors should reduce a prior incumbrance, and that failure to perform any agreement should authorize immediate foreclosure, the act of one of the mortgagors in procuring a receipt from the administrator of the estate which owned the prior incumbrance, but paying no money therefor, and without exhibiting the receipt to either the mortgagee or his assignee, was not such performance as to prevent foreclosure.

2. MORTGAGES \Leftrightarrow 409 — FORECLOSURE — DEFAULT—COVENANT—PRIOR INCUMBRANCE.

Where mortgagors covenanted with their mortgagee to pay principal and interest on a prior mortgage, in favor of the state land board, and to furnish the mortgagee evidence thereof, and agreed that any breach should give the right of immediate foreclosure, the indulgence of the state land board in not foreclosing does not avoid the effect of their breach of covenant to pay such mortgage.

Department 1. Appeal from Circuit Court, Tillamook County; George R. Bagley, Judge.

Suit by Arthur M. Churchill against Minnie A. Meade and T. B. Meade. From decree for plaintiff, defendants appeal. Affirmed, with modification as to costs.

This is a suit to foreclose what is admitted to be a purchase-money mortgage, dated February 10, 1915, given by the defendants to the assignor of plaintiff and securing a note of that date for \$17,000 upon land partly in Tillamook county and partly in Multnomah county. It is stated in the mortgage that:

The realty in Tillamook county "is incumbered by a mortgage of one thousand dollars; said Meades agree to pay principal and interest thereon as provided therein and furnish Beals [original mortgagee] evidence thereof."

The realty in Multnomah county was incumbered by a mortgage calling for \$1,750, concerning which the instrument here involved provided that:

"Said mortgagors do hereby agree to keep up the payments of interest on said seventeen hundred and fifty dollars and furnish said mortgagee evidence of said payments of interest;" and "said Meades agree to reduce said mortgage to \$1,600 within one year from this date."

It was also stipulated therein:

"This indenture is further conditioned upon the faithful observance by the mortgagor of the foregoing conditions."

Lastly, there appears also the following condition:

"Now, therefore, if the said mortgagors shall pay said promissory note and shall fully satisfy and comply with the covenants hereinbefore set forth, then this conveyance shall be void, but

otherwise to remain in full force and virtue as a mortgage to secure the payment of said promissory note in accordance with the terms thereof, and the performance of the covenants and agreements herein contained; it being agreed that any failure to make any of the payments provided for in said note or this mortgage when the same shall become due or payable, or to perform any agreement herein contained, shall give to the mortgagee the option to declare the whole amount due on said note, or unpaid thereon or on this mortgage, at once due and payable and this mortgage by reason thereof may be foreclosed at any time thereafter."

The execution and delivery of the note and mortgage sued upon are admitted. The defendants deny the allegations imputing to them a breach of their covenants. They recite the history of their original purchase of the land involved; the giving of a former mortgage thereon; the institution by the then mortgagee of a suit to foreclose; the answer setting up their contention that they had been induced to purchase the realty by reason of fraudulent representations concerning the quantity of bottom land in the tract; and their compromise and settlement of that litigation, the terms of which included the giving of the present mortgage resulting in the dismissal of the suit and cancellation of the first mortgage. They claim that the mortgage for \$1,000 on the Tillamook property is one in favor of the state land board, and that neither the principal nor the interest thereof is due. They say they have reduced the mortgage on the Multnomah county property to \$1,600 as they agreed. They further contend that the taxes for 1915 were not yet due under the terms of their mortgage, and those of 1913 were already paid by Beals, as stated by him when the compromise agreement was entered into. The material matters in the answer are traversed by the reply. The circuit court heard the testimony and entered a decree foreclosing the mortgage, and the defendants appeal.

S. S. Johnson, of Tillamook, and S. C. Spencer, of Portland, for appellants. H. T. Botts, of Tillamook (Webster Holmes, of McMinnville, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1] The plaintiff assigns as violations of the mortgage upon which he bases his right to foreclose that the defendants have neither paid the mortgage of \$1,000 to the state land board incumbering the land, nor the interest thereon, nor have they reduced the Multnomah county mortgage to \$1,600, and, moreover, they have not furnished to the mortgagee or the plaintiff any evidence of doing either of those things they were required to do. The third and fourth assignments relate to the failure of the defendants to pay the taxes for the years 1913 and 1915. It is unnecessary to consider more of these assignments than the first two. The only showing made by the defendants about the reduction of the Multnomah county mortgage is in substance as follows: The defendant

Minnie A. Meade testified that on August 5, 1916, being more than one year after the date of the mortgage in suit, she applied to John R. Turner, who signed himself "administrator, C. W. Miller Estate," and procured from him a receipt for "\$290, Act. Interest due 1915, and \$150 principal on \$1,750 notes." The defendants do not pretend that she ever exhibited this receipt to either the mortgagee or the plaintiff. Besides this, the record shows that it appeared for the first time at the trial. Moreover, she testified that she did not pay any money, nor give any note or check for the amount represented in the receipt. She does not claim that either the plaintiff or the original mortgagee had any knowledge of such an arrangement, or consented that it should operate as a reduction of the mortgage. The defendants argue that anything which parties agree to may be considered as payments; but that principle, while possibly true as to the immediate parties to such a scheme, does not affect those concerned in the present litigation. They are the ones who are interested in the observance of the conditions of the mortgage under consideration here. As against the plaintiff nothing has been shown which would prevent the collection of the full amount of the Multnomah mortgage, for it is clear that nothing was actually paid thereon.

[2] The mortgage to the state land board was given to secure a note dated September 4, 1906, due one year after date, with interest at 6 per cent. per annum, payable semiannually on the 1st day of January and the 1st day of July in each year thereafter. The defendants have paid no more than the interest, and they seek to charge upon the plaintiff the indulgence of the state land board in not foreclosing the mortgage so as to avoid the effect of their covenant to pay the same, and they do not plead that any new agreement was made between themselves and the plaintiff or the original mortgagee to that end. The note and mortgage to the state land board are clearly due according to their terms, and in the absence of any further contract between the present parties it was incumbent upon the defendants at once to pay that debt. Confessedly they have not done this.

Each of these defaults constitutes a breach of the covenants of their mortgage, and by its terms the holder thereof is entitled to foreclose the same for the full amount due upon the note and their agreements set out therein. These are the cold terms of the mortgage which they admit they made, but which the court cannot unmake for them. A great deal of rancor is manifest in the pleadings, and a very large part of the testimony is taken up in the rehearsal of the altercations of the parties, but all that cannot affect the law of the case. It is unnecessary to consider other reasons urged in support of the foreclosure.

It is sufficient to say that the decree of the

circuit court is affirmed with this modification that neither party shall be allowed to recover costs or disbursements from the other.

MCBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

(37 Or. 695)

YORK v. SOUTHERN PAC. CO. et al.

(Supreme Court of Oregon. March 19, 1918.)

MASTER AND SERVANT \Rightarrow 289(31)—**INJURIES TO SERVANT—SCOPE OF EMPLOYMENT—NECESSITY OF SHOWING.**

Although the complaint alleged that it was the deceased servant's duty to help the train crew in making up a train, and that while helping in switching he was killed, there was no error in taking case from jury in the absence of evidence that as a part of his duties he was required to board the moving train in switching, in doing which he missed the step and was killed, since in the absence of such showing it was entirely conjectural whether deceased was engaged in his employment or in his own affairs.

Department 2. Appeal from Circuit Court, Tillamook County; George R. Bagley, Judge.

On petition for rehearing. Denied.

For former opinion, see 170 Pac. 927.

J. C. Simmons, of Portland (S. S. Johnson, of Tillamook, on the brief), for appellant. Ben C. Dey, of Portland (Wm. D. Fenton and Ralph E. Moody, both of Portland, T. B. Handley, of Tillamook, and John F. Reilly, of Portland, on the brief), for respondents.

MOORE, J. In a petition for a rehearing it is contended that from the testimony received it might reasonably have been concluded that the deceased, immediately prior to and at the time he was injured, was performing a service and discharging a duty demanded of him by reason of his employment, and, such being the case, an error was committed in not reversing the judgment and remanding the cause for a new trial. All the material allegations of the complaint respecting his duties and the negligence charged will be set forth. That pleading states:

"Plaintiff alleges that on or about the 17th day of March, 1915, the decedent, Lewis York, was employed as a laborer on the defendants' line of road, * * * with his duties to help the train crew to make up a train, to cut out cars, and to dump cars, hauling and transporting rocks and like material on, along, and upon defendants' said road and roadbed, * * * and while said decedent was performing the work, labor, and duties as was required of him, he was ordered and commanded and required to assist in cutting out cars from the train in which there were other cars, * * * and setting brakes at what is known and called 'Miami Rock Quarry.' * * * And while thus commanded to assist the said crew in performing the work for his master, he was then and there, at and along the said train, and the cars thereof, performing those duties commanded of him, and as was required of him, all of which were well known and within the knowledge of the defendants and each of them, and before he had safely boarded said cars, the train was suddenly, violently and recklessly started, and was put in motion with a jerk and a lurch by the defendants,

their officers, agents, and employes, and the said cars striking the said decedent and throwing him under the said train, and then and there inflicting mortal wounds resulting in his death.

"Plaintiff alleges that the defendants were and each of them was negligent in the following particulars:

"First. That defendants and each of them recklessly, carelessly, and negligently failed and refused to provide and maintain the deceased, Lewis York, with a safe and proper place along their railroad and roadbed to do and perform the work and labor he was commanded and required to do, and did then and there furnish and maintain an unsafe and dangerous place and places for the deceased to perform said work, in that there were rocks, holes, and ditches alongside of said railroad track and roadbed and at the place and places for switching car and cars in the said rock quarry.

"Second. That defendants and each of them recklessly, carelessly, and negligently started and put in motion the said train before the deceased, Lewis York, had given any signal or notice to start the same, it being then and there the duty of the defendants, agents and employes to not start the said train until signaled so to do by the deceased, Lewis York.

"Third. That defendants and each of them recklessly, carelessly, and negligently started and put in motion said train before the deceased had boarded it or was given any opportunity to board the same, and that the said train was then and there started with a jerk and lurch, thereby preventing the said deceased, Lewis York, from boarding the said car or cars in safety.

"Fourth. That defendants and each of them was careless, reckless, and negligent in operating and running said cars at a high and dangerous rate of speed before allowing the deceased, Lewis York, to board the same, and thereby preventing the said Lewis York from any reasonable chance he might have had to get on said car in safety.

"Fifth. That the defendants were negligent in attempting to perform and make a flying switch at the place, while the same was then and there being done, for the reason that there was a curve and a grade at the said place, and that the conditions and manner in performing the same was unsafe and dangerous, which was known or could have been known by the defendants or either of them, their officers, agents, and employes, and that said flying switch used was not a necessity and could have been avoided by the defendants and each of them in carrying out their said business."

The complaint, it will be seen, does not aver that Lewis York was, when he was hurt, or ever had been, employed by the defendants or either of them as a brakeman, and a careful re-examination of the entire testimony fails to show a statement by any witness that the deceased had ever performed or discharged any duty of that kind.

It will be remembered that the second ground of negligence charges that it was incumbent upon the defendants, their agents, etc., not to start the train until signaled so to do by the deceased, thereby impliedly averring that he supervised or controlled in some manner the movement of the cars. Not a word of testimony to that effect or tending in any manner to substantiate such allegation can be found in the transcript.

It nowhere appears from an inspection of the record before us that it was incumbent upon the deceased to board the train, or that

the performance of any duty whatever was required of him in preparing the cars to make a flying switch, except so far as such service might possibly be inferred from the testimony of George Krumlauf, who stated upon oath at the trial that he saw Mr. York, just prior to the time of the accident, releasing the air from a cylinder beneath a car near the engine.

No testimony was received tending to show that it was at all dangerous for a person to pass over the decks of the flat cars when they were in motion, or that Mr. York was directed or even expected to set or handle the brakes on the rear or any other car of that part of the train.

The evidence shows that from the trestle upon which the caboose and two box cars were left when the train was uncoupled to the switch was about 400 feet, and from that point to the rock quarry about 600 feet further. Why Mr. York attempted to board the moving cars, which were to be taken only such a short distance and left, is a matter of conjecture so far as disclosed by any testimony. In the absence of such showing tending to prove any allegation of the complaint, we are compelled to adhere to the former opinion.

The petition for a rehearing is therefore denied.

McBRIDE, C. J., and McAMANT, J., concur.

(88 Or. 125)

JOHNSON et al. v. CRAWFORD.

(Supreme Court of Oregon. March 19, 1918.)

1. DEDICATION. §19(5) — PLATTING AND SALE.

When the owner of land plats it and sells lots with reference to the plat, he thereby dedicates the streets marked on the plat.

2. DEDICATION §31—PLATTING AND SALE—"ACCEPTANCE."

Where the owner of land plats it and sells lots with reference to the plat, the purchase of lots with reference to the plat constitutes an "acceptance" of the grant made by the owner to the public.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Acceptance.]

3. HIGHWAYS §159(2) — ENJOINING OBSTRUCTION—SPECIAL DAMAGE.

To enjoin the blocking of a roadway, plaintiffs must show special damage to themselves as the result of the acts complained of.

In Banc. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Action by Henry Johnson and others against Walter Crawford. From decree for plaintiffs, defendant appeals. Reversed, and suit dismissed.

This is a suit brought to enjoin defendant from blocking a strip of land 9 feet wide and approximately 660 feet long which plaintiffs claim to be a roadway. Plaintiffs allege that they are owners of real property in the im-

mediate vicinity of the strip of land in question, and that if defendant blocks the alleged roadway, they "will suffer peculiar and irreparable damage to their several properties, in addition to and exclusive of that suffered by the general public." These allegations are denied by defendant except that he admits the ownership by three of the plaintiffs of lands in the vicinity. It is alleged and admitted by the pleadings that in 1882 Van B. De Lashmutt and Harrison B. Oatman acquired a large tract of land including the strip in dispute. In 1885 they conveyed 10 acres of this land to Hattie Murtha, from whom defendant deraigns title. The grant was qualified by the following language contained in the deed:

"Reserving a strip of land off from the west side thirty (30) feet in width, which is dedicated for a public roadway."

The Murtha title passed through mesne conveyances to defendant, each deed containing the language above quoted. The property in dispute is the westerly 9 feet of the strip 30 feet wide mentioned in all these deeds. In 1889 De Lashmutt and Oatman platted the property adjoining the defendant's tract on the west, and dedicated a street 20 feet wide on the east of the plat as Van Ness avenue. While defendant does not admit it, the evidence shows that this street encroaches 9 feet on the strip reserved at the west end of defendant's land. Plaintiffs claim to be owners of portions of the tract platted in 1889. They allege that the use of the strip is necessary as a means of access to the county road, and that it is constantly used as a roadway. Defendant disputes these claims and asserts title by adverse possession. Defendant's immediate predecessor in interest was Blanch McN. Moore. In 1908 she brought an action of trespass against three of these plaintiffs and against other parties, charging that they had destroyed her fence on the strip 30 feet wide on the west side of her property. This litigation reached this court, and was disposed of by Mr. Justice Burnett in an opinion in *Moore v. Fowler*, 58 Or. 292, 114 Pac. 472. In the instant case the lower court enjoined defendant from erecting and maintaining a fence on the tract in dispute, and adjudged that this tract is a public highway. Defendant appeals.

E. B. Dufur, of Portland, for appellant. Beach, Simon & Nelson, of Portland, for respondents.

McAMANT, J. (after stating the facts as above). [1, 2] When the owner of land plats it and sells lots with reference to the plat, he thereby dedicates the streets marked on the plat. *Carter v. Portland*, 4 Or. 339, 345; *Spencer v. Peterson*, 41 Or. 257, 259, 68 Pac. 519, 1108; *Christian v. Eugene*, 49 Or. 170, 172, 89 Pac. 419; *Silverton v. Brown*, 63 Or. 418, 424, 128 Pac. 45; *Nicholas v. Title &*

Trust Company, 79 Or. 226, 240, 154 Pac. 391, Ann. Cas. 1917A, 1149. In such case the purchase of lots with reference to the plat constitutes an acceptance of the grant made by the owner to the public. *Christian v. Eugene*, 49 Or. 170, 173, 89 Pac. 419.

Such of the plaintiffs as are admitted to own land in the platted tract west of defendant's property are entitled to use the streets dedicated by De Lashmutt and Oatman when they recorded the plat. But these parties could not dedicate what they did not own. The strip of land in dispute was not owned by De Lashmutt and Oatman in 1889 when they recorded this plat. They had parted with title to it when they conveyed the ten-acre tract to Hattie Murtha in 1885.

The only ground on which the strip in controversy can be held to be a roadway is the reservation above quoted, which is found in the deeds to Hattie Murtha and her successors in interest. It was held by Mr. Justice Burnett in *Moore v. Fowler*, 58 Or. 292, 297, 114 Pac. 472, 474, that:

"The reservation in the deed as above quoted amounts only to an offer on the part of the grantor to dedicate the roadway to public uses, and there can be no dedication under such circumstances until the same is accepted by the county."

It appears affirmatively in this case that there has been no such acceptance.

[3] There is another reason why plaintiffs have failed to make out a case. They are not entitled to enjoin the acts of defendant in blocking the alleged roadway without showing special damage to plaintiffs as the result of the acts complained of. They allege such special damage, but this allegation is denied, and they have furnished no evidence to maintain their contention on this issue. The pleadings admit that three of the plaintiffs own property in the vicinity, but it does not appear that they have occasion to travel the alleged road.

It follows that the decree of the lower court is reversed, and a decree will be entered here, dismissing the suit.

(89 Or. 360)

FEENEY & BREMER CO. v. STONE.

(Supreme Court of Oregon. March 19, 1918.)

1. SALES ⇨262—BREACH OF WARRANTY—RELINQUENCE AND INDUCEMENT.

In action for breach of warranty, plaintiff must show that the warranty was relied on and that it was an operative cause, although it need not have been the sole inducement.

2. SALES ⇨434 — PLEADING — BREACH OF WARRANTY.

In action for breach of warranty of personal property, the purchaser must allege he relied upon the warranty and was thereby deceived.

3. SALES ⇨287(3)—RESCISSION—BREACH OF WARRANTY—RETURN OF PROPERTY.

The purchaser of a machine may rescind the contract and return the machine within a reasonable time after delivery, if it is not as warranted.

4. SALES ⇨426 — CONTRACTS — REMEDIES OF PURCHASER.

Generally, in a contract of sale, in the absence of language evidencing an intention to make a given remedy, such as a right given to the purchaser to retain without charge the article, if not as warranted, exclusive of all others, such remedy will be deemed cumulative and permissive rather than exclusive and mandatory.

5. SALES ⇨426 — WARRANTY—REMEDIES OF PURCHASER.

A purchaser's right to proceed on the warranty in his sale contract was not destroyed by the seller's agreement that if the property sold were not as warranted the purchaser could keep it without paying for it, especially when the purchaser waived any right arising out of the promise not to charge and sued on the warranty.

6. SALES ⇨442(1)—BREACH OF WARRANTY—DAMAGES.

When the seller of personal property has breached his express warranty to furnish an article of a specified kind, quality, or condition, he is liable, as in the case of any other kind of a contract, for both general and special damages.

7. SALES ⇨288(2)—BREACH OF WARRANTY—EFFECT OF ACCEPTANCE.

Acceptance of property sold does not of itself preclude the buyer from recovering damages for breach of warranty.

8. DAMAGES ⇨62(4)—BREACH OF WARRANTY—REDUCTION OF DAMAGES.

In case of breach of warranty in a contract of sale, the buyer owes an active duty to exercise ordinary care to keep the damages as low as possible.

9. SALES ⇨442(6, 7)—BREACH OF WARRANTY—DAMAGES—EXPENSES.

If buyer of a machine was obliged, because the machine bought did not work, to rent another machine to prevent loss to himself, he was entitled to reimbursement from the seller to the extent such expense was extra in character and reasonable in amount.

10. SALES ⇨442(5) — BREACH OF WARRANTY—ANTICIPATED PROFITS.

The theory of the law being to award compensation for gains prevented and losses sustained, and anticipated profits not being nonrecoverable merely because they are such, if it is reasonably certain that the breach of a contract has deprived the complaining party of a profit which was contemplated or can reasonably be presumed to have been contemplated by the parties at the time the contract was made, then the party committing the breach is liable for the loss of the profit.

11. SALES ⇨437(2)—BREACH OF WARRANTY—SPECIAL DAMAGES.

In order to recover special damages for a breach of warranty, the buyer must allege and prove that the special damages claimed by him are such as were contemplated, or may reasonably be said to have been contemplated, by the parties at the time they made the contract.

12. SALES ⇨442(5)—SPECIAL DAMAGES—LOSS OF PROFITS.

If at the time of sale of a hoist the seller did not know that the buyer intended to use it in the sale of gravel to the public, the buyer could not recover loss of profits on account of the seller's breach of warranty of the hoist, since it could not be said the parties contemplated such loss as a result of breach.

Department 1. Appeal from Circuit Court, Tillamook County; George R. Bagley, Judge.

Action by the Feeney & Bremer Company against C. F. Stone. From judgment for

defendant, plaintiff appeals. Reversed and remanded for new trial.

The plaintiff Feeney & Bremer Company, a corporation, operates a metal foundry and manufactures machinery. The defendant has a gravel bar and since August 1, 1915, has been engaged in the business of selling gravel. The complaint alleges that between July 1, 1915, and January 26, 1916, the plaintiff delivered certain materials and performed services for the defendant of the reasonable value of \$591.43; that \$301 has been paid; and that \$290.43, the unpaid balance, is due. Among the items appearing in the itemized statement attached to the complaint is a drum hoist valued at \$450. The controversy between the litigants relates to the hoist, and consequently no further notice will be given to the other items mentioned in the pleadings.

For a defense the answer avers that on or about July 1, 1915, the defendant was negotiating with manufacturers for an electric hoist to be used in hoisting gravel into bunkers, and that at the same time he was negotiating with the Coast Power Company of Oregon for electricity with which to operate such a hoist; that while the defendant was negotiating the plaintiff approached the defendant and requested him to purchase a hoist from the plaintiff and—

“offered and agreed to construct for the defendant such a hoist as defendant required in his said business, and agreed that if the defendant would give the plaintiff an order for the said hoist the plaintiff would construct such a hoist, and expressly guaranteed that if such order were given to plaintiff the hoist which the plaintiff would construct and deliver to defendant would be a hoist which would stand up to the work and accomplish the purposes of the defendant in that behalf in carrying on his business, and that if said hoist did not work plaintiff would make the same do so, and if the machine would not work that plaintiff would charge the defendant nothing therefor.”

The defendant alleges that:

“In consideration of the representation and guaranty of the plaintiff as aforesaid, the defendant agreed to purchase from plaintiff the drum hoist referred to, at the agreed price of \$450, but in consideration of the said representations, agreement, and warranty of the plaintiff in regard thereto as aforesaid.”

It is averred in the answer that the plaintiff constructed and delivered an electric hoist, but that it was faultily constructed; “that the same would not stand the work required to be done thereby by the defendant and which was contemplated by the parties;” and that “the reasonable value of said hoist so furnished was no more than the sum of \$100,” although it would have been worth \$450 if it had been built in full compliance with the agreement.

The defendant also pleads a counterclaim. He avers that the hoist was first delivered to him in July, 1915; that he began using it on August 1, 1915, and, although the “machine frequently gave way,” he continued to operate it until August 24, 1915, when it

“completely broke down”; that he “thereupon requested plaintiff to repair the same so that it would work as had been agreed, but the plaintiff delayed repairing the same until on or about the 1st day of September, and by reason of said delay of the plaintiff the defendant was compelled to rent other equipment in order to operate his plant.” Continuing, the defendant alleges “that plaintiff did thereafter overhaul and put in repair the said hoist and redeliver the same to defendant,” but that it has never been capable of doing the work contemplated by the agreement.

The defendant then avers:

“That in order to carry on the defendant's operations, on account of the failure of the said machine so furnished by plaintiff to do the work represented to be done and guaranteed to be done by said machine, the defendant has been compelled to procure other machinery to operate his plant, and has necessarily expended on account thereof the following sums: For rent of donkey engine, \$120; for labor in moving engine, \$59; for fuel for operating donkey engine, \$124.95; for extra labor for operation of donkey engine, \$100.”

It is also alleged that because “of the incapacity of the said hoist to properly perform” during the month of August he lost a profit of 50 cents per yard on 500 yards of gravel which he could have sold to the Arenz Construction Company, and a profit of 20 cents per yard on 340 yards of gravel which he could have sold to Tillamook county.

There was a verdict and judgment for the defendant for \$355, and the plaintiff appealed.

S. S. Johnson, of Tillamook (T. B. Handley, of Tillamook, on the brief), for appellant. H. T. Botts, of Tillamook, for respondent.

HARRIS, J. (after stating the facts as above). Briefly stated, the defendant contends that he is entitled to have the price of the machine reduced to \$100 and that he is also entitled to special damages (1) for the expense of the donkey engine; (2) for profits which he lost by reason of his inability to furnish gravel in the month of August to the Arenz Construction Company and to Tillamook county. There is no claim of any loss of profits except for the month of August.

The plaintiff contends that the judgment should be reversed because: (1) The answer does not contain an affirmative allegation that the defendant relied upon the warranty pleaded by him; (2) the warranty is limited to and extends no further than the stipulation that the “plaintiff would charge the defendant nothing” if the hoist did not work; (3) partial failure of consideration was the only defense available to the defendant; and (4) the damages mentioned in the counterclaim were not within the contemplation of the parties and are too remote

and speculative and therefore not recoverable.

[1, 2] In order to maintain an action for a breach of warranty it must be shown that the warranty was relied upon, and, although the warranty need not have been the sole inducement, it must have been an operative cause (35 Cyc. 376; 2 Mechem on Sales, §§ 1234, 1235), and therefore in an action for a breach of warranty the purchaser of personal property must allege that he relied upon the warranty and was thereby deceived (*Abilene National Bank v. Nodine*, 26 Or. 53, 55, 37 Pac. 47; 35 Cyc. 450). The defendant insists that this rule of pleading is satisfied by the following allegation appearing in the answer:

"In consideration of the representation and guaranty of the plaintiff as aforesaid, the defendant agreed to purchase from plaintiff the drum hoist referred to, at the agreed price of \$450, but in consideration of the said representations, agreement, and warranty of the plaintiff in regard thereto as aforesaid. * * *"

It is intimated in *Lincoln v. Ragsdale*, 7 Ind. App. 354, 356, 31 N. E. 581, that the quoted allegation would be sufficient. While the averment lacks directness and positiveness, nevertheless it might possibly be adequate after a verdict and judgment, since, so far as the record discloses, the objection was not made in the lower court, but is made here for the first time. The judgment should be reversed for other reasons, however, and all doubts concerning the sufficiency of the pleading may be removed by the filing of an amended answer.

[3-5] The answer avers that the plaintiff "expressly guaranteed" that if the hoist "would not stand up to the work and accomplish the purposes of the defendant" and that if the hoist did not work "plaintiff would make the same do so, and if the machine would not work the plaintiff would charge the defendant nothing therefor." The plaintiff argues that the parties have, by the agreement alleged in the answer, limited the defendant's remedy for a breach of the warranty to the right to decline to pay for the machine, and that therefore Stone is not entitled to recover damages for a breach of the warranty. If by the stipulation "the plaintiff would charge the defendant nothing therefor" is meant that the defendant could refuse to accept the hoist, then the stipulation added nothing to the rights of the defendant, since the law gave him the right to rescind the contract and return the machine within a reasonable time after delivery, for it must be remembered that the parties contracted for a machine which was not yet in existence when they made the agreement. *Steiger v. Fronhofer*, 43 Or. 178, 183, 72 Pac. 693; *Lenz v. Blake*, 44 Or. 569, 76 Pac. 356. If, on the other hand, the parties intended to agree that the defendant could keep the hoist without paying for it if it did not work, it constituted an additional rather than an exclusive remedy. Generally speaking, the parties to a contract for the sale of personal

property have a right to agree that a defined remedy shall be exclusive, but in the absence of language evidencing an intention to make a given remedy, like the one in question here, exclusive of all others, it is treated as cumulative and permissive rather than exclusive and mandatory; and hence the buyer is usually permitted to avail himself of the special remedy, or, if he chooses, he may accept the property and recover damages for a breach of the warranty. There is nothing to indicate that the parties intended that the right not to pay should be the exclusive remedy. It is not necessary to determine whether Stone could have returned the property and also recover damages for a breach of the warranty, for the reason that he elected to keep the hoist, and as ruled in *Douglass Axe Mfg. Co. v. Gardner*, 10 Oush. 88:

"The buyer has, if not a double remedy, at least a choice of remedies, and may either return the property within a reasonable time, or keep it and maintain an action for breach of the warranty."

The warranty was not rescinded, violated, or destroyed by the stipulation not to charge, especially when the defendant waives, as he has done, any right arising out of the promise not to charge and sues on the warranty. *Sanford v. Brown Bros. Co.*, 208 N. Y. 90, 101 N. E. 797, 50 L. R. A. (N. S.) 778; *Nave v. Powell*, 52 Ind. App. 496, 96 N. E. 395; *McGill v. Hall* (Tex. Civ. App.) 26 S. W. 132; *Fitzpatrick v. D. M. Osborne & Co.*, 50 Minn. 261, 52 N. W. 861; *Aultman M. & Co. v. Theiler*, 34 Iowa, 272; *Gaar S. & Co. v. Patterson*, 65 Minn. 449, 68 N. W. 69; *Obenchain v. Roff*, 29 Okl. 211, 116 Pac. 782; *Batley v. Lunt M. & Co.*, 30 R. I. 1, 73 Atl. 353, 136 Am. St. Rep. 926; 2 Mechem on Sales, § 1801; 35 Cyc. 438.

The remaining assignments of error relate to the measure of damages. The rule for measuring damages for the breach of a contract is found in the celebrated English case of *Hadley v. Baxendale*, 9 Exch. 341, and in the subsequent but equally noted American case of *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718. In the former case the court states the rule in the following language:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

Continuing further, the reasons are given thus:

"Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus [actually] known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so

known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."

Although employing different language, the American case announces the same rule, for we find the doctrine stated thus in *Griffin v. Colver*, 16 N. Y. 489, 494, 69 Am. Dec. 718:

"The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed."

In 2 *Mechem on Sales*, § 1757, the author restates the rule established by *Hadley v. Baxendale* and *Griffin v. Colver*, in this manner:

"The party who has broken his contract is liable to make compensation to the other for all such losses resulting from that breach as are either (1) the ordinary, the usual, the commonly to be expected consequences of such a breach of such a contract; or (2) the peculiar or unusual consequences of the breach of the particular contract in question, if, under the circumstances, it can fairly be said that both parties had those consequences in their contemplation, at the time the contract was made, as a probable result of its breach; and if those unusual consequences are neither uncertain in their nature nor remote as to their cause."

[6-8] When the seller of personal property has broken his express warranty to furnish an article of a specified kind, quality, or condition, he is liable, as in the case of any other kind of a contract, for both general and special damages. 2 *Mechem on Sales*, §§ 1817, 1821; 35 *Cyc.* 451, 465; 30 *Am. & Eng. Ency. Law* (2d Ed.) 209, 214. The acceptance of the property does not of itself preclude the buyer from recovering damages. *Cassidy v. Le Fevre*, 45 N. Y. 562. As in other contracts, the buyer owes an active duty to exercise ordinary care to keep the damages as low as possible. 30 *Am. & Eng. Ency. Law* (2d Ed.) 223; *Wright v. Computing Scale Co.*, 47 Wash. 107, 91 Pac. 571.

[9] If the defendant was obliged to rent the donkey engine in order to prevent loss to himself then, to the extent that such expense was extra in character and reasonable in amount, the defendant is entitled to reimbursement. *Drake v. Sears*, 8 Or. 210, 213; *Hoskins v. Scott*, 52 Or. 271, 279, 96 Pac. 1112; *People's Savings Bank v. Waterloo & Cedar Falls R. T. Co.*, 118 Iowa, 740, 92 N. W. 691; *Optenberg v. Skelton*, 109 Wis. 241, 85 N. W. 356; *Carroll-Porter Boiler & Tank*

Co. v. Columbus Mach. Co., 5 C. C. A. 190, 3 U. S. App. 631, 55 Fed. 451.

[10, 11] The theory of the law is to award compensation for gains prevented and for losses sustained. The party who is damaged by the breach of a contract is not prevented from recovering anticipated profits merely because they are such. If it is reasonably certain that the breach of a contract has deprived the complaining party of a profit which was contemplated or can reasonably be presumed to have been contemplated by the parties at the time the contract was made, then the party committing the breach is liable for the loss of the profit. *Drake v. Sears*, 8 Or. 214; *Hoskins v. Scott*, 52 Or. 271, 276, 96 Pac. 1112; *Fields v. Western Union Tel. Co.*, 68 Or. 209, 137 Pac. 209; *McGinnis v. Studebaker*, 75 Or. 519, 522, 146 Pac. 825, 147 Pac. 525, L. R. A. 1916B, 868, Ann. Cas. 1917B, 1190. The rule is illustrated in the following cases, where the complaining party was not permitted to recover profits claimed to have been lost on account of a breach of warranty: *Weybrick v. Harris*, 31 Kan. 92, 1 Pac. 271; *Puget Sound Iron & Steel Works v. Clemmons*, 32 Wash. 36, 72 Pac. 465; *Wright v. Computing Scale Co.*, 47 Wash. 107, 91 Pac. 571; *Blymer Ice Machine Co. v. McDonald*, 48 La. Ann. 439, 449, 19 South. 459; *Moulthrop v. Hyett*, 105 Ala. 493, 17 South. 32, 53 Am. St. Rep. 139. The following are examples of cases where the buyer was permitted to recover profits which he lost by reason of the breach of the seller's warranty: *Crompton & Knowles Loom Works v. Hoffman*, 5 Ont. L. Rep. 554; *Murray Co. v. Putman*, 61 Tex. Civ. App. 517, 130 S. W. 681; *Alamo Mills Co. v. Hercules Iron Works*, 1 Tex. Civ. App. 688, 22 S. W. 1097. Some of the language employed in *Alamo Mills Co. v. Hercules Iron Works*, supra, is so apropos that we here quote from the opinion of the court:

"The right or not to recover profits for a breach of a contract does not depend upon an arbitrary rule to be adopted by a court, but upon the principles that should control the right. The law does not condemn profits as such as a measure of damages. The question is, Would the loss of profits be the direct result of the breach, and would such loss 'reasonably be supposed to have entered into the contemplation of the parties at the time of making the contract'? Conjectural profits would not be allowed, not for the reason that profits are proscribed, but because they are uncertain; if they become sufficiently certain, are the direct result of the breach, and the parties were in possession of such facts as would charge them, as reasonably intelligent men, with the probable consequences of the breach, then profits fall within the rule, and may be recoverable as damages."

In order to recover special damages for a breach of warranty, the buyer must allege and prove that the special damages claimed by him are such as were contemplated or may reasonably be said to have been contemplated by the parties at the time they made the contract. 35 *Cyc.* 451. It will be nec-

essary now to direct attention to the evidence.

The bill of exceptions contains a narrative of the testimony given by the defendant, and instead of saying that the defendant testified to this or to that we shall, for the purposes of the appeal, given an affirmative statement of the facts on the assumption that the facts are exactly as testified to by the defendant. However, it must be understood that we do not attempt to decide any question of fact. The plaintiff learned that Stone wished to purchase a hoist to be used in raising gravel into bunkers, and inquired of Stone "what the chance was for building that double drum winch." The plaintiff "was warned how this winch had to be built," and was told that "on account of the high speed of the machine necessary to do the work that he [the plaintiff] had to put in bronze brass bushings in the bearings in order to do the work." The parties "discussed that it [the machine] was to be used with overhead lines and bucket; yard and a half bucket was to be used." The plaintiff "agreed to build a hoist there that would do—that would work perfectly—for \$450;" and "if it did not do the work he [the plaintiff] would make it do the work or it would not cost us [the defendant] anything."

The plaintiff constructed a machine; it was delivered to Stone in July, but he "did not start to use it until August 1st." The defendant "commenced raising gravel," but he "never could raise over half a bucket." "The bolts were not big enough;" the frictions were made of green spruce when they should have been "good oak or hickory"; the thrust bearings were small "where they should be large"; Stone asked the plaintiff "time and time again to come down and overhaul it and put in thrust bearings"; but the plaintiff "never did come down." Finally, on August 24th "the pullback drum froze right on the shaft" because of defects in the machine. Stone immediately notified the plaintiff. Feeney & Bremer Company had the machine "down here in the shop," but delayed making the necessary repairs. "The Arenz Construction Company was on the county work and needed rock and gravel bad;" the county "needed gravel bad"; Stone told the plaintiff that he was going to hire a donkey engine if the plaintiff did not repair the damaged hoist; and, finally, on or about August 29th the plaintiff commenced to work on the machine. The plaintiff did not redeliver the hoist until June or July, 1916. Stone rented and installed a donkey engine. While the record does not disclose the exact date, it may be inferred that the donkey engine was ready for operation possibly on August 30th, and Stone continued to use it for about six weeks. "If the hoist had worked according to contract," Stone would "not have been out a nickel on any" of the expense incurred for the donkey engine.

"Along about the 25th of August" the road supervisor came to Stone and stated that he was going to build a certain road and that he would take gravel from the defendant at 35 cents per yard. The Arenz Construction Company was building a pavement "and the county was furnishing the crushed rock" and the defendant "was to put in the gravel." The defendant "could put in half gravel and possibly a little more if the county could not furnish crushed rock." The defendant "was getting \$1.65 for the gravel from the Arenz Construction Company" and was realizing "about 70 cents a yard profit" when using the electric hoist, while the profit was only 60 or 65 cents a yard after the installation of the donkey engine. The county road supervisor "came there on August 28th and got 8 yards"; the donkey engine was not yet ready for use, although it was being installed, and hence the defendant could not furnish any more gravel, and he told the road supervisor "to go in on the bar and get it, and they went in on the bar and loaded 337 yards, which I could have furnished them if the donkey had been working."

If the defendant is entitled to recover for a loss of profits, his right is limited to the loss of profits which he could and would have made on the deliveries to the county and the Arenz Construction Company. There is nothing in the testimony of the defendant to show that he lost any profits, so far as the Arenz Construction Company is concerned, between the 1st and 24th of August, and he could not have lost any profits during that time so far as the county is concerned because the road supervisor did not speak to him about gravel until August 25th, and the county did not call for gravel until August 28th. While the evidence does not disclose the exact date when the donkey engine was ready for installation, it is fair to presume that it could have been operated possibly as early as August 30th and probably not later than September 1st. According to the testimony of the defendant himself the donkey engine "did the work excellently all the time we had it," and therefore the fair inference is that the defendant was able to work the bucket to full capacity. It does not affirmatively appear from the testimony of the defendant whether any of the 337 yards of gravel taken by the county was taken after the donkey engine was ready for operation; but if the county took any of that gravel after the donkey engine was ready for operation the defendant is not entitled to claim a loss of profits on the gravel so taken. The same rule applies to the Arenz Construction Company. The defendant does not say affirmatively that he did not deliver any gravel after August 24th to the Arenz Construction Company. The defendant cannot claim damages for alleged lost profits on gravel delivered to the Arenz Construction Company after the donkey engine was installed.

The answer speaks of a contract for electric power, and the defendant testified about the same subject. However, the defendant did not say that he did in fact make a contract for electric power binding himself to pay for electricity whether he used it or not. He cannot charge for electricity unless he became liable for it.

[12] If the defendant lost profits on account of the breach of warranty, then it may be conceded that such a loss was the proximate consequence of the breach of warranty; and yet it is not enough for the complaining party merely to prove that the loss was the proximate consequence of the breach, for he must also allege and prove that the loss was within the contemplation of the parties, or that it can reasonably be said to have been within the contemplation of the parties, at the time they made the contract for the hoist. It is true that the evidence shows that the plaintiff agreed to build an electric hoist that would do the work of running a yard and a half bucket which was to be operated with overhead lines; but the evidence does not sufficiently show that the plaintiff knew that the buyer intended to use it in supplying gravel to the public. If the seller did not know that the buyer intended to use the hoist for the purposes of selling gravel, it could not be said that the parties contemplated the loss which the buyer claims he sustained. *Puget Sound Iron & Steel Works v. Clemmons*, 32 Wash. 36, 72 Pac. 465. If the plaintiff knew that the defendant intended to use the hoist for the purpose of delivering gravel to the public, then the parties contemplated that a breach of warranty would result in a loss to the defendant. If the defendant lost profits on account of being unable to deliver gravel to the county and to the Arenz Construction Company, the loss would be the proximate consequence of the breach, and since the loss can reasonably be said to have been within the contemplation of the parties at the time they made the contract and the profits are not conjectural but are capable of being ascertained, the defendant is entitled to compensation. *Fields v. Western Union Tel. Co.*, 68 Or. 209, 137 Pac. 200.

A careful examination of the record presented here leads us to the conclusion that justice requires a reversal of the judgment, and it is therefore ordered that the cause be remanded for a new trial.

MCCBRIDE, C. J., and BURNETT and BENSON, JJ., concur.

(88 Or. 443)

CURTIS et al. v. TILLAMOOK CITY.
(Supreme Court of Oregon. March 19, 1918.)

1. MUNICIPAL CORPORATIONS §514(5) — PUBLIC IMPROVEMENTS—REASSESSMENT.

While no reassessment for sidewalks can be made if the property has been once sold

therefor and the city's claim extinguished, there may be a reassessment where, at the first sale, the mayor, without authority, bid in the property, since such transaction did not extinguish the claim.

2. MUNICIPAL CORPORATIONS §514(5) — PUBLIC IMPROVEMENTS—REASSESSMENT.

Where the city assessed lots for a sidewalk, and the mayor, without authority, purchased at the sale on behalf of the city, the city could reassess the lands, and the owners, who knew of the lack of authority in the mayor, could not claim relief from the reassessment upon the ground that the claim was extinguished by the first assessment.

3. MUNICIPAL CORPORATIONS §106—INITIATIVE AND REFERENDUM.

Under Const. art. 4, § 1a, and L. O. L., § 3480, as to the initiative and referendum in cities, it is competent for a city or town council to provide by ordinance the scheme for the exercise of the initiative and referendum in its municipal affairs.

4. MUNICIPAL CORPORATIONS §106—INITIATIVE AND REFERENDUM.

Where the city council first passed an ordinance governing the initiative and referendum and later adopted an ordinance amending the charter, changing the matter of procedure in making street improvements, which was immediately approved, and the council then provided for special election submitting the charter amendment, which ordinance was approved on the same day as the ordinance changing the initiative and referendum procedure, the adoption of the charter amendment by the voters in accordance with the procedure of the new ordinance for initiative and referendum was valid.

5. MUNICIPAL CORPORATIONS §538—REASSESSMENTS—PRESUMPTION.

In a suit to enjoin the enforcement of a reassessment, it will, when the record of the council is silent, be presumed that the objections of the property owners were considered by the council and found without merit, when it subsequently passes the reassessment ordinance, as though such objections were not in the way.

6. MUNICIPAL CORPORATIONS §390 — CHANGE OF GRADE—ESTOPPEL OF PROPERTY OWNER.

Where property owners had improved the street at the old grade and, after a new grade was established, petitioned the council to put in a sidewalk, they could not complain that the sidewalk on the new grade was not useful by reason of the greater height of the street.

Department 1. Appeal from Circuit Court, Tillamook County; George R. Bagley, Judge.

Suit by David Curtis and others against Tillamook City. Decree dismissing the suit, and plaintiffs appeal. Affirmed.

Rehearing denied 172 Pac. 122.

This is a suit against Tillamook City to quiet title to some lots in that town. Thus called upon to assert its claim, the municipality set up certain proceedings it had carried on for the purpose of reassessing the property for the payment of the expense of building a concrete sidewalk along its front, there having been a previous attempt to collect the charge for making the improvement. These transactions were challenged by the reply. The case was heard on a stipulation of facts, and from a decree dismissing the suit, the plaintiffs appeal.

C. W. Talmage, of Tillamook (E. J. Clausen, of Tillamook, and William Marx, of Casper, Wyo., on the brief), for appellants. H. T. Botts, of Tillamook, for respondent.

BURNETT, J. (after stating the facts as above). [1, 2] The first contention urged by the plaintiffs is that the city exhausted its power over the property by the proceedings under the first assessment. It is agreed that the claim of the city for the expense in making the improvement has never been paid by any one. It is stated that when the property was offered for sale the mayor of the city, although not authorized to do so by any municipal law then in existence, attended and bid for the property as such officer the amount of the assessment, and it was struck off to him. In support of the doctrine that a sale of the property exhausts the city's power, there are cited: *Dowell v. Portland*, 13 Or. 248, 10 Pac. 308; *Gaston v. Portland*, 48 Or. 82, 84 Pac. 1040; *Evans v. Meridian Inv. & Trust Co.*, 84 Or. 246, 163 Pac. 1165; and *West v. Scott-McClure Land Co.*, 84 Or. 296, 164 Pac. 554. In all those instances the city realized its demand in full by the questioned sale. The amount of its assessment was paid in money which actually went into its treasury, and it was properly held that this ended the city's power. Thenceforward it had no demand upon the property whatever, and to reassess and sell again with a view of making good for the purchaser the title it had attempted to sequester would be tantamount to taking the property of one individual and giving it to another. The reason of the rule thus announced fails in the present juncture, for the charge for laying the sidewalk remains unpaid. The treasury of the city has never been enriched to the value of a farthing by any of its attempts thus far to collect the actual expense of putting in the walk. Even in *Gaston v. Portland*, Mr. Justice Hailey, discussing the question and speaking of a similar provision in the charter of Portland, says:

"The city would have the right to reassess and sell under section 400 as long as its claim was unpaid by sale of the property or otherwise."

We also find this expression of the rule in *Hughes v. Portland*, 53 Or. 370, 386, 100 Pac. 942, 949:

"It is manifest that the power of the council is not exhausted by an abortive attempt to make a reassessment, but that it may continue to exercise the granted powers until it succeeds in charging the property benefited with its just and proportionate share of the cost of making the improvement."

See, also, *Phipps v. Medford*, 81 Or. 119, 156 Pac. 787, 158 Pac. 666. In such cases equity disregards matters of form and technicalities and bases its action upon the substance of the controversy, so that if in the present litigation it had appeared

that the city had actually received the desired money by its former effort to collect its assessment, an additional or subsequent attempt to collect for the same thing would be held void, because its power had been spent entirely. But the contrary is made to appear by the statement of the case and the stipulation of facts which furnish a reason for distinguishing the cases mentioned and leave the city free to pursue the property until in very truth its claim is paid. This also constitutes good cause for laying out of the case the action of the mayor, unauthorized as it was, in bidding for the city at the sale the amount of the assessment. Those who would now take advantage of it knew that he had no authority for his action, and they cannot claim anything under it now.

The plaintiffs argue also that the municipal legislation under which the improvement was inaugurated was void. They reason thus: When the ordinance proposing the amendment to the charter was approved by the mayor, the ordinance, taking the place of the general state statute and prescribing a new formula for the exercise by the voters of Tillamook City of the powers mentioned, had not yet received the sanction of that officer. On this basis the plaintiffs contend that its subsequent approval could not make it relate back to and affect the ordinance proposing to change the charter, and that the latter measure must have been filed and its final enactment by the people be secured by an observance of the general legislation promulgated by the Legislative Assembly of the state, in default of which any proceeding undertaken under a charter otherwise adopted would be of no force or effect. The ordinance respecting the exercise of these powers and the amendment to the charter each shortened the times within which certain steps in the respective processes should be taken. We find in section 1a of article 4 of the state Constitution this mandatory precept:

"The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation."

Section 3480, L. O. L., also lays down the procedure on such subjects:

"In all cities and towns which have not or may not provide by ordinance or charter for the manner of exercising the initiative and referendum powers reserved by the Constitution to the people thereof, as to their municipal legislation," the duties required of certain state officers in state elections shall be performed by designated city officers. "The provisions of this act shall apply in every city and town in all matters concerning the operation of the initiative and referendum in its municipal legislation,

on which such city or town has not made or does not make conflicting provisions."

[3, 4] The clear deduction from these excerpts is that it is competent for a city or town council to provide by ordinance the scheme for the exercise of the initiative and referendum in its municipal affairs. *State ex rel. v. Kelsey*, 66 Or. 70, 133 Pac. 806; *Duncan v. Dryer*, 71 Or. 548, 143 Pac. 644; *State v. Bozorth*, 84 Or. 371, 164 Pac. 958; *Colby v. Medford*, 85 Or. 485, 167 Pac. 487. In the last of these precedents the ordinance on the subject went into effect only the day before the election at which the charter amendment was adopted, yet it was held in substance that the change in the organic law of the city was regularly accomplished under the procedure established by the ordinance so lately preceding it. The principle is that the people of the state have conferred upon cities and towns the power to provide for the manner in which the municipal voters will enact or reject local legislation. The power thus provided is not limited to such voters themselves, but is given to the cities and towns which act ordinarily through their councils with the approval of the mayor. Hence we hold that this power of making rules governing this function is properly accomplished by an ordinance controlling in the present instance the adoption of the charter amendment, which in turn vitalized the proceedings subsequently attempted under it.

On March 25, 1912, the city council of Tillamook adopted Ordinance No. 233, providing a method of exercising the initiative and referendum powers differing somewhat from that established by the state law already quoted. Four days afterward, on March 29th, the council adopted Ordinance No. 235, changing the manner of procedure in making street improvements, leaving out, for instance, the condition allowing any abutting owner to make the directed improvement at his private expense and without a public assessment. This was approved by the mayor on April 1, 1912. The next in order was the adoption by the council on April 2, 1912, of Ordinance No. 240, providing for a special election, submitting to the legal voters said Ordinance No. 235, which proposed to amend the charter as already stated. This submission ordinance and Ordinance 233, prescribing the method of exercising the initiative and referendum powers, were both approved on April 4th. It will be noted that the ordinance proposing an amendment to the charter was passed and approved between the passage and approval of Ordinance No. 233. It is claimed by the plaintiffs that the new procedure respecting the initiative and referendum powers could not affect a measure which had passed the council prior to the mayor's ratification of the new process, and hence that any proceeding for improving a street based upon the charter amendment so adopt-

ed would be void. It is conceded that if Ordinance No. 233 applied to the transactions, they are regular, because the election for adopting the charter amendment complied with it in all respects. It will be observed that the charter amendment proposed by the council was of no effect whatever until adopted by the people at an election to be held thereafter. Ordinance 240 was designed to gather up all measures awaiting the action of the people and submit them to the electorate at an election to be held under the new procedure, which, as before stated, came into effect simultaneously with that enactment. It was not necessary that the manner of exercising the initiative and referendum should be made the subject of a charter amendment, because the general law shows that an ordinance would be sufficient for that purpose. At least, that is the plain intentment of the statute on that subject. When the question of amending the charter, therefore, was presented to the people, the manner of adopting it was governed by the city law then in force, the terms of which, it is conceded, were regularly observed. It follows that the new charter amendment was regularly adopted and in force when the plaintiffs themselves petitioned for the installation of the improvement.

[5] They also assail the procedure of the council in passing upon objections to the reassessment, claiming that the record of that body does not show that it heard testimony or passed in detail upon each of the exceptions involving matters of fact. In support of their contention they refer to *Hughes v. Portland*, supra, *Applegate v. Portland*, 53 Or. 552, 99 Pac. 890, and *Hochfeld v. Portland*, 72 Or. 190, 142 Pac. 824. These were all direct attacks upon the proceedings of the municipal council by means of writs of review. In *Hughes v. Portland*, Mr. Justice Robert S. Bean, in summarizing the principles governing cases relating to municipal assessments, says, among other things:

"In a suit to enjoin the enforcement of a reassessment, it will, when the record of the council is silent, be presumed that the objections of the property owners were considered by the council and found without merit, when it subsequently passes the reassessment ordinance, as though such objections were not in the way."

That precept was held not to be applicable in that case because the proceeding was a writ of review constituting a direct attack on the doings of the municipality. It does govern, however, in the present case; it being a collateral attack upon the proceedings in question.

[6] Considerable stress is laid upon the fact, averred by the plaintiffs, that they had improved the street in front of their holdings only the year before, by graveling the same at a grade then in force by order of the council. It is admitted that afterwards and before they petitioned to have the walk laid down, the city changed the grade. It thus

appears that their petition to have a walk laid upon the established grade must be held to refer to the new grade. They complain that this is lower than the former grade upon which the gravel in the middle of the street was laid, varying from nothing to two feet, with the result that where it is lower than the level of the street the winter rains bring mud upon the walk, so as to render it disagreeable to travel there. Hence they challenge the benefit alleged to have accrued to their property on account of the installation of the improvement. Whether there is actual utility in the sidewalk in greater or less degree is not a judicial question in the absence of fraud in its establishment. It is referable to the legislative function of the council, with which we have nothing to do. We cannot give heed to that objection. The place to urge it was before the council itself.

The amended charter of the city is almost identical on this subject with the charters of Portland, Medford, and other cities giving the power to reassess until the property is finally charged with its just proportion of the expense. The language of the opinion in *Hughes v. Portland* here set down gives a sound reason for the validity of such a charter:

"The general rule, that all tax proceedings shall be construed in favor of the taxpayer, often results in permitting him to profit by the mere nonobservance of technical and unimportant matters, and thus obtain the benefit of an improvement to his property while contributing nothing to its payment, to the loss of either the contractor or municipality, or both. It was to cover these defects and compel property owners to pay their due proportion of the cost of improving their property that the reassessment provision was inserted in the charter, and it should be so construed as to effectuate the purpose intended. It plainly authorizes an assessment or reassessment of property, benefited by a public improvement, as often as may be necessary to compel it to bear its just proportion of the cost of such improvement. The intention of the charter is that no technical defects in the proceedings for the improvement of a street which has, in fact, been improved, to the benefit of adjoining property, shall prevent or stand in the way of the benefited property paying its just portion of the costs thereof."

The substantial equity of the proceedings before us is that the plaintiffs themselves petitioned the council to lay down the walk in front of their premises, on what they knew was a new grade, because the council had established it before they filed their petition, and under what they knew was the actual will of the people respecting the amendment to the charter, expressed by a large majority of the voters; and now they complain because the result is not so desirable as they could wish. The objections they urge are not valid from a judicial point of view. They have the improvement they asked for, and the city is entitled to pursue them until there is paid into its treasury, either the amount of money necessary to pay their ratable proportion of the expense, or the cash

proceeds of an actual sale of the property assessed.

The decree of the circuit court is affirmed.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

(83 Or. 128)

CARPENTER v. LORD, State Agent, et al.

Ex parte CARPENTER.

(Supreme Court of Oregon. March 19, 1918.)

1. ARREST \Leftrightarrow 66—STATE COURTS—WHERE EFFECTIVE.

A warrant of arrest, issued by a state court, is ineffective beyond the boundaries of the state.

2. EXTRADITION \Leftrightarrow 31—PERSONS IN CUSTODY—DISCRETION OF GOVERNOR.

L. O. L. § 1874, providing that one in custody on a criminal charge cannot be delivered up to another state until legally discharged, is mandatory, and the Governor has no discretion, in view of L. O. L. § 756, making judgments conclusive as to the legal condition of any person.

3. EXTRADITION \Leftrightarrow 31—"IN CUSTODY."

A convicted person, on parole under a judgment, is "in custody," within L. O. L. § 1874, providing that one in custody upon conviction of crime cannot be extradited.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, In Custody.]

4. PARDON \Leftrightarrow 8—EFFECT OF PARDON—NECESSITY FOR ACCEPTANCE.

The Governor may pardon an offender; but it is ineffective, unless the offender accepts.

McCamant and Moore, JJ., dissenting.

In Banc. Appeal from Circuit Court, Multnomah County; John P. Kavanaugh, Judge.

Habeas corpus proceedings by Ida Carpenter, in behalf of her husband, E. H. Carpenter, against Frank Lord, Agent of the State of California, and T. M. Word, Sheriff of Multnomah County. From a judgment denying her prayer for the discharge of her husband, and dismissing the writ, petitioner appeals. Reversed and remanded, with directions.

The plaintiff, Ida Carpenter, acting in behalf of her husband, E. H. Carpenter, sued out a writ of habeas corpus in the circuit court for Multnomah county against the sheriff of that county and one Frank Lord, the latter of whom avers that he is the agent of the state of California, commissioned to return Carpenter to that state on extradition process. The defendant sheriff first stated that he held Carpenter by virtue of a commitment from the municipal court of the city of Portland charging him with being a fugitive from the justice of the state of California. He afterwards amended his return to show that he had delivered the custody of Carpenter to Lord as agent of the state of California. The latter alleges that he holds the prisoner under an executive warrant issued by the Governor of Oregon, dated November 16, 1914, directing his arrest and delivery into the custody of Lord as such agent, to be transported to the state of California. He further

says that he holds Carpenter by virtue of a warrant issued out of the police court of San Francisco, Cal., commanding his arrest for the crime of forgery, pending against him in that court. These returns are controverted in material particulars by the reply of the petitioner, which, among other things, avers that on November 5, 1914, Carpenter was duly and regularly convicted in the circuit court for Multnomah county, Or., of the crime of obtaining money under false pretenses, and that in pursuance of such conviction it was ordered and adjudged by said circuit court as follows:

"That said defendant, E. H. Carpenter, be imprisoned in the Oregon State Penitentiary for an indeterminate period of not less than one year nor more than five years. Defendant making application for parole, and the court consenting thereto: It is ordered that said defendant be allowed to go on parole, on condition that he will not leave the state of Oregon, and that he will not violate the laws of the state of Oregon, or any state or municipality in which he may live, and further that he will report by letter at least once a month to Judge Morrow."

The petitioner further states that her husband is now in custody in the state of Oregon upon said judgment, that the same is still in full force and effect, and that he has never been discharged therefrom. The defendant Lord demurred to this reply, on the ground that it did not state facts sufficient to constitute a defense to his return. The demurrer was sustained, and, the petitioner having refused to move or plead further, it was ordered that her prayer for the discharge of Carpenter be denied, the writ dismissed, and that he be remanded to the custody of the defendant Lord, to be transported to the state of California. The petitioner appealed.

J. J. Fitzgerald, of Portland (Logan & Smith and J. P. Hannon, all of Portland, on the brief), for appellant. George Mowry, of Portland (Walter H. Evans, Dist. Atty., and Arthur A. Murphy, both of Portland, on the brief), for respondents.

BURNETT, J. (after stating the facts as above). The scope of this opinion will be limited to the consideration of the value to be given to the judgment of the circuit court of Multnomah county convicting and sentencing the defendant Carpenter to imprisonment in the penitentiary and paroling him. It is said in section 753, L. O. L.:

"The effect of a judgment, decree, or final order in an action, suit, or proceeding before a court or a judge thereof of this state or of the United States, having jurisdiction to pronounce the same, is as follows:

"1. In case of a judgment, decree, or order against a specific thing, or in respect to the probate of a will or the administration of the estate of a deceased person, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment, decree, or order is conclusive upon the title to the thing, the will or administration, or the condition or relation of the person. * * *

The following sections of the same compilation are also here set down:

Section 1873: "A person charged in any state or territory of the United States with treason, felony, or other crime, who shall flee from justice and be found in this state, must, on demand of the executive authority of the state or territory from which he fled, be delivered up by the Governor of this state, to be removed to the state or territory making the demand."

Section 1874: "When the person demanded is in custody in this state, either upon a criminal charge, an indictment for a crime, or a judgment upon a conviction thereof, he cannot be delivered up until he is legally discharged from such custody; but if he be in custody upon civil process only, the governor may deliver him up or not before the termination of such custody, as he may deem most conducive to the public good."

[1, 2] At the outset, the warrant issued by the municipal court of the city of San Francisco may be laid aside without further consideration, because it is universally held that no process of any state court has any effect or efficiency beyond the boundaries of the state under whose laws it was issued. It is well settled that there is no power to compel the executive of any state to surrender an alleged fugitive from justice. The legislative branch of the government of this state has gone further in limiting the authority of the executive in such matters by the precept in section 1874 that, if the demanded person is in custody in this state upon a judgment of conviction of crime, he cannot be delivered up until he is legally discharged therefrom. This is mandatory language, and completely removes any discretion which the executive might otherwise exercise in such a case.

It is contended, however, that this cannot be urged by or on behalf of the petitioner. In support of this contention we are cited to the following cases: *Ex parte Marrin* (D. C.) 164 Fed. 631; *In re Fox* (D. C.) 51 Fed. 427; *People v. Hagan*, 34 Misc. Rep. 85, 69 N. Y. Supp. 475; *Cozart v. Wolf* (Ind.) 112 N. E. 241; *Mackin v. People* (Ill.) 8 N. E. 178. In all those decisions, without exception, the prisoner who sought relief by habeas corpus was at large on bail at the time he was taken into the custody from which he sought to escape. For instance, in the *Marrin* Case, he had been convicted in the United States District Court for the Eastern District of Pennsylvania for a violation of the postal laws, and had been admitted to bail pending appeal. While he was thus at large he went into the state of New York, and was there apprehended under state process to answer indictments pending in the courts of that state. He sought relief from the custody of the state of New York by habeas corpus issued by the United States court of the Eastern district of New York. As appears by the report of the case, it turned upon section 753 of the Revised Statutes of the United States (U. S. Comp. St. 1916, § 1281):

"The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof, or is in custody for an act done or omitted in pursuance of a law

of the United States, or of an order, process, or decree of a court or judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States."

The court determined, in concluding the discussion in the case, that:

"Frank C. Marrin, therefore, does not seem to be held contrary to any law of the United States, nor in violation of any of his constitutional rights, and the writ of habeas corpus must be dismissed."

In the course of the opinion, however, the court likewise said:

"It has also become well settled that if a party is on trial or in duress—that is, in actual custody—under the authority of a state court, no other state court, and no United States court, should, except in an urgent case, take the defendant from that custody, prior to an actual release or relinquishment of the right to the custody on the part of the court before which the matter is pending."

The principle underlying all the cases last above cited is that, when an individual is allowed to go on bail pending a charge against him, the court admitting him to bail has released him from its authority for the time being, which, for the purpose of being answerable to another tribunal, relegates him to his previous situation, making applicable the doctrine that, if a defendant is simultaneously accused in different forums, it does not lie in his mouth to select the charge upon which he will first be tried. Thus far there has been no final adjudication of his status upon which he can rely. The case in hand has passed that stage. A court of this state having original jurisdiction has not only assumed control of Carpenter, but is in fact executing its judgment upon him, and under the very doctrine laid down in the Marrin Case ought not to be disturbed in that exercise of its authority. This is in accord with the rule enunciated by Mr. Justice Swayne in *Taylor v. Taintor*, 16 Wall. 366, 370, 21 L. Ed. 287, thus:

"Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that, where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function."

No case has been produced, and it is believed none can be cited, where a prisoner has been taken from a state where he is actually serving sentence under a valid judgment of a court of that jurisdiction.

[3] The defendant urges that the prisoner must be actually and not constructively in custody, to defeat his arrest and transportation upon an extradition warrant. As above stated, the cases cited in support of this argument are those where the individual was at large on bail, and hence manifestly not in custody. It remains to consider whether Carpenter is in custody within the meaning of section 1874, L. O. L. It is provided in sub-

stance in section 1586, L. O. L., as amended by the act of February 18, 1911 (Laws 1911, p. 152), that when a person is convicted of felony, and sentenced for not to exceed ten years' imprisonment in the penitentiary, and sentence has been pronounced, the court may in its discretion parole him, and permit him to go and remain at large under the supervision and subject always to the order of the court as it may deem best until the parole shall be terminated. It is provided by section 1587, L. O. L., that the order of parole shall require, among other things, that the defendant shall report to the court his whereabouts, with such further and additional information as it may desire or demand. Section 1588, L. O. L., empowers the court to revoke the sentence, with or without notice to the prisoner, in case he fails to observe all the conditions of his parole and the judicial order. In construing this statute in *State v. Goddard*, 69 Or. 73, 133 Pac. 90, 138 Pac. 243, Ann. Cas. 1916A, 146, Mr. Chief Justice McBride, speaking of a similar situation, said:

"It was made a part of the judgment, and its conditions in themselves constitute a semi-imprisonment. The defendant may not leave the jurisdiction of the court; he must report his whereabouts to the judge every month; he must submit to the judgment of the court as to his conduct; and he must obey strictly every municipal ordinance of any town in which he resides, and all these under penalty of having his parole revoked and being imprisoned for 20 years in case he violates a single one of the conditions. All these conditions constitute a very serious abridgment of the liberty of a citizen."

In *Drinkall v. Spiegel*, 68 Conn. 441, 36 Atl. 830, 36 L. R. A. 486, the court discussed the effect of a parole and said:

"When the plaintiff was liberated from confinement within the reformatory and found himself at large in the state of New York, he was in effect within the prison liberties. But it is the settled doctrine on this subject that the liberties of the prison is an extension or enlargement of the walls of the prison. A person, therefore, is in prison, in legal contemplation, when within the liberties of the prison. An escape from the liberties is an escape from the prison."

Hughes v. Pfanz, 138 Fed. 980, 71 C. C. A. 234, was a case where the petitioner had been convicted in Indiana of a felony and had been paroled under a statute quite similar to the Oregon enactment. He departed from Indiana and went to Kentucky, where he was arrested in extradition proceedings instituted for the purpose of returning him to the former state to serve the remainder of his sentence already pronounced and upon which he had been paroled. It was held in effect that he had escaped from custody by leaving the state of Indiana in violation of his parole. Under such circumstances the convicted defendant is not a free agent to go as he pleases, like he would if he had been admitted to bail. He is under the immediate restraint of the court and in its custody for all practical purposes. He is enduring compulsory expiation of an offense. In *State ex*

rel. v. Bush, 136 Tenn. 478, 190 S. W. 453, the petitioner was convicted of an assault with intent to commit murder and was sentenced to the penitentiary on that account. At the same term he was also convicted of the charge of carrying a pistol, for which he was condemned to confinement in the county workhouse for a certain period. He was imprisoned in the penitentiary for the more serious offense, and was afterwards paroled, whereupon the defendant, who was sheriff, arrested him and sought to incarcerate him in the county workhouse on the lesser charge. He was released on habeas corpus, on the ground that he was still in custody under the first conviction mentioned, and could not be subjected to the workhouse imprisonment.

[4] Again, we remember that the government of this state is divided into three departments, the legislative, the executive, and the judicial, and that neither of these has any authority to interfere with the exercise of the functions of either of the others. Specifically, the executive has no right to override or annul the action of the circuit court, or to interfere with it in the execution of its own judgment. It is true that the Governor may pardon an offender by virtue of his constitutional power in that behalf, but even that is not effective, unless it is accepted by the prisoner to whom the pardon is offered. As said by Mr. Chief Justice Marshall in *U. S. v. Wilson*, 7 Pet. 150, 8 L. Ed. 640:

"A pardon is a deed, to the validity of which, delivery is essential, and delivery is not complete, without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him."

The doctrine of this case has never been disturbed by any ruling to which our attention has been directed. See, also, *In re De Puy*, 3 Ben. 307, Fed. Cas. No. 3,814; *Michael v. State*, 40 Ala. 361; *Ex parte Powell*, 73 Ala. 517, 49 Am. Rep. 71; *Redd v. State*, 65 Ark. 475, 47 S. W. 119; *Grubb v. Bullock*, 44 Ga. 379; *People v. Potter*, 1 Park. Cr. (N. Y.) 51; *Ex parte Lockhart*, 1 Disney (Ohio) 105, 108.

Carpenter's legal condition has been fixed by the judgment of the Multnomah circuit court. That adjudication is declared by section 756, L. O. L., to be conclusive. It restrains the state as well as Carpenter. He is entitled to enjoy its privileges and protection, as well as to sustain its burdens, and no power resides in the executive to deprive him thereof. He is not taking advantage of his own wrong, as the defendants urge. He is relying upon a judicial determination of his condition conclusive alike upon the state and its officers, of whatever grade, as well as upon himself. To hold otherwise would be to say that the Governor may override the decisions of the courts and interfere with their administration of justice, without even re-

sorting to the device of declaring martial law. To deny the prisoner, or one petitioning for him in habeas corpus, the right to urge this, would be to deny him the equal protection of the law. It would withhold from him the advantages of the judgment in execution of which he is now held. It would be like saying to him, "You are bound by this decision of the court, but the other party to it and its officers may ignore it." These principles are crystallized in the statute, declaring that the person demanded cannot be delivered up until he is legally discharged from the custody of the court under which he is serving sentence. In short, the executive warrant of extradition was issued, not only without authority of law, but also in disregard of law, and is consequently void. Being void, it constitutes no protection or sanction to the defendants, or either of them. Under it they have no right whatever to control the movements of the prisoner.

For these reasons the judgment of the circuit court is reversed, and the cause remanded, with directions to that tribunal to discharge the prisoner from the custody of the defendants.

MCCAMANT, J. (dissenting). I think that Carpenter was not in custody, within the meaning of the word as used in section 1874, L. O. L. Under the parole statute (Session Laws 1911, p. 152), a defendant to whom a parole is granted is permitted "to go and remain at large under the supervision of the court." The question involved in *State v. Goddard*, 69 Or. 73, 133 Pac. 90, 138 Pac. 243, Ann. Cas. 1916A, 146, was whether a defendant, convicted and paroled, was entitled to appeal from the judgment of conviction. In the discussion of this question the court used the language quoted in the majority opinion. The case does not hold that a party at large on parole is in custody. Section 1874, L. O. L., was enacted in 1864. The first parole statute in this state was the act of 1905 (Laws 1905, p. 306). The legislative assembly of 1864 could not foresee this later legislation, and the word "custody," as used in the act of 1864, can only have referred to imprisonment. In *Beard v. State*, 79 Ark. 293, 95 S. W. 995, 97 S. W. 667, 9 Ann. Cas. 409, the defendant had been convicted at a special term of court. The statute authorizing special terms of court was as follows:

"The judge of any circuit court may at any time hold a special term for the trial of persons confined in jail, by making out a written order to that effect and transmitting it to the clerk, who shall enter the same on the records of the court."

The order providing for such special term directed that it should be held "for the trial of one Govan Beard, now held in custody, charged with a capital offense." The court said:

"The particular question which we have to determine is whether or not the words 'now held in custody charged with a capital offense' necessarily mean that the defendant was confined in jail, for under no other construction can the order be taken as having been in conformity with the statute. It is not essential that the exact words of the statute be used. Words of like import or meaning are sufficient. We think that the words used necessarily mean that the defendant was confined in jail."

It is held that a party out on bail is not in custody. *Cozart v. Wolf* (Ind.) 112 N. E. 241; *Spring v. Dahlman*, 34 Neb. 692, 52 N. W. 567. Section 1874, L. O. L., if interpreted in accordance with the natural meaning of its language, has no application to this case.

I am also of the opinion that petitioner is in no position to raise the question determined in her favor by the majority of the court. She speaks on behalf of her husband, who has been convicted of crime against the laws of this state, and claims for him exemption from extradition because he has not yet paid the penalty due from him to the state of Oregon. Section 1874, L. O. L., is to be interpreted in the light of the object which the Legislature had in view in its enactment. Endlich on the Interpretation of Statutes, § 73. In my opinion, the act was passed to guide the chief executive of the state in the performance of his duties, not to afford immunity to those who have violated the laws of other states, on the ground that they have also violated the laws of this state. If this were a controversy between the authorities of this state and those of the state of California, each contending for the possession of the prisoner, the Oregon authorities would be entitled to rely on this statute. To hold that the prisoner is entitled to urge this contention is to endow him with privilege through his own wrong. It leads to the conclusion, in my opinion untenable, that a party may successfully resist extradition by violating the laws of the jurisdiction in which he is found and rendering himself subject to punishment through its criminal processes. Under the rule announced, a defendant, charged with murder in California or Idaho, by committing a less serious offense in Oregon, might escape prosecution for the murder until the witnesses against him had scattered or died. He might do this without incurring the inconvenience of imprisonment, if he could secure a parole from the trial judge.

Unless driven to the conclusion by imperative necessity, this court should not announce the rule that violators of the laws of this state may claim exemption from extradition, while all others are subject thereto. The statute should be construed as one enacted to protect the state in its right to demand the penalty due for the violation of its laws. We are familiar with many statutes which are enforced only at the instance of

the state. There are constitutional and statutory provisions in several of the states forbidding alien ownership of lands. It is held in these jurisdictions that a deed running to an alien passes title, subject only to be defeated by direct action of the state. *American Mortgage Company v. Tennille*, 87 Ga. 28, 13 S. E. 158, 12 L. R. A. 529, 530; *Williams v. Bennett*, 1 Tex. Civ. App. 498, 20 S. W. 856, 858-859; *Abrams v. State*, 45 Wash. 327, 88 Pac. 327, 9 L. R. A. (N. S.) 186, 190, 122 Am. St. Rep. 914, 13 Ann. Cas. 527.

In this state the statutes providing the procedure for the organization of corporations are mandatory; but it is held that, when the state acquiesces, a failure to comply with these requirements will not prevent the organization of a de facto corporation. *Brown v. Webb*, 60 Or. 526, 530, 120 Pac. 387, Ann. Cas. 1914A, 148; *Tyree v. Crystal Company*, 64 Or. 251, 254, 126 Pac. 605. Section 6717, L. O. L., provides for the dissolution of corporations which fail to file the reports and pay the fees required by law. In *Dowd v. American Surety Company*, 69 Or. 418, 424, 139 Pac. 112, it is held that the surety of such delinquent corporation cannot plead such dissolution as a defense to an action on its obligation.

As I read the authorities, they are all to the effect that this prisoner is in no position to raise the question which is determined in his favor by the majority opinion. In *People v. Hagan*, 34 Misc. Rep. 85, 69 N. Y. Supp. 475, the relator had been convicted of grand larceny, and had appealed from the judgment of conviction. He was admitted to bail pending the determination of his appeal. Under these circumstances the Governor of New York honored a requisition from the Governor of New Jersey for his rendition to that state to answer an indictment found against him there. In that case, as in this case, a judgment of conviction had been entered in the asylum state; while an appeal had been taken, the presumption was that there was no error, and that the judgment was correct. In that case, as in this, the party whose extradition was sought was at large; he had not paid the penalty due from him to the asylum state. The court said:

"That the state need not surrender, upon requisition of another state, a prisoner held in actual custody, either under civil process to secure the payment of a debt, or under criminal process to answer or suffer punishment for a crime, seems to be well settled. * * * The fact that in this particular case the relator, although under conviction, is actually at large on bail, does not, in my opinion, affect the application of the rule. He still owes to this state a debt of imprisonment as a punishment for the crime against the laws of this state of which he has been convicted. He is still theoretically in the grasp and custody of the law. * * * That, however, is not the precise question presented upon this application, because it is the person charged with crime, and not the state authorities, who insist that he must be kept here to answer for the crime committed in this state, and that he cannot be sent to New Jersey to answer

for the crime committed there. I do not think that he can be heard to make this objection to his extradition. If he has committed offenses against the laws of two states, it is not for him to choose in which state he shall be held to answer. Naturally he would always choose that in which the punishment would be the lighter, or the chances of conviction the least. In *Roberts v. Reilly*, 116 U. S. 80 [6 Sup. Ct. 291, 29 L. Ed. 544], this very question arose. Roberts, a fugitive from the state of New York, was arrested in Georgia upon an extradition warrant issued by the Governor of that state. He averred that the acts with which he was charged constituted a crime against the state of Georgia, as well as against the state of New York, and therefore that he should be held to answer to the laws of Georgia before he was sent out of that state to answer to the laws of another state. This contention was overruled by the Supreme Court of the United States, which held that, even in such a case, it was competent for the state of Georgia to waive the exercise of its jurisdiction by surrendering the fugitive to answer to the laws of New York. In the very nature of things, it is desirable that the power should rest somewhere in the state to refuse to give up a prisoner until he has satisfied the claims of the state against him, or to waive the enforcement of those claims and surrender him to another state for the satisfaction of its laws. If such power did not exist, a criminal might easily evade, or postpone, his just punishment for the gravest of crimes committed in one state by the commission of a crime of much less magnitude in another."

In substantial accord with the above case are *Ex parte Marrin* (D. C.) 164 Fed. 631, 637; *In re Fox* (D. C.) 51 Fed. 427, 430-433; *Cozart v. Wolf* (Ind.) 112 N. E. 241; *Mackin v. People* (Ill.) 8 N. E. 178, 181. It is admitted that none of these cases present all the features of the case at bar, but they all announce the rule that a defendant, charged with or convicted of crime, cannot avail himself of the penalty due from him as a ground on which to resist extradition. I am of the opinion that in departing from this rule we are establishing a precedent which will interfere with the speedy and orderly administration of justice.

All of the contentions advanced by petitioner are, in my opinion, untenable, and I think that the judgment should be affirmed.

Mr. Justice MOORE concurs in this dissent.

(88 Or. 1)

STATE v. HYDE et al.

(Supreme Court of Oregon. March 19, 1918.)

1. WOODS AND FORESTS — FOREST RESERVATIONS — INDEMNITY AND LIEU LANDS.

Act Cong. March 3, 1905, c. 1495, 33 Stat. 1264, repealing Act Cong. June 4, 1897, c. 2, 30 Stat. 36, providing in cases where a tract of land covered by an imperfect bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner may relinquish it to the government and select in lieu thereof a tract of vacant public land open to settlement, but providing that the selections heretofore made in lieu of lands relinquished may be perfected as though the act had not been passed, does not, where title to base land relinquished in lieu of other lands to be selected from the public domain was acquired from the state by fraud, vest such title in the

United States, so as to preclude an attack on the title to base land by the state, where the United States had not accepted the conveyance of the base lands.

2. PUBLIC LANDS — 121 — SELECTION — EFFECT.

Under the regulations of the Interior Department, a selector of unsurveyed public lands acquires an inchoate right thereto which on survey and compliance with the rules entitles him to patent; hence title to base lands included in a forest reserve and relinquished in lieu of other lands is not subject to attack on the theory that there could be no relinquishment because the lieu lands were unsurveyed.

3. WOODS AND FORESTS — 7 — NATIONAL FORESTS — SELECTION OF LIEU LANDS.

As the administration of the forest reserve act is vested in the Land Department, the question whether a relinquishment of lands incorporated in a forest reserve, the owner selecting other lands in lieu thereof, is sufficiently in compliance with the rules to be accepted is solely for the Land Department.

In Banc. Appeal from Circuit Court, Crook County; T. E. J. Duffy, Judge.

On petitions for rehearing and motion for modification. Motion sustained in part, and rehearing denied.

For former opinion, see 169 Pac. 757.

A. C. Shaw, of Portland, for appellants. George M. Brown, Atty. Gen., and J. O. Bailey, Asst. Atty. Gen., for the State.

MCCAMANT, J. The defendants have presented an able argument in support of their petition for a rehearing. It is earnestly contended that we have misapprehended the effect of the evidence on the question of laches. There is room for a difference of opinion as to the date when the state became chargeable with notice of the frauds upon which this suit is based, but we are satisfied upon the whole case of the correctness of our conclusions in this behalf as stated in the former opinion. A re-examination of the evidence to which our attention is directed confirms our conclusions that C. W. Clarke was not an innocent purchaser.

[1] Defendants complain that we have not noticed the act of Congress approved March 3, 1905 (33 Stat. 1264, c. 1495), repealing the legislation under which the base lands were relinquished. This act is as follows:

"That the Acts of June fourth, eighteen hundred and ninety-seven, June sixth, nineteen hundred, and March third, nineteen hundred and one, are hereby repealed so far as they provide for the relinquishment, selection, and patenting of lands in lieu of tracts covered by an unperfected bona fide claim or patent within a forest reserve, but the validity of contracts entered into by the Secretary of the Interior prior to the passage of this act shall not be impaired: Provided, that selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issue therefor the same as though this act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid another selection for a like quantity of land may be made in lieu thereof."

The conclusions announced in our former opinion restore to plaintiff the base lands

which were acquired fraudulently, which were conveyed by guilty parties to the United States and which have never been accepted by the General Land Office. We find no provision in the above statute which amounts to an acceptance of the deeds of relinquishment by which these properties were conveyed. In the absence of acceptance by the United States no title passed by these deeds. We showed in our former opinion that the United States will not knowingly accept a conveyance of land from a party whose title is acquired by fraud. We should not lightly impute to Congress an intention to depart from this salutary rule. Until the conveyance of the base lands has been accepted by the United States, there can be no contract entitled to enforcement under the repealing statute.

It is argued in support of plaintiff's petition for a rehearing that title to the base lands did not pass until the selections were approved for patent. This contention is out of harmony with the doctrine of *Daniels v. Wagner*, 237 U. S. 547, 35 Sup. Ct. 740, 59 L. Ed. 1102, L. R. A. 1916A, 1116, Ann. Cas. 1917A, 40, and *Sawyer v. Gray*, 237 U. S. 674, 35 Sup. Ct. 842, 59 L. Ed. 1170, which seem to us to overrule *Clearwater Co. v. Shoshone County (C. C.)* 155 Fed. 612, on which plaintiff largely relies.

[2] Our attention is called to the fact that many of the selections cover unsurveyed lands, and that under no circumstances can lands be patented prior to survey. It is argued that as the General Land Office could not issue patents to these selected lands at the date when they were selected, it was without jurisdiction to accept deeds to the corresponding base lands. Under the regulations of the Interior Department the selector of unsurveyed lands acquired an inchoate right thereto which ripened into a patent on the survey of the lands and on compliance by the selector with the rules applicable to such selections. 28 Land Dec. 523; 29 Land Dec. 393; *Daniels v. Northern Pacific Ry. Co.*, 43 Land Dec. 381, 384; *Clarke v. Halverson*, 45 Land Dec. 54, 55. This was a valuable right; it was not based on settlement or purchase. Its only foundation was the conveyance of the relinquished lands. The existence of this right is inconsistent with the assumption that the selector retained title to the base lands. On the acceptance of the conveyance of these lands by the General Land Office title thereto passed to the United States. It is true that the selector's title to the selected lands might fail through noncompliance with the regulations, and that it might then become the duty of the United States to reconvey the base lands, but this possibility does not militate against the correctness of the above conclusions.

[3] Plaintiff calls attention to certain cases in which the data filed in the General Land Office were insufficient to constitute compliance with the regulations, and it is contended

that in such cases the Commissioner was without jurisdiction to accept the deeds of relinquishment and approve the corresponding selections. In this branch of their contention counsel for plaintiff lose sight of the distinction between error and lack of jurisdiction. It may be that the letters of approval criticized by counsel were based on an insufficient showing, but in each case there was a deed of relinquishment and a corresponding selection of government land. In no case was the deed of relinquishment delivered for the creation of a floating right of selection. Plaintiff's authorities sustain its contention that this latter practice is unauthorized by the Act of Congress of June 4, 1897; *Roughton v. Knight*, 219 U. S. 537, 547, 31 Sup. Ct. 297, 55 L. Ed. 326; *Western Lumber Co. v. Willis*, 160 Fed. 27, 31, 87 C. C. A. 183. In *Cosmos Co. v. Gray Eagle Co.*, 190 U. S. 301, 308, 309, 23 Sup. Ct. 692, 696 (47 L. Ed. 1064), Mr. Justice Peckham says:

"There can be, as we think, no doubt that the general administration of the forest reserve act, and also the determination of the various questions which may arise thereunder before the issuing of any patent for the selected lands, are vested in the Land Department."

On the delivery of the deeds of relinquishment and the filing of applications to select equivalent acreage, the jurisdiction of the General Land Office attached. The tribunal which formulated the rules of procedure had authority to determine whether relinquishments and selections conformed thereto. When the General Land Office approved the relinquishments, title to the base lands passed, and the title cannot be divested by the decree of a court rendered in a cause to which the United States is not a party.

A few errors have been pointed out in the description and tabulation of properties listed in the supplements to the previous opinion. These errors will be corrected, and copies of the supplements in their final form will be furnished the parties.

The petitions for rehearing are denied.

(88 Or. 66)

STATE v. HYDE et al.

(Supreme Court of Oregon. March 19, 1918.)

In Banc. Appeal from Circuit Court, Hood River County; W. L. Bradshaw, Judge.

On petition for rehearing and motion for modification. Former opinion modified, and, as modified, affirmed.

For former opinion, see 169 Pac. 775.

A. C. Shaw, of Portland, for appellants. George M. Brown, Atty. Gen., and J. O. Bailey, Asst. Atty. Gen., for the State.

McCAMANT, J. Counsel have pointed out a number of errors in the former opinion for which the writer is responsible. The suit involved the title to section 16, township 1 south, range 10 east. Applications to purchase this section were made by Harry Davis and Willie Welch. The evidence shows that they were dummy applicants, receiving a dollar apiece for signing such papers as were presented to them by Hyde's agent. They had no thought of purchasing on their own behalf. The evidence fails

to show that this land has ever been used as a base for the selection of other property on the public domain. Plaintiff is entitled to have this property restored to it.

In correction of this and other errors, the decree should provide for the dismissal of this suit without prejudice as to the southeast quarter of section 36, township 1 south, range 8 east, and the dismissal with prejudice as to the east half of section 36, township 2 south, range 10 east. The state deeds should be canceled, and plaintiff adjudged to be the owner of the north half of section 36, township 1 south, range 10 east; section 16, township 1 south, range 10 east; the west half of section 36, township 2 south, range 10 east, and the southwest quarter, the northwest quarter of the southeast quarter and the south half of the southeast quarter of section 36, township 1 south, range 10 east.

The former opinion, when modified as above, is adhered to.

(88 Or. 144)

**MORTON et al. v. HOOD RIVER
COUNTY et al.**

(Supreme Court of Oregon. March 19, 1918.)

1. HIGHWAYS §30(4)—ESTABLISHMENT—NOTICE—BEGINNING AND TERMINAL POINTS.

Notice of intention to present petition for establishment of a county road states definitely the beginning and terminal points as required by L. O. L. § 6279, it giving a definite government corner as the terminus, and it being easy by retracing the description, given by courses and distances, to arrive at the starting point.

2. EVIDENCE §82—PRESUMPTION—ACTS OF COURT.

While the county court, in acting on a petition for establishment of a county road, is one of special and limited jurisdiction, yet when that jurisdiction is obtained the same applies to its acts as to a court of general and superior jurisdiction.

3. HIGHWAYS §29(1)—ESTABLISHMENT—COUNTY COURT—JURISDICTION.

The county court obtains jurisdiction in a proceeding to establish a county road, on the filing of the petition and proof of posting of the notices required by law.

4. EMINENT DOMAIN §240—ESTABLISHMENT OF COUNTY ROAD—DAMAGES—PRESENTING CLAIMS.

After the county court obtains jurisdiction in a proceeding to establish a county road, persons claiming to be landowners along the route must seasonably present their claims for damages, stating the facts as to their ownership.

5. EMINENT DOMAIN §240—ESTABLISHMENT OF COUNTY ROAD—CLAIMS TO LANDS AND DAMAGES—ROAD VIEWERS.

It is no part of the road viewers' duties in proceeding to establish a county road to settle or even investigate conflicting claims to the lands through which the road passes, but they in a general way assess the damages to the tracts, and the owners, being constructively in court by reason of the posting of the notices of the application, should file their claim for damages in the county court, or by appeal to the circuit court litigate the question of ownership, as well as of damages.

6. HIGHWAYS §60—COUNTY ROAD—ESTABLISHMENT—WRIT OF REVIEW.

Persons have no right to a writ of review of proceeding to establish a county road, on the ground that, not being parties to the record of the road proceeding, they had no right of appeal; but having legal notice of such proceeding, they were required to make themselves parties to the record.

7. HIGHWAYS §30(6)—COUNTY ROAD—PROCEEDING IN REM—NOTICE.

A proceeding to lay out a county road is in its essence a proceeding in rem, except that the application may be defeated by a remonstrance pursuant to L. O. L. § 6288, so that the notice is process to the whole world.

8. HIGHWAYS §42—COUNTY ROAD—PROCEEDING TO ESTABLISH—NECESSITY.

The county court is the final judge of the necessity or utility of a proposed county road, and of the right of the county to condemn and appropriate lands therefor.

9. HIGHWAYS §55—PROCEEDING TO ESTABLISH—MINOR OWNERS.

That owners of land through which a county road was established on sufficient notice were minors, and did not make themselves parties and present their claims for damages, did not make the proceeding void.

10. PLEADING §8(6)—LEGAL CONCLUSION.

Allegation of petition for writ of review of proceedings to establish a county road, that the board of county road viewers did not mark the trees on the proposed road "in accordance with the statute," is a mere legal conclusion.

11. HIGHWAYS §50—COUNTY ROAD—ESTABLISHMENT—MARKING TREES.

Compliance with the requirement of the statute that the board of county road viewers mark the trees on the proposed road is not jurisdictional in a proceeding to establish a county road.

12. PLEADING §8(6)—LEGAL CONCLUSIONS.

Allegation of petition for writ of review of proceedings to establish a county road, that the county court met on a certain day, without notice to plaintiffs, and out of the regular order provided by law, and illegally proceeded to order said road laid out, opened, and established, to the injury of plaintiffs, is with the exception of the statement that the court met on such day, without notice to plaintiffs, nothing but a series of legal conclusions.

13. HIGHWAYS §55—COUNTY ROAD—PROCEEDING TO ESTABLISH—TIME.

Proceedings to establish a county road were not invalidated by the county court, at the same term, ordering the road viewed, receiving the viewers' report, and making the order of establishment; no statute being violated.

Department 2. Appeal from Circuit Court, Hood River County; Fred W. Wilson, Judge.

Petition by J. W. Morton and others against Hood River County and others for writ of review in proceeding to establish county road. From judgment quashing the writ, plaintiffs appeal. Affirmed.

J. W. Morton, of Hood River, for appellants. A. J. Derby, Dist. Atty., of Hood River, for respondents.

McBRIDE, C. J. [1] This is a proceeding to review the action of the county court in the location and laying out of a county road, which, it is alleged in the petition, was attempted without the court having obtained jurisdiction for that purpose. It is claimed first that the notice of intention to present the petition for the establishment of the road was insufficient, by reason of the fact that the beginning and terminal points of the road are not definitely stated, as required by section 6279, L. O. L. The description began as follows:

"Beginning at [state intermediate points] and terminating at a point on the east line of Edgar Locke property, 1734+ north of the center of section 32, township 3 north, range 10 east of the Willamette meridian. Said point being designated as Sta. 1006:30 of the Columbia river highway survey; thence easterly along said survey as follows: N. 87 deg. 47 min. E. to station 1012:57.6," giving calls, directions, distances, curves and stations, and concluding as follows: "Thence 50 deg. 33 min. E. to Sta. 1081:75, point, of ending 845 ft. west of Sec. Cor. common to Secs. 28, 27, 33 and 34, township 3 N. range 10 E. W. M., said road being 60 feet wide."

Taken in its entirety this description is absolutely definite and cannot be mistaken. The notice was probably prepared upon one of the blank forms furnished by the counties of the state for the convenience of petitioners, and there is some want of care manifested in filling out the blanks, but the end of the survey is tied to a definite government corner, and by retracing the description it is easy to arrive at the starting point, which is thereby made definite. That such a description is sufficient is settled in this state by *Nelson v. Yamhill County*, 41 Or. 560, 69 Pac. 678. There is no claim that the petition did not follow the notice; in fact it is shown that they coincide as to the description.

[2] While the county court, when acting upon a petition for the establishment of a county road, is a court of special and limited jurisdiction, yet when that jurisdiction is once obtained the same presumption applies to its acts as to those of a court of general and superior jurisdiction. 11 Cyc. 693.

[3-5] The court obtained jurisdiction by the filing of the petition and proof of posting the notices required by law. Thereafter it was the duty of the appellants, who claim to be landholders along the route of the proposed road, to have seasonably presented their claim for damages, stating the facts as to their ownership. It is no part of the road viewers' duties to settle or even investigate conflicting claims to the lands through which the road passes. In a general way they assess the damages to the tracts, and the owners, being constructively in court by reason of the posting of the notices of the application, should file their claim for damages in the county court, or by appeal to the circuit court litigate the question of ownership, as well as the amount of damages.

[6-8] It is claimed that the petitioners in the writ were not parties to the record, and therefore had no right of appeal, but it was their duty, having legal notice of the proceeding, to make themselves parties to the record, and if they have failed so to do, this of itself does not give them a right to review the proceedings. A proceeding to lay out a county road is in its essence a proceeding in rem, except that the application may be defeated by a remonstrance, as provided in section 6288, L. O. L. The necessity or utility of the road, or the right of the county to condemn and appropriate lands for that purpose,

cannot be contested in the courts, the county court being the final judge of these matters; the object of the notice being: (1) To furnish objectors an opportunity to remonstrate; and (2) to give owners of land an opportunity to present their claims for damages. Being a proceeding quasi in rem, the notice was process against the whole world, and the order appropriating the land was absolutely conclusive. This being so, the order directing the road to be opened is unassailable on review.

[9] It is alleged in the petition for the writ that two of the petitioners were minors at the time the order was made directing the establishment of the road, and it is contended with much plausibility that they have not had their day in court as to the modicum of their damages. As before shown, the notice complied with the requirements of the statute, and the taking of the property was therefore lawful. The fact that some of the petitioners were minors did not render the proceeding void. If, by reason of their minority and lack of guardianship, they failed to present their claim for damages, it may be possible that they still have that right by an independent action to recover such compensation. The authorities on this subject are collated with great care and industry in 28 L. R. A. (N. S.) 968, in a note to *Boise Valley Const. Co. v. Kroeger*, 17 Idaho, 384, 105 Pac. 1070. We express no opinion as to the efficacy of such a remedy here, as the matter is not before us.

[10, 11] It is also urged that the proceeding is void because "the board of county road viewers did not mark the trees on said proposed road in accordance with the requirements of the statutes of the state of Oregon." The allegation states a mere legal conclusion. It does not state that the trees were not marked in some way, but merely that they were not marked in "accordance with the statute." Waiving this objection to the pleading, we are of the opinion that this requirement in this respect is not jurisdictional, and no substantial right of plaintiffs has been invaded by such omission.

[12] Another alleged error is "that said county court met on the 15th day of March, 1917, without notice to said plaintiffs, and out of the regular order provided by law and illegally proceeded to order said county road laid out, opened, and established, to the injury of said plaintiffs." With the exception of the statement that the court met on the 15th day of March without notice to plaintiffs, this allegation contains nothing but a series of legal conclusions. Why a meeting of the court on the 15th day of March, or even the historic 17th day of March, should be "out of the regular order provided by law" is not disclosed.

[13] It is complained that the court ordered the road viewed, received the report of the viewers, and made the order establishing the road at the same term, and that

thereby the rights of petitioners in this writ were prejudiced. We find no provision of the statute requiring the report to lie over until the next term of the court, and while the proceedings seem to have been carried on with singular and unusual expedition, the law was apparently followed in every particular.

Upon consideration of the whole case, we are of the opinion that the petition states no substantial error in the proceedings, and the judgment of the circuit court is affirmed.

MOORE and BEAN, JJ., concur. McCAMANT, J., concurs in the result.

(88 Or. 594)

In re SHARP.*

SHARP v. MARION COUNTY.

(Supreme Court of Oregon. March 19, 1918.)

1. INFANTS \S 12½, New, vol. 17 Key-No. Series—MOTHERS' PENSIONS—PARTIAL DEPENDENCY.

Under Laws 1913, p. 75, \S 2, as amended by Laws 1915, p. 97, providing that a woman, of certain qualifications, who is herself, and all of whose children are, "wholly" dependent on her labor for support, shall receive from the county \$10 a month for one child and \$7.50 a month for each additional child, and Laws 1913, p. 75, \S 3, providing that if they are "partly" dependent on her labor for support, she shall receive such a sum as added to her other income, other than that derived from her labor shall equal the amount provided by section 2, as amended, they having a home and a small area of land to cultivate, a declaration of partial dependency, with deduction from the full amount, is proper; the object of the act being to provide for their necessities, and they by reason of such property requiring less than they would without it.

2. INFANTS \S 12½, New, vol. 17 Key-No. Series—MOTHERS' PENSIONS—ALLOWANCE—APPEAL.

Where, on application for a mother's pension, the juvenile court held applicant and her children only partly dependent within Laws 1913, p. 75, \S 3, and made an allowance, \$10 less per month than that provided by section 2, as amended, where they are wholly dependent, and on appeal therefrom by her the circuit court made full allowance, complaint cannot be made by her on appeal by the county from the circuit court that the juvenile court's manner of arriving at the amount to be deducted was not proper, though the decree of the circuit court be reversed.

Department 2. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Application by Hattie E. Sharp for a mother's pension. From decree of circuit court, on appeal from juvenile court, the County of Marion appeals. Reversed.

The juvenile court of Marion county made an order allowing the applicant \$15 a month for the support of herself and three children under the age of 16 years, under the provisions of the Mother's Pension Act. Chapter 42, Laws 1913, as amended by chapter 90, Laws 1915. This act is superseded by the Law of 1917 (Laws 1917, p. 501). The plaintiff and her family occupy as a home a small

farm of 12.36 acres, improved with a house and barn. Six acres of this are under cultivation, upon which plaintiff keeps a cow, pig, and some chickens. On account of all this a reduction of \$10 was made in her monthly allowance. The applicant and her three children were declared "partly dependent" under section 3 of the act. Because of the reduction made by the order she appealed to the circuit court. Findings of fact and conclusions of law were there made and a decree rendered allowing her and the three children for their support \$25 a month from the date of the application, November 13, 1915. The county of Marion appeals to this court.

Max Gehlhar, Dist. Atty., of Salem (Jas. G. Heltzel, of Salem, on the brief), for appellant. Frank A. Turner, of Salem, for respondent.

BEAN, J. (after stating the facts as above).

[1] There was no objection by the county to the allowance by the juvenile court of \$15 a month from September 11, 1916. The difference of \$10 a month is involved upon this appeal. Section 2 of the act provides that subject to the other provisions of the act, a woman, mentioned in section 1, who is herself, and all of whose children are, "wholly" dependent upon her labor for support shall receive from the county of their residence the sum of \$10 a month for one child, and \$7.50 a month for each additional child residing with her, not exceeding \$40 a month. Section 3 directs that if such woman and children are "partly" dependent upon her labor for support, she shall receive such a sum per month as added to her other income, other than that derived from her labor, shall equal the amount provided for in section 2. The order made by the juvenile court declaring a partial dependency of the applicant and her young children was in perfect accord with section 3 of the act as to the amount of the pension. The purpose of the act is to provide for the necessities of such mother and children, and certainly when they have a home and a small area of land to cultivate they would require a less amount than though they were without such farm.

[2] It is contended by counsel for claimant that the manner of arriving at the figure to be deducted was not proper; but this is unimportant. There being no appeal by the county from the order of the juvenile court, nor any objection thereto made by the county, that order should not be changed and the same is allowed to stand.

The decree of the circuit court modifying the order of the juvenile court is reversed. Neither party will be allowed costs in either court.

McBRIDE, C. J., and BENSON and McCAMANT, JJ., concur.

(88 Or. 682)

McCARGAR et al. v. MOORE et al.

(Supreme Court of Oregon. March 26, 1918.)

1. APPEAL AND ERROR — 425 — SERVICE OF NOTICE—TIME.

Where a judgment was rendered on December 16, 1915, and entered on December 18th, and notice of appeal was served and filed on February 17, 1916, the notice was not served within 60 days, as required by L. O. L. § 550, subd. 5, as amended by Gen. Laws 1913, p. 617; the time for appeal expiring on February 16, 1916.

2. COURTS — 39 — JURISDICTION—DISMISSAL ON COURT'S OWN MOTION.

Whenever want of jurisdiction appears, it is the duty of the court, at any stage of the proceeding, even on its own motion, to refuse to proceed further.

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by C. A. McCargar, P. C. Bates, and K. V. Lively, copartners doing business under the firm name and style of McCargar, Bates & Lively, against L. M. Moore, doing business as L. M. Moore & Co., and Illinois Surety Company. Judgment for plaintiffs, and defendant the surety company appeals: Appeal dismissed.

Thomas Mannix, of Portland, for appellant. F. S. Senn, of Portland (Senn, Ekwall & Recken, of Portland, on the brief), for respondents.

BEAN, J. Counsel for plaintiff, and respondent filed a motion to dismiss the appeal for want of jurisdiction. A statement of the facts and a memorandum of the former consideration of the motion will be found in 157 Pac. 1107. After a review we see no reason for changing the expression therein recorded as to that part thereof relating to judgment being rendered by consent. Further consideration of the motion was permitted by the former opinion.

[1, 2] An additional question which was not specifically mentioned in the motion to dismiss was urged upon our attention at the argument of the case and is in the brief. Counsel for plaintiff and respondent submit that the notice of appeal was not served and filed within 60 days from the entry of the judgment appealed from, as required by subdivision 5 of section 550, L. O. L., as amended by General Laws of Oregon for 1913, p. 617. The judgment was rendered on December 16, 1915. The same was entered, as we understand the record, on December 18, 1915. The notice of appeal was served and filed on February 17, 1916. Counting from the later date of the judgment entry the time for serving and filing the notice of appeal, in order to give this court jurisdiction to determine the cause, expired on February 16, 1916. It was therefore not served or filed within the time specified by the Code. *Hutchison v. Crandall*, 82 Or. 27, 160 Pac. 124; *Stanfield*

v. Mahon, 82 Or. 300, 161 Pac. 561. Whenever want of jurisdiction appears, it is the duty of the court, at any stage of the proceeding, even on its own motion, to refuse to proceed further. The appeal is therefore dismissed.

McBRIDE, C. J., and MOORE and McCAMANT, JJ., concur.

(88 Or. 310)

WEYGANDT v. BARTLE.*

(Supreme Court of Oregon. March 19, 1918.)

1. APPEAL AND ERROR — 997(2) — NONSUIT—SCOPE OF INQUIRY.

In determining whether nonsuit was properly denied, defendant's evidence as well as that of plaintiff may be considered; and, if defendant's evidence supplies the omission of plaintiff's evidence, the denial of nonsuit will be sustained.

2. MUNICIPAL CORPORATIONS — 706(6) — STREETS—SPEED OF TRAVEL—NEGLIGENCE—EVIDENCE.

Evidence held to present a jury question on the right of a pedestrian, struck by an automobile while crossing the city street, to recover.

3. DAMAGES — 134(1) — EXCESSIVE DAMAGES.

Verdict of \$750 in favor of a pedestrian, struck by an automobile, receiving serious hurts and incapacitated for the position to which he was about to be promoted, was not excessive.

4. APPEAL AND ERROR — 1052(5) — HARMLESS ERROR.

Error, if any, in admitting evidence, in such action, that the injuries so caused rendered him incapable of performing work in the position to which he was about to be promoted, was not prejudicial, since the verdict was not excessive.

5. MUNICIPAL CORPORATIONS — 706(1) — STREET ACCIDENTS — PLEADING—INITIATIVE CHARTER.

Sp. Laws 1903 (Sp. Sess.), p. 97, being the legislative charter of the city of North Bend, authorized the city to regulate the speed of automobiles upon its streets, and therefore, in an action under an ordinance prohibiting speed which endangers life or limb, it was not necessary to plead the initiative charter, since it will not be presumed that the legislative charter has been changed.

6. EVIDENCE — 474(8) — OPINION EVIDENCE—ADMISSIBILITY.

A passenger on the automobile which struck plaintiff, who stated that he afterwards rode in automobiles and observed the speedometers, was competent to say what was the speed of the automobile which hit plaintiff.

7. WITNESSES — 380(5) — IMPEACHMENT — WHAT CONSTITUTES.

It was not impeachment, but mere refreshing of memory, for counsel to ask his own witness whether he had previously stated the speed of an automobile to have been greater than he then said it was, and it was within the discretion of the trial court to permit such form of question in order to refresh his recollection.

8. EVIDENCE — 268 — DECLARATIONS—PERSONAL INJURIES.

In an action for personal injuries when struck by an automobile, declarations of plaintiff on the following day were properly admitted in evidence to show the condition of his health.

9. EVIDENCE — 268 — DECLARATIONS—PERSONAL INJURIES.

A physician or attendant may testify to the injured party's statement as to his symptoms,

ills, and the locality and character of his pain, when made for the purpose of medical advice and treatment, as such statements are made with a view to being acted upon in a matter of grave personal concern, in relation to which the injured party has a strong and direct interest to adhere to the truth.

10. APPEAL AND ERROR \hookrightarrow 882(12)—INVITED ERROR.

In action for injuries when struck by an automobile, defendant's counsel cannot complain of an instruction on contributory negligence of the same purport as the one which he requested, although such defense was not pleaded.

11. APPEAL AND ERROR \hookrightarrow 1033(5)—HARMLESS ERROR.

In action for injuries when struck by automobile, where the defense of contributory negligence was not pleaded, a charge submitting contributory negligence was advantageous to the defendant, and he could not assign it as error.

Department 2. Appeal from Circuit Court, Coos County; G. F. Skipworth, Judge.

Action by L. C. Weygandt against Ira B. Bartle. Judgment for plaintiff, and defendant appeals. Affirmed.

The defendant appeals from a judgment for \$750 damages, based upon a jury verdict. The gist of the complaint is that on December 30, 1914, while the plaintiff was lawfully walking along Railroad avenue, a regularly traveled public highway used by pedestrians in the city of North Bend, Coos county, Or., the defendant carelessly ran his automobile onto him, injuring him; that the defendant at the time was operating his car at a very high and unlawful rate of speed so that he was unable to control and guide it properly, and ran against plaintiff without sounding his horn or giving him any warning; and that defendant was driving at an unsafe rate of speed in excess of 25 miles an hour in violation of an ordinance of the city. The answer denies the averments of the complaint except as therein stated, and asserts in substance that defendant at the time was operating his car in a careful manner, and that plaintiff without any reason carelessly failed to observe his approach and attempted to cross directly from one side of the thoroughfare to the other, and that when he heard the approach of the auto he attempted to retrace his steps and came in contact with it; that, upon observing the plaintiff, defendant immediately turned his machine away from him, cut off the power, and applied the brakes; that the accident was unavoidable as far as he was concerned and was caused by the negligent acts of the plaintiff. The reply put in issue the material portions of the new matter of the answer.

C. F. McKnight, of Marshfield (J. P. Brenn, of North Bend, on the brief), for appellant. John D. Goss, of Marshfield (J. C. Kendall and H. S. Murphy, both of Marshfield, on the brief), for respondent.

BEAN, J. (after stating the facts as above).

[1] The first error assigned is the refusal of

the court to grant defendant's motion for a nonsuit made at the close of plaintiff's evidence. After the denial of the motion, defendant introduced evidence in his own behalf. It is contended by defendant's counsel that according to the case of *Woods v. Wikstrom*, 67 Or. 581, 590, 135 Pac. 192, the testimony on the part of defendant should not be considered in reviewing the ruling as to the nonsuit. In *Trickey v. Clark*, 50 Or. 516, 519, 93 Pac. 457, the rule was announced by Mr. Chief Justice Bean, following the holding in *Bennett v. N. P. Ex. Co.*, 12 Or. 49, 6 Pac. 160, that, in determining questions arising on a motion for a nonsuit, consideration will be given to the entire testimony; that if there is a want of sufficient evidence to be submitted to the jury when plaintiff rests his case, if defendant afterwards supplies the omission, the ruling on the request for a nonsuit will not be disturbed. That doctrine has been adhered to in numerous cases, and is our guide now. *Jennings v. Trummer*, 52 Or. 149, 96 Pac. 874, 23 L. R. A. (N. S.) 164, 132 Am. St. Rep. 680; *Dryden v. Pelton-Armstrong Co.*, 53 Or. 418, 421, 101 Pac. 190; *Crosby v. Portland Ry. Co.*, 53 Or. 496, 502, 100 Pac. 300, 101 Pac. 204; *Taylor v. Taylor*, 54 Or. 560, 568, 103 Pac. 524; *Morrison v. Franck*, 59 Or. 429, 435, 110 Pac. 1090, 117 Pac. 308; *Vanyi v. Portland Flouring Mills Co.*, 63 Or. 520, 534, 128 Pac. 830; *Hofer v. Smith*, 65 Or. 145, 148, 129 Pac. 761; *Patton v. Women of Woodcraft*, 65 Or. 33, 36, 131 Pac. 521; *Caraduc v. Schanen-Blair Co.*, 66 Or. 310, 313, 133 Pac. 636; *Oberstock v. United Rys. Co.*, 68 Or. 197, 204, 137 Pac. 195; *Roundtree v. Mt. Hood R. Co.*, 168 Pac. 61. In *Harding v. Oregon-Idaho Co.*, 57 Or. 34, 42, 110 Pac. 412, in regard to the rule referred to, Mr. Justice Slater said: "There can be no question about the principle enunciated." It is not a matter of importance as to who introduced the evidence contained in the record. *Cunningham v. Friendly*, 70 Or. 222, 230, 139 Pac. 928, 140 Pac. 989. The testimony in the record tends to show that on the night of the accident at about 10:30 p. m. plaintiff, Weygandt, was proceeding along the right side of the planked highway to his work on a night shift as a member of the shore gang of a dredge. There was no sidewalk on the roadway. It was planked 18 feet in width and was used constantly by both vehicles and pedestrians and was the main traveled thoroughfare leading from Marshfield to North Bend. The place where the accident occurred was within the city limits of North Bend and known as Railroad avenue. The city maintained street lines and repaired the street. There is a sharp curve at the point which defendant's car was rounding when it struck plaintiff. It was in December when the road was wet and slippery; it was a "greasy road," a dangerous

place. Defendant's car was a two-seated one. There were six people on the car; one on the seat with defendant who was driving, one standing on each side, and two hanging on the back. It was a dark, misty night, and there was quite a bit of moisture on the windshield. The speed of the auto was estimated at from about 20 to 25 miles an hour. Defendant states: "I ran at that time 20 miles an hour—15 or 20 miles an hour." As to the happening of the accident the testimony was, in substance, as follows: Plaintiff's witness Putnam testified thus:

"We got around the curve, and we hit Mr. Weygandt, and then just about the time, or just a little bit before we hit him, Mr. Bartle kind of went kind of diagonal across the road, and when he got to the other side he tried to straighten up, and the rear end of the car kind of slued off from the plank, and we went ahead probably 75 or 100 feet, something of that matter; I didn't measure it, but it was a short distance, and we stopped."

Defendant's witness Standish described the accident thus:

"I was looking ahead, I was on the outside of the car, I had my head on the outside, and I had a perfect view, and was watching the light as it shone on the road, and all at once I saw a man, and I called to the Doctor, 'There is a man there.' He was on the right-hand side of the road, and he was just in the circle of the lights, from the car. The Doctor didn't do anything but shove the car right over, or pulled it to the left, and I hung on because I was a little afraid that he would skid the way he turned there, and I lost sight of the man because he was on the other side of the car. Then I felt a jolt of the car, and I said, 'You hit him.' The Doctor kept on turning to the left until he was clear of the road. Before he got there, I jumped. * * *

Defendant's version of the occurrence is as follows:

"Standish said, 'There is a man,' and I turned the engine off, and I began to turn to the left, and I tried to find him, and I could not see any man in the light, and when I did see him he was in front of the right light. He was not 15 feet away with his head down, and his dinner bucket in his hand. The wind was blowing from the north, and he turned right square around in the road, faced me, and gave a little jump to the side, and the only place that the car hit him was on the top of the fender, and that is what hit him in the side right here. * * * The first thing he asked me, he said, 'Couldn't you see me?' and I said: 'Yes, I could see you, but not quick enough to miss you.'"

Plaintiff testified that he heard no horn or warning as the car approached him from behind and struck him; that "I said to Dr. Bartle, 'My God, couldn't you see me coming?' and he said, 'Yes, I could see you, but I could not keep from striking you.'"

[2] We cannot say there was no evidence to support a verdict; therefore we are inhibited from disturbing the same. Section 3, art. 7, Const. The jury might reasonably conclude from the evidence, and apparently did, that, taking into consideration the time and place and the prevailing circumstances, the defendant was driving his car at a greater speed than was reasonable and proper, having regard to the safety of the public;

that he did not have proper control of the machine so as to stop the same or slacken the speed sufficiently to avoid striking the plaintiff, who was making a desperate leap to escape the car and within a reasonable time would have done so. See Motor Vehicle Law, Laws of Oregon 1911, p. 267, §§ 16, 17. This act provides that every vehicle shall be run at a rate of speed at no time greater than is reasonable and proper, having regard to the safety of the public, the traffic, and use of the street or highway. Ordinance No. 185 of the city of North Bend makes practically the same provision as to the speed of autos on all streets, avenues, and public highways within that city. The deductions to be drawn from the evidence are for the jury, and not for the court. The testimony clearly tended to support the averments of the complaint. The determination upon the motion for a nonsuit cannot be disturbed.

[3, 4] Over defendant's objection and exception, plaintiff was permitted to show that he had been promised an increase in wages, and that owing to the injury complained of he was incapacitated to work; that after the injury he was promoted, but was unable on account of the hurt to do the labor. The rule is stated in 13 Cyc. p. 204bb, thus:

"Where by virtue of the contract of employment plaintiff will, if found satisfactory, be promoted or given an increase of salary within a stipulated or reasonable time, this fact is admissible on the question of damages."

See *Bryant v. Omaha, etc., Co.*, 98 Iowa, 483, 87 N. W. 392; *St. Louis, etc., Ry. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571; *Sou. Pac. v. Ward*, 208 Fed. 385, 392, 125 C. C. A. 601. The damages awarded plaintiff were not excessive. There was no prejudicial error in such ruling.

[5] Defendant's counsel contend that the plaintiff failed to plead and prove the initiative charter of the city as the law then required, and that therefore it does not appear that the city had control of the street where the accident occurred, and that it was error to submit the provisions of the ordinance to the jury. The legislative charter of North Bend of 1903 (section 27, subdiv. 23) provides that the council shall have power within the city of North Bend "to regulate the use of the streets, sidewalks, crosswalks, highways and public places for foot passengers, animals, vehicles," etc. Subdivision 27 of this section confers power on the city council "to control and regulate the traffic on the streets, avenues and public places," and subdivision 40 thereof gives the council power "to regulate the speed upon any and all railways, street cars and street car lines or other roads, or vehicles of all kinds," etc. See *Special Laws of Oregon for 1903* (Sp. Sess.), p. 97. The power thus granted enabled the city to enact the ordinance in question. The provision in the charter in regard to streets is a very common one, and it will not be presumed, in the ab-

sence of a showing to the contrary, that such charter authority has been abrogated by any initiative measure. *Rusk v. Montgomery*, 80 Or. 93, 156 Pac. 435, 438. The evidence as to what change had been made in the charter was excluded at the instance of the defendant. It was under the dominion of the city authorities by virtue of the police power of the city. There was no error in this respect.

[6] Objection is made on behalf of defendant that witness Putnam, a nonexpert, was permitted to estimate the speed of the car on which he was riding at the time of the casualty. This was competent. The witness stated that since the accident he had ridden on cars and had taken notice of speedometers, and judged from that that defendant's car was running about 20 miles an hour. The objection goes only to the weight of the evidence. *Everart v. Fischer*, 75 Or. 316, 145 Pac. 33, 147 Pac. 189; *Macchi v. P. Ry., L. & P. Co.*, 76 Or. 215, 148 Pac. 72; *Oberstock v. United Rys. Co.*, supra. There is no real controversy as to the speed of the auto at the time of the injury. Defendant's witness estimated the rate at from 15 to 25 miles an hour.

[7] The defendant complains that counsel for plaintiff was improperly allowed to impeach his own witness by asking Putnam the following question:

"Haven't you stated that at one time he (defendant) was going at the rate of thirty miles an hour?"

The witness then testified that he had said defendant was probably going between 25 and not more than 30 miles an hour, but that since then he had ridden on cars and observed the speedometers and had reached the conclusion that the speed was about 20 miles an hour. The object of the question objected to was apparently to refresh the memory of the witness, and not for the purpose of impeachment. Where a party is disappointed in his witness, it is within the discretion of the trial court to permit his counsel to frame his questions so as to refresh the memory of the witness and to direct his attention to the statements previously made by him in regard to the subject-matter of his testimony. 40 Cyc. 2450; *White v. State*, 87 Ala. 24, 5 South. 829; *Hildreth v. Aldrich*, 15 R. I. 163, 1 Atl. 249; *Bullard v. Pearsall*, 53 N. Y. 230; *Hickory v. U. S.*, 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170.

[8] Defendant assigns as error that the court erred in permitting plaintiff's witness Richards to testify that on the day after the injury plaintiff complained of pain in his side. The statements or declarations of the plaintiff were properly admitted in evidence for the purpose of showing the condition of his health, which was in issue under the claim that he was severely injured. 1 Greenleaf, Ev. § 102; *Blair v. Madison County*, 81 Iowa. 313, 46 N. W. 1093, 1094; *Keyes v. Cedar Falls*, 107 Iowa, 509, 78 N.

W. 227. At page 200 (8), of 13 Cyc., the rule is laid down thus:

"All such declarations and exclamations of present pain or suffering as would ordinarily and probably be caused by such injury are admissible as original evidence when made under ordinary circumstances, although it be a considerable time after the injury; declarations of past pain and suffering or such declarations, when made after the controversy has arisen or suit has been brought, are not ordinarily admissible."

[9] It is well settled that a physician or attendant may testify to the injured party's statement as to his symptoms, ills, and the locality and character of his pain, when made for the purpose of medical advice and treatment, as such statements are made with a view to being acted upon in a matter of grave personal concern, in relation to which the injured party has a strong and direct interest to adhere to the truth. 13 Cyc. p. 201 (9).

[10, 11] Defendant complains of the instructions given by the court. The jury were plainly instructed to the effect that it was the duty of the defendant in operating his automobile over the highway to use ordinary care to avoid injury to pedestrians, and if he performed his duty he would not be liable; also, that it was the duty of the plaintiff in traveling along the street or highway in question to use ordinary care to avoid injury, and that, if he failed to exercise such ordinary care and thereby proximately contributed to his injury, then the defendant would not be liable even though the defendant was guilty of the negligence charged in the complaint. The defendant contends that contributory negligence was not pleaded in the answer, but that he pleaded that the injury was caused wholly by the negligence of the plaintiff. The defendant's counsel requested an instruction upon contributory negligence of the same purport as the one given, and therefore cannot be heard to complain of the giving of such an instruction. *Wesco v. Kern*, 36 Or. 433, 59 Pac. 548, 60 Pac. 563; 4 C. J. 707. The charge was advantageous to the defendant and cannot be assigned as error by him. 4 C. J. 920, note 63a. See, also, *Pim v. St. Louis Transit Co.*, 108 Mo. App. 713, 84 S. W. 155; *Smith v. Ogden, etc., R. Co.*, 33 Utah, 129, 93 Pac. 185, 188.

A careful examination of all the instructions given by the court to the jury, some of which are complained of, shows that the questions at issue were fairly submitted to the jury. It is unnecessary to refer to the instructions at length. Other errors are assigned in a general way.

We have examined the questions raised and find no prejudicial error in regard thereto nor any reason for the reversal of this case.

McBRIDE, C. J., and MOORE and McCAMANT, JJ., concur.

GIERSCH v. ATCHISON, T. & S. F. RY. CO.*
(No. 21404.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. MASTER AND SERVANT \S 278(18)—FEDERAL EMPLOYERS' LIABILITY ACT—EVIDENCE—SUFFICIENCY.

The evidence examined, and found to support the findings of the jury.

2. SUBSTANTIAL ERROR.

The record examined, and held to disclose no substantial error as to the merits of the case.

3. LIMITATION OF ACTIONS \S 82—DEATH OF SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT.

Under the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, § 8662]) § 6, the cause of action accrues within two years from the date of the death of the deceased, and a personal representative appointed more than two years from such date cannot maintain an action.

4. MASTER AND SERVANT \S 253½ — FEDERAL EMPLOYERS' LIABILITY ACT—LIMITATIONS.

The widow brought her action under the state statute and recovered a judgment which was reversed. When reached the second time for trial, leave was given to amend by interlineation by increasing the amount of recovery prayed for and by the allegation of the widow's appointment as administratrix and by striking out the former allegation that no administration had been had nor any personal representative appointed. The plaintiff's intestate was killed more than two years before this time while engaged in interstate commerce. *Held*, that the statute of limitations had run, and that the plaintiff as administratrix cannot recover.

Johnston, C. J., and Mason, J., dissenting.

Appeal from District Court, Lyon County.

Action by Jessie Giersch, administratrix of the estate of Charles M. Giersch, deceased, against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, with direction to enter judgment for defendant.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, for appellant. W. S. Kretzinger and Hamer & Ganse, all of Emporia, for appellee.

WEST, J. When this case was first here, we held that the action could not be maintained by the widow. 98 Kan. 452, 158 Pac. 54. Thereafter the plaintiff was appointed administratrix and as such was substituted as plaintiff. Leave was granted to amend the petition by interlineation. The jury returned a verdict against the defendant for causing the death of the plaintiff's intestate. The defendant appeals and contends that the action is barred, also that the judgment ought to be reversed, urging in its brief that the evidence did not support the charge of negligence and that the principal findings are contrary to the evidence.

[1] As to the merits, the claim of the plaintiff is that the deceased, a switchman, went in behind a slowly moving flat car, which had been separated from a number of

others and switched upon a certain track, to adjust the knuckle so that it would couple properly, and that the train, which had stopped, started up without warning and ran against him crushing him against the draw-bar of the flat car.

It is insisted that there is no evidence that the train had come to a stop. This record does not bear out such a contention.

Mr. Wilhite testified, among other things

"At the time Mr. Giersch was adjusting or working on that knuckle, the main train had stopped. * * * The main train did not remain standing during all the time he was working on this knuckle."

On cross-examination:

"The cars behind him had stopped. I seen them. There was nothing between me and that train to prevent me from seeing these cars. I should judge the cars following had stopped stock-still. They did not remain stopped very long. I don't know how long. I saw him in there a space of 10 or 15 seconds before he was hit. The cars had stopped possibly 2 or 3 seconds before that."

On redirect examination:

"I said that after he had walked along there behind that car and was working with the knuckle the train stopped, came to a dead stop, and then when it started it moved gradually down."

Mr. Sterner testified:

"He was following the flat car and working the knuckle with his hands. The train had stopped, well, I will say momentarily, as though the engineer has set the air and released it."

On cross-examination:

"I couldn't see the engine that was pushing this string of cars on account of some way-cars, that were on the way-car track between me and the engine. I could not tell as to whether the engine stopped or not. I did notice the slacking or stopping of the cars up at the east end of this string of cars."

Mr. Anderson for the defendant testified:

"Unless a man was paying very particular attention, he could be fooled by this rebound. He might have thought they had stopped when they hadn't."

On cross-examination:

"It fooled me, too, and I don't say now whether it stopped or not."

Again:

"After that car was uncoupled from the train, that train was either so slacked up that I could not tell whether it entirely stopped or not, or it did actually stop; one or the other."

From the counter abstract:

Mr. Wilhite: "Q. If I understand you correctly, you say after he had walked along there behind this car and was working with the knuckle, the train stopped—came to a dead stop? A. Yes, sir."

Mr. Sterner: "Q. I will ask you if you did not state in your former testimony, if you did not unqualifiedly say that the train had stopped, for the purpose of refreshing your memory? A. Well, I believe it had come to a stop—a complete stop."

While there was evidence to the contrary and also evidence tending to show that the stop was merely the action of the train in taking up slack, the statements of witnesses already quoted seem to have impressed the

jury as correct, and they are sufficient to sustain the verdict and findings as to the question of stopping.

The jury found that the switch engine handling the cars stopped after Mr. Giersch cut off a flat car and before the stop signal was given by the foreman. They found that the other switchman and the foreman did not signal the engineer to stop immediately after the deceased had stepped between the cars; that the switchman shouted, but not immediately—too late to avoid injury. The allegation was that the foreman in charge and other employes knew or should have known that the deceased was adjusting the knuckle of the flat car and was not in a position where he could observe the danger, and that the foreman carelessly and negligently caused the train to again come forward without warning to the deceased. The jury found that the negligence consisted in starting the train and pushing it forward without warning after the flat car was cut off, and that the foreman and another employe were the ones immediately negligent. They also reduced the damages from \$10,000 to \$7,916.66 on account of the negligence of the deceased. The foreman himself testified that he had control over the way the men did their work; that he knew the position of the deceased; that he was looking at him all the time and could not be mistaken.

The switchman whom the jury found to have been negligent testified that he turned the pin puller over to Mr. Giersch, or the lever, and stopped so that he could give the signal to the foreman.

"The only signal I intended to give was that when that track was shoved far enough they would stop; that is what I was doing at that time. In this case we were shoving the cars. When you kick in you give them a kick off and let them go."

He further testified that as the gap opened up Mr. Giersch stepped around the end of the car.

"I suppose I was in sight of the foreman. The foreman was keeping in line with me. He was behind me. He was looking towards me. It was not necessary for me to turn around to face him to give the sign. The engine stopped once on my stop signal. It did not start again before Mr. Giersch was hurt."

"When a man is in there adjusting a knuckle, it is not his duty to give any signal. He cannot give any signal. I am not positive whether the train stopped or not."

The theory of the defense seems to be that Giersch went in between moving cars knowing full well the danger of so doing, and that it was his own negligence, and not the negligence of those over him, which caused the injury. The plaintiff's theory is that he went where it was his duty to go at a time when it was safe, having a right to rely on the supposition that the train would remain stopped or sufficient warning would be given before starting again, and that by reason of the starting and failure of warning he was crushed.

[2] Out of the usual evidential conflict the jury reached their conclusions, and the record fails to show that they were unwarranted in so doing. We find nothing in the record of which the defendant can complain as to the merits of the action.

[3, 4] The death occurred on December 28, 1913, the widow began her action on February 20, 1915, and obtained a judgment which was reversed June 10, 1916, and on July 19th, thereafter, the court permitted an amendment to the petition and the substitution of the plaintiff as administratrix for herself as widow. Her appointment as administratrix was on July 10, 1916. The amount prayed for was increased from \$10,000 to \$20,000, but subsequently changed to its original amount. Section 6 of the federal Employers' Liability Act, 35 St. at Large, 65 (U. S. Comp. St. 1916, § 8662), provides that:

"No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

It also provides that in case of the death of an employe the carrier shall be liable to his or her personal representative for the benefit of the survivor, widow or husband and children of such employe.

In the former opinion it was held that the testimony brought the case under the federal act exclusively, although it was not alleged in the original petition that the parties were engaged in interstate commerce. It is contended that the change by amendment and substitution was a change "from law to law" which cannot be more than two years after the death of the employe. Plaintiff insists that under the federal statute the action does not accrue until the appointment of an administrator.

In *Rodman v. Railway Co.*, 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704, it was held under the Lord Campbell Act, Civil Code, § 419 (Gen. St. 1915, § 7323), that the limitation as to the time in which the action must be brought is a condition upon the right to sue and is not affected by the general provisions of section 22 of the Civil Code (Gen. St. 1915, § 6912). This was followed in *Swisher v. Railway Co.*, 76 Kan. 97, 90 Pac. 812, and in *Harwood v. Railway Co.*, 171 Pac. 354.

It has frequently been decided that an amendment may be made after the statute has run if it go only to the form and not to the substance of the action. A change from the common-law to statutory liability is deemed a departure. *Kansas City v. Hart*, 60 Kan. 684, 57 Pac. 938. In *Powers v. Lumber Co.*, 75 Kan. 687, 90 Pac. 254, it was held that a petition, which falls to state a cause of action, cannot by amendment which asserts a cause of action barred by the statute of limitations thereby be made good. A petition alleging the death in another state, but failing to add that such state authorized a recovery under the facts, was held amendable after the statute had run, in *Cunning-*

ham v. Patterson, 89 Kan. 684, 132 Pac. 198, 48 L. R. A. (N. S.) 506. The closing words of the opinion are:

"The amended petition did not state a new cause of action. It merely amplified and corrected the statement of facts constituting the only cause of action the plaintiff had or professed to have." 89 Kan. page 690, 132 Pac. page 200 [48 L. R. A. (N. S.) 506].

In Robinson v. Railway Co., 90 Kan. 426, 133 Pac. 537, a similar ruling was made. In Harlan v. Loomis, 92 Kan. 398, 140 Pac. 845, an amendment to correct a mistake of the pleader, merely substituting one party plaintiff for another, was held not to change the cause of action and to be proper although made after the statute had run.

An action under the state statute must be brought within two years from the time of the death. It is urged, however, that under the federal act the statute does not begin to run until the appointment of an administrator. This depends on when the cause of action accrues under that act. The case of American R. Co. of Porto Rico v. Coronas, 230 Fed. 545, 144 C. C. A. 599, L. R. A. 1916E, 1095, is relied on, and it was there held that, in view of the fact that an action can be maintained only by the personal representative for the benefit of the beneficiaries, it must be deemed to accrue, not from the date of the employee's death, but from the date of the appointment of the administrator; no one being able to sue before that time. The opinion was by the United States Circuit Court of Appeals for the First Circuit. It was suggested that the action is not for the occurrence out of which the death arose, but for the pecuniary damage to the beneficiaries by the death, "so that in no event could the cause of action arise until after the death or be said to exist so that the statute could run until after that time." 230 Fed. page 547, 144 C. C. A. page 601 [L. R. A. 1916E, 1095]. After going over the authorities, it was said:

"In view of the well-recognized rule heretofore pointed out as to when a right of action accrues—which Congress must have had in mind when enacting the present law,—and in view of the fact that Lord Campbell's Act, upon which the Employers' Liability Act was modeled, expressly provided that the limitation should run from the death of the injured party, and that, in the enactment of the present law, Congress declined to adopt such a limitation, and fixed the period from the time the action accrued, we are of the opinion that the proper construction of the statute is that the right of action did not accrue, so that the limitation attached, until the administrator was appointed, and that the demurrer was properly overruled." 230 Fed. page 553, 144 C. C. A. page 607 [L. R. A. 1916E, 1095].

In Hall v. Louisville & N. R. Co. (C. C.) 157 Fed. 464, a widow of an employé of an interstate railroad company sued under the Florida statute, and it was held that an amendment of her declaration changing the capacity in which she sued to that of administratrix made a new cause of action based on the federal statute and was in ef-

fect the bringing of a new cause, which for the purpose of limitation was begun when the amendment was filed and did not date back to the time of the beginning of the original action. In Smith v. Atlantic Coast Line R. Co., 210 Fed. 761, 127 C. C. A. 311, it was held by the Fourth Circuit Court of Appeals that a plaintiff who sued for personal injury could after the expiration of two years amend so as to bring the case within the federal Employers' Liability Act; that such amendment did not introduce a new cause of action, but only affected the defenses which might be made. Mo., Kans. & Texas Ry. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134, is to the effect that while under the federal act the beneficiaries of one killed cannot maintain an action except as personal representatives where the plaintiff is the sole beneficiary and takes out letters after the beginning of the action, an amendment may be allowed which alleges that the plaintiff sues as administrator.

"An amendment to the effect that plaintiff sues as personal representative on the same cause of action under the federal statute, instead of as sole beneficiary of the deceased under the state statute, is not equivalent to the amendment of a new action and is not subject to the statute of limitations." (Syl.)

In this case the widow sued in the Circuit Court to recover for the death of her husband, diverse citizenship being pleaded. She alleged that there was no administration and that none was necessary; that the deceased was a citizen of Texas but was killed in Kansas. "Where the said F. S. Wulf was killed, a right of action is provided by statute, for injuries resulting in death." 226 U. S. page 572, 33 Sup. Ct. page 136 [57 L. Ed. 355, Ann. Cas. 1914B, 134]. She claimed \$40,000 damages. The case was begun January 23, 1909; the death was alleged to have occurred November 27, 1908. On January 6, 1911, plaintiff amended by averring that two days previously she had been appointed temporary administratrix and had made application to be appointed temporary administratrix and that she sued in her individual capacity and as administratrix. "That by virtue of both the laws of the state of Kansas, where the said F. S. Wulf was killed, and the acts of Congress of the United States of America, the right of action was provided for injuries resulting in death in the manner and form and in the occupation that the deceased was engaged in at the time of his death." 226 U. S. page 573, 33 Sup. Ct. page 136 [57 L. Ed. 355, Ann. Cas. 1914B, 134]. The defendant in its answer excepted to that portion of the pleadings seeking to make her a party as administratrix, "because the amendment making her a party in that capacity was made more than two years from the time the alleged cause of action accrued, and for that the cause of action, if any, was barred by the limitation of two years." 226 U. S. page 574, 33 Sup. Ct. page 136 [57 L. Ed. 355, Aq

Cas. 1914B, 134]. In the opinion it was said:

"It seems to us, however, that aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions."

"* * * It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that with respect to the responsibility of interstate carriers by railroad to their employes injured in such commerce after its enactment it had the effect of superseding state laws upon the subject. * * * Therefore the pleader was not required to refer to the federal act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done. * * * It is true that under the federal statute the plaintiff could not, although sole beneficiary, maintain the action except as personal representative. * * * Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by section 6 of the Employers' Liability Act [U. S. Comp. St. 1916, § 8662]. The change was in form rather than in substance. * * * It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit." 229 U. S. page 575, 576, 33 Sup. Ct. page 137 [57 L. Ed. 355, Ann. Cas. 1914B, 134].

One significant point in this case is that the original petition pleaded that the deceased was in the performance of his duties upon a train bound from Parsons, Kan., to Osage, Okl. Hence it was well said in closing the opinion that the federal statute did not need to be pleaded. In the case now before us the widow is not the sole beneficiary. In *St. L., San Francisco & T. Ry. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156, it was held that when the plaintiff's petition states a cause of action under the state statute, and from the evidence it appears that the case is controlled by the federal statute, and the defendant has duly excepted, the state court is bound to take notice of the objection and dismiss if the plaintiff is not entitled to recover under the federal statute. The action was brought by the widow and parents apparently under the Texas statute. The company contended that the deceased was engaged in interstate commerce and that it was liable, if at all, only to the personal representative. This was denied by the state court. It was said in the opinion:

"And if the federal statute was applicable, the right of recovery, if any, was in the personal representative of the deceased, and no one else could maintain the action." 229 U. S. page 158, 33 Sup. Ct. page 652 [57 L. Ed. 1129, Ann. Cas. 1914C, 156].

"In our opinion the evidence does not admit of any other view than that the case made by it was within the federal statute. * * * It comes then to this: The plaintiffs' petition, as ruled by the state court, stated a case under the state statute. The defendant by its special exceptions called attention to the federal statute and suggested that the state statute might not be the applicable one. But the plaintiffs, with the sanction of the court, stood by their petition. It was to the case therein stat-

ed that the defendant was called upon to make defense. * * * In short, the case pleaded was not proved and the case proved was not pleaded. In that situation, the defendant interposed the objection, grounded on the federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the state courts erred in overruling it." 229 U. S. page 161, 33 Sup. Ct. page 653 [57 L. Ed. 1129, Ann. Cas. 1914C, 156].

In *Central Vermont Ry. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252, the administratrix sued for the benefit of the widow and next of kin. The company raised the point, and the plaintiff in her reply alleged that the deceased was engaged in interstate commerce at the time of his death. This was demurred to as a departure from the petition. The state court held that this reply was proper, and the Supreme Court deemed this ruling binding as a matter of practice. In discussing the point raised, the court said:

"The Employers' Liability Act is substantially like Lord Campbell's Act, except that it omits the requirement that the jury should apportion the damages. That omission clearly indicates an intention on the part of Congress to change what was the English practice so as to make the federal statute conform to what was the rule in most of the states in which it was to operate." 238 U. S. page 515, 35 Sup. Ct. page 869 [59 L. Ed. 1433, Ann. Cas. 1916B, 252].

In *Seaboard Air Line v. Renn*, 241 U. S. 290, 36 Sup. Ct. 567, 60 L. Ed. 1006, the original complaint alleged that the defendant was engaged in operating its road in North Carolina and other states, and it was held that an amendment that the parties were both engaged in interstate commerce at the time of the injury did not amount to the statement of a new cause of action, but merely amplified or extended that already stated and related back to the beginning of the action. This was an action by the employe himself for personal injuries. In *Atlantic Coast Line R. R. Co. v. Mims*, 242 U. S. 532, 37 Sup. Ct. 188, 61 L. Ed. 476, the action was brought for the death of a car inspector; the plaintiff alleging that the defendant operated a line of railway wholly within the state of South Carolina. The case went to the Supreme Court of that state, and after reversal, and when called for the second trial, the defendant asked leave to amend its answer by pleading gross and willful contributory negligence. Up to this time no claim had been made by the defendant and no facts had been pleaded or shown indicating that the federal act applied in any way. When the plaintiff rested her case on the second trial, the defendant for the first time offered to prove that the deceased was engaged in interstate commerce. This was rejected as coming too late. No application was made for leave to amend the answer. It was held that the refusal of the state court to permit the point to be raised at this time was not a denial of a federal right. In the opinion in response to the argument that

under the recent decisions of the federal Supreme Court it is not necessary to claim the benefits of the federal act in a pleading in a state court in order to obtain a review of a decision denying or refusing to consider such claim, it was said that while it is true that the reports show in the Seale Case, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156, and the Slavin Case, 236 U. S. 454, 35 Sup. Ct. 306, 59 L. Ed. 671, that the federal act was not specially referred to in the pleadings, yet they were in such form that the trial court could have admitted testimony making it necessary to apply the federal act in deciding each case.

"This, of course, was equivalent to holding that the pleadings in the trial court were in a form to justify the introduction of testimony in support of the federal claim, under the system of practice and pleading prevailing in the courts of the two states in which the cases were decided. This brings these decisions clearly within the principle of the conclusion we are announcing in this case." 242 U. S. page 536, 37 Sup. Ct. page 190 [61 L. Ed. 476].

It does not appear whether the action was by the widow or by a personal representative, and no point or mention is made touching the capacity to sue. In *New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, Ann. Cas. 1917D, 1139, it was held that the obligations of interstate carriers to make compensation for personal injuries to their employes while engaged in interstate commerce are regulated both inclusively and exclusively by the federal statute, and that no room exists for state regulation even in respect to injuries occurring without fault, for which the federal act provides no remedy. In *Missouri Pacific Ry. Co. v. Taber*, 244 U. S. 200, 37 Sup. Ct. 522, 61 L. Ed. 1082, an action by a guardian was brought under the state statute, and the federal act was not pleaded or relied upon or otherwise called to the trial court's attention. The point was raised first in the state Supreme Court, which declined to pass on it because not presented to the trial court, and this was held to present no federal question. In *New York Cent. etc., R. R. Co. v. Tonsellito*, 244 U. S. 360, 37 Sup. Ct. 620, 61 L. Ed. 1194, it is held that the federal act is exclusive as to cases which it covers and no other can be added by state law. The father sued to recover for expenses incurred for medical attention to his son and for loss of services on account of personal injuries. The New Jersey courts held that it was a common-law case which had not been taken away by the federal act. The Supreme Court followed the *Winfield* Case, holding that the act is not only comprehensive but also exclusive, and that it cannot be abridged by common or statutory law of a state. In *Pardee v. St. L., S. F. R. Co.*, 204 Fed. 970, 123 C. C. A. 292, 51 L. R. A. (N. S.) 721, it was held by the Eighth Circuit Court of Appeals that an action for a wrongful death under the Oklahoma statute, which provides that "the action must be commenced within two

years," must be begun within two years from the wrongful act or death. After referring to the contentions in favor of the other view, Sanburn, J., said:

"A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixed the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. Such a statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability." 51 L. R. A. (N. S.) at page 725.

Numerous decisions, including the *Rodman* Case, were cited in support of this view. A note to this decision (51 L. R. A. (N. S.) 721) collates numerous other authorities. This decision was rendered in 1913. *Central Vermont Ry. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252, decided in 1915, contains this:

"But matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy but destroys the liability. (Citing authorities.) In that class of cases the law of the jurisdiction, creating the cause of action and fixing the time within which it must be asserted, would control even where the suit was brought in the courts of a state which gave a longer period within which to sue." 238 U. S. page 511, 35 Sup. Ct. page 867 [59 L. Ed. 1433, Ann. Cas. 1916B, 252].

In *Hamilton v. H. & St. J. R. Co.*, 39 Kan. 56, 18 Pac. 57, the Missouri statute was under consideration, and it was held that the widow could not maintain an action begun more than six months after the death; the statute providing that recovery could be had by the husband or wife for six months after the death and if they fail to sue within that time then by the minor child or children.

"The provision designating when and by whom the suit may be brought is more than a mere limitation; it is a condition imposed by the Legislature, which qualifies the right of recovery and upon which its exercise depends." 39 Kan. page 62, 18 Pac. page 61.

In *Berry v. K. C., Ft. S. & M. R. Co.*, 52 Kan. 759, 34 Pac. 805, 39 Am. St. Rep. 371, it was held (Syl. 3) that an action could be brought by the widow after the enactment of section 7324 of the General Statutes of 1915 (Code Civ. Proc. § 420), "if commenced within two years after the death complained of." In the *Rodman* decision, 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704, appears the following:

"As a part of the right of action itself, as a condition imposed upon and in limitation of the exercise of the right granted, it is provided that the action upon which recovery is had must be commenced within two years from the time the right of action arose. No excuse pleaded for

delay in the commencement of the action for more than two years will avail, for the reason that no such excuse can in law be held sufficient. * * * But the limitation in time of the commencement of the action here brought under this statute is imposed as a condition upon the exercise of the right itself, is special and absolute in its nature, and is unaffected by the general provisions of section 23." 65 Kan. page 654, 70 Pac. page 645 [59 L. R. A. 704].

From the briefs on file in the state library it appears that Mrs. Rodman was appointed administratrix more than two years after the death.

"The general and reasonable rule is that the statute runs from the time of the death and not from that of the injury; and many of the statutes based on Lord Campbell's Act and purporting to confer a new cause of action, contain an express provision to this effect." 8 R. C. L. p. 803, § 82.

"The better rule seems to be that the statute of limitations begins to run against the statutory right of action for death by wrongful act only from the time that such death occurs, although that event may take place long after the time of the infliction of the injury causing such death." 13 Cyc. 339.

Now, as before, the question is not so much one of pleading as one of party. In the former opinion in response to the suggestion that the defendant could not avail itself of the defense of the interstate question without pleading, it was said:

"It would be more accurate, however, to say that the real question is whether or not, in view of the condition of the pleadings, the defendant had a right by competent evidence to show that whatever liability might exist the widow could not maintain the action." 98 Kan. 455, 158 Pac. 55.

The result was thus stated:

"The conclusion is reached, therefore, that under the record as it appears here the plaintiff was not entitled to recover because not the proper party under the only statute applicable to the case." 98 Kan. 461, 158 Pac. 53.

When the point was first brought to the attention of the widow, she might have been appointed administratrix and amended; but this she did not do until more than two years after the date of the death. Thus the two years' time in which a personal representative might sue was allowed to elapse. The fact that the widow had within the statutory time attempted to recover under the state law could not affect the right which the federal statute gives to the administratrix only. The one cannot be tacked upon the other, nor can the limitation be thereby extended.

The federal statute is not retroactive. *Winfree v. Northern Pac. Ry. Co.*, 173 Fed. 65, 97 O. C. A. 392, 44 L. R. A. (N. S.) 841, Ninth Circuit Court of Appeals. It is intended to supersede all other bases of actions wherever it applies. It has repeatedly been said to be similar to the Lord Campbell Act, and in fixing the limitation at two years it is difficult to conceive that it was intended that all this time and more might elapse before an administrator must be appointed, and that he would then have two years longer in which to sue, which would

be the case if the time ran from his appointment and not from the death of the decedent. While, of course, this is a question finally for the federal Supreme Court, we hold that, in view of the authorities now obtainable, the action must be brought within two years from the time of the death, and therefore that the administratrix in this case cannot prevail.

The judgment is therefore reversed, with directions to enter judgment for the defendant.

BURCH, PORTER, MARSHALL, and DAWSON, JJ., concurring.

MASON, J. (dissenting). The decision in *St. L. S. F. & T. R. Co. v. Smith*, 243 U. S. 630, 37 Sup. Ct. 477, 61 L. Ed. 938, affirming a Texas decision reported in (*Tex. Civ. App.*) 171 S. W. 512, seems to me to establish the right of the plaintiff to maintain her action as one under the act of Congress, for the facts of that case appear essentially similar to those here presented. In the reply brief of the defendant it is said:

"We are willing to concede that if there had been an express allegation in the original petition that Charles Giersch, at the time of his death, was engaged in interstate commerce, and the railway company was so engaged at that time with the allegation as to the application of the state Employers' Liability Act omitted, then the amendment by substituting the administratrix and increasing the prayer for damages could be made, even after two years from the date of the death. This principle has been settled by the case of *M. K. & T. Ry. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134, and also the case of *Seaboard Air Line v. Renn*, 241 U. S. 290, 36 Sup. Ct. 567, 60 L. Ed. 1006. In the *Renn* Case there was an allegation 'that the defendant (railway) was engaged in operating its railroad in that and other states.' It was held that the amendment after the statute had run 'merely amplified or expanded' the statement of the original cause of action."

The petition in the present case alleged that the defendant owned and operated a "system of railroads," and a "freight terminal junction in connection with its said railroad system in and near the city of Emporia," in the yards of which terminal the plaintiff's husband was killed. Facts of which judicial notice is taken need not be pleaded. 31 Cyc. 47. The courts of Kansas know judicially that the "system of railroads" owned and operated by the defendant company extends into other states. *Patterson v. Railway Co.*, 77 Kan. 236, 239, 94 Pac. 138, 15 L. R. A. (N. S.) 733. The allegations of the original petition point to an interstate operation much more definitely than those in the *Renn* Case. The insertion of other averments suggesting a reliance on the local statute should not affect the matter, because a mistaken belief on the part of the plaintiff or her attorneys that the state law could apply in an action for an injury received in the course of interstate commerce ought not to defeat her

recovery. To render the petition nonamendable, it must have utterly failed to state a case under the federal law—mere defects and surplusage could not have that effect.

Moreover, I think the judgment should be affirmed upon another theory. When the case was here before, a reversal was ordered (as I interpret the opinion) because it was believed that controlling federal decisions gave the defendant the right to prove that the plaintiff's husband was killed while engaged in an operation of interstate commerce without pleading it. *Giersch v. Railway Co.*, 98 Kan. 452, 158 Pac. 54. It now seems obvious that, if the first judgment had been sustained and a review of the ruling had been sought in the federal Supreme Court, it would have been there affirmed both because the decision of the state court of last resort on such a matter is regarded as final "when it is clear * * * that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right," and because the "essential justice of" such "decision, which is the fundamental thing," would have commended it to the favor of that tribunal. *Atlantic C. L. R. Co. v. Mims*, 242 U. S. 532, 534, 535, 37 Sup. Ct. 188, 61 L. Ed. 476. I am not suggesting a re-examination of the former decision, but I think the situation stated has a bearing upon the present case as warranting a somewhat strict application of rules of procedure that may militate against the defendant's contentions—a course the more justifiable because of the essentially technical character of its defense. If the defendant in its answer had specifically pleaded the interstate character of the transaction in which the plaintiff's husband met his death, the defect of the petition in omitting that allegation would under our practice have been cured. *Irwin v. Paulett*, 1 Kan. 418; *Campbell v. Coonradt*, 22 Kan. 704; *Sill v. Sill*, 31 Kan. 248, 1 Pac. 556. When the defendant, without pleading anything with reference thereto, offered documentary evidence the only possible purpose of which was to show that the car in connection with which the injury occurred was in the course of an interstate trip, I think it should be regarded as having asserted the fact to all intents and purposes as fully and definitely as though it had pleaded it, so that from the time of such assertion (which was within two years from the death) the allegation with regard to interstate commerce was in the case and might thereafter be formally incorporated in the petition, regardless of the statute of limitation. The view of the court results in what appears to me to be the somewhat anomalous situation that a claim for damages which has twice been judicially determined to be otherwise valid is lost to the plaintiff because she omitted

to plead a fact which was well known to the defendant, while the defendant succeeds in defeating the claim by proving the same fact without having pleaded it.

JOHNSTON, C. J., joins in the dissent.

(101 Kan. 532, 102 Kan. 531;
MULCAHY v. CITY OF MOLINE,
(No. 21079.)

(Supreme Court of Kansas. Oct. 6, 1917. On Rehearing, March 9, 1918.)

(Syllabus by the Court.)

1. DISMISSAL AND NONSUIT \S 81(3)—VACATION OF ORDER OF DISMISSAL — POWER OF COURT.

Within the duration of a term of court, the trial court or judge has power to vacate an order or judgment dismissing an action at plaintiff's cost, and may order the cause reinstated and grant time to file amended pleadings.

2. APPEAL AND ERROR \S 907(2)—PRESUMPTION—JUDICIAL ACTS WITHIN TERM.

On appeal, where the validity of the judicial acts of a trial judge at chambers depends upon whether they were dispatched within the duration of a term of court, it will be presumed, in the absence of proof, that the judicial business in question was transacted before the term of court was formally adjourned.

3. JUDGES \S 27 — JUDICIAL BUSINESS AT CHAMBERS—HOLDING OF ANOTHER TERM.

Whatever judicial business a district judge may transact at chambers may be so done, although at the time he is formally holding court at a regular term in another county of his judicial district.

On Rehearing.

4. COURTS \S 65 — EVIDENCE \S 82 — ADJOURNMENT — ORDER OF JUDGE—PRESUMPTION—PRESENCE.

Where a court record shows that an adjournment of court sine die was announced by the sheriff and recorded by the clerk, there is a presumption that the announcement was made pursuant to an order of the court, and the personal presence of the judge in the courtroom was not required to give such order validity.

Johnston, C. J., and Dawson and Marshall, JJ., dissenting.

Appeal from District Court, Elk County.

Action by Catherine Mulcahy against the City of Moline, Elk County, Kansas. Demurrer to petition sustained and cause dismissed, and plaintiff's motion to set aside order of dismissal and to reinstate the case and for time to file amended petition allowed, and defendant appeals. Affirmed.

W. A. Elstun, of Moline, and Chester Stevens, of Independence, for appellant. Hackney & Moore and Jackson & Noble, all of Winfield, and Ed. J. Fleming, of Arkansas City, for appellee.

DAWSON, J. This appeal presents a simple question of practice and procedure. The plaintiff sued the defendant for damages for the death of her husband, who was killed in the service of the defendant while excavating a ditch for a water main. A demurrer to her petition was sustained, and she

elected to stand upon her petition, and the case was dismissed at her cost. Later the plaintiff filed a motion to set aside the order of dismissal and to reinstate the case, and she asked for time to file an amended petition.

[1, 2] This motion was allowed, and the city appeals, contending that when the action was dismissed the court lost jurisdiction of the cause and of the defendant, and that the only procedure open to plaintiff, if any, was to commence a new action with the regular service of summons. The city's contention would be good if the term of court at which the action was dismissed had expired before the motion to vacate the order of dismissal and to reinstate was filed, and before the trial judge had made some order concerning it (*Martindale v. Battey*, 73 Kan. 92, 84 Pac. 527; *Welling v. Welling*, 100 Kan. 139, 163 Pac. 635), but if the motion was filed and some rule or order concerning it was made within the term, the court had not lost jurisdiction, and might entertain the motion or make any other appropriate order within its judicial discretion (*Sylvester v. Riebolt*, 100 Kan. 245, 164 Pac. 176).

Had the term of the district court of Elk county expired when the motion to vacate and reinstate was filed, or when the court granted that motion? The record does not show. A recourse to the statute shows that the terms of that court begin on the first Monday in January and May and the third Monday in September (Gen. Stat. 1915, § 3031). A term of court does not necessarily end before the beginning of the next succeeding term. The order or judgment of dismissal at plaintiff's cost was made at the May term, on June 27, 1916. The motion was filed on July 11, 1916, and granted on September 14, 1916. The next term of court did not begin until the third Monday in September, which was on September 18th, four days later. In the absence of a clear and positive showing that the district court of Elk county had formally adjourned its May term before the proceedings complained of transpired, a presumption of their regularity must be indulged. "*Omnia rite esse acta præsumentur.*" And so the city must plead to the cause as reinstated; but, if so advised, it may plead the facts relating to any formal adjournment of the May term.

[3] No significance attaches to the fact that the judge of the district court of Elk county was sitting at chambers in Butler county when the action was dismissed, nor because he ordered the dismissal vacated and the cause reinstated, at chambers, while he was holding the regular term of the Chautauqua county district court. Whatever a district judge may do at chambers he may do at any time and anywhere within his entire judicial district; and, while he is presiding at a regular judicial term in one county, he may occupy his spare time in dispatching judicial business pending in the district courts of the

other counties of his electoral bailiwick if they be of a character which may be disposed of at chambers. Such is the elastic scope of the new Code and related statutes. *Rea v. Telephone Co.*, 87 Kan. 665, 667, 125 Pac. 27; *Bank v. Courter*, 97 Kan. 178, 183, 155 Pac. 27.

Judgment affirmed. All the Justices concurring.

On Rehearing.

This is a rehearing. The case was fully stated in our first opinion. *Mulcahy v. City of Moline*, 101 Kan. 532, 171 Pac. 597. It was there held that, in the absence of a positive showing that the May term of the district court had adjourned prior to the time the motion to set aside the order of dismissal and to grant time to file an amended petition was allowed, a presumption that court had not adjourned would be indulged, and that the defendant city should answer, but that in such answer it might plead the facts touching the adjournment. The city now asks leave to supply the following record:

"Adjournment of May, 1916, Term.

"In the District Court of Elk County, Kansas.

"County of Elk, State of Kansas—ss.:

"Now, on this 2d day of September, A. D. 1916, all cases of May, 1916, term of this court having been called to the judicial notice of Hon. A. T. Ayres, Judge of this court:

"Court was adjourned by J. K. Munsinger, sheriff, *sine die*.

"J. K. Munsinger, sheriff, and W. B. Russell, clerk, being present.

"W. B. Russell, Clerk."

[4] Appellee contends that this adjournment is void, for the reason that the sheriff had no power to adjourn court, as his authority to do so is limited to that conferred by the statute:

"If the judge of a court fail to attend at the time and place appointed for holding his court, the sheriff shall have power to adjourn the court from day to day, until the judge attend or a judge pro tem. be selected; but if the judge be not present in his court, nor a judge pro tem. be selected, within two days after the first day of the term, then the court shall stand adjourned for the term. The sheriff shall exercise the powers and duties conferred and imposed upon him by other provisions of this code, by other statutes, and by the common law." Code Civ. Proc. § 744; Gen. St. 1915, § 7876.

It is clear that the adjournment recorded was not made under any of the circumstances covered by the statute just quoted, and that the sheriff was not undertaking to act under any authority supposed to be thereby conferred on him. It is the view of this court that the words, "Court was adjourned by J. K. Munsinger, sheriff, *sine die*," were meant to express the idea, not that the sheriff assumed to decide that the court should be adjourned and to make an order accordingly, but that he announced an adjournment presumably directed by the proper authority—that he promulgated the order at the direction of the judge. It is common for a judge to say to a bailiff, "Adjourn court until (for

instance) to-morrow morning," and the record in such case might show that the direction was obeyed. Colloquially the bailiff is spoken of in such a case as adjourning the court, but all understand that what is really done is that the court, acting through the judge, decides and orders, and therefore makes, the adjournment, and the bailiff merely gives publicity to the fiat. The recital of the record above quoted that the sheriff and clerk were present may imply that the judge was not in the courtroom when the proclamation was made; but it does not necessarily indicate that he had not been in the courtroom when the direction was given, and it does not even suggest that he was not then in the courthouse—much less that he was absent from the county. It is not essential that the judge shall be personally in the courtroom when an order is made. This court makes many orders outside of the courtroom, which are communicated to the clerk by telephone and by him entered upon the record. In a recent murder case the larger part of the trial was had outside of the courtroom. *State v. Sweet*, 101 Kan. 746, 168 Pac. 1112. The recital of the record that all the cases of the term had been called to the judicial notice of the judge seems substantially equivalent to a statement that the business of the term was ended—the record of a finding to that effect, which is to be attributed to the judge, rather than to an executive or ministerial officer. This court interprets the entry as meaning that the judge properly ordered the adjournment and the sheriff announced it—an interpretation which finds added support in the fact that the record has been permitted to remain unchanged. If it related to the unauthorized act of the sheriff the presumption would seem to be that it would have been expunged. The court sees no conflict between this decision and that rendered in *In re Terrill*, 52 Kan. 29, 34 Pac. 457, 39 Am. St. Rep. 327. What was decided there was that the clerk cannot (without statutory authority) adjourn the court. When the order there involved was attempted to be made the judge seems not to have arrived in the county; there was nothing in the record to suggest that the clerk acted otherwise than upon his own motion, and no suggestion to that effect appears to have been made.

It follows that our former judgment of affirmance should be set aside, and the judgment of the district court will now be reversed, with instructions to set aside its order reinstating the cause, and with further instructions that the cause be dismissed.

BURCH, MASON, PORTER, and WEST, JJ., concur.

DAWSON, J. (dissenting). In the case of *In re Terrill*, supra, it was said:

"The opening, holding, and adjournment of court are the exercise of judicial power, to be performed by the court. To perform the functions of a court, the presence of the officers constituting the court is necessary, and they must be present at the time and place appointed by law." 52 Kan. 31, 34 Pac. 453, 39 Am. St. Rep. 327.

See, also, *State ex rel. Barber v. McBain*, 102 Wis. 431, 78 N. W. 602.

It was conceded in the oral argument that the judge was not in the courtroom at the time court was adjourned, and some doubt was expressed as to whether he was even in the county. I think we should adhere to the old rule that the personal presence of the judge is requisite to a valid adjournment of court, except under the circumstances expressly covered by the statute.

JOHNSTON, C. J., and MARSHALL, J., join in this dissent.

(102 Kan. 663)

CUSICK v. MILLER. (No. 21339.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS \S 705(10) — CROSSING STREET — CONTRIBUTORY NEGLIGENCE.

A pedestrian arriving at a street intersection which he desires and attempts to cross is not necessarily guilty of contributory negligence because he does not look behind him for approaching automobiles.

2. APPEAL AND ERROR \S 1048(6)—EVIDENCE \S 219(1) — MUNICIPAL CORPORATIONS \S 706(5) — TRIAL \S 290(4, 5) — INJURY FROM AUTOMOBILE—INSTRUCTIONS—CROSS-EXAMINATION.

Various assignments of error relating to evidence, instructions, special findings, and the general verdict, considered, and held, none of them is sufficient to warrant a reversal.

Appeal from District Court, Cowley County.

Action by Fannie Cusick against W. F. Miller. Judgment for plaintiff, and defendant appeals. Affirmed.

J. E. Torrance and S. C. Bloss, both of Winfield, for appellant. Jackson & Noble, of Winfield, for appellee.

BURCH, J. The action was one for damages for personal injuries inflicted by the defendant, who drove his automobile over the plaintiff at a street crossing. The verdict and judgment were for the plaintiff, and the defendant appeals.

Seventh street in the city of Winfield extends east and west. It is crossed by Andrews street, which extends north and south. The plaintiff desired to go from the northeast corner to the southwest corner of the intersection. She intended to take a diagonal course, but discovered a team and wagon, followed by an automobile, entering the intersection from the west. She took a course more toward the west than toward the south.

As the team and wagon came forward the automobile passed north of them and south of the plaintiff, who was only two or three feet within the north portion of the intersection. Just at this time the defendant approached from the east. Driving his automobile at a speed of 12 miles per hour, the defendant, without warning and without slackening speed, undertook to dart between the wagon and the plaintiff. He knocked the plaintiff down, ran over her, and seriously injured her. The plaintiff was in plain view, and the defendant could have stopped his automobile within the space of two or three feet. With the verdict the jury returned special findings of fact, which follow:

"(1) If plaintiff on approaching Seventh avenue had looked to the east, could she have seen the defendant's car approaching? A. Yes.

"(2) What, if anything, was there to prevent plaintiff from passing straight across Seventh avenue from north to south on a line with the sidewalk? A. Wagon and automobile.

"(3) As defendant, Miller, approached the intersection of Andrews street with Seventh street, were there other vehicles in or near the crossing which partly attracted his attention and made it necessary for him to look out for them? A. Yes.

"(4) After defendant saw plaintiff in the street and in a dangerous position, did he use his best judgment and efforts in trying to avoid the accident? A. No.

"(5) After having entered upon the street or intersection of Seventh avenue and Andrews, in what direction or directions did she move before she was struck by defendant's car? A. South and west.

"(6) After the plaintiff stepped upon Seventh avenue or the intersection of Seventh avenue and Andrews and before the accident, was she delayed or her direct course obstructed by reason of the automobile and the team and wagon on the intersection? A. Yes.

"(7) Did the plaintiff just before going south in her effort to cross Seventh avenue look east to see if other vehicles or automobiles were coming from that direction? A. No.

"(8) Was the plaintiff guilty of negligence which proximately contributed to her injury? A. No.

"(9) If you find the defendant was negligent and that such negligence caused the injury complained of, state what particular act or acts, omission or omissions, on the part of the defendant, caused the injuries. A. Failed to sound horn, failed to put on emergency brake, and driving too fast.

"(10) After the defendant discovered the position of the plaintiff in the street, did he use all reasonable means within his power under the circumstances to avoid the accident? A. No."

[1,2] The defendant complains of the introduction of certain evidence.

It is said the plaintiff was allowed to prove the defendant's wealth. What occurred was this: Shortly after the accident, deeds of real estate from the defendant to his children were placed on record. The plaintiff desired to show the transfers as tending to establish consciousness of liability and a purpose to evade satisfaction of such liability. The defendant was asked a preliminary question, what property he owned at the time of the accident. He answered that he owned 640 acres of land. He was then asked what he did with the land shortly after the

accident. He answered that he still owned it, and explained that the deeds which were placed on record were deeds of other land, made long before the accident. No attempt was made to prove the defendant's wealth. The evidence which the plaintiff expected to obtain would have been proper, the method of examination to obtain it was proper, and the plaintiff simply failed to prove what she desired to prove.

The defendant complains of the introduction in evidence of a letter to him from the pastor of a church, which it is argued tended to create sympathy for the plaintiff and resentment toward the defendant. On cross-examination of the defendant the following occurred:

"Q. How many times were you up to see Miss Cusick? A. I never went to see Miss Cusick.

"Q. You received a letter from Rev. Gentry? A. I did.

"Q. Never answered that letter? A. No, sir; I thought he was a meddler and didn't pay any attention.

"Q. I say, you never answered that letter? A. No, sir."

At this point counsel for the defendant objected, no ground of objection being stated, and the cross-examination closed. The subject of the cross-examination was outside the scope of the direct examination, was wholly immaterial, and the plaintiff was bound by the answers returned. The defendant, however, reopened the subject by testifying to facts justifying him in not visiting the plaintiff, because of apprehension of bodily harm. The letter, which was a friendly one, was then admitted, and the defendant was asked if he was afraid of the preacher. The court instructed the jury that the letter could be considered only as bearing on the question whether or not the defendant was afraid to visit the plaintiff. The issue of fear was raised by the defendant. He might have had the cross-examination stricken out, if he had so desired. Instead of this, he chose to enlarge upon it, and must abide the result.

Complaint is made that an instruction which was requested was not given, and of instructions which were given.

The requested instruction authorized the jury to infer contributory negligence from the plaintiff's knowledge of traffic conditions usual to the place, not conditions as they actually existed, and from her failure to look toward the east. It ran counter to instructions which were given, over objection, and which will now be considered.

The court instructed the jury on the subject of contributory negligence in terms of reasonable and ordinary care, to be determined from all the facts and circumstances. The jury were further instructed that a pedestrian about to cross a city street is not necessarily negligent in not looking and listening for approaching automobiles. The instruction was correct. It is not the law of this state that mere presence of a city street crossing cries danger to a pedestrian, however dangerous a

few incorrigible automobile drivers may in fact make the public thoroughfares. *Williams v. Benson*, 87 Kan. 421, 423, 124 Pac. 531; *Ratcliffe v. Speith*, 95 Kan. 823, 828, 149 Pac. 740. In this connection it may be observed the defendant is quite inconsistent. He asks to be acquitted of negligence in not seeing the plaintiff, who was directly in front of him, because his attention was taken by the team and wagon and the automobile following them. He charges the plaintiff, whose attention was taken by the same objects, with negligence because she did not look backward and discover his approach.

Violation of the statute limiting the speed of automobiles on city streets and at street intersections was pleaded and proved. The court stated the terms of the statute in an instruction to the jury. It is said the court should have qualified the instruction by stating that violation of the statute must be the direct and proximate cause of injury, to authorize recovery on that ground. The qualification was contained in another instruction covering all acts of negligence charged.

Certain portions of the instructions were devoted to the doctrine of last clear chance. They need not be discussed because the jury eliminated the subject of last clear chance from the controversy by finding the plaintiff was not negligent at all. It is contended the finding was induced by erroneous impressions derived from instructions. The court perceives no sound basis for the contention.

In one instruction it was said the burden of proof respecting contributory negligence rested on the defendant, without referring to the fact that the plaintiff's evidence might be looked to. The instruction is to be read with another which discussed contributory negligence and directed the jury to consider all the evidence bearing on the subject.

Complaint is made of some of the findings of fact.

It is said the fourth finding is not sustained by the evidence. Leaving out of consideration the defendant's explanation of his conduct, which the jury may not have believed, the finding is sustained by the evidence. If, however, an affirmative answer based on the testimony most favorable to the defendant were given to the interrogatory, the verdict would not be affected.

It is said the eighth finding is inconsistent with the sixth and seventh findings. The proposition is not argued, and is not capable of demonstration.

It is said the jury were not really instructed with reference to the plaintiff's negligence. The record does not support the statement.

It is said there was no evidence that any of the specifications of negligence contained in the ninth finding contributed to the plaintiff's injury. The court finds no difficulty in relating the injury to the causes stated.

It is said with reference to the tenth finding that there is no evidence the accident would have been prevented had the defendant done any of the things he omitted to do. The evidence was that when the defendant discovered the plaintiff he was far enough from her to have stopped his automobile before striking her, and the inference is this could have been done by using the emergency brake. If the defendant had been driving at a lawful rate of speed, it is clear the accident would not have happened. Very likely the jury believed the defendant discovered the plaintiff at a greater distance from him than he estimated, and, if so, sounding the horn would no doubt have saved her.

Some of the objections to the evidence, to the instructions, to the findings, and to the verdict, have not been discussed. They have, however, been considered, and none of them is deemed sufficient to warrant a reversal.

The judgment of the district court is affirmed. All the Justices concurring.

(102 Kan. 661)

WAYMAN v. SOLLER et al. (No. 21384.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

COURTS \S 222(5)—SUPREME COURT—APPELLATE JURISDICTION.

In an action for the recovery of money only, in which a party is resisting the recovery of any amount and a judgment is rendered for \$62, from which such party attempts to take an appeal, the amount in controversy as to such party is fixed by the amount of the judgment; and, it being less than \$100, no appeal lies to the Supreme Court.

Appeal from District Court, Washington County.

Claim of T. C. Dodd against the estate of O. H. P. Steele and Caroline Steele, deceased. From an order allowing the claim, Vashti C. Wayman filed notice of appeal to the district court, and from an order sustaining claimant's motion to dismiss the appeal, said Wayman appeals. Appeal dismissed.

Edgar Bennett, of Washington, Kan., for appellant. J. R. Hyland, of Washington, Kan., for appellee.

JOHNSTON, C. J. T. C. Dodd filed a claim against the estate of O. H. P. Steele and Caroline Steele, deceased, in the sum of \$103.03. It was duly exhibited to the administrator of the estate, August Soller, and on April 29, 1916, the probate court allowed the claim to the extent of \$62, and assigned it to the fifth class. On May 3, 1916, Vashti C. Wayman, daughter and heir at law of Caroline Steele, filed notice of appeal to the district court from the order of the probate court, but she did not file her appeal bond until June 10, 1916. After the case was taken to the district court Dodd filed a motion to dismiss the appeal for the reasons: (1)

That the heir is not the proper party to take an appeal from the probate court; and (2) that the appeal bond was not filed and approved within 30 days from the date of the judgment. The district court sustained the motion, from which order this appeal is taken.

The heir plausibly contends somewhat in line with the rule in *Sarbach v. Deposit Co.*, 99 Kan. 29, 160 Pac. 990, L. R. A. 1917B, 1043, that she is an interested party, and is therefore entitled to an appeal from the allowance of a claim that will reduce the residue of the estate of which she was entitled to a part. Granting, however, that an heir is entitled to an appeal, under the statute the steps to an effective appeal are to be taken within 30 days, which was not done in this instance. The defendants insist that the giving of bond is a prerequisite to the granting of an appeal, one equally as essential as notice and affidavit which have been held to be indispensable, and they have cited authorities to sustain their contention which are very persuasive. *Spangler, Adm'r. v. Robinson*, 20 Kan. 682; *McClun v. Glasgow*, 55 Kan. 182, 40 Pac. 329; *McIntosh v. Wheeler*, 58 Kan. 324, 49 Pac. 77; *Pee v. Witt*, 100 Kan. 171, 163 Pac. 797.

Although the questions raised for and against the right of appeal are simple and the answers to them are obvious, it is equally obvious that, as there is less than \$100 involved, this court is without jurisdiction to consider or determine them. The claimant asked the probate court for an allowance of \$103.03. That court allowed \$62 of the claim. The disallowance of \$41.03 was to that extent a decision in favor of the heir, if she be an interested party, and also in favor of the administrator, who is not attempting to appeal. As to either of them \$62 is the amount in controversy, and, as nothing else is involved than the recovery of money, the case is not appealable. Civ. Code, § 566 (Gen. St. 1915, § 7470); *Richmond v. Brumle*, 52 Kan. 247, 34 Pac. 783; *Nuhfer v. Flanagan*, 87 Kan. 420, 124 Pac. 418; *Wilson v. Fisher*, 92 Kan. 786, 142 Pac. 241.

The appeal is therefore dismissed. All the Justices concurring.

(102 Kan. 607)

FINN v. ALEXANDER et al. (No. 21361.)
(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. ADVERSE POSSESSION §13—REQUISITES.

Title to the land of another cannot be acquired by adverse possession, unless the possession is open, notorious, hostile, and exclusive—a possession of such a nature and notoriety that the owner may be presumed to know that the occupant is claiming a title inconsistent with his own.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adverse Possession.]

2. ADVERSE POSSESSION §60(2) — OCCUPANCY—HOSTILE CHARACTER.

Occupancy of land in common with the owner or with his consent and in recognition of his right is not sufficient to constitute adverse possession.

3. ADVERSE POSSESSION §86—PAYMENT OF TAXES.

Payment of taxes, although not a controlling circumstance, is one of the means by which ownership is asserted, and the failure to pay taxes weakens a claim of ownership by adverse possession.

4. ADVERSE POSSESSION §114(1)—FINDING—EVIDENCE.

The general finding of the court that the defendant had failed to sustain her claim of title by adverse possession is held to be sustained by the evidence.

Appeal from District Court, Lane County. Ejectment by G. L. Finn against Nannie Alexander and John Collison. Judgment for plaintiff, and defendants appeal. Affirmed.

Dwight M. Smith, of Kansas City, Mo., Ed. R. Bane, of Scott City, and Stone & McDermott, of Topeka, for appellants. John S. Simmons and K. K. Simmons, both of Hutchinson, for appellee.

JOHNSTON, C. J. This was an action of ejectment by G. L. Finn against Nannie Alexander and another. It was conceded that the plaintiff, a resident of California, held the record title to the land, having acquired his deed thereto in 1901; but the defendant Nannie Alexander claims title by adverse possession for more than 15 years in herself and her grantor, S. L. Filson. The defendant claims that Filson received a deed to the land about 1890, which he neglected to put on record and later lost; that he immediately went into possession of the land, cultivating and fencing a portion of it and inclosing the balance of it as a part of his pasture land; that he raised crops upon it every year and continued in open possession until he conveyed it to her in 1907; and that during this time no one questioned his right. The evidence on behalf of plaintiff tended to show that it was the custom of cattlemen to use pasture lands of nonresidents; that Filson used the land in question with Finn's permission, and that acts and statements of Filson were inconsistent with a claim of ownership adverse to plaintiff; and that he was not in continuous possession of the land. The evidence was heard by the court, who rendered judgment in plaintiff's favor, and the defendants appeal.

[1, 2] The question presented for decision on this appeal is whether the general finding of the court in favor of the plaintiff is sustained by sufficient evidence. It is conceded that the plaintiff has the record title. The defendant is compelled to rely on such right as was gained by Filson's possession of the land. The tract was inclosed in the big pasture of Filson, and it is shown that he began pasturing and using the land more than 15

years before this suit was commenced; but a party cannot gain title to the land of another by possession, unless it is really adverse. The plaintiff claimed and offered testimony tending to show that the occupancy of the land by Filson was permissive in character, and that it was held in subordination to plaintiff's title and ownership. The testimony in behalf of defendant, if it had been uncontradicted, would have supported her claim of adverse possession, but opposing testimony of the plaintiff tended to show that Filson's possession of the land lacked the essential elements of adverse possession. Occupancy in common with the owner or with his consent and in recognition of his right is not sufficient to constitute adverse possession. To gain title to the land of another the possession must be open, notorious, exclusive, and hostile—a possession of such a nature and notoriety that the owner may be presumed to know that the occupant is claiming a title inconsistent with his own. *Gildehaus v. Whiting*, 39 Kan. 706, 18 Pac. 916; *Anderson v. Burnham*, 52 Kan. 454, 34 Pac. 1056; 1 R. C. L. 700. A possession, however open and long continued it may be, will not operate as a disseisin and commencement of a new title, unless it imports a denial of the owner's title and an appropriation of the land by the occupant to his own use.

[3, 4] There was evidence that after plaintiff's land was fenced in with that of Filson the latter openly and tacitly recognized that plaintiff was the owner of the tract. It is not uncommon, as we have seen, for cattlemen to fence in with their own the unused land of nonresidents, and they do this without any intention of acquiring title to the tracts so inclosed. Filson built his pasture fence around a number of tracts which he did not own. In negotiating a sale of his ranch in 1905 long after the fencing in of plaintiff's tract he informed the proposed purchaser that the tract in question belonged to the plaintiff, and that it could be obtained at a reasonable price. At that time he discussed with the purchaser how soon the owner of this land as well as the owners of other lands inclosed within the pasture might wish to occupy and use them, and Filson then said he "could get it later on very cheap." The purchaser testified that at that time Filson did not make any claim to the ownership of the plaintiff's land. At another time Filson inquired as to the price of the land in question, and when it was given to him he stated that when he closed up a deal that he had on hand he would have the money and would buy the tract. While Filson's brother was in charge of his ranch litigation arose between the brother and one Laird, who owned a tract of land inclosed in the pasture, over the destruction of Laird's crops on his land. The plaintiff, who was a friend of Laird, aided in the settlement of the con-

troversy, and it was then agreed that if Filson and his brother would fence out Laird's land they should have permission to use the plaintiff's land, and acting upon this agreement Laird's land was fenced out. It appears that during this long period while the plaintiff's land was inclosed in the pasture Filson allowed the plaintiff to pay the taxes on the tract. This is not a controlling circumstance, but it is one of the means whereby a claim of ownership is asserted, and the failure to pay taxes for so long a time tends to weaken a claim of ownership by adverse possession. 1 R. C. L. 699. At one time the plaintiff overlooked the payment of his taxes, and the tract was sold to the county for the delinquent taxes, and subsequently Filson obtained an assignment of the certificate. When the land was redeemed Filson accepted the redemption money that was paid. The plaintiff testified that the first intimation he had of the adverse claim to the land was in 1913 when he went to pay his taxes and found they had been paid by another. The facts and circumstances in evidence tend to sustain the theory of the plaintiff and the decision of the court. It devolves upon one claiming title by adverse possession to clearly make out his claim. It has been said that:

"Adverse possession is to be taken strictly, and every presumption is in favor of a possession in subordination to the rightful owner. Title by adverse possession, therefore, must be established by clear and positive proof. It cannot be made out by inference." 1 R. C. L. 695.

There appears to be abundant proof to sustain the finding of the court and therefore the judgment is affirmed. All the Justices concurring.

(102 Kan. 684)

LINDERHOLM v. WALKER, Probate Judge.*
(No. 21411.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. MANDAMUS ⇨ 37(2)—DISCRETIONARY ACTS—APPROVAL OF APPEAL BOND.

The Supreme Court cannot require a probate judge to approve an appeal bond which does not satisfy the probate judge as to its sufficiency, when the judge's good faith is not challenged.

2. REFUSAL OF MANDAMUS.

Some other simple reasons showing why writ of mandamus should not issue, discussed.

3. INSANE PERSONS ⇨ 87—DISABILITY—CONDUCT OF LITIGATION.

A person who has been adjudged insane and who is under guardianship cannot conduct litigation without the supervision, control, and protection of his guardian.

4. INSANE PERSONS ⇨ 99—ACTION—DISMISSAL.

When it clearly appears that a person who has been adjudged insane is the plaintiff in an action, and that he is seeking to maintain that action independent of his guardian and without the approval of the latter, the action should be dismissed.

Application for an alternative writ of mandamus by Justus B. Linderholm against J. W. Walker, as Probate Judge of McPherson

⇨ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied April 12, 1918.

County, Kan. Writ denied, and case dismissed.

Justus B. Linderholm, for plaintiff. Frank O. Johnson and J. M. Grattan, both of McPherson, for defendant.

DAWSON, J. This is an application for an alternative writ of mandamus to require the probate judge of McPherson county to approve an appeal bond in a certain matter which the petitioner seeks to appeal to the district court from the judgment of the probate court and to certify it to the district court. The particular grievance which the petitioner desires to have reviewed by the district court was the question of the propriety of an order of the probate court discharging Mrs. Agnes Ekblad as executrix of her deceased husband's estate; the latter in his lifetime having been guardian of the estate of the petitioner. The probate judge disapproved the bond and refused to certify the matters to the district court.

In behalf of the probate judge, an answer has been filed in which it is shown that the petitioner was adjudged insane some years ago; that thereafter in May, 1909, the petitioner's mother was appointed and qualified as his guardian, and that she died in a short time, and that John Ekblad was then appointed as guardian for the petitioner, and he qualified and acted as such until his death in 1914; and that Frank O. Johnson was afterwards appointed and qualified as guardian of the petitioner, and still is the legal guardian of the petitioner, and is in possession of the petitioner's property. The answer continues:

"That the said Frank O. Johnson had duly settled and collected from the executrix of his predecessor with the approval of this court all the funds that came into her hands as such executrix, or that had been collected by said John Ekblad, deceased, and belonged to said plaintiff's estate. That at no time did the said plaintiff file any claim against the said estate of John Ekblad, claiming that said estate was indebted to said plaintiff or to his guardian. * * * That the said alleged appeal bond is insufficient, and in the judgment of the said probate court the sureties are not responsible, and it is not in the judgment of said probate court a good and sufficient appeal bond."

To this answer the plaintiff has filed a demurrer which has the same effect as a motion to quash or a motion for judgment on the pleadings. In other words, for the purpose of testing the sufficiency of the answer, the demurrer admits the truth of the matters pleaded therein.

On the mere statement of the case which we have outlined above, so many sound judicial reasons why the writ should not issue come to mind that we shall limit ourselves to indicating only a few of them, and choose from among those which are simplest and which may be most readily understood.

[1,2] A writ of mandamus never issues from a higher court to a lower court to control the discretion of the latter. Here the probate judge exercised his discretion—his

best judgment—in holding that the appeal bond was not a good one. There is no allegation in the petition that the probate judge abused his discretion, no showing that he acted arbitrarily or in bad faith. The plaintiff's demurrer admits the facts which are alleged in the probate judge's answer. The demurrer in effect says:

"Suppose the bond is not a good and sufficient bond, I want the Supreme Court to compel Probate Judge Walker to approve it, nevertheless."

This court could not do that. We could not compel the judge to approve a bond which in his judgment is not a good one, when the petition does not impeach the judge's good faith.

Another matter: The petition does not show that the cause sought to be appealed to the district court was disposed of in the probate court in such a way as to injure any right of the plaintiff. The petition does not show that Mrs. Ekblad was wrongfully given her final discharge as executrix by the probate court. The petition discloses no reason why Mrs. Ekblad should have been denied her discharge. It is not even shown in the petition that the plaintiff had filed any claim in the probate court against the executrix. Why then should she be kept in court and dragged from court to court and harassed with litigation? The state does not maintain courts on the same theory that public parks and playgrounds are maintained—for the mere entertainment and recreation of those who choose to use them. Courts are instituted to deal with the serious, controversial matters of men, for the vindication of substantial rights and the redress of substantial wrongs which men cannot settle amicably without the help and authority of the state.

[3,4] Still another suggestion: The probate judge's answer says that the plaintiff was adjudged insane some years ago, and that he is yet under guardianship. A person under such disability cannot conduct litigation in his own behalf. Among the many reasons why he cannot and should not do so is one which is paramount—the temporary incapacity of such person to protect his rights. If an insane person could maintain a lawsuit he might and probably would lose that lawsuit because his temporary disability would too severely handicap him in a contest with a wide-awake, enterprising, and perhaps none too scrupulous opponent. Another important reason why a person adjudged insane should not be permitted to indulge in litigious controversies is that they cause worry, anxiety, and mental unrest, while the paramount good of the invalid requires that he be freed from worries, cares, and vexations, in the hope that he may speedily be restored to his mental health and intellectual vigor. Furthermore, parties who might be involved in litigation with an insane person have also some rights entitled to protection. If they are dragged into litigation they are entitled to get through with that litigation

and get done with it; but a lawsuit with an insane person would not conclude anything. When the insane person was afterwards mentally restored, his legal adversaries would always face the possibility of having to go through the turmoil of the same litigation again, since a judgment against an insane person would not ordinarily bar any right of action existing or accruing to him during his mental infirmity. The law on this subject is neither thoughtless nor unjust. It has provided adequate legal machinery for protecting the rights of insane persons. If those rights are jeopardized, it is the duty of his legal guardian to attend to them, and the petition discloses nothing from which it could be assumed that the guardian has neglected his duty touching Mrs. Ekblad's claim of right to her final discharge as executrix. It also appears from the pleadings that the plaintiff's guardian does not approve of the litigation which the plaintiff seeks to maintain, and the petition does not impeach the guardian's good faith.

The court indulges the hope that it has made this subject sufficiently plain for the petitioner's comprehension.

The writ must be denied, and this case is dismissed. All the Justices concurring.

(202 Kan. 646)

WALKER v. FAELBER. (No. 21371.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. HIGHWAYS §177 — MOTORCYCLE LAW — PURPOSE.

Chapter 65, Session Laws of 1913, making it unlawful for any person to operate a motorcycle on a public highway outside of a town or village at a greater rate of speed than 25 miles per hour, was intended solely for the protection of others using such highway.

2. HIGHWAYS §181(3)—OPERATION OF MOTORCYCLE—VIOLATION OF STATUTE—LIABILITY.

The defendant operated a motorcycle along a public highway at a rate of 40 miles per hour. In a field adjacent to the highway the plaintiff's team attached to a binder became frightened at the noise of the exhaust on the defendant's machine, ran away and injured the plaintiff. In an action to recover for the injuries on the ground that the defendant was liable under the statute, *held*, that the court rightly sustained a demurrer to the evidence.

Appeal from District Court, Saline County.

Action by Thomas Walker against Edward Faelber. Demurrer to plaintiff's evidence sustained, and he appeals. Affirmed.

G. A. Spencer and A. R. Buzick, Jr., both of Salina, for appellant. Z. C. Millikin, of Salina, for appellee.

PORTER, J. This is an appeal from a judgment sustaining a demurrer to the plaintiff's evidence.

The plaintiff was engaged in harvesting grain in a field adjoining a public highway,

and was using a binder drawn by four horses. The defendant passed along the public highway on a motorcycle, moving at a rate of 40 miles an hour. The plaintiff claimed that his horses became frightened from the noise of the exhaust or muffler on the motorcycle and ran away, breaking the binder to which they were hitched, injuring one of the horses so that it died, and throwing the plaintiff from the seat of the binder, resulting in his injuries. It was the plaintiff's contention that the defendant was wantonly reckless and negligent in traveling at such a rate of speed on the highway with the exhaust of the motorcycle open. The action was sought to be maintained on the theory that plaintiff was entitled to recover by reason of the provisions of section 7, chapter 65, Session Laws of 1913, which reads in part as follows:

"No person shall operate a motor vehicle on any highway outside of a city or village at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the conditions of the road, nor at a rate of speed such as to endanger the life or limb of any person; provided that a rate of speed in excess of twenty-five miles an hour shall be presumptive evidence of driving at a rate of speed which is not careful and prudent in case of injury to the person or property of another."

The statute has been amended and the limit of speed outside towns and villages fixed at 40 miles per hour (Laws 1917, c. 74, § 5), but it was in force and effect at the time of plaintiff's injury. The plaintiff testified that he had not heard any noise except that made by the binder, but saw something pass on the highway like a streak when the horses gave a jump, threw up their heads and started to run. The evidence showed that the horses attached to another binder 4 or 5 rods in front of the one plaintiff was operating were not affected by the noise of the motorcycle.

[1, 2] The defendant's contention, which was upheld by the trial court, is that the statute was enacted solely for the protection of persons using the public highways. The title of the act shows that it relates to automobiles and other motor vehicles "regulating their use and operation upon the streets and highways." Section 7 forbids any person to "operate a motor vehicle on any highway outside of a city or village at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the conditions of the road," or "at a rate of speed such as to endanger the life or limb of any person." In another part of the same section defining the rate of speed in which such vehicles shall be operated within any city or village, it is declared that "no motor vehicle shall be operated at a speed greater than twelve miles an hour or at a rate of speed greater than is reasonable and proper, and having regard for the traffic and use of

the road, and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person." In this section also the person operating a motor vehicle is required to reduce the speed to a rate not exceeding 8 miles an hour in approaching railroad crossings and intersections of highways, or a bridge or a sharp curve or a steep descent, or upon approaching "another vehicle or an animal or person outside of any village or city," and there the rate of speed is limited to 8 miles an hour until the person is "entirely past such intersection, bridge, curve, descent, vehicle, animal or person." Section 8 of the act makes it the duty of the person operating such motor vehicle "at request or on signal by putting up the hand, from a person riding or driving a restive horse or other draught or domestic animal," to bring such motor "vehicle immediately to a stop," and "if traveling in the opposite direction" to "remain stationary so long as may be reasonable to allow such horse or animal to pass."

In section 9 the act requires the motor vehicle to be equipped with good and sufficient brakes, and with a suitable bell, horn, or other signal, and to exhibit "during the period from one half hour after sunset to one half hour before sunrise, one or more lamps showing white lights visible within a reasonable distance from the direction toward which such vehicle is proceeding, and a red light visible from the reverse direction."

We think it is obvious that the trial court's construction of the statute is the correct one. The legislative purpose was to protect a distinct class of persons; that is, users of public highways. The safety of a person in a field adjoining a public highway was not within the contemplation of the Legislature. The requirement of a bell or horn and the use of signals and of lamps in front and in the rear, and the giving of signals from the direction towards which such vehicle is proceeding, and a different signal visible from the rear, could only have been intended for the protection of persons traveling on the highway. The duties imposed by law upon the driver of a motorcycle require him to keep his eyes upon the road and to look ahead for the purpose of protecting other persons using the public highway from probable injury resulting from fast driving or other negligence. Since the statute imposed upon defendant no duty to the plaintiff, the evidence failed to show negligence. It is only where the defendant wrongfully fails to perform some duty owed to the plaintiff that a cause of action based upon negligence can exist. *Tawney v. A., T. & S. F. Ry. Co.*, 84 Kan. 354, 114 Pac. 223; *Denton v. M., K. & T. Ry. Co.*, 90 Kan. 51, 133 Pac. 558, 47 L. R. A. (N. S.) 820, Ann. Cas. 1915B, 639. Moreover, there was no evidence tending to show that a mo-

torcycle running at 40 miles an hour would make any more noise, or be any more likely to frighten a horse in an adjoining field, than one running at 25 miles an hour, which was the rate of speed allowed by the statute. Counsel for the plaintiff admit they have not been able to find any case or precedent directly in point, and we have found none, but on the general principles upon which actions for negligence are based, we are satisfied that the plaintiff cannot recover.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 533)

NORRIS v. EVANS et al. (No. 21344.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

MORTGAGES \S 529(3) — FORECLOSURE SALE — CONFIRMATION.

In a suit by the holder of a junior judgment to set aside the confirmation of a foreclosure sale and permit him to redeem from the prior judgment, *held*, on the facts stated in the opinion, it was error to deny the relief prayed for.

Appeal from District Court, Barber County.

Suit in nature of a bill to redeem and to set aside confirmation of sale in a foreclosure proceeding by L. M. Norris against Emma Evans and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions to set aside the confirmation and to permit plaintiff to redeem.

Sam K. Sullivan and H. S. Burke, both of Newkirk, Okl., and G. M. Martin, of Medicine Lodge, for appellant. Noble & Tincher and Samuel Griffin, all of Medicine Lodge, for appellees.

PORTER, J. The suit was one in the nature of a bill to redeem and to set aside the confirmation of a sale in a foreclosure proceeding. The plaintiff appeals from a judgment denying him relief.

L. M. Norris, the plaintiff, resided in Illinois. He was the holder of a mortgage on a farm in Barber county subject to a prior mortgage to the Warren Mortgage Company. In May, 1916, an action in foreclosure brought by the Warren Mortgage Company was pending in the district court. Norris filed a cross-petition setting up his second lien. Seward I. Field was the local attorney for the Warren Mortgage Company, and had traded for the equity in the land subject to both mortgages. His deed was recorded on the 4th day of March, 1916. On May 1st he wrote to Carl F. Truitt, who resided in Oklahoma, and who was the attorney for L. M. Norris, the following letter:

"I have just learned that you represent the cross-petitioner and second lienholder in the case of the Warren Mortgage Company against Emma Evans, pending in our court, No. 4997. In this connection I represent the Warren Mort-

gage Company, holders of the first mortgage, and am writing you to state that court will convene here, regularly, on the 15th day of May, at 2 o'clock in the afternoon, and we can probably arrange to take a judgment at that time. Our court is supposed to convene here on the 8th day of May, but I understand the judge is not going to get down here until the 15th, in the afternoon. It might be that if you could send me figures, I could arrange to take judgment on behalf of both parties as per journal entry and we could agree upon the journal entry without any necessity of your making a trip here. Of course it will be all right for you to come on and we can take the judgment here that day anyway, unless you care to submit figures and I will take judgment for both parties if you desire."

On May 10th Mr. Truitt replied as follows:

"We have your letter of a few days ago in which you so kindly offer to represent us at the next term of district court in your county, which convenes in about a week, in the foreclosure suit now pending therein and in which we represent the cross-petitioner. We inclose herewith a brief suggestion of some parts of the journal entry of judgment that we would like incorporated in the journal entry as approved by the court and as filed in this cause. The inclosed is meant only as a suggestion of about what we would like in part, we have also made a brief reference to some parts of the judgment in favor of your client, the plaintiff, only because we could better explain what we were getting at in our part of the journal entry, and is not intended as any suggestion of what your part of the journal entry should or should not be—you are very capable of doing that part yourself. If order of sale issues after six months, as in this state, then you will of course make this journal entry show such time, the main thing we want is a personal judgment against L. Dora Randall, Lucinda Randall, and Emma Evans, in addition, of course, to the judgment foreclosing this mortgage. If you have time before court convenes to send us a copy of the journal entry as compiled by you including our part and as ready for the approval of the court, we will be glad to look over same and will return same at once if you so desire. We ask this since we are anxious to get proper judgment and at same time do not feel that it is necessary for us to come up there since you have been good enough to volunteer your services in this matter. Any expenses in drawing this journal entry, stenographer fees, etc., we shall expect to reimburse you for our part."

In answer to Mr. Truitt's letter, Mr. Field wrote May 12th as follows:

"I have your letter of May 10th in reference to case of the Warren Mortgage Company v. Emma Evans and others. In this connection I did not mean to imply by my letter that I wanted to represent the cross-petitioner, only that I thought I could save Mr. Truitt a trip over here, as in foreclosure matters, we usually find that there is nothing to do except to agree upon a journal entry, and I thought perhaps it would be an unnecessary trip for him and we could handle it through the mails, as I should be glad to do as a matter of courtesy. In this connection, however, while I represent the plaintiff, locally, it also happens that I am the owner of the land against which this mortgage is being foreclosed. I explained this matter to the general attorney for the Warren people and thought it due you to advise you to the same effect, although my deed is on record. I am forwarding your suggestion as to the journal entry to Mr. M. M. Suddock, of Emporia, the general attorney for the plaintiff, and am suggesting to him that he prepare the journal entry or I will do so if he wishes me to. * * * Again, you

have our old Kansas foreclosure law in Oklahoma, which provides a stay of execution for six months and then sale, with immediate delivery of deed on confirmation. We have a redemption law here, under which we sell the property immediately after judgment or as soon as it can be advertised. Upon confirmation of this sale a certificate of purchase is given to the purchaser and the owner of the property allowed 18 months from the date of the sale to redeem from the sale at the amount sold for, with interest; upon failure to make such redemption during the 18 months, a deed then issues to the purchaser and during which 18 months the owner of the property is entitled to possession. Junior creditors, such as second mortgage holders, like yourself, also have redemption rights and may redeem from the certificate holder and thereby add their junior claims to the amount of the certificate, and the owner redeeming thereafter must pay the amount of the certificate and the amount of the junior creditor's claim, such as yourself, who has redeemed from the certificate. These are mere matters of practice, however, and we always take care of them in the journal entry and it works out very simply. This, of course, would change some of your suggestions in the journal entry but the statute will be followed in these matters. * * * As above stated, I am forwarding your suggestions and copy of this letter to Mr. Suddock to draw the journal entry, or he may refer it back to me and I will draw it."

On May 16th Mr. Truitt received another letter from Mr. Field, as follows:

"In the case of Warren Mortgage Company v. Evans, judgment was rendered this morning as follows: 'Service by publication approved and judgment for plaintiff in the sum of \$3,224.50. Foreclosure of mortgage and awarded first lien. Judgment for cross-petition, L. M. Norris, for \$3,828.80, foreclosure of mortgage and awarded second lien. Original papers filed for cancellation. Period of redemption fixed at 18 months.' I am busy trying jury cases but so soon as I get a few moments time, I will prepare journal entry and forward to you for approval together with office copy for your files. I believe this is exactly in accordance with your figures and idea of the case, except that I have omitted the item of \$200.00 attorney fee. I took this matter up with the court and I think there is no question as to the correctness of my position under the Kansas law. If you care to present this matter you may come up and we will take it up, or present it to the court through the mail if you prefer, but I believe the journal entry will stand as the order is rendered. I trust this is satisfactory."

On May 22d, Mr. Field wrote again as follows:

"In the case of the Warren Mortgage Company v. Evans et al., I inclose herewith for examination a journal entry of judgment I have prepared in accordance with the judgment rendered on the 16th. In preparing this journal entry I have made it read to render a personal judgment in favor of your client, L. M. Norris, and against the defendants, Randall, as suggested by you, so that it will be good for what it is worth as a personal judgment. Will you kindly examine same, and if it meets with your approval, sign and return to me at once, and I will get it signed by the judge and filed before court adjourns and the judge goes home, which will be some time this week? This provides for an 18 months' period of redemption to the defendants and junior lienholders, such as your client, from the date of the foreclosure sale."

Mr. Truitt made no reply to any of the letters except the first one. He testified that

on receipt of the letter of May 22d he talked with Mr. Field over the telephone and that on June 7th he wrote Judge Hay; that Judge Hay answered stating that in his opinion the showing was not sufficient to justify shortening the period of redemption; that he tried several times during the month of June to reach Mr. Field by telephone, but was unable to get in communication with him; that on the 28th of June he wrote Mr. Field inquiring at what time the real estate would be sold and if the same had been advertised for sale, but received no reply; that in the first days of July, he tried to communicate with him over the telephone but received word that Mr. Field was out of town. Shortly thereafter he telephoned the clerk and was told that the land had been sold, the sale confirmed on the 3d day of July, and that redemption had been made.

It appears that on the 27th of May, Mr. Field, as attorney for the Warren Mortgage Company, caused an order of sale to be issued and the sale advertised for July 1st. At this time the journal entry had not been settled or agreed upon. The land was sold and bid in by Mr. Field for the Warren Mortgage Company for the amount of its judgment. Mr. Field was the only bidder at the sale. On the same day he filed a motion for confirmation. On July 3d there was a special session of the court, at which the sale was confirmed and at the same time Mr. Field presented the journal entry to the judge, and it was approved. The amount of the Warren Mortgage Company judgment was \$3,224.50. The amount of the Norris judgment which was a second lien was \$3,828.80. Immediately after the sale was confirmed Mr. Field paid the amount of the Warren Mortgage Company's judgment and redeemed the land as owner.

Mr. Field was a witness and produced a letter written by him on May 23, 1916, to Judge Hay, as follows:

"In the case of the Warren Mortgage Company v. Evans, you will perhaps recall that on the 16th I took judgment by default for the plaintiff for something over \$3,200.00 and for cross-petitioner on second mortgage on behalf of Mr. Carl F. Truitt for something over \$3,800.00. I sent journal entry to Mr. Truitt for approval, and he calls me up to say that he wants the period of redemption reduced to less than 18 months. After talking with him over the long distance telephone, I suggested that he send the J. E. direct to you and if you saw fit to reduce the period of redemption on his showing it would be all right with me; so I am writing to give my side of it, as he will probably explain his position. I do not wish the period of redemption reduced, as I am the owner of the equity, personally. Perhaps that ought not to have any weight, but the facts are that neither of the mortgages on the land is a purchase money mortgage—both represent loans; and also, the land is rented, mostly farmed, balance in pasture, also rented, all enclosed by fence, and in the actual possession of my tenant. Taxes are in default, but property is worth much more than mortgages and taxes. I have just recently acquired it, during the pendency of the case, and wish to merge all indebtedness against it into

one certificate of purchase so I can handle it to better advantage."

He further testified that he did not write Mr. Truitt at any time to tell him that the notice was running and that the property would be sold; his excuse being that he had written Mr. Truitt four letters to which he had received no answer. He was asked:

"Q. You didn't notify Mr. Truitt it was bought and there was going to be a session of court here on the 30th? A. No, sir. Q. When did you first know there was going to be one here on the 30th? A. The county attorney and I and some other attorneys, I am not sure who, there were several talking. There was somebody in jail and wanted to plead guilty and get away to the penitentiary and serve his time. It was discussed calling the judge down and I think somebody wanted to plead guilty and get away and I think that was the occasion of a special session. * * * Q. You were interested in the judge coming down so as to get a confirmation on the 30th? A. Yes, sir. * * * Q. You got it done, did you not? A. Yes, sir. Q. And then you immediately redeemed it? A. Yes, sir; I did. Q. You didn't mean to tell the court it was not your intention in writing this letter that Mr. Norris would have 18 months to redeem as well as you would have— A. Understand this. When this gentleman wrote me back and disclosed to me that he did not know anything about the Kansas foreclosure laws I undertook, in a two-page letter, to explain it to him and I think I explained it to him fairly and told him what his rights were and what the redemption period would be and that was before judgment was rendered and his client would have his right. This letter is in evidence here. * * * Q. You were sufficiently interested to have a special day by request and have some other reason why the court should be here? A. I did not order that day. Q. You knew if the court did not come until October you could not get a confirmation of that sale until he did come? A. I think I could have got a confirmation on the 9th of October because everything was regular and clean and clear and I still think if the court had not got down here all summer (and he usually comes two or three times) on the 9th day of October he would have confirmed that sale."

He further testified that he was the only bidder at the sale and bid for his client, the Warren Mortgage Company. He denied receiving a letter of June 28th asking about the time of sale, and denied that in the telephone conversation there was anything said about postponing the proceedings in order to present the matter of the period of redemption to Judge Hay. His testimony is that in the conversation over the telephone Mr. Truitt said he had received the journal entry and that it was all right except that he did not like the 18 months' period of redemption that was allowed; that he then informed Mr. Truitt under what circumstances the judge would reduce the period, and that he did not think Mr. Truitt was entitled to have it fixed at 6 months; but told him if he was not satisfied with the 18 months to send the journal entry to Judge Hay and present his side of the case, "and I will write him a letter and tell him my side, and if Judge Hay sees fit to reduce the period of redemption, it will be all right with me."

The land in controversy is shown by the testimony to be worth from \$6,400 to \$8,000. Under the judgment of the district court the plaintiff loses his lien and Mr. Field obtains the land for the amount of the first lien.

The plaintiff in the present suit was represented in the foreclosure proceedings by an attorney who resided in Oklahoma and who seems to have been unfamiliar with the Kansas laws respecting foreclosures and the rights of junior lienholders. Even after discovering his ignorance of the Kansas statutes, the attorney was negligent in failing to make himself familiar with the law affecting his client's interest. Apparently he relied upon the fairness and courtesy of the defendant's attorney to protect his client's rights. Irrespective of Mr. Field's motive, it is obvious, we think, that the natural effect of his letter offering to act for Mr. Truitt, together with the apparent candor and frankness of all the other correspondence, had the effect to lull the attorney into the belief that no advantage would be taken of his ignorance of the Kansas law, nor of his failure personally to give attention to the date of the sale. Originally Mr. Field owed no duty to the plaintiff or his attorney; in fact, he represented opposing interests, those of his own client and of himself as owner of the land; but it would be going too far to say that after encouraging the nonattendance of the opposing attorney at court by voluntarily offering to act for him in taking the judgment and to prepare a journal entry to be agreed upon, he was in a position where in conscience and equity he could take advantage of the absence of plaintiff's attorney, and especially of that attorney's ignorance of the fact that a sale of the property was pending, and that a special session of court had been arranged at which confirmation could be had. True, in the second letter he disclaims any intention of acting as the attorney for Mr. Truitt's client, but this frank statement of itself might have tended only to increase the attorney's confidence.

Although the petition alleged actual fraud and an attempt to procure an unconscionable advantage of the plaintiff by a studied attempt to deceive his attorney, it was not necessary that this claim should be established in order to entitle the plaintiff to the relief demanded, and the judgment of the trial court is that fraud had not been proved. Since the procedure in confirmation of sales was amended in 1893 (Civil Code, § 500 [Gen. St. 1915, § 7404]), the trial court is not expected to close its ears to all equitable considerations and confirm a sale as a matter of course, merely because the record shows no irregularity in the movement of the judicial machinery by which the sale was accomplished. Even before the statute was amended it was held that:

"Inadequacy of price, taken alone, is seldom if ever sufficient to authorize the setting aside of a sheriff's sale; yet great inadequacy of price

is a circumstance which courts will always regard with suspicion, and in such case slight additional circumstances only are required to authorize the setting aside of the sale." Means v. Rosevear, 42 Kan. 377, 22 Pac. 319.

To the same effect is Dewey v. Linscott, 20 Kan. 684.

In Bank v. Murray, 84 Kan. 524, 533, 114 Pac. 847, and in other, recent cases, the amendment has been referred to as imposing upon the court the same powers and responsibilities that rested upon the chancellor of the old court of equity in a suit in the nature of a bill to redeem. In the case last cited the court approved the following language from Graffam v. Burgess, 117 U. S. 180, 190, 6 Sup. Ct. 686, 691 (29 L. Ed. 839):

"Looking at the whole case, the traces of design on the part of Graffam to mislead the complainant, to lull her into security, and thus to prevent her from redeeming the property, are abundantly manifest, and such design must be assumed as an established fact. * * * As already perceived, we do not rest our conclusion alone upon the gross inadequacy of the consideration of the sale; but upon that in connection with the unfair conduct of the defendant in taking advantage of the complainant's ignorance of the sale, and giving her no intelligible notice or intimation of it, or of his intended seizure of the property after the year of redemption had passed, but standing by and seeing her expend large sums of money upon it, even after the year had expired. This, we think, presents a case sufficiently strong to justify the action of the court below, at least to the extent to which it went in making the decree appealed from (allowing the owner to redeem)."

The opinion also quoted with approval from Pewabic Milling Co. v. Mason, 145 U. S. 349, 356, 12 Sup. Ct. 887, 888 (36 L. Ed. 732), where, after stating the rule that there is a measure of discretion in a court of equity in such matters, Mr. Justice Brewer said:

"And after a sale has once been made, he will, certainly before confirmation, see that no wrong has been accomplished in and by the manner in which it was conducted."

In Bank v. Murray, supra, we held also that inasmuch as the entire evidence on which the trial court acted had been abstracted "we may properly reach our own conclusions thereon."

As the judgment stands, the plaintiff, who was himself without fault, and who offers to do equity by bidding the amount of the first and second liens or by redeeming from the first, is compelled to lose his entire lien, while one who purchased the property subject to both liens gets a clear title merely by satisfying the first, and is thus permitted to take advantage of the absence and neglect of plaintiff's attorney to attend and bid at the sale under such circumstances as, in our opinion, renders the judgment unconscionable and inequitable.

The judgment is reversed and the cause remanded, with directions to set aside the confirmation and permit plaintiff to redeem.

JOHNSTON, C. J., and MASON, WEST, MARSHALL, and DAWSON, JJ., concurring. BURCH, J., concurring in the result.

(102 Kan. 656)

BOARD OF COM'RS OF DOUGLAS COUNTY v. CITY OF LAWRENCE.
(No. 21380.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. DEDICATION —54—TOWN-SITE PURPOSES —LEVEES—STREETS AND PARKS—STATUTE.

When the founders of a city or town execute, file, and record the plat of the property devoted by them to town-site purposes, the fee title of the levees, streets, alleys, parks, and the like vests in the county forever in trust for the public by operation of law.

2. DEDICATION —60—LEVEES, STREETS, ETC. —POSSESSION AND CONTROL.

The lawful possession, dominion, and control of all levees, streets, and the like, dedicated to the public by the founders of a town site, are vested in the city by operation of law.

3. DEDICATION —60—MUNICIPAL DUTIES—LEVEES.

A city cannot by executing a deed of conveyance to a part of a public levee disable itself of its public municipal power nor relinquish its public municipal duty to control the property for the public good.

4. ADVERSE POSSESSION —8(1) — DEDICATION —63(2) — ESTOPPEL —62(4) — LIMITATION OF ACTIONS —11(3)—DUTIES AND PRIVILEGES CONFERRED FOR PUBLIC BENEFIT.

Those rights, duties, and privileges conferred and imposed upon a municipal corporation exclusively for the public benefit cannot ordinarily be lost through nonuse, laches, estoppel, or adverse possession, and statutes of limitation are not ordinarily applicable thereto.

Appeal from District Court, Douglas County.

Action by the Board of County Commissioners of Douglas County against the City of Lawrence. Judgment for defendant, and plaintiff appeals. Affirmed.

J. S. Amick, of Lawrence, for appellant. Thomas Harley and J. W. Ward, both of Lawrence, for appellee.

DAWSON, J. This was an action by the board of county commissioners of Douglas county against the city of Lawrence to quiet its title to a small tract of land on the bank of the Kansas river in the city of Lawrence. The county's title sought to be quieted was based on a deed from the city to the county executed in 1860. The defendant city prevailed, on the following facts and conclusions of law as found and determined by the trial court:

"(1) The tract of land in dispute in this case is clearly marked on the plat attached to the pleadings. It is bounded on the north by the Kansas river, on the west by the west line of Vermont street produced, on the south by Pinckney street, and on the east by the west line of Massachusetts street produced. The ground forms a portion of the original town site of Lawrence.

"(2) The original town-site company filed its plat in the late '50's, and on that plat this land was marked 'Levee.' This plat was destroyed by fire in the Quantrell raid of 1863, but another was reproduced by a competent engineer

later by order of the board of county commissioners.

"(3) In June, 1860, the city of Lawrence by its proper officers executed and delivered to Douglas county a warranty deed for the land in question, and a few years later the county erected a jail thereon and used it for jail purposes until some five or six years ago, when it erected a new jail on another site.

"(4) In 1868 certain persons representing themselves to be 'trustees of the Lawrence Town Company' executed a deed of conveyance to the city of Lawrence for this property.

"(5) The county has leased this property to various persons from time to time. * * *

"(7) If the city through its mayor and councilmen had the authority so to do, it has parted with all of its title to the real estate in question to the county, both by actual transfer and by permitting the county to use the same openly, notoriously, and adversely for more than 15 years.

"Conclusions of Law.

"(1) When the plat of the original town site was filed, it vested the title of the real estate in question in the county for the uses and purposes therein designated. The use and control, however, was always in the city.

"(2) The city was powerless to part with the title to this real estate or to its right to possess and use the same for the purpose for which it was dedicated.

"(3) The fee of the real estate in question is still in the county, not by virtue of any conveyance, or any adverse title, but it holds the original title vested in it by the filing of the plat; the possession and use of it, however, is in the city."

Plaintiff appeals.

[1, 2] The county of Douglas has an unimpeachable fee title to the land as trustee for the benefit of the public, and particularly for that portion of the public represented by the city of Lawrence and its inhabitants; such title in trust being based on the dedication of the land to public uses by the original incorporators of the city of Lawrence, as evidenced by the plat filed by them at the time the city was founded about 1854 or 1855. Kansas Stat. (Territorial) 1859, c. 24; Gen. Stat. 1915, §§ 6797-6808; County of Franklin v. Lathrop, 9 Kan. 453; Atchison & N. R. Co. v. Garside, 10 Kan. 552, Syl. par. 1; Wood v. National Waterworks Co., 33 Kan. 590, 7 Pac. 233; A. & N. R. Co. v. Manley, 42 Kan. 577, 586, 22 Pac. 567; A. T. & S. F. R. Co. v. Leuning, 52 Kan. 732, 735, 35 Pac. 801, 803. In the latter case the court said:

"In this state the fee of all real estate, when dedicated to public use by the proprietors of any town or city, vests absolutely in the county wherein such real estate lies, and the county forever afterwards holds the property in trust for such use. The county holds the property as a mere agent of the public, and in trust for the public use. But the city has the control over it as another agent of the public. Railroad Co. v. Garside, 10 Kan. 552; Showalter v. Railway Co., 49 Id. 421 [32 Pac. 42]."

In the Wood Case, supra, part of the syllabus reads:

"Where a proprietor laying off any city or town, or an addition to any city or town, * * * makes out a map or plat thereof, and reserves for public uses streets and alleys, and acknowledges, certifies, files, and records the

same with the register of deeds of the county in which the city or town, or addition, is situated, the fee of the streets and alleys dedicated to public use vests absolutely in the county wherein such real estate lies, and the county forever afterward holds the property in trust for such use; but the city has control over it, as another agent of the public; and such streets and alleys, under the direction and control of the public authorities, are subject to be appropriated to all the uses to which the streets of a city are usually devoted, as the wants or conveniences of the people may render necessary or important."

The evidence and the inferences which may properly be derived therefrom justify the trial court's second finding of fact. The deed of the original grantor of the town-site company intended that the levees, streets, parks, etc., should pass to the public. That the grantor directed that his trustees should convey the levees, etc., by deed to the town corporation is unimportant. The statute designated the proper mode of conveying the property for the uses intended, by the execution, filing, and recording of the plat, and that mode was complied with. The act of 1859 (chapter 24) was intended so far as applicable to apply to lands theretofore platted for town sites as well as to those which should be platted thereafter. Sections 11 and 12.

"A strip of land lying along the margin of a navigable stream was included in the plat of a city and dedicated to the public by the use of the word 'Levee' written thereon. Several streets opened upon this tract and many lots had no other means of ingress and egress except over and along it. Held, that its dedication included its use as a street as well as a landing place for boats." *McAlpine v. Railway Co.*, 68 Kan. 207, 75 Pac. 73, 64 L. R. A. 85, 1 Ann. Cas. 452, Syl. par. 1.

[3] It seems, therefore, that when the original plat of the city of Lawrence covering the levee in question was filed and recorded, the prior title holders parted with all their interest in the property in dispute, and the fee title in trust passed by operation of law to Douglas county; and the beneficial use of the land passed to the general public; and the control of the land for the benefit of the public passed to the city of Lawrence. Consequently the deed of 1860 from the city of Lawrence to the county of Douglas conveyed nothing that the county did not then already possess—the fee title to the property; and the deed from the city to the county executed in 1860 was void because the city had no fee title to convey, and it could not by such conveyance disable itself of its public municipal power nor relinquish its public municipal duty to control the property for the public good.

The deed of 1866 from the trustees of the Lawrence Town Company to the city was of no force, as the dedication of the property to public uses several years before had conveyed all that the grantors had power to convey. And the doctrine of the effect of after-acquired title is not applicable.

A levee in a city dedicated to public use

does not substantially differ from a street or public park. In *Webb v. Demopolis*, 95 Ala. 116, 13 South. 289, 21 L. R. A. 62, it was held:

"A city or town has no alienable interest in the public streets thereof, but holds them in trust for its citizens and the public generally; and neither its acquiescence in an obstruction or private use of a street by a citizen, or laches in resorting to legal remedies to remove it, nor the statute of limitations, nor the doctrine of equitable estoppel, nor prescription, can defeat the right of the city to maintain a suit in equity to remove the obstruction." Syl. par. 4.

[4] While a municipal corporation may part with its private, proprietary rights through conveyances, or lose them through prescription, adverse possession, or by statutes of limitation, yet the great weight of authority is that those rights, duties, and privileges which are conferred or imposed upon a municipal corporation exclusively for the public benefit are not ordinarily lost through nonuse, laches, estoppel, or adverse possession, nor are statutes of limitation applicable thereto. *Simplot v. Chicago, M. & St. P. Ry. Co.* (C. C.) 16 Fed. 350, Syl. par. 2; *San Leandro v. Le Breton*, 72 Cal. 171, 13 Pac. 405; *Orena v. City of Santa Barbara*, 91 Cal. 621, 28 Pac. 268; *Lee et al. v. Town of Mound Station*, 118 Ill. 304, 8 N. E. 759; *Cheek v. City of Aurora et al.*, 92 Ind. 107; *Wolfe et al. v. Town of Sullivan*, 133 Ind. 331, 32 N. E. 1017; *City of Waterloo v. Union Mill Co.*, 72 Iowa, 437, 34 N. W. 197; *Taraldson v. Town of Lime Springs*, 92 Iowa, 187, 60 N. W. 658; *Witherspoon v. Meridian*, 69 Miss. 288, 13 South. 843; *Territory v. Deegan*, 3 Mont. 82; *Price v. Inhabitants of Plainfield*, 40 N. J. Law, 608; *St. Vincent Orphan Asylum v. City of Troy*, 76 N. Y. (31 Sickels) 108, 32 Am. Rep. 286; *Commonwealth v. Moorehead*, 118 Pa. 344, 12 Atl. 424, 4 Am. St. Rep. 599; *Sims v. Chattanooga*, 70 Tenn. (2 Lea) 694; *Yates v. Town of Warrenton*, 84 Va. 337, 4 S. E. 818, 10 Am. St. Rep. 860; *Ralston v. Town of Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834; *Childs v. Nelson*, 69 Wis. 125, 33 N. W. 587.

There is still another somewhat different legal and equitable principle which bars the rights of Douglas county as sought to be maintained in this action. The county became the trustee holder of the title in 1855 or thereabout by operation of law. The county was thereby charged in law with a trustee's duties, to hold the title inviolably for the benefit of its *cestui que trust*, who under this trust were the general public. The county has always been charged in law with notice of the rights of the public. It could acquire no interest in the property inconsistent with its duty as trustee. It was charged in law with notice that the city could not abdicate its public municipal power nor escape its public duty to control the property for the benefit of the *cestui que trust*, the people in general and the inhabitants of Lawrence in particular.

The judgment of the district court was correct, and it is affirmed. All the Justices concurring.

(102 Kan. 699)

CAPITAL IRON WORKS CO. v. CHICAGO BONDING & SURETY CO. et al.
(No. 21769.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

LIMITATION OF ACTIONS §22(7) — BOND TO SUPERSEDE LIEN—CONSTRUCTION — LIMITATIONS.

The terms of a bond given in connection with a contract for the erection of a public building considered, and *held*, the bond was one to supersede mechanics' liens, to which the general statute of limitations applies.

Appeal from District Court, Shawnee County.

Action by the Capital Iron Works Company against the Chicago Bonding & Surety Company and another. Judgment for plaintiff, and defendant named appeals. Affirmed.

Harding, Deatherage, Murphy & Harris, of Kansas City, Mo., for appellant. Garver & Garver, of Topeka, for appellee.

BURCH, J. The action was one to recover on a bond given in connection with a contract for the erection of a public building. A demurrer was sustained to the answer, which pleaded the statute of limitations. Judgment was rendered for the plaintiff, and the defendant appeals.

The bond recited that the principal and surety were bound to the state of Kansas for the use of all persons in whose favor liens might accrue by virtue of section 1, chapter 183, of the Laws of 1909, and that if the principal should pay all claims which might be the basis of liens and should pay all indebtedness incurred for labor and material furnished to erect the building, the bond should be void. The answer was that the bond was exacted under the law requiring a bond conditioned to pay all indebtedness incurred for labor or material furnished to erect the building; that the bond sued on was the only bond required; that the bond was duly filed in the office of the clerk of the district court; that the building was completed more than six months before the action was commenced, and hence that the action was barred by the special statute of limitations contained in section 7570 of the General Statutes of 1915 (Code Civ. Proc. § 662). The argument is that section 1, chapter 183, of the Laws of 1909, is permissive. The contractor may give the bond there provided for, and should he do so the bond takes the place of the security afforded by mechanics' liens. To such a bond the general statute of limitations applies. Section 7569 of the General Statutes of 1915 (Code Civ. Proc. § 661) is mandatory, and required pub-

lic officials to take a bond conditioned for payment of all indebtedness incurred for labor and material furnished. The presumption is the mandate was observed. The allegations of the answer are that the bond was given as required by law, and no other bond was given. These allegations were admitted by the demurrer, and the special statute of limitations referred to must apply.

The terms of the bond could not be changed by allegations of the answer respecting its nature and purpose. The instrument speaks for itself. It was clearly a bond to supersede mechanics' liens. The answer does not charge that the plaintiff was not a party interested in such security, and consequently the special limitation applicable to suits on general bonds for the payment of labor and material debts does not apply. Probably the bond was sufficient to comply with section 7569 because of the added condition to pay all indebtedness incurred for labor and material. If so, the validity of the instrument for other purposes of security was not impaired. If not, the defendant cannot escape liability on this bond because another was not also taken.

The judgment of the district court is affirmed. All the Justices concurring.

(102 Kan. 542)

SHORE et ux. v. ATCHISON, T. & S. F. RY. CO. (No. 21118.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

CARRIERS §331(3)—PASSENGERS—SHIPPER'S PASS—CONTRIBUTORY NEGLIGENCE.

One who was traveling on a shipper's pass accompanying stock being transported to market got off the caboose at a station where the train was stopping to unload other stock, and while waiting at the station was ordered or directed by the station agent and a brakeman to take a key and deliver it to the train crew at the cattle pens and to ride back on that part of the train. He voluntarily obeyed the order or direction, and while getting upon the side of a car to ride back was caught between the side of the car and the cattle chute, and received injuries from which he died. *Held*, that as he voluntarily placed himself in a position of obvious danger, and was not engaged in looking after or caring for the stock in his charge, the railroad company is not liable in an action to recover for his death. *A., T. & S. F. R. Co. v. Lindley*, 42 Kan. 714, 22 Pac. 703, 6 L. R. A. 646, 16 Am. St. Rep. 515.

Appeal from District Court, Sedgwick County.

Action by E. Shore and Kittle Shore against the Atchison, Topeka & Santa Fe Railway Company. Demurrer to plaintiffs' evidence sustained, and they appeal. Affirmed.

Adams & Adams, of Wichita, for appellants. Houston & Brooks, of Wichita, and W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, for appellee.

PORTER, J. Alleging that the death of their son, John Shore, was caused by the defendant's negligence, plaintiffs sued to recover damages. The court sustained a demurrer to the evidence, and they appeal.

John Shore was in charge of a carload of cattle being shipped from Wichita. At the station of Norwich it was necessary for the defendant to unload two head of stock at the local cattle pens, which were about 1,100 feet from the railway station. Young Shore, who was 21 years of age, alighted from the caboose and stood at the station platform waiting for the train to resume its journey. When the train crew in charge of the car to be unloaded arrived at the cattle pens the cattle chute was found to be locked, and it became necessary to obtain a key before the car could be unloaded. They signaled the station agent for the key, and the brakeman and the station agent requested plaintiffs' son to take the key down to the cattle chute and ride back to the station on that part of the train. He took the key and delivered it to the train crew. Shortly afterwards he was found lying by the track near the cattle chute, and died almost immediately from his injuries. There was no eyewitness to the accident, but the circumstances indicated that he climbed on the side of one of the cars to ride back to the station, and was caught between the side of the car and the end of the cattle chute and received the injuries which resulted in his death. It was contended that because he was acting under the orders of the station agent and brakeman performing a service solely for the defendant's benefit, the defendant is liable; that it was negligent in maintaining its cattle chute so close to the tracks that a person attempting to climb upon the train or ride upon the side of the car would be knocked down and injured.

The defendant admits that the fair inference to be drawn from the circumstances in evidence are that the deceased was caught and crushed between the cattle chute and the side of one of the cars, but insists there was no evidence tending to show any negligence on the part of the defendant. It is urged that the act of the station agent and brakeman in sending him down to the chute with the key and telling him to ride back on the train could not have been the cause of his death; that if he was on the side ladder of the car, he must have climbed on near the cattle chute, and, by the use of his ordinary faculties of observation, he could have perceived the danger of being injured. An authority relied upon by the defendant is *A. T. & S. F. R. Co. v. Lindley*, 42 Kan. 714, 22 Pac. 703, 6 L. R. A. 646, 16 Am. St. Rep. 515, where a shipper of stock, at the request of the conductor, got on top of the train to help signal, and was thrown off by a sudden movement of the train and injured. There, as in the present case, the train was in charge of

the conductor, but it was said in the opinion that the order or direction of the conductor to go on top of the cars and help signal "was entirely without the routine of the conductor's duties; and as it was voluntarily obeyed by Lindley, it could not fasten any liability on the railroad company." If he acted as an employé or brakeman it was of his own volition. The defendant also relies upon the terms of the shipping contract pleaded in the answer, by which the deceased received free transportation with the stock, and by which he agreed to remain in a safe place in the caboose while the train was in motion, and that he would not get upon any freight car while switching was being done or about to be done at stations, or at any other time or place.

In our opinion the act of the station agent and brakeman in requesting the deceased to take the key down to the cattle chute and directing him to ride back on the train was not the cause of his death. He was under no obligation to obey the order or direction of these employes, neither of whom had any charge of the train. Even if the conductor in whose sole charge the train was had given him the order it would have been optional with him whether or not he obeyed the request. From his age and intelligence as shown by the evidence, it is apparent that he must have known the danger of attempting to get on the side of a car passing the cattle chute, and there is nothing in the evidence to indicate that any of the employes of the defendant saw or knew that he was in a position of danger. It is not even claimed that the station agent or brakeman told him what position to take on the train or how to get on it, although it would not seem that if this had been done it would have added anything to the plaintiffs' cause of action.

He voluntarily placed himself in the position of obvious danger at a time when he was not engaged in the performance of any duties connected with the care of the stock in his charge, and, following the rule declared in the *Lindley Case*, supra, the demurrer to the evidence was rightly sustained.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 535)

MAPLE GROVE DRAINAGE DIST. v.

HICKS et al., Board of Highway
Com'rs. (No. 21096.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

HIGHWAYS—ACTION OF TOWNSHIP OFFICERS—MANDAMUS BY DRAINAGE DISTRICT.

The statute defining the powers and duties of a drainage district does not vest it with power to regulate the construction of highways or of culverts forming parts of highways within the district, but such power over township highways is vested in township officers; and therefore the drainage district may not maintain

mandamus to compel township officers to construct highway culverts in the district so that they will operate as dams and sluiceways.

Appeal from District Court, Douglas County.

Mandamus by the Maple Grove Drainage District against A. A. Hicks and others, as the Board of Highway Commissioners of Grant Township, Douglas County. Judgment for defendants, and plaintiff appeals. Affirmed.

J. B. Wilson and B. V. Pardee, both of Lawrence, for appellant. J. Q. A. Norton and Walter G. Thiele, both of Lawrence, for appellees.

JOHNSTON, C. J. This proceeding in mandamus was brought by a drainage district to compel township officers acting as a board of highway commissioners to construct culverts of certain dimensions and form at three points on highways within the drainage district. The questions involved in this appeal arise upon the ruling of the trial court in sustaining a demurrer to plaintiff's petition. It was alleged that in the drainage district are three bayous or sections of lowland separated by higher ground; that at times of excessive rains large quantities of water collect in these low places; that the natural drainage in the district is in a southerly direction toward the Kansas river; and that plaintiff had caused surveys to be made and was proceeding to establish and complete a system of drainage under which the water would pass into the Kansas river through a tile 30 inches in diameter, which was then in course of construction. The plans made contemplated that the water should pass from one bayou or low place to another through pipes or openings not larger than 30 inches, and from the lower bayou through the 30-inch tile leading to the river. On the higher ground separating the bayous township highways have been established and culverts are about to be built by the township officers with rectangular openings 4 feet by 6 feet in size. It is alleged that these openings would allow the water to pass from one bayou to another in greater volume than could be carried by the tile or single outlet leading to the river. The district served notice of its purposes and plans upon the township officers with a demand that they build culverts at certain designated places, not to exceed 30 inches in diameter, of substantial material and good construction; but notwithstanding the notice and demand the defendants are proceeding to build the culverts in dimensions of 4 by 6 feet.

It is insisted that to allow the defendants to build the culverts as they were proceeding to do would result in allowing the water to flow through the ditches much faster than it could be carried off through the 30-inch tile leading to the river, and would defeat the plaintiff's right, as given it by statute, to

control the construction and maintenance of its drainage system. Plaintiff is not proposing to build culverts, nor is it claiming that it has authority over the construction and maintenance of the township highways of which the culverts form a part. These powers have been expressly conferred on the township officers. Gen. Stat. 1915, § 8765. The powers of the drainage district have been specified by the Legislature, but nothing in the act authorizes it to regulate the construction of highways, or to deprive township officers of the powers conferred upon them respecting highways. Gen. Stat. 1915, § 3896. Culverts constitute a part of the highway and are necessary to its construction, and the township officers are not only given control of the construction, but the township itself is made liable for injuries which result from defective construction. Gen. Stat. 1915, § 722. It may be that culverts or openings of the size demanded by the drainage district will not be sufficient to properly drain the water from the highways and, at any rate, the determination of that question is vested in the township officers.

The district is not complaining that the culverts will not allow the water to flow freely across the highways, but that they will not retard the flow of drainage so as to accommodate a small pipe at the lower end of the district. There might be cause for complaint if the officers had constructed the highways so that they would have prevented the free flow of water, but it appears that the proposed construction facilitates the flow, and presumably it is one which contributes to the efficiency and durability of the highways. The plaintiff is asking, in effect, that the township officers be compelled to construct the highways so that they will operate as dams and sluiceways, holding back the water during periods of excessive rains, and only allowing the passage of so much as will flow through a pipe 30 inches in diameter. If dams, levees, floodgates, and sluiceways are essential to efficient drainage of the district, the plaintiff has the power to construct them (Gen. Stat. 1915, § 3896), but the Legislature has not authorized it to control the construction and maintenance of highways.

The law of course proceeds on the theory that officers in the performance of their several duties in the district will co-operate so far as practicable, so that the exercise of the powers devolved upon one will not obstruct or defeat those conferred on the other, and that all will work together for the general welfare. It must be assumed that the township officers were acting in good faith, and until the Legislature gives the drainage district the control of highways in the district, such control must be exercised by the officers upon whom it has been laid.

The judgment of the district court is affirmed. All the Justices concurring.

(102 Kan. 693)

STATE v. HEITMAN. (No. 21564.)
(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. CRIMINAL LAW §449(2)—EVIDENCE—UNDERSTANDING OF EXPRESSION.

No error is committed in refusing to allow a witness to testify as to what he understood a person to mean by an expression he had used, when the situation is such that all the data from which an inference on the subject might be drawn could readily be made available to the jury.

2. CRIMINAL LAW §825(4)—INSTRUCTIONS—PRESUMPTION AND BURDEN OF PROOF.

In a criminal case the jury were told that they should acquit the defendant unless they found from the evidence beyond a reasonable doubt all the facts, which were enumerated, necessary to constitute the offense; that no presumption of guilt existed on account of the defendant being charged with crime, but that every presumption of law was in favor of his innocence; and that with respect to an alibi it did not devolve upon him to prove that defense, but that an acquittal must follow if the jury had a reasonable doubt whether he was personally present at the time of the alleged offense. *Held*, that at least in the absence of a specific request it was not error to omit to instruct in so many words that the burden of proof was on the state, that the burden never shifted, and that the defendant was presumed to be innocent until the contrary was proved.

Appeal from District Court, Shawnee County.

L. O. Heitman was convicted of arson, and he appeals. Affirmed.

Otis E. Hungate, Paul Heinz, and Edward Rooney, all of Topeka, for appellant. S. M. Brewster, Atty. Gen., and Robert D. Garver, of Topeka, for the State.

MASON, J. L. O. Heitman appeals from a conviction upon a charge of arson. The property burned was a frame building occupied by him as a grocery store and meat market. The fire was obviously incendiary, and the theory of the state is that the defendant set it for the purpose of collecting the insurance. Only two rulings are challenged; the sustaining of objections to questions asked of a witness and the omission to include certain instructions in the charge.

[1] 1. A witness for the state testified that he saw the fire while he was about a block and a half away, at 2 o'clock in the morning; that he ran to the store, and there met a man who told him he was Heitman, and who appears to have been identified as the defendant by another witness; that he said to this man, "We turned in the alarm as quick as we saw it," and the man merely said, "The son of a bitch." The defendant on cross-examination in effect asked to whom the witness understood him to refer, the purpose being to show that the epithet was applied to the person who had set the fire rather than to the one who had turned in the alarm. Objections to questions of this character were

sustained, the court adding that the witness could tell what the speaker said and how he looked and everything of that kind. We see no error in the ruling. There was no occasion for the witness giving his opinion as to what the speaker meant. The facts bearing on that matter were not so complicated or obscure as to make it at all difficult for him to give the jury the benefit of all the information he had on the subject without stating the judgment he had formed about it. He was not offered as an expert, and the case falls within the rule, which has been well stated in these words:

"Such a witness' inferences are inadmissible when the jury can be put into a position of equal vantage for drawing them; in other words, when by the mere words and gestures of the witness the data he has observed can be so reproduced that the jurors have those data as fully and exactly as the witness had them at the time he formed his opinion." 3 Wigmore on Evidence, § 1924.

If the evidence had been admissible, error in its rejection would not be now available, for no showing was made as to what the answer of the witness would have been if the objections to the questions had been overruled. *State v. Wellman*, 102 Kan. —, 170 Pac. 1052, decided February 9, 1918.

[2] 2. The defendant alleges that the court omitted to instruct the jury that the burden of proof was upon the state, and not upon the defendant, that the burden of proof never shifted, and that the defendant was presumed to be innocent until the contrary was proved. The instructions did not make use of this exact language, but the jury were told that they should acquit the defendant, unless they found from the evidence beyond a reasonable doubt all the facts, which were enumerated, necessary to constitute the offense; that no presumption of guilt existed on account of the defendant being charged with crime, but that every presumption of law was in favor of his innocence; and that with respect to an alibi it did not devolve upon the defendant to prove that defense by a preponderance of the evidence or beyond a reasonable doubt, but that an acquittal must follow if the jury had a reasonable doubt whether he was personally present at the time of the alleged offense. The charge, therefore, showed explicitly that the burden of proof was on the state, that it did not shift, and that the defendant was presumed to be innocent until the contrary was proved. It is not apparent what advantage there could have been in a restatement of these rules according to a particular formula, if a request to that effect had been made. And in the absence of such a request it is clear that no error was committed in this regard.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 599)

HENSHAW v. SMITH et al. (No. 21352.)
(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. CONTRACTS \S 137(1) — **PARTIAL INVALIDITY—EFFECT.**

If a contract contains provisions some of which are valid and some of which are invalid, and the lawful matter can be readily severed from that which is unlawful, the lawful portion of the contract will be upheld. *Fackler v. Ford, McCahon*, 21, 1 Kan. (Dass. Ed.) 463, syl. par. 2.

2. LANDLORD AND TENANT \S 157(9) — **IMPROVEMENTS BY TENANT—RIGHT OF ACTION.**

Where a tenant makes lasting and valuable improvements on a farm which the landlord agrees to pay for when the tenancy is terminated, the tenant's right to reimbursement for the improvements is sufficiently mature to justify his cause of action when the landlord leases the farm to another tenant and the latter is let into possession of part of the property.

3. LIMITATION OF ACTIONS \S 43 — **RUNNING OF STATUTE.**

The statute of limitations does not begin to run until an obligation is due.

4. FRAUDS, STATUTE OF \S 49 — **LIMITATION OF ACTIONS** \S 46(3) — **ACCRUAL OF CAUSE OF ACTION—ORAL CONTRACT.**

Where the time fixed for payment of an oral obligation is uncertain, but its maturity might have arrived within one year, and the promisee had fully performed his part of the obligation, the statute of limitations did not begin to run until the obligation matured, and the obligation was not repugnant to the statute of frauds.

5. DAMAGES \S 74 — **LIQUIDATED DAMAGES — VALIDITY.**

Where parties by agreement fix the measure of recovery due from the one to the other, their agreement governs, and abstract principles of law, relating to the measure of recovery when agreements are wanting, are inapplicable.

Appeal from District Court, Douglas County.

Action by Nathan Henshaw against Albert J. Smith and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Wilson & Pardee, of Lawrence, for appellees. Rilling & Rilling, of Lawrence, for appellants.

DAWSON, J. This was an action by a landlord against his tenant on certain rent notes and for the proceeds of the landlord's share of a wheat crop, and a cross-action by the tenant for permanent improvements placed on the land pursuant to certain oral agreements made from time to time between the landlord and the tenant. The plaintiff rented his farm in Douglas county to the defendant A. J. Smith. The other defendants are the wife and a son of the tenant. The tenancy began in March, 1897, and continued for about 20 years. It had not been completely terminated at the inception of this lawsuit, although the farm ere then had been leased to another tenant and the latter was in possession of part of the land. The defendant A. J. Smith admitted his liability on the rent notes, and admitted his liability for the plaintiff's share of the proceeds of

the wheat crop but disputed its amount. There was also a minor item or two touching the rent of a small acreage of pasture which was to be computed on its value as wheat land. For several years there was apparently no written lease between the parties. Later, about 1906, annual written leases between the parties began to be their practice, but according to defendant's pleading and testimony these leases were only to evidence the rent charges, and not for the purpose of defining the leasehold as an ordinary tenancy from year to year. Defendant's cross-petition alleged that in addition to the written contracts of lease, there was a series of oral agreements, whereby defendant was to occupy the farm as long as plaintiff owned it, and that defendant was privileged to place permanent improvements upon the land upon condition that if plaintiff should sell the land or if defendant was otherwise dispossessed, the plaintiff was to reimburse defendant for his labor and expenses incurred in making these improvements. Pursuant to these oral understandings agreed to from time to time, defendant planted an orchard on the land in 1900, and at various later intervals he built an addition of three rooms and a porch to the farmhouse, put a cement foundation under the house, painted the house, made several additions to the barn, seeded several acres to grass, grubbed out stumps, cut large hedges, built fences, and otherwise permanently improved the property. Aside from defendant's own labor and that of his son for the improvement of the farm, he exhibited receipts for payments of materials and labor made by him aggregating several hundred dollars. The aggregate of plaintiff's causes of action was for \$731.68 and interest; defendant's cross-action was for \$903.56. The jury returned a verdict for defendant for \$99.57.

[1, 2] Plaintiff assigns several errors which will be noted in the order presented. It is hardly accurate for plaintiff to say that the verbal agreements contradicted the terms of the written instruments. The instruments—the leases made from year to year—did not profess to cover the subject of the improvements. There is no reason to think the matter of improvements was involved in the annual written contracts of lease. It does not appear that the oral agreements concerning reimbursements for improvements were part of the leases nor merged therein. The times when the oral agreements were made had no relation to the times when the annual leases were executed. If the oral agreements to pay for the improvements had been made between the landowner and some third person not residing on the land, no one would have the hardihood to maintain that the landlord would not be bound to pay for them. Nor would there be any justice in holding that because the party making the improvements was a

tenant of the landlord, he should not be paid for making them. This view of the controversy does not require the court to go the full length contended for by defendants, that the annual leases were merely to specify the rent in writing, nor is it necessary to give force to the tenant's contention that he was entitled to hold the property until it should be sold by the landlord. The matter is clearly severable. The agreement, if there was one, or the illegal agreement as it really appears to have been, that the defendants could retain the farm as long as the landlord owned it, is readily severable from the various agreements between the defendant Albert and the plaintiff touching the improvements. Thus when the building of an addition to the house was under consideration, plaintiff said:

"It is for thee, Albert; I will never make thee move. If thee has to move, I will pay thee for it."

And when the building or enlarging of the barn was under consideration, plaintiff said:

"All of these improvements is for thee, and if thee ever has to move, I will pay thee for all of them."

The promise, "I will never make thee move" may be wholly void as being at variance with the annual written leases, or because it is an abortive obligation pretending to convey an interest in land of greater dignity than a lease for a year which could not be done except in writing; and it may also be void as indefinite and without consideration. But the promise, "If thee ever has to move, I will pay thee for it," is a binding severable obligation, not dependent upon the length of the term of tenancy; and it can and should be enforced. *Fackler v. Ford, McCahon*, 21, 1 Kan. [Dass. Ed.] 463, syl. par. 2; 9 Cyc. 569; 1 M. A. L. 495, 496. In 6 R. C. L. 682, 683, it is said:

"But where the consideration for a contract is made up of several distinct transactions or several parts, some of which are legal while others are illegal, and the legal portions of the consideration can be separated from the illegal portion, the contract will be upheld, at least if it contains nothing contrary to good morals and nothing for which a legal penalty is incurred. A similar rule seems to apply where the illegal portion of the consideration is merely incidental."

It is next urged that, even if the oral agreements to pay for the improvements were not merged into the annual contracts of lease, the defendants' cause of action thereon was not mature. The plaintiff landlord had taken steps to terminate the tenancy. He had leased the farm to another tenant, and had already let the new tenant into possession of part of the property. It was not necessary for defendants to wait until they were forced to surrender the whole premises. When defendants pleaded their cross-action it was then apparent they would "have to move"; the time for payment had substantially arrived in accordance

with plaintiff's promise, "If thee has to move, I will pay thee."

[3, 4] The court discerns no merit in plaintiff's next contention, that if the defendants' claims were mature, they were more than 3 years old, and barred by the statute of limitations. The statute never begins to run until an obligation is due. The term fixed for payment was uncertain, but since it could have wholly matured within a year, and there had been complete performance by the defendant, neither the statute of frauds nor the statute of limitations barred the defendants' cross-action. *Larimer v. Kelley*, 10 Kan. 298, 312; *Stout v. Ennis*, 28 Kan. 706, note [Dass.] on page 715; *Sutphen v. Sutphen*, 30 Kan. 511, 2 Pac. 100; *A., T. & S. F. R. Co. v. English*, 38 Kan. 110, 117, 16 Pac. 82; *Aiken v. Nogle*, 47 Kan. 96, 98, 27 Pac. 825; *Heery v. Reed*, 80 Kan. 380, 102 Pac. 846; *Brown on Frauds*, § 279; 20 Cyc. 199. Plaintiff's obligation to pay was not due, not mature, until he leased the farm to another tenant.

[5] Touching the proper measure of recovery, the measure was fixed by the agreement of the parties, and did not rest on abstract principles of law which courts apply in the absence of such agreements.

Neither error of law nor miscarriage of justice can be discerned in this case, and the judgment of the trial court is affirmed. All the Justices concurring.

(102 Kan. 616)

GILLIDETT v. HAYDEN. (No. 21368).
(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

VENDOR AND PURCHASER — 134(2) — APPROVAL OF TITLE — MORTGAGE.

A contract for the sale of land provided that the buyer should pay interest at 7 per cent. on the agreed price from the date the title was approved; it also contained a provision that he should pay the interest on an existing mortgage on the land for \$4,000, bearing 8 per cent., until the date named for the payment of \$5,000 on the purchase price. In an action in which the sole controversy was as to the date when by the approval of the title the buyer became liable for interest, *held*, that the existence of such mortgage could not be regarded as an obstacle to the approval of the title, at least where by oral evidence an understanding was shown to the effect that the mortgage was to be satisfied out of the \$5,000 payment.

Appeal from District Court, Meade County.
Action by M. S. Gillidett against James H. Hayden. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank S. Sullivan, of Meade, for appellant.
H. Llewelyn Jones, of Meade, for appellee.

MASON, J. On March 4, 1915, a written contract was entered into for the sale of land by M. S. Gillidett to James H. Hayden. It provided for the payment of \$1,100 down and \$5,000 on August 1, 1915, and for the

giving of a mortgage for the balance of \$14,000, with interest at 7 per cent. from the date titles were approved. The deal was carried out, but in the settlement interest was computed only from August 1, 1915. Gillidett brought an action against Hayden, alleging that the title had been approved on March 6th, and asking for interest from that date to August 1st, amounting to \$392. The plaintiff recovered, and the defendant appeals.

At the conclusion of the plaintiff's evidence the defendant demurred. The demurrer was overruled, but the plaintiff asked leave to introduce further evidence. The request was granted, and more evidence was given. The demurrer was then renewed and again overruled. The defendant assigns error upon each of these rulings. The reopening of the case was within the discretion of the trial court, and the only substantial questions involved are whether incompetent evidence was admitted, and whether the evidence was sufficient to support a finding that the title was approved on March 6th. On that date the attorney who made the examination for the defendant reported that the title was good and marketable, subject to a mortgage for \$4,000. He added that if any improvements had been made within four months, proof should be furnished that the labor and material had been paid for, and that if the land was occupied by any one other than the plaintiff, inquiry should be made as to the claims of the occupant. In other words, the effect of the report was that the record title was clear (subject to the mortgage) but that grounds for mechanics' liens might exist without a lien statement having been filed, if improvements had been made within four months, and that a claim under an unrecorded instrument might be good if made by some one in possession. There is no suggestion that any such improvements were made, or that any one else was in possession, and these matters did not involve any delay in passing on the title, and apparently are not relied upon as having had that effect. But the mortgage referred to was not released until the \$5,000 was paid, in August, being satisfied out of that payment. The defendant maintains that the title was not cleared and was not approved until the mortgage was discharged, and that he should not be required to pay interest until that time.

The plaintiff contends that within the meaning of the contract the title was to be regarded as approved when he had shown to the satisfaction of the defendant his ability to perform his contract; that the existence of a mortgage for a less amount than the payment to be made in August did not prevent the approval of the title; and that if there would otherwise have been any doubt about this proposition, it was put at rest by the fact (to which he testified) that there had been

an understanding between the parties that the mortgage was to be paid out of the \$5,000 installment due in August. The defendant insists that the plaintiff's testimony regarding this understanding was incompetent, because it was hearsay, being based on what others had told the witness. When the evidence was offered it was objected to only on the ground that it tended to vary the written agreement. On cross-examination it was developed that most of the plaintiff's information on the subject was derived from what his own agents had told him, but it was not made clear that he was entirely without direct knowledge concerning it. The written contract contained a paragraph reading as follows:

"Said first party [the plaintiff] is to furnish within a reasonable time an abstract of title certified to date by a bonded abstractor, showing a good and merchantable title to the said premises, clear of all incumbrances or liens except. It is also agreed that said purchaser is to pay the interest on a certain \$4,000 mortgage now on said land from date of contract to the date the \$5,000 payment is made at 8 per cent."

The provision that until the time arrived for the payment of the \$5,000 installment the purchaser should pay interest on the \$4,000 mortgage at 8 per cent.—that being the rate borne by the mortgage debt—seems inconsistent with the idea that the existence of the mortgage could constitute an obstacle to the approval of the title. It plainly suggests an expectation of the parties that the mortgage should be satisfied out of the \$5,000 payment. If it does not in itself amount to an agreement to that effect, it forms a basis for the admission of oral evidence to show that such was the understanding of the parties. We therefore think that there was no error in the admission of the testimony referred to, and that the evidence is sufficient to support the decision.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 670)

STATE v. FLEEMAN. (No. 21398.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. STATUTES §18—ENACTMENT—REGULARITY.

Chapter 179 of the Laws of 1913, commonly known as the white slave law, was regularly enacted.

2. CRIMINAL LAW §240—PRELIMINARY EXAMINATION—NEW COMPLAINT.

A person arrested on a warrant based on a complaint charging one felony may be bound over for another felony shown to have been committed by the evidence adduced at the preliminary examination. When this occurs it is not necessary or proper to file a new complaint.

3. CRIMINAL LAW §234—PRELIMINARY EXAMINATION—RIGHT TO INTRODUCE EVIDENCE—WAIVER.

The proceedings at a preliminary examination considered, and held, the defendant waived the right to introduce evidence.

4. INDICTMENT AND INFORMATION \S 125(3) — COMPLAINT—DUPLICITY.

Section 2 of the act referred to creates a single offense, and an information is not bad for duplicity which charges a person with keeping and maintaining, and assisting in keeping and maintaining, a place where all the immoralities named in the act are practiced, permitted, and allowed.

5. INDICTMENT AND INFORMATION \S 137(6)—INFORMATION—MOTION TO QUASH.

A motion to quash an information, drawn under the section referred to, on the ground of indefiniteness and uncertainty, considered, and *held*, the matters complained of did not affect the defendant's substantial rights.

6. INDICTMENT AND INFORMATION \S 161(3)—TRIAL AMENDMENTS.

An amendment of the information in a matter of form was properly allowed at the trial.

7. INDICTMENT AND INFORMATION \S 52(1) — AMENDMENT—REVERIFICATION.

After the amendment the information was reverified. The reverification was unnecessary, and did not furnish ground for quashing the information.

8. PROSTITUTION \S 4 — PROSECUTION — EVIDENCE.

General reputation of the place described in the information was admissible.

9. CRIMINAL LAW \S 1064(4), 1170(1)—WITNESSES \S 351—IMPEACHMENT—PREDICATE.

The evidence considered, and *held*, sufficient ground for impeaching the defendant was laid, prejudicial error was not committed in striking out the answer to a question propounded to a witness, and proper foundation was not laid for assigning error on a ruling sustaining an objection to evidence.

10. CRIMINAL LAW \S 941(2)—NEW TRIAL—REPUTATION OF WITNESS—DISCOVERY.

The general reputation for truth and veracity of a witness for the state whose name is regularly indorsed on the information should ordinarily be discovered before the trial.

11. CRIMINAL LAW \S 941(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE — IMPEACHING EVIDENCE.

It is not error to deny a new trial desired for the purpose of producing newly discovered impeaching evidence.

12. CRIMINAL LAW \S 1158(1)—FINDING ON AFFIDAVITS—REVIEW.

The finding of the district court, on affidavits contradicted by oral testimony, respecting the merits of a motion for a new trial, will not be disturbed on appeal.

Appeal from District Court, Montgomery County.

W. P. Fleeman was convicted of maintaining a place where prostitution was practiced, and he appeals. Affirmed.

Harold McGugin, of Coffeyville, I. M. Mahin, of Smith Center, and Charles Bucher, of Coffeyville, for appellant. S. M. Brewster, Atty. Gen., and Thurman Hill and George D. Higgins, both of Independence, for the State.

BURCH, J. The defendant was convicted of maintaining a place where prostitution was practiced, contrary to the provisions of section 2 of chapter 179 of the Laws of 1913 (Gen. Stat. 1915, § 3647), miscalled in extravagant newspaper phrase "the white slave law."

[1] The defendant contends the matter pub-

lished in the statute book never became a law.

The original bill was House Bill No. 40. It was amended in committee of the whole according to the recommendation of the judiciary committee and was passed by the House on January 23, 1913. The bill was amended in the Senate, and was passed as amended on February 13th. On the evening of February 13th the bill was returned to the House. At the morning session of February 14th the House nonconcurred in the Senate amendment and asked for a conference. Conferees agreed on a report. The Senate amendments materially changed section 1 and slightly modified section 6. The conference report eliminated the Senate amendments to section 1, and accepted the Senate amendment to section 6. The conference report was adopted by both houses on February 21st. The enrolled bill, duly authenticated by the presiding officer of each house, was approved and signed by the Governor on February 25th. The secretary of state received the enrolled bill on March 1st, and it was published in the official state paper on March 3d. Indorsements on the enrolled bill show the passage of the bill in each house, with the date, and the adoption of the conference report by each house, with the date.

There are in the office of the secretary of state two documents, each purporting to be original House Bill No. 40. To one the report of the House judiciary committee is attached. The legislative history indorsed on the back stops with the action of the House committee of the whole, recommending the bill for passage as amended by the judiciary committee. The other document, starting with the same matter, has the Senate amendments attached to it. The legislative history indorsed on the back is complete, including an indorsement of the adoption of the conference report by each house, and the conference report made to the House, where presumably the bill remained after return from the Senate, is attached. On the back of this document is an indorsement, in two kinds of ink and two styles of writing, indicating a change by addition. It now reads as follows, the original matter being italicized: "*House nonconcurred in Senate amendment. Conference asked.*" The Senate Journal contains a message received from the House on February 21st that the House had concurred in the Senate amendments to House Bill No. 40. The Senate Journal contains no message of non-concurrence from the House, and contains no record of the appointment of Senate conferees. In the secretary of state's office is an enrolled bill, duly authenticated, and signed by the Governor on February 25th, containing the Senate amendments. On the document is indorsed passage by the House on January 23d, passage by the Senate on Feb-

ruary 13th, and the following: "House concurred to Senate amendments February 21, 1913." This document was received by the secretary of state on February 26th, and was published in the official state paper on February 27th.

An enrolled bill is well-nigh conclusive evidence of the action of the Legislature. In this instance each enrolled bill is as complete, perfect, and authentic as the other. Each one provided it should take effect on publication in the official state paper. The Constitution reads as follows:

"The Legislature shall prescribe the time when its acts shall be in force, and shall provide for the speedy publication of the same; and no law of a general nature shall be in force until the same be published." Article 2, § 19, Gen. Stat. 1915, § 159.

The enrolled bill containing the Senate amendments was published on February 27th, and became effective, if at all, on that date. The other was of no force until published. It was published on March 3d. If the two bills are so inconsistent that both cannot stand, and they probably are, the one published on March 3d is the later enactment and the law. If they are not inconsistent, the defendant was prosecuted under the later law.

The defendant appeals to other evidence than the enrolled bill to show that the law contained in the statute book was not passed. The only competent evidence is the journal which the Constitution requires each house to keep and publish. To overcome the verity of an enrolled bill the legislative journals must clearly and affirmatively establish its invalidity. In this instance the legislative journals clearly and affirmatively establish the validity of the enrolled bill which omits the Senate amendments to section 1.

The legislative proceedings are regular until House Bill No. 40 was returned to the House with the Senate amendments. The Senate Journal shows a communication from the House stating the amendments were agreed to. The House Journal, however, affirmatively shows prompt nonconcurrence, request for conference, appointment of conferees, report of the conference committee, and adoption of the conference report which eliminated the Senate amendments. The Senate Journal merely recorded a communication. It could not constitute the constitutional record of the House proceedings. What the House does is recorded in the House Journal, which is the best evidence of its action. Besides this, later in the day on which the House communication was received by the Senate, the Senate heard the report of its own conferees, and adopted the conference report by a yea and nay vote entered on the journal. This is the final action of the Senate, and no matter what may have occurred previously, is conclusive with respect to what the Senate did with House Bill No. 40. It is true there is no Senate record of notice of nonconcurrence by the House, or

of the appointment of Senate conferees. Inferences from silence and omission, however, cannot prevail against affirmative declarations of the legislative record.

The two documents reposing in the office of the secretary of state, each purporting to be original House Bill No. 40, confirm the legislative record. The one which shows no action beyond that of the House committee of the whole is unimportant. The other is clearly the one from which the enrolled bill was prepared, and faithfully corresponds to the legislative record, including adoption of the conference report by the two houses. The corrected indorsement showing the House action concerning the Senate amendments corresponds to the House Journal. These documents could not be considered in opposition to the enrolled bill or the legislative journals. They are, however, consistent with both.

The Constitution makes no provision for indorsement on an enrolled bill of any portion of its legislative history. The presiding officers of the two houses sign it, and that is all. The action of each house is shown by its journal. Therefore the notation on the enrolled bill containing the Senate amendments, "House concurred to Senate amendments February 21, 1913," is no part of the bill, and is not the best evidence of what the House did.

The clear and affirmative evidence which establishes the regularity of the enrolled bill which omits the Senate amendments excludes all reasonable probability of the other having been passed. The theory of the defendant is, the House in fact concurred in the Senate amendments. The enrolled bill was made up accordingly and sent to the Governor. A vigilant lobby discovered what had been done and protested so vigorously that some legislative commotion ensued which led to shuffling of documents and records and the promulgation of an act which had not been passed. The court is bound by the records showing the House did not concur in the Senate amendments, and showing the Senate receded from the amendments which caused the disagreement. If there could have been more than one House Bill No. 40, or if there were but one enrolled bill based on House Bill No. 40, some presumptions might reasonably, perhaps necessarily, be indulged. As the matter stands, any presumption resorted to to sustain one enrolled bill could be indulged to sustain the other, and the bill last published would be the law.

The court holds the defendant was prosecuted under a statute regularly enacted.

[2, 3] The information contained two counts. The defendant was convicted on the second count only, the nature of which has been stated, and the first count is no longer material. The defendant complains because his plea in abatement, grounded on the fact he had no preliminary examination, was overruled.

A complaint was filed charging the defendant with statutory rape. A warrant was issued on which he was taken into custody. Legality of the detention was not contested, and the complaint passed into history. A preliminary examination was held on the charge stated in the warrant. The evidence developed commission of the crime stated in the information, and the defendant was bound over to answer for that crime. The warrant then passed into history. The defendant cross-examined the state's witnesses. When the state rested the defendant was asked if he was ready to call his witnesses. He said, "No," but rested. He then demanded a preliminary examination of the offense disclosed by the evidence. When his demand was overruled he offered no evidence and asked for no continuance to enable him to obtain evidence.

The writer of the opinion in the case of *Redmond v. State*, 12 Kan. 172, ventured the assertion that when a person is arrested for one crime, and on preliminary examination is bound over for another, a new complaint ought to be filed, but said the statute does not require it. The reason the statute does not require a new complaint is that the accused is already in custody, and the complaint has no function to perform except to furnish the basis for a warrant. For 45 years the Legislature has ignored the suggestion, and it may now be regarded not only as obiter, but as defunct obiter.

In this instance the county attorney filed a new complaint and had a new warrant issued. They served no purpose whatever, except to afford the defendant opportunity to multiply objections to the regularity of the preliminary procedure. If he had desired, in good faith, to meet the evidence which the state had introduced, he would have been given an opportunity as a matter of course. He chose, however, to stand on the proposition he had not received the benefit of a preliminary examination at all, and that he was entitled to a preliminary examination at which he might produce witnesses. The plea in abatement was properly overruled.

The information reads as follows:

"That heretofore, and, to wit, on or about the 24th day of January, A. D. 1917, at and within the county of Montgomery and the state of Kansas, the above-named defendant, W. P. Fleeman, then and there being, did then and there, willfully, wrongfully, unlawfully, and feloniously keep and maintain, and assist in keeping and maintaining, a brick building located and situated on [lots described], more particularly described as the Oriental Rooms, a place where prostitution, fornication and concubinage is practiced, permitted, and allowed, and that said above-described premises are owned or leased by the said defendant and under his control; all contrary to and in violation of the form of the statutes in such case made and provided, and against the peace and dignity of the state of Kansas."

[4, 5] A motion to quash was overruled. The defendant says he was charged in a single count with numerous felonies—keeping a

place where prostitution was practiced, keeping a place where fornication was practiced, keeping a place where concubinage was practiced, and several others. He further says he was bewildered by uncertainty whether he should prepare to meet evidence that he kept the place, or only assisted in keeping it, and evidence that he owned the place, or merely leased it. The statute creates a single offense, keeping a place for unlawful sexual commerce on premises for which the keeper is responsible. The keeping may be by one who keeps, or maintains, or who assists in keeping or maintaining. The place may be a house, or any other place. The commerce may be prostitution, fornication, or concubinage, and the place may be one distinctively for such commerce, or one where such commerce is practiced, or is permitted, or is allowed. Responsibility for the premises may be by virtue of ownership, or lease, or control. The substance of the offense is keeping a vicious place, and only one offense is committed if all the immoral practices named be indulged there.

One who assists in keeping an immoral resort keeps it to the extent of his participation, although others also participate. Assigning to him the character of assistant does not relieve him of the character of keeper. No distinction is made in procedure or punishment between a keeper sole and an assistant. The gist of the matter to be proved—keeping—is the same. A charge of keeping would be sustained by proof of assisting, and both capacities may be attributed to the same person without affecting the certainty of the charge.

The defendant might have been charged in one count as owner, as lessee, and as in control of the premises. Sufficient authority over the premises to prevent disreputable practices there is the important thing. If there be any repugnancy between owning and leasing, it would not defeat the information because the crime would nevertheless be indicated. Gen. Stat. 1915, § 8024. It would be useless formality to multiply counts in order to meet contingencies of proof. In this instance the defendant was charged with being in control of the premises described, and it was further charged that he was owner or lessee. He was informed of the nature and cause of the accusation against him. Bill of Rights, § 10; Gen. Stat. 1915, § 114. The court could pronounce judgment according to the right of the case (Gen. Stat. 1915, § 8023), and he could not be prejudiced in his substantial rights on the merits (Gen. Stat. 1915, § 8024).

At the trial the defendant testified he owned the Oriental Rooms and spent all of his time there. Conceding the information was defective, it would be the quintessence of nonsense to reverse the judgment because of the fact, even if there were no statute on the subject. The statute reads as follows:

"On an appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." *Crim. Code*, § 293; *Gen. Stat. 1915*, § 8215.

The record discloses that none of the exceptions taken to the information affected the defendant's substantial rights.

The Code of Criminal Procedure was framed to supersede the common law with a more rational system. While it is defective in many respects, and in many others exhibits a conservatism which contrasts strongly with its general liberality, it is distinctively modern. The tradition of the common law, however, was so strong that it came near superseding the Code. In time the Code was rediscovered, and it is the purpose of the court to interpret and apply it according to its true intent and spirit.

[8, 7] The defendant complains because the information was amended at the trial. The amendment consisted in writing the words "County Attorney of Montgomery County, Kansas," under the signature of the county attorney to the verification. The amendment was one of form only, the defendant calls it a matter of form, and the statute expressly authorizes amendments in matters of form at the trial, so the complaint is frivolous.

The statute reads as follows:

"An information may be amended in matter of substance or form at any time before the defendant pleads, without leave. The information may be amended on the trial as to all matters of form, at the discretion of the court, when the same can be done without prejudice to the rights of the defendant. No amendment shall cause any delay of the trial, unless for good cause shown by affidavit." *Gen. Stat. 1915*, § 7982.

How any amendment of form, as distinguished from substance, can ever prejudice a defendant, this court is unable to perceive.

After amending the information the county attorney reverified it, which was wholly unnecessary. The defendant then filed a new motion to quash, which was properly overruled.

[8] The defendant complains because the general reputation of the place was proved. The evidence was admissible for two purposes. It was admissible to prove the actual character of the place. The authorities are divided on this question, but the fact that a house has acquired a general reputation in the community of being an immoral resort is some evidence that it is such. While the evidence may be weak, it is not to be rejected on that account. The evidence was admissible for the purpose of charging the defendant with notice of the character of the place. The person who owns or controls an immoral resort is not likely to be ignorant of what the community knows. Notice was relevant to the issue of permission and allowance.

[9, 10] The defendant complains of some impeaching testimony because he says the proper foundation was not laid by calling

his attention to specific time and place. The question was whether or not the defendant had an arrangement with named girls whom he employed to send them to men's rooms and divide their earnings on a stated basis. The defendant told what his arrangement with the girls was. He was then asked if his arrangement was not of the character stated. He vehemently denied such an arrangement, and said he never hinted such a thing. Under these circumstances he fairly exposed himself to impeachment without going further into details.

A police officer had occasion to go through the defendant's place. He was called as a witness and asked if the defendant demanded that he have a warrant. He said, "No," and the answer was stricken out. In view of the abundant, direct, and positive evidence of guilt, it is not likely this answer would have worked an acquittal. The officer was asked a further question, and was not permitted to answer. What his answer would have been was not shown at the hearing on the motion for a new trial.

[11, 12] A motion for a new trial was filed on the ground of newly discovered evidence. The evidence was bad general reputation for truth and veracity of one of the state's witnesses, and impeaching evidence. The names of witnesses are indorsed on the information so that the defendant may look up notorious facts like general reputation, and the rule is well established that it is not error to deny a new trial desired for the purpose of producing newly discovered impeaching evidence. The witness for the state who was called in rebuttal to impeach the defendant made an affidavit in which she repudiated the testimony which she gave at the trial. The defendant says he relies on the case of *State v. Keleher*, 74 Kan. 631, 87 Pac. 738. The *Keleher* Case was a very exceptional one. The present case belongs to a very common class. At the hearing the state contested the motion for a new trial. After hearing all the evidence introduced the court found against the defendant. Nothing appears to indicate the ordinary rule should not be applied. *State v. Baker*, 78 Kan. 663, 864, syl. par. 2, 97 Pac. 785.

The judgment of the district court is affirmed. All the Justices concurring.

(102 Kan. 650)

SHARRER v. CAPITAL LIFE INS. CO. OF COLORADO. (No. 21373.)*

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. EVIDENCE \Rightarrow 151(8)—GOOD FAITH.

Testimony of neighbors as to the physical appearance of the insured was properly received touching his good faith in making the statements contained in the application.

2. INSURANCE \Rightarrow 256(2)—LIFE INSURANCE.

The policy provided that the statements made by the insured should, in the absence of

fraud, be deemed representations and not warranties. *Held*, that good faith in making such statements was sufficient, although they may have been incorrect, in fact.

3. INSURANCE §685(3) — LIFE INSURANCE — ACTION ON POLICY—SUFFICIENCY OF EVIDENCE.

The evidence supported the verdict, and there was no error in the giving or refusing of instructions.

Appeal from District Court, Saline County.

Action by Mary E. Sharrer against the Capital Life Insurance Company of Colorado. Judgment for plaintiff, and defendant appeals. Affirmed.

Burch, Litowich & Royce, of Salina, and Wm. El. Hutton, of Denver, Colo., for appellant. Z. C. Millikin, of Salina, for appellee.

WEST, J. The defendant appeals from a judgment on a life insurance policy, claiming that the answers of the applicant touching his health relieved the company from liability; that certain testimony was improperly admitted; that certain findings of fact should have been set aside; and that the court erred in charging the jury. The answers in the application complained of are that he had never had any disease of the stomach, and that to the question, "How often during the five years did you consult a physician?" the answer was "No." It seems that the applicant had consulted certain doctors about some digestive disturbance, and had had his stomach washed out and received some treatments; that some months after the policy was issued the trouble developed into a cancer of the stomach or esophagus, from which he died.

The agent testified: That he took the examination blank on September 27, 1915, and the policy was issued three days later. That he had known the deceased some two years, went to his house to solicit his two boys for life insurance, and spoke to the father about insuring him, remaining at the house 2 or 2½ hours. Later he called the deceased to come to his office, and finally got his application for life insurance, being paid one year's premium in advance by check. He sent the applicant to Dr. Moses, the examiner, and when the policy came the agent went out as quickly as he could and delivered it at the applicant's home and stayed there until after dinner. That he did not observe anything unusual about the applicant's eating, he seemed to eat like the rest of the people, took the same kind of food as near as the agent could tell, and was apparently in good health.

The examiner testified:

That he did all the writing on the application except the signature. "Q. After you had written down the answers in this blank, did you read it over to him? A. No, sir. Q. You just passed it to him and asked him to sign it? A. I just passed it to him, and says, 'This is what

you are to sign,' pointing the place where he is to sign. Q. And he signed? A. He signed. * * * Q. Yes; and you say, to all external appearances, at least, or as far as your examination disclosed, he was a healthy man? A. He was a healthy man."

The jury found:

That the deceased consulted one physician June 28 and July 26, 1915, another about August 25th and September 4th, and the former about September 27th, but that on September 27th and for two months before he enjoyed good health, and that two months prior to that date he had no sickness.

"(13) Was the insured in sound health and insurable condition at the time of the delivery of the policy of insurance sued upon in this action? A. Yes."

[1] Witnesses were permitted to testify that they had seen the deceased at various times during the summer and fall, one as late as December, and that he looked and acted as usual. This simply corresponds with what the examining physician thought at the time he wrote in the answers to the questions, and it was competent touching the good faith of the deceased; for, if his appearance was such that his neighbors and acquaintances, as well as the examining physician, thought him in usual good health, this would tend to show that the applicant had no reason to believe that he had been or was soon to be stricken with a fatal malady.

[2, 3] It is argued that the truth and not the good faith of the answers is the scale-tipping thing. But it is stated in the plaintiff's brief, and not disputed, that the policy contained the clause that:

"All statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties."

The rule in such cases is that good faith is sufficient. *Mouler v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447; *Insurance Co. v. Woods*, 54 Kan. 663, 39 Pac. 189. See, also, *Farragher v. Knights and Ladies*, 98 Kan. 601, 159 Pac. 3, and *Diehl et al. v. Mut. Life Ins. Co.*, 176 Ill. App. 462. The recent decision in *American Bankers' Ins. Co. v. Hopkins*, by the Supreme Court of Oklahoma, 169 Pac. 489, is very much in point. Section 5290 of the General Statutes of 1915 provides that:

"No misrepresentation * * * shall be deemed material * * * unless the matter misrepresented shall have actually contributed to the contingency or event out of which the policy is to become due and payable."

The answer alleged, not only that the applicant when insured was and for many months had been afflicted with cancer of the stomach, but also that all of the representations covering this matter "were false, and known to be false by the said David N. Sharrer, and were falsely and fraudulently made by the said David N. Sharrer for the purpose of inducing the issuance to him" of the policy. The day the examination was made the deceased had had his stomach washed out, and this was repeated two days

later, the doctor giving him a prescription. But not until November 1st was an X-ray picture taken, and this revealed what the doctor termed two notches about as big as a half dime. After the death in the following March a post mortem convinced the same physician that cancer caused the death. Two other doctors examined him on September 4th, and discussed a case of malignancy or cancerous stomach, but did not conclude that it was such. Two of the attending physicians during his last sickness testified that a case of cancer might develop and produce death within three months, and that they were unable to say that any diseased condition existed as early as September. One of them stated that the condition found at the post mortem was not necessarily inconsistent with good health the previous September.

From the foregoing it appears that the jury had fair grounds for finding that the claims of existing cancer and fraudulent statements were not sustained.

The instructions gave the jury correct rules to guide their deliberations.

Mention is made of a previous rheumatic ailment, but this does not appear to have returned, or to have been a causal element in the case.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 603)

DUBBS et ux. v. HAWORTH. (No. 21063.)
(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS \S 451(4)
—TRIAL—FINDINGS—CONSISTENCY.

There is neither literal nor positive inconsistency between a jury's finding that services performed for an elderly woman, since deceased, were to be paid for "after she was through with her property" and another finding of the jury that such payment was not to be made by a bequest in her will.

2. EXECUTORS AND ADMINISTRATORS \S 227(3)
—PRESENTATION OF CLAIMS—AFFIDAVIT—STATUTE.

Where pursuant to a single contract two persons jointly perform services for another person, since deceased, the affidavit of one of the persons performing the services is a sufficient verification or proof of claim to satisfy the statute (Gen. St. 1915, §§ 4572, 4573), relating to the presentation of demands against the estate of the deceased.

3. EXECUTORS AND ADMINISTRATORS \S 227(4), 256(4)—APPEAL AND ERROR—CLAIM AGAINST ESTATE—AFFIDAVIT—WAIVER—OBJECTION.

Where an affidavit in support of a proof of claim against an estate is lacking in some of the recitals required by the statute, but the defendant's objection to the affidavit was too obscure to apprise the probate and district courts of the specific nature of the defect, the defect will be deemed waived, and it is too late to raise a specific objection to the verification for the first time on appeal.

4. EXECUTORS AND ADMINISTRATORS \S 227(5)
—PRESENTATION OF CLAIM—AMENDMENT.

When parties who have jointly performed services for a person, since deceased, present

their claim therefor against such person's estate, and are required to itemize their claim, there is no impropriety in their amending their claim to show a list of services performed by them in excess of the amount for which they demand payment, and they may rely for recovery of their limited demand upon the entire list of items which they were required to itemize and specify.

5. LIMITATION OF ACTIONS \S 46(5)—CLAIM AGAINST ESTATE—ACCRUAL OF RIGHT OF ACTION.

Where two persons jointly perform services for another person, which services extend over a period of several years and were to be paid for by the recipient, "after she was through with her property," a demand against the latter's estate after her death, if timely made, is not affected by the statute of limitations.

Appeal from District Court, Jewell County.

Claim by W. W. Dubbs and wife against E. F. Haworth, executor, etc. From a judgment of the district court, on plaintiffs' appeal from the probate court's disallowance of claim in favor of claimants, defendant appeals. Affirmed.

D. M. McCarthy and White, Mahin & Mahin, all of Mankato, for appellant. W. R. Mitchell, of Mankato, for appellees.

DAWSON, J. W. W. Dubbs and A. I. Dubbs, husband and wife, filed in the probate court a claim against the estate of Tacy Campbell for services rendered by them to the latter in her lifetime, at her instance and request. This claim was only verified by Dubbs, the husband, and it was disallowed by the probate court on the ground "that the evidence is insufficient to constitute an oral contract between said claimants and the deceased." The claimants appealed to the district court where they prevailed. The jury made special findings of fact:

"Question No. 1. Did Tacy Campbell, deceased, agree with the plaintiffs, to pay them for the services for which they claim pay in this suit? Answer: Yes.

"Q. 2. If you answer question No. 1 in the affirmative, state when she made such an agreement. A. Before services were rendered. * * *

"Q. 4. If you answer question No. 1 in the affirmative, state when she was to pay for such services. A. After she was through with her property.

"Q. 5. If you answer question No. 1 in the affirmative, state whether or not such payment was to be made by a bequest in her will. A. No. * * *

"Q. 8. Did Tacy Campbell at any time agree with Mrs. A. L. Dubbs to pay her for any services rendered by Mrs. Dubbs? A. Yes. * * *

"Q. 11. If you answer questions Nos. 1 and 8 in the affirmative, state whether or not the plaintiffs voluntarily quit the service of Tacy Campbell in 1912. A. Yes."

Several errors are urged which will be considered in the order presented.

[1] It is urged that the special findings are inconsistent, particularly findings 4 and 5. There is no literal inconsistency. The evidence shows that at one time Mrs. Campbell made a will of all her property to the plaintiffs, some \$40,000 in value, and that

she later revoked that will. Mrs. Campbell doubtless believed she had a right to do so. She had not literally bound herself to pay the plaintiffs by some bequest or provision in her will. In revoking her will she took advantage of the literal terms of her bargain to pay "after she was through with her property." Thus it cannot be declared that there is a positive inconsistency between findings 4 and 5.

[2] It is next urged that the plaintiffs' proof of claim was insufficiently verified. The claim was for the services of both husband and wife, and it was verified by the husband alone. Another defect urged is that the affidavit did not contain the recital prescribed by the statute, "stating to the best of his [affiant's] knowledge and belief he has given credit to the estate for all payments and offsets to which it [the estate] is entitled, and that the balance claimed is justly due." Gen. Stat. 1915, § 4572. The proof of claim and the affidavit showed clearly that the services were rendered by both husband and wife, not that some of the services were rendered by the husband and some by the wife. Consequently the affidavit of one of the parties presenting the claim was as potent as if the claim—the same claim—had been sworn to by both husband and wife.

Touching the want of the recitals in the affidavit which the statute requires, it does not appear that this defect was raised in the probate court nor in the district court. There was, of course, the blind, stereotyped demurrer "that said proofs of claim and each of them failed to state matter and facts sufficient to constitute a cause of action or a proof of claim against the aforesaid estate," and, again, "for the further reason claimants and plaintiffs are without legal capacity to sue on the amended proof of claim not being made and filed according to law and being irregular, no service having been made upon the executor of above-named estate."

[3] The real objection in the probate and district courts to the proof of claim, the want of the statutory recitals in the affidavit, was shrouded and obscured in a cloud of words. The probate court based its judgment on the insufficiency of plaintiff's evidence; and even the district court did not perceive what the defendant was driving at. What the defendant should have done was to have pointed out the defect clearly, so that plaintiff might have had an opportunity to amend the affidavit. However, in the course of the trial both of the plaintiffs were on the witness stand; and all the facts, including those which the statute requires to be established by affidavit, were developed and proved by sworn testimony. In principle, the sworn evidence used in the trial ought to be held to answer every purpose of a preliminary affidavit filed with the claim. More-

over, it is too late to raise a question of the insufficiency of the verification for the first time on appeal. *Emery v. Bennett*, 97 Kan. 490, 155 Pac. 1075; *Blair v. McQuary*, 100 Kan. 203, 206, 162 Pac. 1173, 164 Pac. 262.

[4] The next complaint of appellant relates to the form in which the claim was presented. Plaintiffs' first claim was on a lump sum of \$600. They were required to amend by setting out the specific items upon which their claim was based. Plaintiffs complied by setting out a specific list of services covering a number of years and aggregating \$1,087. Plaintiffs were then required to elect on which of the items listed they would rely for a recovery, and they responded by electing to rely on them all, notwithstanding their total demand was only for \$600. Error is assigned on this, but it does not appear to be seriously objectionable. It is not required of a creditor that he shall demand the uttermost farthing which may be technically due him. He may be satisfied with less than his just due; and if, in fact, he honestly believes that more is due him than he is asking to be paid for, his debtor has no just complaint that the creditor, upon the debtor's request, specifies more items than the aggregate amount for which the creditor is insisting on payment. Modesty of demands is ordinarily a virtue, not a fault.

[5] Still another point suggested is that the plaintiffs' claim was barred by the statute of limitations. We think not. The services performed by plaintiffs were not to be paid for until after Mrs. Campbell "was through with her property," and it does not appear how the statute affects their right of recovery under their contract as established by the findings of the jury. *Alken v. Nogle*, 47 Kan. 96, 27 Pac. 825; *Heery v. Reed*, 80 Kan. 380, 102 Pac. 846; *Henshaw v. Smith*, No. 21,352, just decided, 171 Pac. 616.

The record discloses no prejudicial error, and the judgment is affirmed. All the Justices concurring.

(102 Kan. 687)

MANSFIELD v. WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY.

(No. 21413.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §300—PRINCIPAL AND AGENT §159(1)—TORTS—LIABILITY.

A master or principal is responsible for the tortious acts of his servant or agent where such acts are incidental to and done in furtherance of the business of the master or principal, even if such acts are done willfully or in excess of the authority conferred.

2. PRINCIPAL AND AGENT §159(1)—ASSAULT BY AGENT—LIABILITY OF PRINCIPAL.

Where one representing a detective agency is authorized to obtain a confession from a suspect, and in executing that authority commits an assault and battery upon the suspect, the principal is responsible for the manner of the agent in the execution of the authority, and for the

wrong of the agent in selecting the means by which the authority was executed.

3. APPEAL AND ERROR 1060(1)—HARMLESS ERROR—READING FROM MAGAZINE IN ARGUMENT.

The reading of a short article from a magazine in the course of the argument of counsel, which was argumentative and illustrative in character, condemning such methods as were employed by the agent of the defendant in the present case and containing statements which would have been unobjectionable if they had been original with counsel, is held not to be a ground of prejudicial error.

Appeal from District Court, Wyandotte County.

Action by William Mansfield against the William J. Burns International Detective Agency. Judgment for plaintiff, and defendant appeals. Affirmed.

J. B. Larimer, of Topeka, J. H. Brady and E. H. Henning, both of Kansas City, Kan., and Wentworth E. Griffin and Cameron L. Orr, both of Kansas City, Mo., for appellant. E. E. Martin, J. S. Detwiler, and L. C. True, all of Kansas City, Kan., for appellee.

JOHNSTON, C. J. This was an action by William Mansfield against the William J. Burns International Detective Agency to recover damages for assault and battery. The defendant appeals from the judgment in the sum of \$2,250 in plaintiff's favor rendered upon the verdict of a jury.

A family by the name of Moore living near Red Oak, Iowa, was murdered in 1912 by some person who used an axe in perpetrating the deed. The defendant was employed to discover the murderer, and James M. Wilkerson, a detective employed by defendant to act for it in Kansas, was assigned to the case. Wilkerson looked up plaintiff's record and came to the conclusion that he was the one who had committed the murder and was the same person as "Insane Blackie," a person who had the reputation of having committed crimes of that character. Wilkerson went to the packing house in Kansas City where plaintiff was employed, called him from his work, and told him he was under arrest. He called him "Insane Blackie," and thrust up his chin in order to see a scar upon his neck by which he sought to identify him. Police officers of Kansas City having been summoned, Wilkerson and the latter, without any warrant having been issued for plaintiff's arrest, conducted him to a waiting automobile, in which they took him to police station No. 1, where he was confined for a short time. Thence he was taken in an automobile across the river to station No. 4 in Argentine, where he was confined and sweated all night without rest, and the next morning he was returned to station No. 1, from which he was later removed to the county jail. Plaintiff testified that while crossing the bridge on the way to station No. 4, Wilkerson punched him in the ribs, and threatened to throw him in the river if he did not con-

fess to the crime; and that he was piled with questions all night at station No. 4, where Wilkerson threatened and cursed him and applied vile epithets to him, struck him in the face, and loosened some of his teeth, brandished an axe about his head and against his cheek, telling him he would be killed the same way the Moore family had been killed, pushed him down over a chair and injured his body, and deprived him of food and water, all in an attempt to obtain a confession from him. He also testified that after he was returned to station No. 1, Wilkerson again struck him squarely in the mouth. Physicians who had examined plaintiff at the jail testified to finding certain injuries upon his body. These acts of violence were contradicted by Wilkerson in his testimony, but the conflict in the testimony was settled in favor of the plaintiff by the general verdict; no special findings having been requested.

[1] The principal contention of the defendant is that the acts of violence toward the plaintiff, the brutal assaults committed on him, and the torture to which he was subjected by its agent, Wilkerson, were outside the scope of his employment, and for them the defendant is not liable. The general rule is that a master or principal is liable for the tortious acts of his servant or agent where such acts are incidental to and done in furtherance of the business of the master or principal, and this is true, although the servant or agent acted in excess of the authority conferred upon him, or willfully or maliciously committed the wrongs. In *Hynes v. Jungren*, 8 Kan. 391, where it was alleged that an agent willfully assaulted and beat the plaintiff and wrongfully detained him in jail, and where the principal defended upon the ground that the agent acted as a constable under an order of civil arrest, it was held that the agent having acted wrongfully in doing that which he was directed to do, the principal was responsible for his acts whether the agent acted innocently or maliciously. In *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350, 13 Pac 609, 59 Am. Rep. 571, the principal was held liable for the acts of its agent in arresting and detaining the plaintiff; it appearing that the acts were incidental to and done in furtherance of the principal's business, and this notwithstanding that the principal did not directly authorize nor subsequently ratify the tortious acts. In a case where a brakeman wrongfully pushed a man off of a train, the railway company insisted that the act was outside of any duty the brakeman owed to the company, and that it was not liable for his act, although he might have done it in the interest of the company. It was held that his acts were within the scope of his implied authority, and hence the company might be held responsible for his acts. *O'Banion v. Railway Co.*, 65 Kan. 352, 69 Pac. 353. In another case it was held that a master might be held liable for the

acts of his servant in setting out a fire if the setting of the fire was a part of the business or resulted from some act done in the performance of the business of the principal. *Mirrick v. Suchy*, 74 Kan. 715, 87 Pac. 1141, 11 Ann. Cas. 366. In *Creely v. Telephone Co.*, 84 Kan. 19, 113 Pac. 386, 33 L. R. A. (N. S.) 328, it was held that the master was not responsible for an assault committed while the servant was in its service, but which was not done in the course of the employment. It was added, however, that if the tortious acts were done in the execution of the master's business, and as a means of performing the work assigned to the servant, the master would be liable, although the acts were willfully and wantonly done. In *Lehnen v. Hines & Co.*, 88 Kan. 58, 127 Pac. 612, 42 L. R. A. (N. S.) 830, a proprietor of a hotel was held responsible for the acts of his clerk who assaulted and beat a guest and caused her to be arrested and taken from the hotel because she declined to leave the hotel on the demand of the clerk, as against a contention that the clerk was acting for himself and not for the proprietor nor within the scope of his employment when the assault was committed. It was held that as the clerk had charge of the hotel for the time being, and as the wrongful acts were committed by him while he was in the control of the hotel and as a means of exercising such control, he was acting for the proprietor, and the latter was responsible. Other cases of like import are *Whitman v. Railway Co.*, 85 Kan. 150, 116 Pac. 234; 34 L. R. A. (N. S.) 1029, Ann. Cas. 1912D, 722; *Roberts v. Kinley*, 89 Kan. 885, 132 Pac. 1180, 45 L. R. A. (N. S.) 938; *Martin v. Railway Co.*, 93 Kan. 681, 145 Pac. 849; *Sipult v. Land & Grain Co.*, 94 Kan. 224, 146 Pac. 329.

[2] In some cases the line between acts which are within and those which are without the scope of employment is not easily traced, but in this case no difficulty can arise. It is conceded that Wilkerson was acting within his authority in the examination of the plaintiff and in the effort to obtain a confession from him. While Wilkerson denies the acts of cruelty and torture with which he is charged, he admitted that whatever he had done in making the investigation and in the effort to obtain a confession was done at the instance of the defendant. The verdict involves a finding that Wilkerson assaulted and beat the plaintiff, and did it with such force and violence as to loosen his teeth and to cause bruises and lameness, and that he went to the extent of swinging an axe over and against him in order to make him confess the commission of the crime of murder of which he was innocent. Defendant says that the detection of crime, in which it is engaged, is a lawful and honorable business, one that may be carried on by legal means, and that it should not be held liable for brutal assaults and the beating up of suspects with axes that may have been committed by its agents while engaged in its

business. No doubt there may be a searching investigation without inhumanity nor any doubt that the business may be carried on by legal and efficient methods, without putting suspects on the rack or extorting confessions by the drastic and cruel means that were employed in this instance; yet, withal, the acts of its agent appear to have been done in the course of his employment. Authority was conferred on Wilkerson to secure a confession, and in the execution of this authority the wrongs complained of were committed. The agent selected the means by which the orders of his principal were to be carried out and the confession was to be obtained, and the methods employed by him in this case were therefore employed in the course of the business of the principal and in doing what the agent was employed to do. As we have seen, a principal is ordinarily responsible for the acts of his agent done in furtherance of his business, for the manner employed by the agent in the execution of his orders and for the wrong of the agent in selecting the means by which the authority is to be executed.

There is nothing substantial in the complaint that the court failed to give the jury a correct statement of the issues involved in the case. It is stated that the court gave an epitome of the allegations of the petition, and that some of them set out the arrest and detention of the plaintiff, and carried the implication that a recovery might be had on that ground. There was no chance for a mistake in this respect, as it was expressly stated that the plaintiff claimed no damages except for assault and battery. The allegations referred to were preliminary to those setting forth the assaults that were committed, and were no more than a statement of the circumstances under which these assaults were made. In view of the positive disclaimer of damages for false imprisonment and the fact that every one connected with the trial understood that the only damages sought in the case were for assault and battery, no prejudice could have resulted from the reference to the arrest. Besides, in the instructions the court directly informed the jury that the only damages plaintiff could recover were those sustained by reason of assault and battery committed upon the plaintiff, if any was committed. We think the instructions taken together fairly presented the case to the jury, and that there is no merit in any of the objections presented.

[3] It is finally contended that error was committed by the court in permitting counsel for plaintiff to read to the jury a short magazine article in condemnation of such practices as Wilkerson employed in the present case, and which are called the administration of the "third degree." The article was read as a part of counsel's argument, and the matter contained in it was argumentative and

illustrative in character, and would have been unobjectionable if it had been original with counsel. Indeed, stronger language might have been used in characterizing and condemning the means employed by the agent of the defendant than was used in the article read, without trenching upon the bounds of permissible argument, or of committing prejudicial error.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 527)

AVERY et al. v. HOWELL et al. (No. 21058.)
(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. ACTION FOR COMMISSION — QUESTION FOR JURY.

There was evidence sufficient to compel the submission of the defense to the jury, and to sustain the verdict and judgment for the defendants.

2. FINDINGS OF FACT—EVIDENCE.

There was evidence which tended to support each of the findings of fact made by the jury.

3. ACTION FOR COMMISSION—SUFFICIENCY OF EVIDENCE.

Before this action was commenced, the defendants gave a certain reason for refusing to perform a contract for the exchange of property. In their answer they pleaded that reason with others. There was evidence which tended to prove the truth of the reason first given. That evidence was sufficient to support the verdict and judgment for the defendants.

4. APPEAL AND ERROR — 1047(3) — REVERSIBLE ERROR—WITHDRAWAL OF COMPETENT EVIDENCE.

A judgment will not be reversed on account of the withdrawal of competent evidence, where it does not appear that the complaining party was injured by that withdrawal.

5. BROKERS — 85(3) — INSOLVENCY OF PURCHASER—EVIDENCE—JUDGMENTS.

Evidence of judgments for the recovery of money is admissible where the insolvency of a judgment debtor is one of the issues presented.

6. WITNESSES — 321—CROSS-EXAMINATION—IMPEACHMENT—DISCRETION OF COURT.

Where a witness has been called by all the parties to the action, cross-examination which tends to impeach the witness is within the sound, judicial discretion of the trial court.

7. INSTRUCTIONS.

There is no substantial merit in the complaint concerning the refusal of the court to give requested instructions, nor in the complaint concerning the instructions given.

Appeal from District Court, Gray County.
Action by Gilbert Avery and another against Geo. Howell and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Judgment affirmed on rehearing 172 Pac. 995.

Charles A. Baker and H. O. Trinkle, both of Garden City, for appellants. J. M. Kirkpatrick, of Dodge City, and John W. Davis, of Greensburg, for appellees.

MARSHALL, J. The plaintiffs seek to recover a commission from the defendants for effecting an exchange of property. Judg-

ment was rendered in favor of the defendants, and the plaintiffs appeal. This is the third appeal in this action. Avery v. Howell, 91 Kan. 297, 137 Pac. 785; Avery v. Howell, 96 Kan. 657, 153 Pac. 532.

A brief statement of the facts is contained in Avery v. Howell, 96 Kan. 657, 153 Pac. 532. The judgment of the trial court was there reversed for the reason that there was evidence to show that fraud had been practiced on the defendants, and for the further reason that the trial court ignored the issue made by the pleadings as to the purchaser being ready, able, and willing to exchange properties on the agreed terms. On the trial from which the present appeal is taken, the jury answered special questions of fact as follows:

"(1) Did Avery & Keesling make any statements which they knew to be false to Howell & Rhinehart, concerning the incumbence of Hanna's property or the ownership thereof? Ans. Yes.

"(2) If you answer the above question 1 in the affirmative, then state what statement they knowingly and falsely made. Ans. That Hanna was the owner of all (underlined in the original) of the stock of goods and other properties described in the contract,

"(3) Was not the only reason assigned by Howell & Rhinehart for their refusal to complete the deal, at the time of their refusal to complete the same, that Hanna was unable to comply with the written contract? Ans. Yes.

"(4) If you answer the above question in the negative, then state what other reason Howell & Rhinehart did assign. No answer.

"(5) Could Hanna, if given a reasonable time, have raised sufficient funds to have passed the title subject to no more than \$8,500? Ans. No.

"(6) Did Avery & Keesling fail to disclose to Howell & Rhinehart any knowledge they had as to Hanna's financial condition, before the contract was signed? Ans. Yes.

"(7) If you answer the above question 6 in the affirmative, then state what knowledge they had that they failed to disclose. Ans. Failed to disclose Hanna's indebtedness to be more than \$8,500 before the contract was signed.

"(8) Did Hanna, to the knowledge of plaintiffs, make any statement which he knew to be false and they knew to be false concerning the incumbence on his property of the ownership thereof? Ans. Yes.

"(9) If you answer the above question 8 in the affirmative, then state what statements which he knew to be false and they knew to be false he so made to their knowledge. Ans. That the incumbence on the property was not more than \$8,500.

"(10) Is it not a fact that after defendants had refused to perform their contract with Hanna and before this suit was brought they secured a release of their obligations to Hanna under the said contract in consideration of the sum of \$150 which they paid to Hanna's attorneys for him? Ans. Yes.

"(11) Did Hanna, when he executed the contract, know that the Rock Island Implement Company had recorded the contract which they had with him? Ans. No evidence to show that he did know."

[1] 1. The plaintiffs argue that there was no merit in the defense; that the court should have sustained the plaintiffs' demurrer to the defendants' evidence; and that after the evidence had been submitted to the jury, the court should never have allow-

ed the verdict to stand. This argument is directly opposed to the decision rendered by this court in 96 Kan. 657, 153 Pac. 532. It may be that the evidence on the last trial was not the same as on the trial from which the last preceding appeal was taken, but it is probably safe to assume that the evidence was substantially the same. Based on that assumption, the question now presented has been decided. Be that as it may, there was evidence on the last trial sufficient to compel the court to submit the defense to the jury.

[2] 2. The plaintiffs urge that the findings of the jury, except findings numbered 3, 10, and 11, were not sustained by any evidence whatever. The voluminous abstract and the transcript of the evidence have been carefully read, and this court is unable to agree with the plaintiffs in this matter. There was evidence which tended to support each of the findings made by the jury. That evidence cannot be here recited without making this opinion exceedingly long.

[3] 3. The court instructed the jury:

"That where a party gives a reason for his conduct and decision touching anything involved in controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another different consideration."

The plaintiffs claim that before the present action was commenced, the defendants gave as their reason for refusing to pay the commission that Hanna was unable to perform his part of the contract. The plaintiffs further claim that the defendants were permitted to change their grounds, or reasons, for not performing the contract. To support their contention, the plaintiffs rely on the answer made by the jury to the third special question. The answer to the plaintiffs' argument is that even if the defendants did introduce evidence to establish grounds other than those first given by them for refusing to perform the contract, there was evidence to show the truth of the ground which the plaintiffs say was first given by the defendants. The latter evidence was sufficient to support the verdict and judgment so far as this matter is concerned.

[4] 4. Soon after the defendants refused to perform the contract signed by them, H. D. Hanna commenced an action in the district court of Finney county to enforce specific performance of that contract. That action was afterward dismissed by Hanna on the payment of \$150 to him by the defendants. The plaintiffs introduced in evidence a certified copy of the record in that action. That record was afterward withdrawn from the consideration of the jury. Complaint is made of the order withdrawing that record. Wherein this harmed the plaintiffs does not appear. The tenth question answered by the jury finds that such a settlement was made, and there was evidence to support that finding. Withdrawing the record of the action

from the consideration of the jury did not prejudice the plaintiffs, even if that record was competent evidence.

[5] 5. Another matter of which complaint is made is that the court erred in admitting in evidence judgments that were rendered against H. D. Hanna after the contract between him and the defendants had been signed. The answer to this complaint is that one of the defenses pleaded was that Hanna was insolvent and unable to carry out and perform his contract. Evidence of the judgments was admissible on the question of Hanna's solvency.

[6] 6. H. D. Hanna was called as a witness by the plaintiffs and also by the defendants. He was first called by the plaintiffs, afterward by the defendants, and then recalled by the plaintiffs. When Hanna was recalled by the plaintiffs, the defendants were permitted to ask questions impeaching his credibility as a witness. The plaintiffs contend that this was erroneous. The rule is that a party cannot ordinarily impeach his own witness. *Johnson v. Leggett*, 28 Kan. 591; *State v. Sorter*, 52 Kan. 531, 34 Pac. 1036; *State v. Keefe*, 54 Kan. 197, 38 Pac. 302. But, whether a party may impeach his own witness is largely within the sound, judicial discretion of the trial court. *St. L. & S. F. Ry. Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176. Even if the defendants were erroneously permitted to cross-examine Hanna concerning matters that affected his credibility as a witness, it does not appear that the cross-examination did, in any way, prejudicially affect any substantial right of the plaintiffs. This court is precluded by section 581 of the Code of Civil Procedure (Gen. St. 1915, § 7485), from reversing the judgment, because it appears on the whole record that substantial justice has been done.

[7] 7. Complaint is made of the refusal of the court to give an instruction requested by the plaintiff, and complaint is also made of an instruction given by the court. These instructions have been examined. The complaints are without substantial merit.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 668)

THOMPSON v. MISSOURI, K. & T. RY. CO.
(No. 21396.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

LIMITATION OF ACTIONS §105(2)—SUSPENSION—PENDENCY OF ACTION.

An action for compensation for property of the plaintiff destroyed through the negligence of the defendant is not brought upon the same cause of action as one to recover an amount agreed to be paid in compromise of a claim of that character, and the pendency of an action founded on such an agreement does not suspend the running of the statute of limitations against an action on the tort.

Appeal from District Court, Miami County. Action by Frank Thompson against the Missouri, Kansas & Texas Railway Company. Demurrer to petition sustained, and plaintiff appeals. Affirmed.

Lane & Lane, of Paola, for appellant. W. W. Brown and James W. Reid, both of Parsons, and R. E. Coughlin, of Paola, for appellee.

MASON, J. Frank Thompson brought an action against the Missouri, Kansas & Texas Railway Company to recover \$1,575 damages by reason of a fire negligently set out by the defendant in the operation of its road. The petition was filed more than two years after the injury complained of, and a demurrer to it was sustained on the ground that the statute of limitations had run. The plaintiff appeals. To avoid the bar of the statute he relies upon the provision of the Code, allowing an additional year in which to begin a new action, where in one brought in due time the plaintiff has failed otherwise than upon the merits. Code Civ. Proc. § 22 (Gen. Stat. 1915, § 6912). He pleaded the bringing of a prior action, and the only question involved is whether it was of such a character as to extend the time within which to bring the present proceeding. To have that effect it must have been brought upon the same cause of action. 25 Cyc. 1315; 19 A. & E. Encyc. of Law, 265. The present case, as already indicated, is brought to recover compensation for the loss of property destroyed through the negligence of the defendant. The petition in the earlier case alleged that the plaintiff's property was destroyed by a fire negligently set out by the defendant, to his damage in the sum of \$2,000, but these allegations were preliminary to the further statement that the plaintiff's claim arising therefrom was compromised, the defendant agreeing to pay, and the plaintiff to accept, \$1,393.50 in full settlement thereof. A payment of half this amount was alleged, and the action was brought to recover the remainder. We agree with the trial court in its conclusion that the two cases were not brought upon the same cause of action. The earlier one was founded upon a contract, the later upon tort. In the first action the plaintiff in order to recover was not obliged to prove the negligent conduct of the defendant, or the value of the property destroyed, and the complete disproof of his allegations in regard to these matters would have availed the defendant nothing. The existence of a controversy, irrespective of the merits, so that there was no bad faith, was a sufficient basis for the agreement to pay. *Shellberg v. McMahon*, 98 Kan. 46, 157 Pac. 268. If the plaintiff had recovered a judgment, it would not have been because of the defendant's negligence, but because of its promise. True, facts were set out in the petition which might perhaps have

been sufficient, by a very liberal construction, to constitute a cause of action in tort, if they had been relied upon for that purpose; but the other allegations, coupled with the prayer, showed affirmatively that the plaintiff was not relying upon these facts as his ground of recovery; he was not suing upon them; their statement was incidental to his statement of a cause of action upon the contract. The language of an early case is pertinent to the situation:

"But could a party thus keep alive one cause of action by instituting a different one, and when witnesses are gone, and facts are forgotten, dismiss one and then bring another? Such at least is not the policy of the law." *Hiatt v. Auld*, 11 Kan. 176, 183.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 695)

STATE v. PERELLO et al. (No. 21669).^{*}
(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS ~~§~~222—UNLAWFUL POSSESSION—INFORMATION—NEGATIVE AVERMENTS.

In an information charging the violation of section 1 of the "Bone-Dry Law" (Laws 1917, c. 215) making it unlawful "for any person to keep or have in his possession any intoxicating liquors * * * or to give away or furnish intoxicating liquors to another, except druggists or registered pharmacists as hereinafter provided," it is not necessary to allege that the defendant was not a druggist or registered pharmacist.

2. INDICTMENT AND INFORMATION ~~§~~111(3)—DESCRIPTION OF OFFENSE—NEGATIVE AVERMENTS.

A negative averment of the matter of an exception or proviso in a penal statute is not necessary in an information, unless such matter enters into and becomes a material part of the description of the offense.

West, J., dissenting.

Appeal from District Court, Cherokee County.

Lawrence Perello and others were convicted of having possession of beer contrary to the statute, and Perello appeals. Affirmed.

A. L. Majors, of Columbus, for appellant. S. M. Brewster, Atty. Gen., Don H. Elleman, of Columbus, and L. M. Resler, of Galena, for the State.

PORTER, J. [1] An information was filed against Lawrence Perello and Louie Soffietti, charging them with having in their possession three sacks of bottled beer, contrary to the statute. They were tried and convicted. Perello appeals from the judgment, and his sole contention is that the information does not state a public offense because it fails to negative the provisions of the latter portion of section 1 of what is known as the "Bone-Dry Law" (Laws of 1917, c. 215). Section 1 reads:

"It shall be unlawful for any person to keep or have in his possession, for personal use of

^{*}For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

^{*}Rehearing denied April 12, 1918.

otherwise, any intoxicating liquors, or permit another to have or keep or use intoxicating liquors on any premises owned or controlled by him, or to give away or furnish intoxicating liquors to another, *except druggists or registered pharmacists as hereinafter provided*. Any person violating the provisions of this act," etc.

We have italicized that portion which it is contended the information should have negated. The appellant relies upon the cases of *State of Kansas v. Thompson*, 2 Kan. 432; *Kansas City v. Garnier*, 57 Kan. 412, 46 Pac. 707; *State of Kansas v. Thurman*, 65 Kan. 90, 68 Pac. 1081; *State of Kansas v. Buis*, 83 Kan. 273, 111 Pac. 189.

In passing upon the question in the early case of *State v. Thompson*, supra, which the later cases follow, the court quoted with approval the following from Archbold's *Criminal Practice and Pleading*:

"If there be any exception contained in the same clause of the act which creates the offense, the indictment must show negatively that the defendant or the subject of the indictment does not arise within the exception. If, however, the exception or proviso be in a subsequent clause or statute, or although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, it is in that case matter of defense for the other party, and need not be negated in the pleading." Page 118.

The appellee insists that the exception in the statute is purely a matter of defense, because it is not incorporated within the enacting clause by any words of reference, and therefore forms no part of the clause which defines or describes the offense.

Among the modern authorities cited by the appellee the statute considered in the case of *Smythe v. State*, 2 Okl. Cr. 286, 101 Pac. 611, 139 Am. St. Rep. 918, is most nearly like that under which the appellant in this case was convicted. The Oklahoma statute reads:

"Section 1. It shall be unlawful for any person, individual or corporate, to manufacture, sell, barter, give away or otherwise furnish, *except as in this act provided, any spirituous, vinous, fermented or malt liquors.*" Laws 1907-08, c. 69, art. 3.

It was held not necessary to negative the exception, for the reason that:

"A negative averment to the matter of an exception or proviso in a penal statute is not requisite in an information, unless the matter of such exception or proviso enters into, and becomes a material part of, the description of the offense." Syl. 2.

The statute we are considering defines the offense, and in the same clause uses the language, "except druggists or registered pharmacists as hereinafter provided." Section 5 of the act enumerates the particular conditions under which liquor may be delivered to certain persons engaged in the wholesale drug business and to registered pharmacists actually and in good faith engaged in the retail drug business; these exceptions being coupled with elaborate provisions designed to prevent evasions of the law. The language in section 1, "except druggists or registered pharmacists as hereinafter provided," does not set forth, nor does it purport to state,

except in most general terms, the nature of the exceptions in favor of druggists and registered pharmacists. It is a mere parenthetical expression, thrown in to show that in another part of the act provisions will be found which except certain classes of persons from the operation of the statute. As held in the Oklahoma case just cited, we think the rule contended for by the appellant should never apply where the matter of such exception or proviso does not enter into and become a material part of the description of the offense. Although there is a general reference in section 1 to an exception in favor of druggists and registered pharmacists, all druggists and all registered pharmacists are not excepted; and it is necessary to examine the conditions "hereinafter provided" in order to ascertain what druggists and what registered pharmacists are within the exception.

[2] Again the rule contended for if it ever had any substantial ground to rest upon has become obsolete by the changed conditions in criminal procedure. Without taking time to state the history of its inception, it is enough to say that it is a relic of a period under the old common law when there were so many restrictions upon the rights of an accused person that the courts found it necessary in construing indictments to reach out and seize upon slight technicalities in order to prevent grave miscarriages of justice. It recalls the period when a person charged with crime was denied the benefit of counsel and was not permitted to be sworn as a witness in his own behalf. The court would be making use of an archaism if it attempted to apply such a technical rule of criminal pleading to a procedure like ours, which admonishes us to give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties (Crim. Code, § 293, [Gen. St. 1915, § 8215]), and which declares that no indictment or information may be quashed or set aside for any "defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits" (Crim. Code, § 110 [Gen. St. 1915, § 8024]).

It is impossible to conceive how the rights of the appellant could have been prejudiced by the failure of the indictment to negative these exceptions, even if we were to say that the offense was not clearly defined in the clause until the end of the sentence containing the exception. If, when appellant was found in possession of the three sacks of bottled beer, he had been in fact a registered pharmacist or a wholesale druggist as provided in section 5, or any kind of a druggist or registered pharmacist within the language of the exceptions as referred to in section 1, it would have been very easy for him to have shown that fact at the trial, or at least to have challenged the attention of this court to

the fact. If the rule of pleading he relies upon were held to be in force and effect, and the language of the statute were held to fall within the rule, a reversal of the judgment and a new trial could not benefit the appellant if under an amended information he should not be able to bring himself within the exception.

The judgment is affirmed.

JOHNSTON, C. J., and BURCH, MASON, MARSHALL, and DAWSON, JJ., concurring.

WEST, J. (dissenting). To one who has devoted ten years of his life drawing indictments and informations and prosecuting those charged thereunder, it seems needless at this late date to change the rule of criminal pleading heretofore understood by even the veriest tyro in the law and continuously recognized by this court from the second to the ninety-ninth Kansas report. *State of Kansas v. Thompson*, 2 Kan. 432; *Kansas City v. Garner*, 57 Kan. 412, 46 Pac. 707; *State of Kansas v. Thurman*, 65 Kan. 90, 68 Pac. 1061; *State of Kansas v. Buis*, 83 Kan. 273, 111 Pac. 189; *State v. Creamery Co.*, 83 Kan. 389, 111 Pac. 474, L. R. A. 1915D, 515; *King v. Wilson*, 95 Kan. 390, 393, 148 Pac. 752; *Kansas City v. Jordan*, 99 Kan. 814, 163 Pac. 188. The Legislature in prescribing the offense simply made it unlawful for any one except a druggist or registered pharmacist to do the thing prohibited, and this is not only all in one section but all in one sentence.

(102 Kan. 546)

EVERITT v. HASKINS et al. (No. 21140.)
(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

WILLS — 674 — SPENDTHRIFT TRUST.

To create a spendthrift trust, a will need not expressly declare that the interest of the cestui que trust shall be beyond the reach of his creditors. It is sufficient if that intention can be clearly ascertained from the whole will. In the present case, it is held that the will created such a trust, and that the trust property cannot be reached by creditors of the cestui que trust.

Appeal from District Court, Cloud County.

Proceeding in aid of execution by A. E. Everitt against William Henry Haskins and others. Judgment for plaintiff, and defendants appeal. Reversed, and judgment rendered for defendants.

Kennett & Hunter, of Concordia, for appellants. Pulsifer & Hunt, of Concordia, for appellee.

MARSHALL, J. The defendants appeal from an order made in a proceeding in aid of execution.

The will of William H. Haskins was probated on February 19, 1908. It provided for the payment of the debts of the testator, and

among others, contained the following additional provisions:

"Second. I give, devise and bequeath all of the balance of my property, both real and personal, after the payment of my debts, to my wife Lydia Haskins, if she survives me, for her use and benefit during her life, with full power to use and dispose thereof, as she may see fit, for her own comfort and pleasure, and not to account to any one for such use, nor be in any wise restricted in the use thereof, whether of income, increase or the property itself.

"Third. Any of my property that may remain after the death of both myself and my wife not expended, used or disposed of I hereby give, devise and bequeath to my three children, Emma M. Gleason, William Henry Haskins and Lida Nelson, share and share alike. Should any of my children die before either myself or wife, then such share, as he or she would have received, as herein provided, shall go to their descendants if any, and if they leave no descendants then to the surviving of my children, in equal shares. The share of my son William Henry, as provided herein, shall not be given into his control, but shall be put into the hands of my executor, Wm. M. Peck, as trustee for my said son. Said trustee shall invest and manage the same, as to him seems best, and pay to my said son the sum of three hundred dollars (\$300.00) per annum, in semi-annual installments of \$150 each, but such amount may be increased to whatever may be considered necessary, by the trustee, by any change in condition of said William Henry, to an amount sufficient for his comfort. Such amount to be paid by the executor, or trustee, out of any money thus coming to him, whether income, increase, or the corpus of the estate so given; it being my intention that he shall have, as above provided, the said sum of three hundred dollars, or more if necessary, per year, so long as there shall remain any property herein given him from which to pay it. Should there be any of the estate herein given to my son William Henry remaining at his death, it shall be paid over and conveyed by the trustee to the heirs of said William Henry. It is my will and I hereby direct, that in no event shall any of my estate ever be given to the husbands, either present or future, of my daughters, but shall be kept free from such husbands, during the life of my said daughters, and, if any remains of their respective shares at their death, it shall go to their heirs, other than their husbands. It being my will and intention that my said daughters, after they receive their share, shall be unrestricted in the use, or disposition thereof, in any other way than, as herein provided, that it shall in no event go to their husbands.

"Fourth. It is my will, and I hereby appoint as the executor of this, my last will and testament, Wm. M. Peck, and, as trustee for the share of my son William Henry, when the same shall come to him. * * *

"Fifth. I hereby vest the legal title of and to all real estate, that I may own, in my wife, so long as she may live, and hereby give her full power to transfer, convey and dispose of the same, and execute any and all deeds of conveyance thereof, that may be necessary or convenient.

"After the death of my wife, such power is hereby vested in my executor and trustee to sell transfer and convey any and all property, at any time in the execution of the trust herein imposed."

On September 29, 1914, the plaintiff obtained a judgment for \$1,123.61 in the district court of Cloud county against the defendants William Henry Haskins and Mary R. Haskins. On November 7, 1914, execution was

issued on the judgment, but no property was found on which the execution could be levied. On December 24, 1914, an affidavit, under section 524 of the Code of Civil Procedure, was filed with the probate judge of Cloud county, alleging that the plaintiff had reason to believe and did believe that Wm. M. Peck had property of William Henry Haskins, and was indebted to him, which property was not exempt from being taken on execution to satisfy the judgment heretofore rendered. The defendant Wm. M. Peck appeared and was examined. The probate judge ordered Wm. M. Peck, as trustee, to pay \$300 per annum, in semiannual payments, to the clerk of the district court, to be applied on the judgment, interest, and costs, and, until the judgment, interest, and costs are paid in full, to pay such additional sums to the clerk of the district court as the trustee might otherwise see fit to pay to defendant William Henry Haskins. The probate judge further ordered the trustee, until the judgment, interest, and costs are fully paid, to make no transfer or disposition, other than as above directed, of any of the property in his hands as such trustee, and to pay no money and to turn over no property to William Henry Haskins.

From the order of the probate judge, the defendants appealed to the district court. That court sustained and confirmed the rulings and orders made by the probate judge. From the order made by the district court, the defendants appealed to this court. They argue that the will created a spendthrift trust, and that the funds in the hands of the trustee cannot be reached by the creditors of William Henry Haskins. Cases involving the law of spendthrift trust have been before this court on two occasions. The first time in *Sherman v. Havens*, 94 Kan. 654, 146 Pac. 1030, Ann. Cas. 1917B, 394, and the last time in *Pond v. Harrison*, 96 Kan. 542, 152 Pac. 655, L. R. A. 1916B, 1264. The decision in the latter case will not assist the court in the case that is now presented, for the reason that in the *Pond* Case the will expressly stated that the fund therein bequeathed should not be subject to the payment of the debts of the spendthrift, on execution, attachment, or otherwise. The present case must be determined according to the rules announced in *Sherman v. Havens*, 94 Kan. 654, 146 Pac. 1030, Ann. Cas. 1917B, 394. In that case this court said:

"The rule adopted by the majority of the American courts is that 'it is lawful for a testator or grantor to create a trust estate for the life of the cestui que trust, with the provision that the latter shall receive and enjoy the avails at times and in amounts either fixed by the instrument or left to the discretion of the trustee, and that such avails shall not be subject to alienation by the beneficiary nor liable for his debts.' 26 A. & E. Encycl. of L. 139." 94 Kan. 657, 146 Pac. 1081 (Ann. Cas. 1917B, 394).

"The question is a new one in this state. There is no statute or decision upon the subject, but we see no reason why the rule adopted by the majority of the courts of this country should not apply here." 94 Kan. 659, 146 Pac. 1032 (Ann. Cas. 1917B, 394).

"It accords not only with the weight of authority in this country and with sound reasoning, but also with the general policy which the state has always maintained respecting the rights of creditors and debtors as shown in the liberal provisions of our exemption laws." 94 Kan. 659, 146 Pac. 1032 (Ann. Cas. 1917B, 394).

"There is some conflict in the authorities as to what is essential to the creation of a spendthrift trust. It seems to be clearly established, however, that the intent need not be stated in express terms." 94 Kan. 660, 146 Pac. 1032 (Ann. Cas. 1917B, 394).

"It is not necessary that an instrument creating a spendthrift trust should contain an express declaration that the interest of the cestui que trust in the trust estate shall be beyond the reach of his creditors, providing such appears to be the clear intention of the testator or donor as gathered from all parts of the instrument construed together in the light of the circumstances. The court will look to the intention disclosed by the whole instrument, rather than to the language employed in any particular clause of it." 26 Am. & Eng. Ency. of Law (2d Ed.) 141, 142.

See, also, notes found in 3 Ann. Cas. 1010; 18 Ann. Cas. 495; Ann. Cas. 1917B, 400; 24 Am. St. Rep. 686.

In *Leary v. Kerber*, 255 Ill. 433, 99 N. E. 662, a will containing provisions very closely parallel to the one now under consideration was held to create a spendthrift trust.

The will of William H. Haskins expressly provides that none of the property shall be given into the control of William Henry Haskins, but, instead thereof, that control is given to the trustee, who shall invest it and manage it as to him seems best. Any payments over \$300 per annum is within the discretion of the trustee. The wife of the testator, during her life, had absolute power of disposition over the entire estate, and after her death that power was given to the trustee. The trustee's control, discretion, and power of disposition cannot be regulated or directed at the suit of creditors. The exercise of such authority by the courts would be in contravention of the terms of the will. Why did the testator put these provisions in his will? The answer is that he intended that William Henry Haskins should not exercise any discretion concerning, or any control or power of disposition over, the property that was placed in the hands of the trustee.

William Henry Haskins cannot control or dispose of the semiannual payments before they have been paid to him. The will directs that the payments shall be made to him. If he can assign or transfer his right to the payments before they are made, or before they are due, he can entirely defeat the will so far as provision therein made for his benefit is concerned. If he can assign the payments and give to his assignee the right to collect them, he can assign all the payments that will ever be made to him, and he can transfer to his assignee all the benefits that are given to Haskins under the will. That would be in contravention of the

terms of the will. If Haskins cannot assign the payments, his creditors cannot, by any legal proceeding, appropriate them to the payment of the debts of Haskins. It follows that the will created a spendthrift trust to which creditors of William Henry Haskins cannot look for the payment of any debts contracted by him.

The judgment is reversed, and judgment is rendered in favor of the defendants. All the Justices concurring.

(102 Kan. 575)

STATE ex rel. WILSON, Co. Atty., v. BISMARCK DRAINAGE DIST. NO. 1, DOUGLAS COUNTY. (No. 21339.)
(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

OFFICERS ~~§~~49—STATUTES ~~§~~64(5)—TERM—PARTIAL INVALIDITY—EFFECT.

The provision in chapter 168 of the Laws of 1911 fixing the tenure of office of the supervisors of a drainage district at five years is violative of section 2 of article 15 of the Constitution; but as the term of office named in the act is void, the tenure is not in fact fixed, and the office is held subject to the appointing power, and therefore the invalid part does not render the whole act void.

Original quo warranto by the State of Kansas on the relation of J. B. Wilson, as County Attorney, etc., against the Bismarck Drainage District No. 1 of Douglas County. Judgment for defendant.

Mina P. Dias, L. H. Menger, R. E. Melvin, Chas. M. Gilmore, Rilling & Rilling, J. B. Wilson, and S. D. Bishop, all of Lawrence, for plaintiff. Thomas Harley, of Lawrence, for defendant.

JOHNSTON, C. J. This is an action of quo warranto in which the plaintiff is challenging the existence of the Bismarck drainage district, which was incorporated under the provisions of chapter 168 of the Laws of 1911. The organization of the district was effected on June 15, 1916, and at an election held on July 6, 1916, five supervisors of the district were chosen who as the statute provides, determined by lot that their respective terms of office should be for one, two, three, four, and five years, and until their successors were elected and qualified. It is provided that after the first election those chosen for supervisor shall hold their offices for a term of five years. Laws 1911, c. 168, § 6. The validity of the act is assailed on the ground that it violates section 2 of article 15 of the state Constitution, which, among other things provides that:

"The Legislature shall not create any office the tenure of which shall be longer than four years."

The drainage districts provided for in the act are municipal corporations, and their officers are vested with many important functions, including the condemnation of pri-

vate property for a public purpose and the levy of taxes on the property within the district. The offices of the district were certainly created by the Legislature, and necessarily fall within the constitutional limitation which prohibits the fixing of the tenure of the office for longer terms than four years. That provision must therefore be treated as a nullity. The invalidity of the provision, however, does not impair the constitutionality of the whole act, as the provision being a nullity, the act stands as if it had created the offices and prescribed their duties without fixing the length of their terms. This question was before the court in *Lewis v. Lewelling*, 53 Kan. 201, 36 Pac. 351, 23 L. R. A. 510, where it was held that:

"Where the statute fixes a term of office at such a length of time that it is unconstitutional, the tenure thereof is not declared by law, and the office is held only during the pleasure of the appointing power." Syl. par. 4.

The same rule was applied in *Wulf v. Kansas City*, 77 Kan. 358, 94 Pac. 207. Under this holding no doubt can arise as to the validity of the acts of the officers done since their election because of the unconstitutional tenure, and besides, it appears that four of them were chosen for terms not exceeding the constitutional limitation.

The judgment must therefore go in favor of the defendant. All the Justices concurring.

(102 Kan. 653)

SCOTT v. KANSAS STATE FAIR ASS'N et al. (No. 21379.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. NEGLIGENCE ~~§~~136(29)—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE—INFANT—QUESTION FOR JURY.

Whether the plaintiff, a boy 10 years old, of average intelligence, who, while attending automobile races, occupies a dangerous place after repeated warnings of the danger, is guilty of such contributory negligence as will prevent his recovering damages for the injuries he sustained by being run over by one of the racing automobiles, is a question of fact, to be determined by the jury.

2. RELEASE ~~§~~29(4)—JOINT TORT-FEASORS—RESERVATION OF RIGHT.

On an oral compromise with several joint tort-feasors, a reservation of the right to proceed against the other joint tort-feasors may be made orally.

Appeal from District Court, Shawnee County.

Action by Alfred Scott, by his next friend, Henry Scott, against the Kansas State Fair Association and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

Edwin D. McKeever, of Topeka, for appellant. Otis Hungate and F. G. Drenning, both of Topeka, for appellee.

MARSHALL, J. The Kansas State Fair Association appeals from a judgment ren-

dered against it for negligently injuring Alfred Scott.

[1] 1. The association urges that the plaintiff was guilty of contributory negligence, and, for that reason, no judgment could be properly rendered in his favor. This question was presented to the trial court in several ways. On September 17, 1915, the association was holding a free state fair on the Kansas state fair grounds at Topeka, and had advertised that automobile races would occur on that day. The plaintiff, then a boy 10 years old, with a couple of companions, attended the fair and the automobile races. These races occurred on a half mile race track, which had been built and was ordinarily used for horse racing. The plaintiff and his companions sat on some boxes near the curve at one end of the track. A large number of other people occupied positions near the plaintiff. Around the track a post and woven wire fence had been built; the plaintiff was near this fence. The association, through its officers and employees, gave repeated warnings to all who were near the plaintiff that the place occupied by them was dangerous, and that the racing automobiles were liable to leave the track, go through the fence, and kill and injure some of those who were standing near. The plaintiff heard these warnings, but he remained at or near the place then occupied by him. One of the racing automobiles left the track, went through the fence, and injured the plaintiff. The plaintiff lived in the city of Topeka. He was a boy of average intelligence, and was acquainted with automobiles, and with the danger encountered by getting in front of one.

The association argues that, because of the intelligence of Alfred Scott, because of the dangerous place occupied by him, and because of his remaining in that place after repeated warnings, he was guilty of such contributory negligence as prevents his recovering damages for the injuries he sustained. Contributory negligence, like negligence, is ordinarily a question for the jury. Under the circumstances disclosed by the evidence abstracted, the question of the contributory negligence of the plaintiff was a question to be determined by the jury as a question of fact. The circumstances did not disclose that the plaintiff was guilty, as a matter of law, of such contributory negligence as would prevent his recovery. In *Ratcliffe v. Speith*, 95 Kan. 823, 149 Pac. 740, this court said:

"Whether * * * the plaintiff, who was over 13 years old and who started across the street without looking for or observing the approach of the automobile, which was coming at a moderate rate of speed, was guilty of contributory negligence, were questions for the determination of the jury." Syl. par. 2.

A like conclusion was reached in *Routh v. Weakley*, 97 Kan. 74, 154 Pac. 218. See, also, *K. P. Ry. Co. v. Whipple*, 39 Kan. 531, 18 Pac. 730; *Bess v. Railway Co.*, 62 Kan.

299, 62 Pac. 996; *Coy v. Railway Co.*, 74 Kan. 853, 86 Pac. 468; note to "Contributory Negligence of Children," L. R. A. 1917F, pages 10 and 66.

[2] 2. Another matter urged is that the plaintiff settled with the other defendants in this action, and that he cannot now recover against the fair association. The action was brought against the Kansas State Fair Association, H. L. Kirkpatrick, S. E. Lux, and W. W. Webb. A compromise was effected with S. E. Lux and W. W. Webb. Under that compromise they paid to the plaintiff \$2,666.67, and were released from further liability. However, the plaintiff made a distinct reservation to sue the Kansas State Fair Association, notwithstanding the settlement with Lux and Webb. Both the settlements and the reservation were oral. The argument is that such a reservation should be reduced to writing. That argument is not good. There is no law which requires that such a reservation shall be in writing. An oral reservation is as good as a written one. This court has held that such a reservation is good, and that it preserves the right of the injured party to proceed against the joint tort-feasor with whom no settlement has been made. *Edens v. Fletcher*, 79 Kan. 139, 98 Pac. 784, 19 L. R. A. (N. S.) 618; *City of Topeka v. Brooks*, 99 Kan. 643, 164 Pac. 285; *Feighley v. Milling Co.*, 100 Kan. 430, 165 Pac. 276. No question is presented concerning the negligence of the association.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 545)

PRATHER et al. v. EDEN et al. (No. 21120.)
(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. TRIAL \S 3—SEPARATE TRIALS—DISCRETION OF COURT.

The court properly exercised its discretion in refusing separate trials of the issues.

2. FRAUD \S 50—BURDEN OF PROOF.

The burden of proving fraud was properly placed on the party alleging it.

3. INSTRUCTIONS—REFUSAL OF NEW TRIAL.

There was no error respecting instructions or in refusing a new trial.

Appeal from District Court, Kingman County.

Action by Charles H. Prather and others against John Eden, John A. Wyer, and others, in which plaintiffs dismissed as to defendant Wyer, and in which defendant Eden filed a cross-petition against defendant Wyer. Judgment for plaintiffs and for defendant Eden, and defendant Wyer appeals. Affirmed.

Walter & Connaughton, of Kingman, for appellant. S. S. Alexander, of Kingman, for appellees.

WEST, J. The plaintiffs sued the defendants to recover a real estate commission of

\$500 for finding a purchaser for the defendant, Eden, of a farm at \$9,000, such purchaser being the defendant, Wyer. It was alleged that as a result of the plaintiffs' efforts Eden contracted with Wyer for the purchase of the land at \$9,000; that afterwards, Wyer, learning that the plaintiffs were to receive \$500 commission, for the purpose of cheating them fraudulently stated to Eden that if he would accept \$8,500 instead of \$9,000, as provided by the contract, Wyer would stand good for any loss to Eden, Wyer claiming that he had been defrauded by the plaintiffs. The plaintiffs dismissed as to Wyer. Eden answered that the \$500 would not be due until paid by Wyer, and denied any conspiracy. He also filed a cross-petition against Wyer for the \$500.

[1] Wyer complains that the court refused a separate trial of the issues between the plaintiffs and Eden and of those between Eden and himself, and that the burden of proof was placed on him of certain instructions given and refused, and the denial of a new trial.

As to the matter of separate trials, the court exercised, and we cannot see that it abused, its discretion.

The question of misjoinder could, under the Code, be raised only by demurrer or answer. Civil Code, § 95 (Gen. St. 1915, § 6986).

[2, 3] Wyer was the only party alleging fraud, and the court did not err in putting the burden on him to prove it. We have examined the instructions given and refused, and find no error in respect thereto.

The evidence justified the verdict, a new trial was properly refused, and the judgment is affirmed. All the Justices concurring.

(102 Kan. 538)

DECKER v. BAILEY et al. (No. 21102.)*
(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

NEW TRIAL — DISCRETION OF TRIAL COURT—GROUNDS.

The proceedings considered, and *held*, the court did not abuse its discretion in granting a new trial.

Appeal from District Court, Gove County.

Action by W. Listen Decker against J. H. Bailey and another. Judgment for defendants, and from an order sustaining generally a motion for a new trial, they appeal. Affirmed.

Monroe, Roark, McClure & Monroe, of Topeka, for appellants. Arch L. Taylor, of Russell, for appellee.

BURCH, J. The defendant appeals from an order sustaining generally a motion for a new trial, based on all the statutory grounds.

A statement of the proceedings is not necessary. The district court might have been satisfied the plaintiff was not afforded a rea-

sonable opportunity to present his case, because, after taking leave to amend his answer, the defendant did not do so, and the plaintiff did not know the answer would not be amended in time to prepare for trial on the pleadings as they stood at the term at which the cause was heard. Some improper evidence was admitted. Essential features of the defendant's case depended on oral testimony, which the court might have believed the jury should not have credited.

The judgment of the district court is affirmed. All the Justices concurring.

(102 Kan. 564)

NATIONAL BANK OF WEBB CITY, MO.,
v. DICKINSON et al. (No. 21326.)
(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. **BILLS AND NOTES — SIGNATURE AS MAKER—LIABILITY.**

Those who sign a promissory note as makers are primarily liable thereon.

2. **BILLS AND NOTES — FORM—NEGOTIABILITY.**

A note signed by five joint makers contained this language:

"We, the makers, sureties, indorsers and guarantors of this note, hereby severally waive presentment for payment, notice of nonpayment, protest and notice of protest and consent that time of payment may be extended without notice thereof to any of the sureties of this note."

Held, that such note is negotiable.

3. **BILLS AND NOTES — FORM—NEGOTIABILITY—WAIVER.**

Under the law as expressed in the Negotiable Instruments Act there was nothing on such note to indicate that any party thereto was a surety, and the quoted sentence was meaningless and did not render the instrument a courier impeded with luggage.

Appeal from District Court, Pawnee County.

Action by the National Bank of Webb City, Missouri, against S. S. Dickinson and others. Judgment for plaintiff and defendants appeal. Affirmed.

F. Dumont Smith, of Hutchinson, and E. E. Glasscock, of Larned, for appellants. Frank L. Forlow, of Webb City, and W. H. Vernon and W. H. Vernon, Jr., both of Larned, for appellee.

WEST, J. The defendants appeal from a judgment rendered against them on a promissory note taken by the plaintiff for value before maturity in due course, the complaint being that it was nonnegotiable and subject in the hands of the plaintiff to the defense of failure of consideration.

The only question is the negotiability of the note, and this depends upon the proper construction of the following provision thereof:

"We the makers, sureties, indorsers and guarantors of this note, hereby severally waive presentment for payment, notice of nonpayment, protest and notice of protest and consent that

time of payment may be extended without notice thereof to any of the sureties of this note."

Following this are the five names of the makers.

[1, 2] The defendants argue that as the note was made and is payable in Kansas it is governed by our law, and that under the authority of *Bank v. Heslet*, 84 Kan. 315, 113 Pac. 1052, 33 L. R. A. (N. S.) 738, and *Nelson v. Southworth*, 93 Kan. 532, 144 Pac. 835, the quoted language renders the instrument nonnegotiable. The plaintiff relies on section 6528 of the General Statutes of 1915, which requires, among other things, that the paper must be payable on demand or at a fixed and determinable future time, and section 6531, which defines a determinable future time as a fixed period after date or sight, or on or before a fixed determinable future time therein, or on or at a fixed period after the occurrence of a specified event which is certain to happen though the time of happening be uncertain. *Bank v. Hoffman*, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 390, Ann. Cas. 1912D, 1. It is further contended that as there are no sureties on the note, the clause providing for extension without notice to sureties is without effect. While the quoted language mentions sureties, the form of the note would indicate that all the signers are makers. True, as held in *Water Power Co. v. Brown*, 23 Kan. 676, the form of the paper does not prevent inquiry in an action between the parties liable thereon as to who are principles and who sureties. But section 3 of the Negotiable Instruments Act (section 6523, Gen. Stat. 1915) provides that:

"The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same."

See, also, section 6587; *Bank v. Bowdon*, 98 Kan. 140, 157 Pac. 429.

In *Bank v. Gunter*, 67 Kan. 227, 231, 72 Pac. 842, 843, the makers and indorsers waived protest, demand, and notice, but also in case it should not be paid at maturity agreed to all extensions and partial payments before or after maturity without prejudice to the holder, and the note was held to be not negotiable. The court said it lacked the element of certainty as to time of payment, and that the provision just referred to made the time indefinite by stipulating that it might be changed and extended either before or after maturity.

"If the time is to remain fixed until maturity when another time is to be fixed by the parties, or if payment is made to depend upon events which necessarily must occur and the time of payment is ultimately certain, other considerations would arise; but here payment is not ultimately certain, for the time named in the paper is subject to change at any time at the volition of some of the parties to the paper."

In that case the agreement to an extension was consented to in advance by the makers and indorsers, while here the agreement was only to the effect that the time of payment might be extended without notice to any of the sureties, which, of course, did not cov-

er makers, indorsers, and guarantors as distinguished from sureties. The case of *Bank v. Heslet*, 84 Kan. 315, 113 Pac. 1052, 33 L. R. A. (N. S.) 738, was under the Negotiable Instrument Act. There the makers and indorsers waived presentment for payment, notice, exemptions, valuation, and appraisal, "and each signer and indorser makes the other an agent to extend the time of this note." It was said that the precise inquiry was whether the authority to extend could be exercised only after maturity; that, if so, the authority to extend would only amount to a waiver of the right to be relieved from liability for an extension without such authority, but if it gave the right to extend before maturity, it would be the same as if the words "on or before" had been inserted. It was further stated that this extension clause did not indicate whether the extensions should be made before or after maturity, and that ordinarily it would be made before the note should fall due.

"The vice of the stipulation in question is that the date of payment cannot be determined. The signer [maker] or any indorser may, at any time he sees fit to do so, as agent one for another, extend the time for payment by agreement with the holder."

The *Gunter* Case was approved and the note was held not negotiable, not having "the element of certainty in time of payment necessary in commercial papers." In each of these cases there was an express agreement to extend.

[3] The note in the case now before us contains no agreement to extend, except that the time of payment may be extended without notice thereof to any of the sureties. If there be no sureties, then of course there could be no notice to them. Counsel argues that whenever it is necessary to examine into the provisions of an instrument to see whether it is negotiable or not, its negotiability is lost, and that it was necessary in this case to so examine, and that as a matter of fact each maker is a surety for the various other makers in proportion as each was to divide up the stock for which the note was given. Section 6648 provides that a person secondarily liable is discharged—

"(6) by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

In the cited case of *Bank v. Bowden* it was held that a comaker, although in fact a surety, is not released by an extension granted the principal in consideration of the payment of interest in advance. Speaking of the rule holding the surety liable, it was said:

"It merely defines the obligation of one who upon the face of a negotiable instrument assumes unconditional liability. It requires a surety who is unwilling to bind himself, irrespective of any extension granted to a comaker, to refrain from signing a note as one of the makers."

One of the two makers pleaded suretyship, want of consideration, and an extension by the other without her consent by payment of advance interest. While it was said that, aside from the statute, the same result would be reached, the surety was held liable by virtue of the Negotiable Instruments Act. Ruling Case Law lays it down that, under the provisions relating to primary and secondary liability:

"A surety comes squarely within the definition of a person whose liability is primary, for he is, by the terms of the instrument, absolutely required to pay the same." 3 R. C. L. p. 1120, § 335.

In *Mullendore et al. v. Wertz*, 75 Ind. 431, 39 Am. Rep. 155, it was held that an extension agreement between the payee and one of two makers of a note without the knowledge or consent of the other, who was a surety in fact, but not known as such to the payee, did not have the effect to release the nonconsenting maker. The consideration in that case was the payment of advance interest.

Section 6648 provides that a person secondarily liable is discharged, among other things, by any agreement blinding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made by the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved. But as already seen neither party to this note can be said to be secondarily liable, for each is primarily liable. We then have a promissory note signed by five makers, each and all of whom are primarily liable for its payment and by no one else; the signature of no other person or party appearing thereon. The provision that the time of payment may be extended without notice to any of the sureties, and the recital that this is made by the sureties, do not necessitate any examination or investigation for the purpose of ascertaining, by a purchaser in due course before maturity, whether any party can as to the holder claim the right to mere suretyship, and hence the note is not rendered nonnegotiable or made into a courier impeded with luggage.

If all the makers agree in advance that the note may be extended, this amounts merely and only to the unnecessary consent that they may enter into a new contract when they get ready to do so. If they all agree that the note may be extended by some of them without notice to the others, this might, and probably would, mean that, in case of a valid agreement for extension between the holder and such others, those not entering into it would be bound thereby, because such provision would amount to a mere appointment in advance of the other makers to represent them in an extension agreement. But a stipulation by all the makers of the note, reciting that they and the sureties consent that it may be extended without notice

to any of the sureties, does not amount to an agreement that it may be extended by any of the makers without consent of the others, or to an appointment of any of them as agents to extend for such others. It is apparent that in this instance a blank note, prepared for use when principals and sureties were to sign, was used, and hence the language which has caused this controversy became impractical and meaningless.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 592)

ALLEN v. PEOPLE'S STATE BANK et al.
(No. 21347.)

(Supreme Court of Kansas. March 9. 1918.)

(Syllabus by the Court.)

1. EVIDENCE OF AGENCY.

The record justified the conclusion that the defendant bank acted as the agent of the plaintiff in loaning the money sued for herein.

2. TRIAL \S 251(2)—INSTRUCTION—PLEADING—MISAPPROPRIATION BY AGENT.

The petition set forth conduct clearly fraudulent without using that particular adjective. *Held*, that it was proper to instruct on the fraud thus alleged.

3. BANKS AND BANKING \S 175(3)—MISAPPROPRIATION OF PROCEEDS OF LOAN.

The evidence tended to show that the bank profited by the transaction.

4. ADMISSION OR EXCLUSION OF EVIDENCE.

No error appears touching the admission or rejection of evidence.

Appeal from District Court, Seward County.

Action by Grace Allen against the People's State Bank, a corporation, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

G. W. Sawyer, of Liberal, for appellants. Macy & Davis, of Liberal, and Barrett & Turner, of Pratt, for appellee.

WEST, J. The defendant bank appeals from a judgment against it for having loaned for the plaintiff \$400 to an insolvent borrower. Complaint is made of rulings rejecting and receiving evidence, of instructions given, and overruling a motion for new trial.

[1] The petition alleged in substance that the bank, well knowing the insolvency of one Franz C. Wimmer, loaned \$400 of the plaintiff's money to him, taking a mortgage on a stock of drugs subject to a first mortgage to the bank for \$525.25; that she had advised the bank that she desired to have this loaned with good security; that the bank well knew the insolvency of Wimmer, and misappropriated the plaintiff's money by loaning it to him, and used the proceeds to liquidate overdrafts and other accounts owing the bank by Wimmer, who was subsequently adjudged a bankrupt, all of the assets being exhausted by the bank, and the plaintiff receiving nothing. It is complained that no agency was shown, but the record sufficiently

justifies the conclusion of the jury on this point.

[2] The court correctly instructed on the subject of fraud, and of this the defendant complains, on the ground that no fraud was alleged. The word "fraud" is not found in the petition, but that pleading as clearly and fully described fraudulent conduct as if that particular adjective had been employed. Hence there was no error in giving the instructions complained of.

[3] It is argued that the bank could be held only for the unauthorized acts of its officer in case it accepted and retained the benefits arising therefrom, and the question is asked, What consideration did the bank receive or retain? There was evidence that the bank used the proceeds of this loan to pay off overdrafts and other accounts held by it against Wimmer.

[4] We find no error in the rejection or admission of evidence. The jury heard all the testimony, and the trial court approved their verdict. We now add the approval of this court.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 701)

STATE ex rel. BREWSTER, Atty. Gen., v. KNAPP, State Auditor, et al. (No. 21790.)
(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

STATUTES § 22—ENACTMENT—CONSTITUTIONAL PROVISIONS—"BILL."

Under a Constitution which provides that "no law shall be enacted except by bill," but which recognizes that a joint resolution passed by the Senate and House of Representatives may in some circumstances become a law, a proposition passed by both houses and approved by the Governor may be regarded as a bill within the meaning of the provision quoted, where it has received the treatment of such a document and has every characteristic thereof, except that it describes itself as a concurrent resolution, and contains the words, "Be it resolved by the House of Representatives of the state of Kansas, the Senate concurring therein." instead of the constitutional formula for an enacting clause, "Be it enacted by the Legislature of the state of Kansas."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill.]

Marshall, Dawson, and West, JJ., dissenting.

Original petition for mandamus by the State of Kansas, on the relation of S. M. Brewster, Attorney General, against F. W. Knapp, Auditor, and Walter L. Payne, State Treasurer. Judgment for relator without issuance of writ.

S. M. Brewster, Atty. Gen., for plaintiff.

MASON, J. Merrell Gage has presented to the auditor a claim against the state for \$1,500 on account of a statue of Lincoln recently erected on the statehouse lawn, and has requested its allowance. The auditor, being in doubt as to the legal authority for

the payment of the claim, has declined to approve it until the question shall have been judicially determined. For the purpose of such determination this proceeding has been brought, a mandamus being asked by the Attorney General, requiring the auditor to approve the claim and issue a warrant therefor, and the state treasurer to pay it. The case is submitted upon the pleadings. It is agreed that the plaintiff has done everything possible on his part to entitle him to the payment asked, and the only doubt in the matter is whether any valid appropriation has been made therefor. If so, it is by virtue of action of the Legislature which is recorded as chapter 346 of the Session Laws of 1917, reading as follows:

"House Concurrent Resolution No. 25.

"Relating to an appropriation for purchasing and aiding in the erection of the Merrell Gage statue of Abraham Lincoln upon the capitol square.

"Whereas, the sculptor, Merrell Gage, has produced an excellent statue, of the great emancipator and typical American, Abraham Lincoln, the completed model of which is on exhibit at Mr. Gage's studio, 1027 Fillmore street, in the city of Topeka; and

"Whereas, art critics, as well as persons who knew President Lincoln personally, declare the same to be an accurate and lifelike reproduction of President Lincoln; and

"Whereas, the Woman's Club of the city of Topeka, and many other public spirited citizens of such city, have expressed the desire to have the statue erected on the capitol square, and have expressed a willingness to supply, or to procure the supply of by the city of Topeka, one half of the cost of such statue and the erection thereof on the capitol square, provided, the state of Kansas is willing to permit the same to be placed there, and to pay the other half for the cost and erection of such statue: Therefore,

"Be it resolved by the House of Representatives of the state of Kansas, the Senate concurring therein:

"Section 1. That the sum of fifteen hundred dollars is hereby appropriated for the purpose of assisting in the purchase, erection and unveiling of a bronze statue of Abraham Lincoln, created by Merrell Gage, said statue to be erected and located upon the statehouse lawn or square, and at such place thereon as shall be designated by the executive council of the state, and the executive council are hereby authorized and empowered to permit the erection of said statue upon the statehouse lawn or square: Provided, that the amount herein appropriated shall be in full of all claims or demands of every kind or character against the state: Provided, further, that said sum shall not be available or paid until the city of Topeka or the citizens of the city of Topeka shall have made provisions, in full, for the entire purchase price, erection and expenses incident to the unveiling of said statue; or, shall produce and file with the auditor of state a receipt in full from the said Merrell Gage together with a bill of sale transferring to the state of Kansas all of his right, title and interest in and to said statue; and, also, a receipt or receipts showing that all expenses of every kind or character incident to the erection and unveiling of said statue has been fully paid and satisfied by the city of Topeka or the citizens of the city of Topeka.

"Sec. 2. That the auditor of state is directed to draw his warrants in favor of Merrell Gage for the sum and the purposes herein named, and

upon his verified voucher therefor, accompanied by the receipt and bill of sale provided for in section 1 of this act.

"Sec. 3. This act shall take effect and be in force from and after its publication in the official state paper.

"Approved [by the Governor] March 3, 1917.
"Published in official state paper March 7, 1917."

Our Constitution provides that "no money shall be drawn from the treasury, except in pursuance of a specific appropriation made by law" (article 2, § 24), and that "no law shall be enacted except by bill" (article 2, § 20). The same article of the Constitution, however, recognizes that a law may be created by joint resolution. The section relating to the exercise of the veto power of the Governor reads as follows, the last sentence having been added in 1904:

"Every bill and joint resolution passed by the House of Representatives and Senate shall, within two days thereafter, be signed by the presiding officers, and presented to the Governor; if he approve, he shall sign it; but if not, he shall return it to the House of Representatives, which shall enter the objections at large upon its journal and proceed to reconsider the same. If, after such reconsideration, two-thirds of the members elected shall agree to pass the bill or resolution, it shall be sent, with the objections, to the Senate, by which it shall likewise be reconsidered, and if approved by two-thirds of all the members elected, it shall become a law; but in all such cases the vote shall be taken by yeas and nays, and entered upon the journal of each house. If any bill shall not be returned within three days (Sundays excepted) after it shall have been presented to the Governor, it shall become a law in like manner as if he had signed it, unless the Legislature, by its adjournment, prevent its return, in which case it shall not become a law. If any bill presented to the Governor contains several items or appropriation of money, he may object to one or more of such items, while approving the other portion of the bill; in such case he shall append to the bill, at the time of signing it, a statement of the item or items to which he objects, and the reasons therefor, and shall transmit such statement, or a copy thereof, to the House of Representatives, and any appropriations so objected to shall not take effect unless reconsidered and approved by two-thirds of the members elected to each house, and, if so reconsidered and approved shall take effect and become a part of the bill, in which case the presiding officers of each house shall certify on such bill such fact of reconsideration and approval." Article 2, § 14.

This section as originally framed resembled the corresponding section in a number of state Constitutions, as well as that of the federal Constitution, but the phrase "and joint resolution" was new, although in Michigan the words "and concurrent resolution" were used (article 4, § 14), and in Maine "or resolution having the force of law" (article 4, § 2). The veto clause of the federal Constitution is made applicable to "every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment)." Article 1, § 7. The section quoted expressly declares that if a joint resolution, which has been disapproved by the Governor, afterwards receives a two-thirds vote in each house "it shall become

a law." The inference seems clear that a joint resolution which is approved by the Governor after its adoption by the Legislature thereby becomes a law, although this is not declared in so many words. If a law can be enacted only by bill, and a joint resolution may become a law, it would seem that a joint resolution must be a bill, or may in some instances be regarded as a bill. And such is said to be the congressional practice in this section of a well-known work which dates back to 1856:

"A form of legislation, which is in frequent use in this country, chiefly for administrative purposes of a local or temporary character, sometimes for private purposes only, is variously known, in our legislative assemblies, as a joint resolution, a resolution, or a resolve. This form of legislation is recognized in most of our Constitutions, in which, and in the rules and orders of our legislative bodies, it is put upon the same footing, and made subject to the same regulations, with bills properly so called. In Congress, a joint resolution, which is the name given in that body to this kind of legislation, is there regarded as a bill." Cushing's Law and Practice of Legislative Assemblies, § 2403.

Whether or not legislation may ordinarily be accomplished by means of the adoption of a proposition submitted in the form of a resolution, we conclude that the process used in the case now under consideration amounted to the enactment of a law by bill. While the instrument acted upon by the two houses and the Governor described itself as a concurrent resolution, it had every characteristic, in form and treatment, of such a bill as by the combined action of the Legislature and the Governor becomes a law. It had a title which clearly expressed its subject to be the appropriation of money to pay for the Lincoln statue. It was read on three separate days in each house. It contained a provision declaring that "this act" should take effect upon its publication. In each house it received the votes of a majority of the members elected, and the result of the roll call was entered in full on the journal. It was submitted to and approved by the Governor, and published in the official state paper and in the statute book. "Joint resolutions," which may sometimes become laws, are required by the Constitution to be adopted by a majority of the membership in each house (article 2, § 13) by a recorded vote (article 2, § 10), as well as to be approved by the Governor, and "acts" of the Legislature must take effect at a prescribed time, and be published (article 2, § 19); but save for these requirements no mere resolution needs to have a title, to be read on three separate days, to show when it takes effect, to be adopted by a yeas and nays vote entered on the journal, to be approved by the Governor, or to be published. The treatment given this measure seems to show that it was regarded by the Legislature and the Governor as a "bill." It ought to be given effect as such, unless some insuperable obstacle is interposed. The

fact that it is styled a concurrent resolution rather than a joint resolution or bill is not in itself especially important. It should be classified by its essential qualities rather than by what it happens to have been called. All that it lacks of the necessary characteristics of a bill is a literal compliance with the requirement that "the enacting clause of all laws shall be, 'Be it enacted by the Legislature of the state of Kansas.'" Constitution, art. 2, § 20. In lieu of this, however, it has one reading, "Be it resolved by the House of Representatives of the state of Kansas, the Senate concurring therein." The courts are divided in opinion on the question whether a provision of the Constitution prescribing a form of enacting clause is mandatory or directory. Note, L. R. A. 1915B, 1060, 1063. Those which consider it mandatory hold the entire absence of the clause to be fatal (same note; Id. 1061), and such is the practice in this state (In re Swartz, Petitioner, 47 Kan. 157, 27 Pac. 839). But even where that rule obtains a substantial compliance is all that is deemed necessary. Note, L. R. A. 1915B, 1061, 1062. The turning point in the present controversy is whether the words, "Be it resolved by the House of Representatives of the state of Kansas, the Senate concurring therein," convey essentially the same meaning as "Be it enacted by the Legislature of the state of Kansas." In a familiar case a conviction on a charge of felony was set aside because the word "the" was omitted from the concluding clause of an indictment, so that it read "against the peace and dignity of state" instead of "against the peace and dignity of *the* state." It was there conceded that a substantial conformity to the requirement of the Constitution was all that was necessary; the court saying:

"It is plainly manifest that, the definite article 'the' which should immediately precede the word 'state' being omitted, the conclusion to the indictment in the case at bar falls far short of indicating the power or authority against which the facts charged in the body of the indictment constitute an offense. * * * It is clear that the omission of this word not only changes the sense but the very substance of the clause. * * * In the use of the definite article 'the' immediately preceding 'state' in the conclusion prescribed by the Constitution we have pointed out the state whose peace and dignity has been offended, and by the omission of such definite article we have a conclusion that does not designate the power or authority against which the offense is committed. * * * If this conclusion embraced language similar to that pointed out in the cases to which we have heretofore referred, such as 'against the peace and dignity of our said state,' or 'against the peace and dignity of state of Missouri,' it might be very properly ruled that such language was at least equivalent to the language prescribed by the Constitution, for the reason that it indicated the power and authority against which the offense as charged in the body of the indictment constitutes an offense." State v. Campbell, 210 Mo. 202, 224, 225, 109 S. W. 706, 712 (14 Ann. Cas. 403.)

171 P.—41

Whatever may be thought of the application there made of the rule, the statement of the general principle is obviously sound—that the test to be applied is whether the language employed conveys the same meaning as the language prescribed. In the matter now under consideration, if the expression used had been "Be it *legislated* by the Legislature of the state of Kansas," or "Be it enacted by the House of Representatives and Senate of the state of Kansas," it would hardly be doubted that the requirement of the Constitution was substantially met. We think that the clause "Be it resolved by the House of Representatives of the state of Kansas, the Senate concurring therein," unequivocally indicates that the two houses comprising the Kansas Legislature unite in giving their approval to the sections which follow it, with the purpose to give them the effect which they purport to have, and that this is all that could have been accomplished by a literal adherence to the formula employed by the Constitution.

A requirement of the Constitution that "the style of the laws of the state shall be, 'Be it enacted by the Legislature of the state of Mississippi,'" was held to be met by the use of the word "resolved" in the place of "enacted"; the court saying, "The word 'resolved' is as potent to declare the legislative will as the word 'enacted.'" Swann v. Buck, 40 Miss. 268. That decision was followed, the language quoted being expressly approved, in Smith v. Jennings, 67 S. C. 324, 45 S. E. 821. In May v. Rice, Auditor, 91 Ind. 546, a joint resolution for the appropriation of money was held to be ineffective, but it was not in fact approved by the Governor, and in the opinion stress was laid on the consideration that the Constitution made no provision for the presentation of a joint resolution to the Governor for his approval; the case of Swann v. Buck, supra, being distinguished on this ground and also upon a difference in the language of the provision regarding the enacting clause.

In at least two instances the Kansas Legislature has attempted to appropriate money by the adoption of a measure described as a joint resolution. Laws 1889, pp. 421, 422; Laws 1891, p. 416. It may be doubted whether either attempt was technically successful, for neither document contained any provision as to the time of its taking effect, or for its publication, although each was in fact published in the statute book. Here, however, inasmuch as we conclude that every requirement of the Constitution has been substantially complied with, the result is a valid enactment.

Judgment is rendered in favor of the plaintiff, determining that the claim should be approved and a warrant issued and paid. The issuance of a writ will of course not be necessary.

JOHNSTON, C. J., and BURCH and PORTER, JJ., concurring.

MARSHALL, J. (dissenting). Neither the title to the resolution, nor its enacting clause, if it may be called such, pretends to say that what follows is intended to be a law. The title to every law, except one enacted by the Legislature in 1917, begins with the words "An act." The one exception is chapter 91, the title to which, as printed in the statute book, begins with the words "Relating to"; but on the back of the original bill the title reads, "An act realting to," etc. The constitutional requirement concerning the enacting clause was followed by the Legislature, in 1917, in all instances, when a law was being enacted. It is safe to say that every member of that Legislature understood that both the title to an act and its enacting clause must give warning that what followed was intended to be a law. In the present instance neither the title, nor the enacting clause, nor both together, gave any such warning.

The constitutional requirement is simple. It is generally understood. It is easy to follow. There should be no refinements concerning it. Its simple requirements must be so obeyed, or they will cease to have any force or effect.

DAWSON, J. (dissenting). I cannot assent to the conclusions of the majority. The Legislature will meet again in a few months and doubtless would pay the petitioner's claim in the regular way, by a specific appropriation made by law, as all other proper claims against the state are paid. A house concurrent resolution is not a law. The Constitution takes no cognizance of such a resolution, and does not define it. A resolution is a declaration of opinion, or the expression of a purpose—nothing more. In the Session Laws of 1917 are concurrent resolutions expressing the compliments of the House and Senate to Hon. Charles F. Scott (chapter 339); expressing condolences on the death of Frank Edimer McFarland (chapter 345); requesting the Kansas Senators and Representatives in Congress to vote for woman suffrage (chapter 351), etc. There are 28 pages of concurrent resolutions in the Session Laws of 1913, the subject-matter ranging all the way from memorials to the President on the high cost of living (chapter 341), to denunciations of "log rolling" and "pork barrel" raids on the national treasury (chapter 340). And the decision in this case raises all that sort of stuff to the dignity of legislation!

The Constitution recognizes joint resolutions, but the resolution here under scrutiny does not pretend to be a joint resolution. What the Constitution does say is that no money can be drawn out of the state treasury except pursuant to a specific appropri-

tion made by law; and it says also that no law shall be enacted except by bill. In re Swartz, Petitioner, 47 Kan. 157, 27 Pac. 839. Again, the Constitution says that every bill shall have an enacting clause, and that it shall plainly run like this: "Be it enacted by the Legislature of the state of Kansas." Compliance with that provision of the Constitution is wanting in the resolution. The familiar, effective, and summary way of killing a bill in the Legislature is by striking out its enacting clause.

I know quite well that the spirit of our time is to give regard to the substance and not to the form of things. I trust I am in accord with that spirit; but disregard of fundamentals is not a true interpretation of that spirit. Every change does not necessarily lead to progress. There are a few plain, positive restrictions upon the delectable task of getting money out of the state treasury which the Constitution requires to be observed, and which it will be mischievous to disregard. A resolution of the two houses of the Legislature to appropriate money is merely a declaration of the House and Senate that they intend to see to it that a law to that effect will be duly enacted. The student who cares to investigate this subject will find that the Kansas legislative custom is to follow up these resolutions to draw money from the state treasury with specific items of appropriations to that effect. These are usually inserted in the miscellaneous appropriation acts. For example, a Senate concurrent resolution to appropriate \$6,000 for a statue of Governor Glick (Laws 1913, c. 364) was followed by an item in the miscellaneous appropriation act to the same effect (Laws 1913, c. 60, item 34). In discussing the necessity of following up this resolution with a corresponding item in the miscellaneous appropriation bill, the member from Atchison (Hon. J. W. Orr) said: "All the resolution amounts to is three cheers for Governor Glick!" In 1903, the House concurrent resolution authorizing a statue of John J. Ingalls (H. J. 1435, 1612; S. J. 843, 844) was followed by a specific item appropriating \$6,000 in a formal act of the Legislature (Laws 1903, c. 35, item 138). See, also, Laws 1913, c. 364, and Laws 1913, c. 60, item 34. Such illustrations could be indefinitely extended.

Mandamus is a discretionary writ. It should seldom issue in any gravely debatable case. The courts, the Legislature, and the executive officers are all solemnly sworn to uphold and defend the Constitution. If we are to have and maintain a constitutional government, we must stand by it, and not whittle it away so that it will mean nothing but a few glittering generalities.

WEST, J., joins in the dissent.

(102 Kan. 556)

EVANS v. WOODMAN ACC. ASS'N.
(No. 21149.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. INSURANCE §173—ACCIDENT INSURANCE
—CONSTRUCTION OF POLICY.

A clause in an accident insurance contract provided that if the insured was injured "while engaged temporarily or otherwise in any occupation, work, risk or exposure classified by this association as more hazardous than that under which this certificate is issued, or while doing any part of the work of any one so classified, I or my beneficiary shall be entitled only to the benefits provided by this association in its classified tables for such increased hazard," and the insured who had been in charge of city schools for years and was classified in the certificate as superintendent of a city school was accidentally killed while cutting down a tree, about six months after the end of the term of school, in order to obtain firewood for his father. Occasionally while teaching and in vacations he did some work on his farm near the school and some chores for his father. In a contest as to the extent of the benefits due it is held that the clause quoted applies to occupations rather than to casual or incidental acts which might pertain to occupations other than those named in the certificate, and that under the testimony in the case the jury was justified in finding that the insured had not changed his occupation, and that the work he was doing when he was killed pertained as much to that of a teacher as that of a farmer.

2. INSURANCE §146(3) — ACCIDENT INSURANCE—CONSTRUCTION.

The general rule is that if the terms of an accident policy are obscure or open to more than one construction, that one which is more favorable to the insured must prevail.

Appeal from District Court, Sedgwick County.

Action by Nellie Boyd Evans against the Woodman Accident Association. Judgment for plaintiff, and defendant appeals. Affirmed.

G. P. Craft and E. J. Hainer, both of Lincoln, Neb., and James G. Martin, Chester I. Long, and A. M. Cowan, all of Wichita, for appellant. George A. Neeley, of Hutchinson, for appellee.

JOHNSTON, C. J. Nellie Boyd Evans recovered a judgment against the Woodman Accident Association in the sum of \$3,222 upon a certificate issued by the association to her husband, William E. Evans, now deceased. The defendant appeals.

On May 26, 1913, when the certificate of membership in the association was issued to Evans and for several years prior thereto his profession was that of public school-teacher, and at the time of the issuance of the certificate he held the position of superintendent of public schools of Mulvane, Kan., and his occupation was so stated in his application for membership and in the certificate. For several years prior to his death he was also the owner of a tract of farm land, and adjoining this tract was a small tract upon which his aged and infirm father

lived alone. The deceased lived in town not far from his school, but it had been his custom when not engaged in his regular duties as a teacher to go to the farm and do some of the work there, mainly in the mornings or evenings, and aid his father in doing chores and in caring for the few head of stock kept on the farm. It was provided that the application of the insured, the by-laws of the association, and the certificate issued should together constitute the whole contract between the parties. Among the provisions of the application was the following:

"I hereby agree that if I am accidentally injured, fatally or nonfatally, while engaged temporarily or otherwise, in any occupation, work, risk or exposure classified by this association as more hazardous than that under which this certificate is issued, or while doing any part of the work of any one so classified, I or my beneficiary shall be entitled only to the benefits provided by this association in its classified tables for such increased hazard."

The classification of risks in force at the time the certificate was issued was as follows:

Occupation.	Risk.	Benefits.
Teacher school, city	Select	\$3,000
Teacher school, country or village	Ordinary	1,500
Farmer owner, truck raiser	Medium	1,000
Farmer owner, or renter	Medium	1,000
Farm laborer, hired hand	Special	800

[1] In May, 1914, Evans' term as superintendent expired, and he did not thereafter secure any employment or contract of employment as a teacher or superintendent of schools. During the summer of 1914 he made a campaign for the office of county treasurer, and also spent some of his time working on the farm. After being defeated for that office at the general election in the fall he spent considerable time working at the farm or overseeing others working there and in aiding his father. However, he did not depend upon the farm as a means of support for himself and family. After the election efforts were made by him to obtain another position as teacher, and he considered an offer of a position in the town of Corbin, but it does not appear that he arranged to take that position. In connection with his work as a teacher and up until the time of his death he was a member of the county board, which conducted examinations of teachers and graded their examination papers. Evans also received a certificate as a licensed normal teacher about the time his term as superintendent expired. He was killed on December 24, 1914, when a cottonwood tree upon his farm which he was cutting down for fuel for his father fell upon him and crushed him. Among other findings the jury found that deceased never changed his occupation after his term as superintendent expired; that his activities after June, 1914, consisted of being a member of the examining board, campaigning for the office of county treasurer, and taking his usual recreations on the

farm; that the work he was doing when he was killed was connected with and related to the occupation of teacher, and did not pertain to that of a farmer.

The certificate provided for the payment to the beneficiary of \$3,000 in case of death by external, violent, and accidental means, and it was conceded that Evans' death was so caused. Prior to this action and at the trial defendant made a tender of \$1,000 to plaintiff as the extent of its liability under the certificate. It is contended by defendant that the deceased was injured while temporarily engaged in the work of a farmer, and that he was doing part of the work of his father, a farmer, and therefore plaintiff could not recover more than the amount allowed for such risks. It is clear that the occupation of the insured was that of school-teacher. He had served as superintendent of the schools of Mulvane for seven years, and before that time had been engaged as teacher of the common schools of that city. The fact that during this period he had occasionally done some work on his farm and chores for his father who was a retired farmer did not operate as a change of vocation, nor make him a farmer, "temporarily or otherwise." His unsuccessful candidacy for an office during the vacation period cannot be interpreted as a change of occupation. There was testimony that the work done by him on the farm and for his father was his means of obtaining exercise and recreation, and the jury having found that there was no change of occupation, and that between the ending of the term of school and the time of his death in December of the same year the only work done by him was acting as a member of the examining board, an unsuccessful effort to be elected as county treasurer and his usual recreations on the farm. Some time before his death some steps had been taken by him to obtain another position as school-teacher and it is plain that he had not abandoned his calling. The things done by him upon the farm were casual, and might be said to be incidental to his work as a teacher. Clauses like the one in question, limiting the insurer's liability where the insured is injured while engaged in an occupation classified as more hazardous than that named in the certificate, are generally held to apply to occupations rather than to acts that are merely casual or incidental. The terms "work," "risk," or "exposure" pertain to a classified occupation more hazardous than that under which the certificate is issued.

In *Willey v. Sheppard*, 61 Kan. 351, 354, 59 Pac. 651, 652 (47 L. R. A. 650), it was held that one insured against accident as a barber and restaurant keeper who was injured while hunting might recover, although hunting might be classed as a more hazardous occupation. The hunting was treated as a matter of recreation incident to the daily life of the insured, and, not being for profit or hire, could not be regarded as even a tem-

porary change of occupation. In that case there is a quotation with approval from *Union Mutual Accident Ass'n v. Frohard*, 134 Ill. 228, 25 N. E. 642, 10 L. R. A. 383, 23 Am. St. Rep. 664, in which it was said that:

"The word 'occupation' * * * must be held to have reference to the vocation, profession, trade or calling which the assured is engaged in for hire or for profit, and not as precluding him from the performance of acts and duties which are simply incidents connected with the daily life of men in any or all occupations, or from engaging in mere acts of exercise, diversion or recreation."

Cutting down a tree was not the usual work of the insured, and may be said to be as incidental to school-teaching as it would be to farming and many other vocations. It is not easy to say what particular acts are properly incidental to one vocation and not to another. If an insured lawyer should occasionally cut down a dead tree in his orchard or yard his acts could hardly be treated as a change of calling any more than the chopping down of a tree now and then by the Prime Minister Gladstone effected a change of his vocation. Occasional acts of that kind may be properly treated as incidental to almost any of the callings or occupations. The filial act of the insured in cutting wood for his father's use cannot be regarded as the act of a farmer, and, besides, his father had retired from the occupation of farming. It did not make him a farmer or woodchopper any more than to have carried his father's mail occasionally would have made the insured a mail carrier.

In *Stone's Adm'rs v. United States Casualty Co.*, 34 N. J. Law, 371, the insured was classified in the policy as a school-teacher, and, being temporarily out of employment, he caused two buildings to be erected for his own use, and while examining the work as it progressed he fell from the second story and was killed. The clause relating to a change of occupation or any exposure more hazardous than that named in the policy was held to apply to occupations, and not individual acts, and it was said that it would be preposterous to affirm that because of the building of these two houses he thereby became a builder by profession. It was held that the jury were warranted in finding that the act of the assured which led to his death was not an act that was more appropriately incident to other occupations than it was to that of a teacher.

Although there is some conflict of authority, the general trend of the cases is that casual or incidental acts pertaining to another employment than that named do not constitute a change of employment within the meaning of clauses like that under consideration; neither do they operate as a forfeiture or reduction of the amount of benefits. In a note in 7 Ann. Cas. 568, many authorities are collected in support of the rule, which is stated as follows:

"In construing insurance policies which contain provisions for changes in the occupation of the insured, or which classify risks according to

occupation, it is the general rule that to be engaged in a certain occupation or employment is not inconsistent with the incidental performance of acts, either of service or pleasure, which do not come within the stated vocation of the insured, and that the doing of such acts does not operate to remove the insured from the vocation in which he is classed."

Later cases to the same effect are collected in Ann. Cas. 1916B, 740. Another statement of the rule applicable where a forfeiture or reduction of benefit is claimed by reason of a change of occupation or of temporary or occasional acts and exposures pertaining to an occupation classed as more hazardous than that named in the policy, with a long list of supporting authorities, is set forth in L. R. A. 1915D, 312. It is there said that:

"Clauses in accident policies providing for a forfeiture or reduction in the sum payable if the insured is injured or killed in any occupation or exposure classed as more hazardous than that under which he was classified have frequently been before the courts. There has been little difference of opinion as to the applicability and effect of such provisions as applied to cases where the insured was injured while performing an occasional act relating to a more hazardous occupation; it being generally held that the classification intended by such provisions is a classification of occupations, and not of particular acts or exposures, and that therefore the fact that the insured occasionally performs acts pertaining to a more hazardous occupation does not have the effect of forfeiting the policy or reducing the amount of recovery."

See, also, note in 24 L. R. A. (N. S.) 1174.

[2] A few cases taking a different view of such clauses and giving them a strict interpretation as against the insured may be found in these notes. The general rule is that if there is doubt as to the construction of such provisions, that which is most favorable to the insured must prevail. *Casualty Co. v. Colvin*, 77 Kan. 561, 568, 95 Pac. 585; *Stone's Adm'rs v. United States Casualty Co.*, supra.

The instructions of which complaint is made follow closely the rule laid down in *Willey v. Sheppard*, supra, and the other authorities which are herein cited and approved. We find no good ground for the claim that the verdict was given under the influence of passion and prejudice.

The judgment of the district court is affirmed. All the Justices concurring.

(102 Kan. 551)

LASNIER v. MARTIN et al. (No. 21147).
(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §635(3) — FAILURE TO FILE TRANSCRIPT—EFFECT.

Failure to provide a transcript of the evidence does not necessarily require the dismissal of an appeal. It merely excludes from the scope of the review those features of the lawsuit dependent thereon.

2. PERPETUITIES §1 — RULE AGAINST PERPETUITIES.

The rule against perpetuities is that no future interest in property can lawfully be created which does not necessarily vest within 21

years after some life or lives presently in being, excluding from such computation of years the incipient life of infants in ventre sa mere.

3. PERPETUITIES §6(5)—TESTAMENTARY PROVISION—INVALIDITY.

Provisions of a will which direct that no disposition of certain property shall be made "within twenty-one years after the death of my beloved wife" are void under the rule against perpetuities.

4. WILLS §866—VOID DEVISE—EFFECT.

When a future estate attempted to be created by a will fails because it offends the rule against perpetuities, the property thus ineffectually disposed of vests at once in the heir or heirs at law; and a rent charge on the abortive future estate during the illegal interim of suspension fails therewith.

Appeal from District Court, Cloud County.

Action to quiet title by Celina Lasnier against Helen Martin and others. Judgment for plaintiff, and certain defendants appeal. Affirmed.

M. V. B. Van De Mark, Fred W. Sturges, Jr., and A. M. French, all of Concordia, and Kagey & Anderson, of Beloit, for appellants. W. H. Savery, of Kankakee, Ill., and Pulsifer, Hunt & Short, of Concordia, for appellee.

DAWSON, J. This was an action by the plaintiff, Celina Lasnier, widow and sole heir at law of the late Alfred Edmond Lasnier of Cloud county, to quiet her title to certain property which had belonged to her deceased husband. Alfred left a will, the material parts of which read:

"First, I bequeath to my wife, Celina Lasnier all the income, real estate and personal property that I own, as long as she lives a widow. If she re-marries she will have right to what the law allow her only.

"Second, I oblige her after receiving my life insurance, which is in her name, to pay \$500.00 to the parish of Concordia for Masses to be said for me to the above amount, within a year after my death.

"Third, I oblige her to give \$500.00 to my sister Emeline Lasnier, Sister in the Convent of Presentation of Marie, in St. Hyacinthe, Canada, under the name of Sister Theresa.

"Fourth, I devise [advise] her to sell the farm and all of the Stock and Implements, but I desire that the store shall not be disposed of in any manner within 21 years after the death of my beloved wife. And in the meantime during the 21 years, the building to be kept in repair out of the income of same building and the balance to be equally divided amongst my brothers and sisters.

"Fifth, After 21 years elapse after the death of my beloved wife, should the building be sold the amount to be divided amongst and between the children of my brothers and sisters that have remained good Catholics and good Citizens. "I appoint my beloved wife, Celina Lasnier, the executrix of this my last will and testament."

The plaintiff elected to take under the law, and not under the will. As executrix she paid the bequests mentioned in the second and third paragraphs of the will, and brought this action against all the next of kin of her husband who might have some claim of right under the fourth and fifth clauses of Alfred's will, basing her action on

the ground that those clauses of the will were void, and there was a partial intestacy of her husband's estate which devolved upon her as his sole heir at law.

The trial court gave judgment for plaintiff on the ground:

"That the will of Alfred Edmond Lasnier as to the fourth and fifth clauses thereof is void and of no effect because of ambiguity, uncertainty, and remoteness, and also because of the reason that the said clauses violate the rule against perpetuity."

Certain of the defendants appeal.

[1] The appellee raises a preliminary question by moving to dismiss this appeal because no transcript of the evidence was provided by the appellants. But unless the questions involved in the appeal require a review of the evidence or of the rulings of the court thereon, a transcript would serve no purpose. Failure to provide a transcript does not necessarily require the dismissal of an appeal; it merely excludes from the scope of the review those features of the lawsuit dependent thereon. In this case apparently there was some evidence introduced at the trial, but we do not discern its relevancy to the matters now urged upon our attention.

[2, 3] Were the fourth and fifth clauses of the will void as decided by the trial court? Let us test them by the rule against perpetuities. That rule is that no future interest in property can lawfully be created which does not necessarily vest within 21 years after some life or lives now in being, excluding from such computation of years the incipient life of infants *in ventre sa mere*.

In *Klingman v. Gilbert*, 90 Kan. 545, 548, 549, 135 Pac. 682, 683, it was said:

"If by the terms of the will no estate could vest in the children of either son who died leaving a widow until her death or remarriage, the rule against perpetuities was violated, because it might happen that the son would marry a woman born after his father's death, who would survive him more than twenty-one years. The improbability of such an occurrence does not affect the matter. 'The rule requires that future interests within its scope should vest within twenty-one years, exclusive of periods of gestation, after a life or lives in being.' * * * It is not enough that the future interest may, or even that it will, in all probability, vest within the limits. It must necessarily so vest.' 30 Cyc. 1482, 1483. If, however, an estate would necessarily vest in such children at or before the death of their father, the rule was satisfied, no matter how long their possession and enjoyment of the property might be postponed. 30 Cyc. 1471, 1473; 22 A. & E. Encycl. of L. 721, 722; *Gates v. Seibert*, 157 Mo. 254, 57 S. W. 1065 [80 Am. St. Rep. 625], a case somewhat like the present; note, 49 Am. St. Rep. 126. The question for determination therefore is, When would an estate vest in the children of one of the sons under the circumstances stated? If the actual and obvious purpose of the testator was one which the law does not permit to be carried out, the provision of the will must fail."

In *Keeler v. Lauer*, 73 Kan. 388, 393, 394, 85 Pac. 541, 543, it was said:

"The trust is to terminate and the property to pass to the children when the youngest child arrives at the age of twenty-one years. Having

no statute on the subject the common-law rule prevails, under which the contingent interest must become vested within a life or lives in being and twenty-one years afterward, to which, under some circumstances, is added the period of gestation. 22 A. & E. Encycl. of L. 708; Gray, *Rule against Perpetuities* (2d Ed.) § 201. If the contingency on which the estate is to vest must certainly happen within the common-law period, it does not offend the rule. As the minority of the youngest child comes within the gross period added to a life in being there is no room for disagreement. It is held, too, that the term of twenty-one years may be taken in gross, without reference to infancy, and the devise is not too remote if the contingency must happen within that period. *Barnitz's Lessee v. Robert Casey*, 11 U. S. [7 Cranch] 456, 468, 3 L. Ed. 403; *Potter v. Couch*, 141 U. S. 296, 314, 11 Sup. Ct. 1005, 35 L. Ed. 721; *Johnston's Estate*, *Johnston's Appeal*, 185 Pa. 179, 39 Atl. 878, 64 Am. St. Rep. 621; *Cadell v. Palmer*, 1 Cl. & F. (Eng.) 372; *Von Brockdorff v. Malcolm*, 30 Oh. Div. 172; Gray, *Rule against Perpetuities* (2d Ed.) §§ 186, 223; 22 A. & E. Encycl. of L. 709."

The rule against perpetuities has received the sanction of lawyers and statesmen for many generations, both in America and England, and it is grounded on the salutary and far-sighted public policy which frowns on the total exclusion of property from social commerce for long periods of time. Such exclusion is at variance with that philosophy of government which encourages the accumulation of private property in such form that it may be readily used or disposed of to provide against the possibilities of future want or misfortune. Chancellor Kent's examination of the early English cases led him to say that perpetuities had led to confusion and disorder, and had often caused the entanglement and ruin of families. 4 Kent, 267, 268. Professor Gray declares that the rule is not of feudal origin, but has its support in the practical needs of modern times. Gray, *The Rule Against Perpetuities*, § 203. Sir William Blackstone, in discussing the rule against perpetuities, says:

"But, in * * * these species of executory devises, the contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within a moderate term of years, for courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors; because by perpetuities * * * estates are made incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established. The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in is that of a life or lives in being, and one and twenty years afterwards." *Cooley's Blackstone*, book 2, pp. 173, 174.

[4] In the present case, the plaintiff, as was her privilege, disclaimed under the will and claimed her right to half the estate under the statute. What, then, became of the other half of the estate after paying the specific bequests? The will says the store building is not to be disposed of in any manner within 21 years after plaintiff's death. After that time it is to vest, or the proceeds of it are to vest, in certain persons whose

identity need not at this point concern us. It is not within 21 years after some life now in being, but after that time—beyond that time—that the proceeds of this property are to vest according to this will. Certainly this provision of the will offends the rule against perpetuities. And when a proposed future estate fails because of the rule against perpetuities, the property vests at once in the heir or heirs at law. In re Walkerly, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97, and note; Re Kountz, 213 Pa. 390, 62 Atl. 1103, 3 L. R. A. (N. S.) 639, 5 Ann. Cas. 427; Cooly's Blackstone, book 2, pp. 156, 157; Gray, The Rule Against Perpetuities, §§ 247, 248. The rent charge on the property, being for the proposed illegal term of suspension or postponement of the vesting of the estate, necessarily fails with the failure of the abortive estate itself.

In view of the foregoing, it seems wholly unnecessary to decide whether the provisions of the will creating a future estate to vest finally in such of the testator's kinsmen as had "remained good Catholics and good citizens," without prescribing a mode of determining these requisite qualifications of beneficiaries to take under the will, are void for uncertainty. If the will had created and bestowed a power of appointment, or if it had prescribed some other definite and suitable mode of determining who among the testator's nephews and nieces possessed the requisite qualifications, there might be no such uncertainty as would vitiate the devise or bequest. 40 Cyc. 1708.

It is suggested in appellants' brief that the store building did not amount to one-half of the testator's property. Probably so, but aside from the building the will does not attempt to regulate the disposition of any residue. The testator advised his widow to sell the farm, etc., but failed to direct a disposition of the proceeds of such sale. There, too, the will discloses a partial intestacy. All the property ineffectually disposed of by the will devolved on the plaintiff as sole heir at law.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 569)

DEFFENBAUGH v. UNION PAC. R. CO.
(No. 21328.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §278(17)—ALLEGATIONS OF NEGLIGENCE—PROOF.

There was evidence to support the plaintiff's allegation of negligence.

2. MASTER AND SERVANT §94—INJURY TO SERVANT—PLACE OF WORK—LIABILITY.

Under section 8545 of the General Statutes of 1915, a railroad is liable for the injuries sustained by a car repairer who is blown by the wind from the top of a car on which he is working, where the car is being repaired in regular shops, at a division point, on tracks

exclusively used for repair work, and is not in or under any shed.

3. COMMERCE §27(8)—FEDERAL EMPLOYERS' LIABILITY ACT—"INTERSTATE COMMERCE."

A car repairer cannot be said to be engaged in interstate commerce while working on a car which has been used in such commerce, and which, while being repaired, is empty, and is not used in any kind of transportation, where it does not appear that the car is used exclusively in interstate commerce.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

4. MASTER AND SERVANT §204(2), 228(2)—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—STATUTE.

Under sections 8480-8482 of the General Statutes of 1915, neither contributory negligence nor assumption of risk is a defense in an action to recover damages for injuries sustained by a car repairer under the circumstances described in the second paragraph of this syllabus.

Appeal from District Court, Wyandotte County.

Action by Frank E. Deffenbaugh against the Union Pacific Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

R. W. Blair, T. M. Lillard, and A. M. Hambleton, all of Topeka, for appellant. Stanley & Stanley, of Kansas City, for appellee.

MARSHALL, J. The defendant appeals from a judgment rendered against it in favor of the plaintiff for injuries sustained by him.

The plaintiff, a car repairer, was injured by being blown from the top of a freight car on which he was working. At the time of his injury, the plaintiff was employed by the defendant in its regular repair shops in Kansas City, Kan., one of the defendant's division points. The car on which the plaintiff was working was standing on a track used exclusively for repair work, but was not covered nor inclosed by any shed. There were sheds connected with the repair shops, but the sheds were full, and there was no room in them for the car on which the plaintiff was working. The plaintiff was removing sheet metal from the roof of the car. After the metal had been loosened, a gust of wind caught it and blew it and the plaintiff to the ground. On the day the plaintiff was injured, the wind was blowing from 40 to 45 miles an hour.

The petition alleged that the defendant was negligent in not having the car on which the plaintiff was working in a shed which could have been closed, so as to prevent the wind from catching and blowing the metal roof off the car. Contributory negligence, assumption of risk, and that the plaintiff was engaged in interstate commerce at the time of his injury, were alleged as defenses.

[1] 1. The defendant's first contention is that there was no evidence to support the plaintiff's allegation of negligence. Section 8545 of the General Statutes of 1915 reads:

"It shall be unlawful for any railroad company or corporation or other persons who own, control or operate any line of railroad in the state of Kansas to build or repair railroad equipment at division points where shops are located without providing sheds, so constructed that they may be entirely inclosed, over the tracks exclusively used for such repair work, so that all men permanently employed for such repairs may be protected during storms or other inclement weather or from extreme heat: Provided, nothing in this act shall relate to temporary repairs made at places other than regular shops."

The statute applied to the work that was being done by the plaintiff. The evidence supported the charge of negligence set out in the petition.

[2] 2. The defendant's second contention is that its negligence in failing to provide a shed for the repair track was not the proximate cause of the plaintiff's injury. The contention cannot be harmonized with the requirements of the statute. The wind was the direct cause of the injury to the plaintiff. If the statute had been complied with, the accident would not have occurred. The purpose of the statute, which has been quoted, is to protect employes from being injured by inclement weather of any kind—heat or cold, rain or snow, wind or storm. The statute was not complied with, and, because it was not complied with, the plaintiff was injured. Injury to an employé, caused by inclement weather, could have been foreseen by the defendant as a result of its failure to comply with the statute. The injury that did result was one of those that might have been thus foreseen. High winds occur frequently in this state, and metal roofs are often torn from buildings by such winds. A person working on a loosened metal roof of any structure, during a high wind in this state, is liable to be injured. The statute was intended to compel the defendant to guard against the thing that caused the plaintiff's injury. There was, therefore, causal connection between the violation of the statute and the injury to the plaintiff, and the defendant's contention cannot be sustained. Substantial support for the conclusion here reached is found in *Fowler v. Enzenperger*, 77 Kan. 406, 413, 94 Pac. 995, 15 L. R. A. (N. S.) 784; *Caspar v. Lewin*, 82 Kan. 604, 625, 109 Pac. 657, 49 L. R. A. (N. S.) 526; *Casteel v. Brick Co.*, 83 Kan. 533, 537, 112 Pac. 145.

[3] 3. The defendant's third contention is that the plaintiff was employed in interstate commerce at the time of his injury. The car on which the plaintiff was working was an empty Union Pacific car. The accident occurred on November 19, 1915. The car had been used in the regular commercial service of the defendant. On November 16, 1915, it was received from the Wabash Railroad after it had completed an interstate trip. It was then inspected, found in bad order, and placed in the yards for repairs. While undergoing repairs, it was entirely out of commercial service, and was not used

for any commercial purpose. On November 22, 1915, after it had been repaired, it was again put into commercial service. It does not appear whether the first service of the car, after being repaired, was in interstate commerce or in intrastate commerce, and it does not appear that the car was used exclusively for service in interstate commerce.

There has been some confusion in the decisions in both the state and federal courts concerning the interstate character of work similar to that performed by the plaintiff. An analogous case was decided by the Supreme Court of the United States on January 8, 1917 (*Minneapolis & St. Louis R. R. Co. v. Winters*, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358), where that court said:

"The plaintiff was making repairs upon an engine. This engine 'had been used in the hauling of freight trains over defendant's line, * * * which freight trains hauled both intrastate and interstate commerce, and * * * it was so used after the plaintiff's injury.' The last time before the injury on which the engine was used was on October 18th, when it pulled a freight train into Marshalltown, and it was used again on October 21st, after the accident, to pull a freight train out from the same place. That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine as such is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events." 242 U. S. 356-357, 37 Sup. Ct. 171 (61 L. Ed. 358).

Following the reasoning of the United States Supreme Court, the conclusion is inevitable that the plaintiff was not engaged in interstate commerce at the time he was injured.

[4] 4. The defendant's last contention is that the plaintiff was guilty of contributory negligence and assumed the risk. This contention is not good. Section 8481 of the General Statutes of 1915 reads:

"That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé: Provided, that no employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier, its officers, agents, servants or other employes of any federal or state statute enacted for the safety of employes contributed to the injury or death of such employé."

Section 8482 of the General Statutes of 1915 reads:

"That any action brought against any common carrier, under or by virtue of any of the provisions of this act, to recover damages for injuries to, or the death of any of its employes, such employes shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier, its officers, agents, servants, or other employes of any federal or state statute enacted for the safety of employes contributed to the injury or death of such employe."

These statutes applied against all corporations operating railroads, in all cases of—"injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier: or by reason of any insufficiency of clearance of obstructions, of strength of roadbed and tracks or structure, of machinery and equipment, of lights and signals, or rules and regulations and of number of employes to perform the particular duties with safety to themselves and their coemployes, or of any other insufficiency, or by reason of any defect, which defect is due to the negligence of said employer, its officers, agents, servants or other employes in its cars, engines, motors, appliances, machinery, track, roadbed, boats, works, wharves, or other equipment." Gen. Stat. 1915, § 8480.

The failure of the defendant to provide a shed over the track on which the car was standing while being repaired, or to place the car in a shed, contributed to the plaintiff's injury, and neither contributory negligence nor assumption of risk is a good defense.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 611)

FAIR v. UNION TRACTION CO.
(No. 21362.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

STREET RAILROADS \S 102(2), 114(21)—**PERSONAL INJURY — PROXIMATE CAUSE — CONTRIBUTORY NEGLIGENCE.**

The evidence and findings considered, and held, the proximate cause of a collision between a street car and an automobile was the unlawful speed at which the automobile was driven, although at the moment of collision the automobile was moving at a lawful rate of speed. Held, further, the plaintiff, who was an occupant, but not the driver of the automobile, was guilty of negligence which contributed to his injury.

Appeal from District Court, Montgomery County.

Action by E. C. Fair against the Union Traction Company. Judgment for plaintiff, and defendant appeals. Reversed and cause remanded, with direction to enter judgment for defendant.

John J. Jones, of Chanute, and Chester Stevens, of Independence, for appellant. Thomas E. Wagstaff, of Independence, for appellee.

BURCH, J. The action was one for damages for personal injuries sustained through the collision of one of the defendant's street

cars with an automobile in which the plaintiff was riding. The plaintiff recovered, and the defendant appeals.

The automobile was driven by a doctor who was a friend of the plaintiff, and who was taking the plaintiff to his home at about 11 o'clock at night. Myrtle street in the city of Independence extends east and west. Myrtle street is crossed by streets running north and south, numbered consecutively from east to west. The plaintiff lived on the south side of Myrtle street, just west of Thirteenth street, which is 50 feet wide. In front of the plaintiff's home Myrtle street is 40 feet wide. The street car track is laid in the center of Myrtle street. At ninth street the automobile, going west on the north side of Myrtle street, passed the street car, which was west bound. The automobile proceeded at the rate of about 25 miles per hour until Thirteenth street was reached. The driver then commenced to reduce speed in order to make the contemplated turn to the south to the plaintiff's home. The driver first turned to the right until near the north curb of the street, and then executed a curve to the south, going at the rate of about 5 miles per hour. As the automobile was crossing the street car track, 55 or 60 feet west of Thirteenth street, it was struck by the street car, which was running at the rate of 20 to 25 miles per hour. The street car was equipped with headlights much like those of an automobile, and could be stopped within 200 feet when running at the rate of 25 miles per hour.

The cause was submitted to the jury on the plaintiff's evidence, after a demurrer to the evidence had been overruled. The plaintiff and the automobile driver both testified that the plaintiff gave the driver no instructions or directions with reference to the management or operation of the automobile. The plaintiff testified as follows:

"Q. Now the street car was moving off just as you went by it? A. Yes; if I remember rightly it started up just as we went by.

"Q. Going in the same direction that you did? A. Yes, sir.

"Q. And the doctor went fast in order to keep ahead of the car? A. Yes, sir.

"Q. You knew that that street car was following you right down the street? A. That is the reason we were trying to get ahead of it or get away from it.

"Q. And for the purpose of getting away from that car you drove fast, as fast as 25 miles an hour? A. Yes.

"Q. You were perfectly familiar with that street car and the street car track and the street? A. Yes, sir."

Among the defenses pleaded were the contributory negligence of the plaintiff and the excessive rate of speed of the automobile. The court refused to instruct the jury with reference to the statutory duty to operate automobiles on city streets at a rate of speed not in excess of 12 miles per hour. With the general verdict for the plaintiff the jury

returned special findings of fact, which follow:

"Q. No. 1. How far east of the point of collision could the approaching street car have been seen on the night of January 7, 1916, by one at or near the place where the automobile commenced to turn toward the track? A. Two hundred feet.

"Q. No. 2. Is it not a fact: (a) That the automobile was racing with the street car immediately before the collision? A. No. (b) That in order to keep ahead of the street car, the automobile was traveling at the rate of about 25 miles per hour from about the intersection of Ninth and Myrtle streets? A. Yes. (c) That the plaintiff knew these facts? A. Yes.

"Q. No. 4. How far was the street car from the point of collision when the automobile started to cross the street car track? A. About 150 feet.

"Q. No. 5. If the automobile at no time had run at a rate of speed to exceed 12 miles per hour, could the collision have occurred at the time, place, or in the manner in which it did occur? A. No.

"Q. No. 6. Did the plaintiff or Dr. Alford, at any time, warn or otherwise inform the motor-man that the automobile was about to cross the street car track? A. No.

"Q. No. 8. After the automobile crossed Ninth street, did the plaintiff know that the street car was following the automobile in which he was riding? A. Yes.

"Q. No. 9. If you find for the plaintiff, in what respect do you find the defendant, its agents, servants, and employees negligent? A. Running too fast; not using proper signals."

A motion for judgment in favor of the defendant on the special findings was denied.

Since the plaintiff admitted, and the jury found, the plaintiff knew the street car was following the automobile, signals would have conveyed no information, and the jury were not warranted in basing their verdict on failure of the defendant to use proper signals. If by their finding relating to negligence the jury meant the defendant was negligent because the street car was operated at too great a rate of speed, in connection with the fact proper signals were not given, there was no basis for the verdict. If, however, the jury meant the defendant was negligent in two distinct and independent respects—running too fast, and not using proper signals—the verdict must rest on the first ground alone. The only direct evidence bearing on the subject of proper speed for the street car was that of a former employe of the defendant, who said cars were ordinarily operated at the rate of 20 to 25 miles per hour. There was testimony that Myrtle street was one of the principal thoroughfares of the city, used by automobiles, street cars, buggies, and pedestrians, but the extent to which the street was used late at night was not shown, and there was no evidence whatever that any vehicle besides the automobile in which the plaintiff was riding was using the street, or that any person crossed the street, during the time the street car and the automobile moved from Ninth street to the point of collision. The evidence of several of plaintiff's witnesses was that the street was lighted and a per-

son could see all the way up Myrtle street from Thirteenth to Ninth. The jury, therefore, resorted to some standard not revealed by the evidence for the finding that the defendant was negligent in respect to the speed of the street car. Granting, however, the car was operated at too great a rate of speed, we have this result: Two power-propelled conveyances go forward from a point on the same street, at the same time, in the same direction, at the same general rate of speed, and under the same conditions, except that one is confined to a fixed course, while the other has a choice of courses, and can be stopped more quickly. The one having greater freedom of movement turns in front of the other, and they collide. The street car is negligently used. The automobile is not. Manifestly there is something wrong with a verdict announcing such a conclusion.

The court is of the opinion the unlawful speed of the automobile directly and proximately contributed to the collision. The admitted purpose of the plaintiff was to reach his home on the south side of Myrtle street beyond Thirteenth. The proper route was taken. To make the required turn across the street car track to the plaintiff's home it was necessary to reduce the speed of the automobile. The speed was reduced to 5 miles per hour, and at the moment of the collision the automobile was not violating the statute. The statute fixes the maximum rate of speed for country roads as well as for city streets. If an automobile driver going to town should violate the statute several times on level stretches of good road, but on reaching the city limits should observe the law, and after driving several blocks should collide with a street car, his fast driving would bear no causal relation to the final event. The meeting of the automobile and the street car would be a mere fortuity. In this instance the causal connection is quite manifest. The finding of the jury that the automobile was not racing with the street car *immediately* before the collision is technically correct. The contest of speed ended a few seconds before the collision, when the automobile reached the point where it was obliged to slow down. All that high speed could accomplish was accomplished. But for the distance of four blocks the automobile maintained twice the lawful rate of speed, for the purpose of keeping ahead of the street car which is racing. The ultimate goal was the plaintiff's home, and slackening speed to make the turn across the track was merely a method of reaping the reward of the unlawful conduct. The jury properly found that the collision could not have occurred if the automobile had been operated at lawful speed, and the violation of the statute was a contributing cause of the collision.

While the driver of the automobile was a doctor, he was not answering an emergency call demanding excessive speed. Gen. Stat. 1915, § 506. He was taking the plaintiff

home. Although the drive was made for the plaintiff's convenience and benefit, it may be conceded the plaintiff was merely the driver's guest. To accomplish the desired end a flagrant violation of a statute enacted for the public safety was persisted in for a long distance down Myrtle street. By the frank admissions contained in the plaintiff's testimony printed above he identified himself with the unlawful enterprise. He approved it, consented to it, and participated in it. He said, "that is the reason we were trying to get ahead of it." Consequently he was personally negligent, within the principles stated in the case of *Anthony v. Kiefner*, 96 Kan. 194, 200, 201, 150 Pac. 524, L. R. A. 1915F, 876, Ann. Cas. 1916E, 264.

The plaintiff and the automobile driver both testified that before the turn was made they looked back and saw no street car. They described the conditions and related what they did. The jury found, however, that the street car could have been seen for a distance of 200 feet when the automobile commenced to turn toward the track, that the street car was 100 feet away when the automobile started across the track, and that the plaintiff knew the street car was following the automobile. The plaintiff had been identified with a violation of the speed law, the consequences of which were to be estimated and met. Under these circumstances the plaintiff was chargeable with what he could have seen when leaving a place of safety for a place of danger, and judgment should have been rendered for the defendant on the special findings of the jury.

The judgment of the district court is reversed, and the cause is remanded, with direction to enter judgment for the defendant. All the Justices concurring.

(102 Kan. 577)

CANADAY et al. v. MILLER et al.
(No. 21342.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER §136—CONTRACT TO PURCHASE LAND—MERCHANTABLE TITLE—SATISFACTION OF PURCHASER.

A vendor agreed to make abstracts of title and perfect title to the satisfaction of the vendee. The vendee took the opinion of able lawyers, who advised him the abstracts furnished were insufficient, and the title tendered was not marketable, and refused to complete the purchase. *Held*, specific performance should not be decreed.

2. VENDOR AND PURCHASER §130(1)—MARETABLE TITLE—FOREIGN LAW—EVIDENCE.

The evidence relating to the title of real estate in the state of Arkansas considered, and *held*, the title is not marketable under the laws of that state.

Appeal from District Court, Miami County. Action for specific performance by J. P. Canaday and another against Frank Miller and another. Judgment for defendants and plaintiffs appeal. Affirmed.

M. A. Lane, Charles T. Meuser, and Alpheus Lane, all of Paola, for appellants. R. T. Riley, of Paola, J. H. Austin, B. Denny Davis, and Wm. F. Woodruff, all of Kansas City, Mo., for appellees.

BURCH, J. The action was one for specific performance, the purpose being to require the defendant to accept title to certain lands in Arkansas. The defendant prevailed, and the plaintiff appeals.

The defendant traded a stock of goods to the plaintiff for land in Kansas and in Arkansas. Possession of the stock of goods was delivered to the plaintiff, on certain conditions. The plaintiff furnished abstracts of title to the Arkansas land which were confessedly defective and which disclosed questionable title. Afterwards a second contract was made giving the plaintiff time in which to perfect both his abstracts and his title. The agreement was that the plaintiff would, "with all convenient speed, proceed at once to have abstracts and title to said land made and perfected to the satisfaction of said Miller." New abstracts were subsequently submitted to the defendant, who, after having them examined, disapproved them and disapproved the title disclosed. The action involved several subjects. With respect to the one under consideration, the court made merely a general finding that the plaintiff ought not to recover.

The decision of the district court is sustainable on two grounds.

[1] The abstracts and title were to be made and perfected to the satisfaction of the defendant. He is not satisfied with either. He took the opinion of able lawyers on both subjects, who advised him the abstracts are insufficient and the title is not merchantable. His dissatisfaction is not capitious, nor arbitrary, nor feigned, and under his contract he is not obliged to go further. *Le Roy v. Harwood*, 119 Ark. 418, 178 S. W. 427; *Hollingsworth v. Colthurst*, 78 Kan. 455, 96 Pac. 851, 18 L. R. A. (N. S.) 741, 130 Am. St. Rep. 382; *Read v. Loftus*, 82 Kan. 485, 493, 108 Pac. 850, 31 L. R. A. (N. S.) 457; *Ramey v. Thorson*, 94 Kan. 150, 146 Pac. 315.

[2] The title tendered was not merchantable. The determination of this question depended on the law of Arkansas. The plaintiff offered in evidence the opinions of Arkansas attorneys. They admitted the plaintiff does not have a record title, and base their opinions that the title is merchantable on adverse possession of a special kind, or on confirmatory actions quieting such title as the plaintiff had by adverse possession. The defendant offered the opinion of an Arkansas attorney, based on decisions of the Supreme Court of Arkansas, that the title is not merchantable. The evidence of this witness sustains the judgment of the trial court.

Under a statute of the state of Arkansas payment of taxes, under color of title, on un-

improved and uninclosed land, confers constructive possession, which may ripen into title by virtue of the statute of limitations, the same as actual adverse possession. The title thus acquired is title by adverse possession, constructive adverse possession as distinguished from actual adverse possession. *Taylor v. Leonard*, 94 Ark. 122, 126 S. W. 387. The plaintiff's title is of the character just described, and in Arkansas, to be marketable, a title must be a clear record title. Title by adverse possession is not marketable, however perfect it may be. *Mays v. Blair*, 120 Ark. 69, 179 S. W. 331.

Decrees quieting the plaintiff's title have been entered. The service was by publication of a warning notice to all persons interested. Decrees of this kind may be opened within three years by any person offering to file a meritorious defense, and may be opened by persons under disability—infants, idiots, lunatics, and married women—within three years after removal of disability. The decrees were rendered in November, 1915. This action was commenced in January, 1916. Since the decrees are "not even yet impervious to the attack which under certain circumstances can be made" upon them, the plaintiff's title still rests on adverse possession. See *Shelton v. Ratterree*, 121 Ark. 482, 181 S. W. 288.

The plaintiff undertakes to demonstrate that the decrees cannot be opened by anybody. What he succeeds in doing is to show a probability that his title by adverse possession is good. Under the law of Arkansas that kind of a title is not marketable.

The judgment of the district court is affirmed. All the Justices concurring.

(102 Kan. 579)

MULL v. BOYLE et al. (No. 21343).
(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT \S 322—LEASE—PROCEEDS OF PASTURING GROWING CROP.

Where the owner of land makes a contract with tenants that they are to raise, harvest, and thresh a crop of wheat thereon, delivering to him one-third thereof at a railway station, in the absence of any further agreement affecting the matter, he has no claim against them for a share of the proceeds of pasturing the growing crop.

2. LANDLORD AND TENANT \S 322—LEASE—PASTURING GROWING CROP—DAMAGES.

In an action by the owner against the tenants under such a contract, for damages done to the land by the pasturage, it is not error to instruct that they had a right to pasture the growing crop, being responsible to the owner for any resulting injury.

Appeal from District Court, Clark County.

Action by Henry Mull against James Boyle and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Robert C. Mayse, of Ashland, for appellant. F. C. Price, of Ashland, for appellees.

MASON, J. Henry Mull, the owner of a tract of land, agreed with James, Charles, and Ed Boyle that they were to grow a crop of wheat thereon, delivering to him one-third thereof. The agreement was carried out. Mull thereafter brought an action against the Boyles, alleging that they had for their own benefit pastured cattle upon the growing wheat between November and March, and asking judgment for \$120, which he alleged to be one-third of the value of the pasturage. An objection to the introduction of evidence upon this part of the petition was sustained, and from this ruling the plaintiff appeals. A second cause of action was included in the petition, based upon the assertion that the land was injured by pasturing cattle thereon. On this count a trial was had, resulting in a verdict and judgment for the defendants. An appeal is taken therefrom on the ground of error in the giving and refusal of instructions.

[1] 1. The petition described the agreement between the parties in these words:

"A verbal contract of lease whereby plaintiff did for the following crop season rent to defendant's jointly [the land referred to] in consideration of which the defendants did agree to farm said land and plant the same to wheat, furnish the seed therefor, harvest and thresh said wheat when matured, and deliver one-third of the crop therefrom to order of plaintiff at the nearest railway station."

The plaintiff by the use of the terms "lease" and "rent" characterizes the contract as one creating the relation of landlord and tenant, and it is so treated in his brief. The argument upon which he bases his right to recover is substantially this: The statute declares that, where the rent is payable in a share of the crop, the lessor shall be deemed the owner of such share. Gen. Stat. 1915, § 5980. It is held that the landlord has such an ownership in the growing crop that he may maintain an action for the value of his share against a third person who has negligently destroyed it. *Sayers v. Railway Co.*, 82 Kan. 123, 107 Pac. 641, 27 L. R. A. (N. S.) 168. The landlord and tenant under such a lease are regarded as tenants in common of the crop (24 Cyc. 1471); and, inasmuch as the defendants by pasturing the growing wheat used to their profit a part of a crop which the plaintiff owned in common with them, they should account to him for the proceeds in proportion to his ownership. Upon this proposition the plaintiff cites the statute giving one cotenant a right of action against another for receiving more than a just proportion of rents and profits (Gen. Stat. 1915, § 5977), which, however, relates to the rights of tenants in common of the land rather than of the crops. Under a lease, as distinguished from a cropper's agreement, the ownership of the crops as between the landlord and tenant is ordinarily regarded as in the latter, although the rent is to be paid in a share thereof. 24 Cyc.

1469; 8 R. C. L. 376, 377; 16 R. C. L. 588. But we do not think the controversy is to be settled by the consideration of where the title of the growing crop is deemed to be vested, but by determining the fair and reasonable construction of the contract that was entered into. It was not reduced to writing, but its terms are precisely set out in the pleading. The situation is substantially the same as though a written agreement had been made in the very words used by the pleader. The question presented is as to the legal effect of that language. And we think it reasonably clear that the provision that the defendants were to deliver one-third of the "crop" at the railway station meant that one-third of the grain was to be delivered, and from the fact that it was specified that the plaintiff was to receive one-third of the grain, without any reference to his obtaining any other profit out of the transaction, the fair inference is that this is all that he expected or was entitled to. The defendants were intrusted with the management and control of the crop; it was for them and not for the plaintiff to say whether it should be pastured, and, if so, when and how; and, in the absence of any express reference to the matter in the agreement, we think they were entitled to the incidental profit.

Whether a part of what may be called the by-products is deemed to be included without express mention in an agreement that the landlord is to receive a share of the crop as rent may depend to some extent on the facts of the particular case. In *Moser v. Lower*, 48 Mo. App. 85, the landowner was held to be entitled to a share of the stalks under a contract giving him a proportion of the corn crop, but the other party was said to be a cropper, and the matter was affected by the practical interpretation given to the agreement. In *Black v. Scott*, 104 Mo. App. 37, 78 S. W. 301, the same rule was applied where the conditions may not have been the same, but no purpose was shown to extend the doctrine of the earlier case, or to do more than follow the precedent there established. In *Hansen v. Hansen*, 88 Neb. 517, 129 N. W. 982, the circumstance that the landlord's share of the corn crop was to be delivered to him at some distance from the land was held to indicate that the stalks were not meant to be included. In *Iddings v. Nagle*, 2 Watts & S. (Pa.) 22, it was suggested that an agreement to pay rent by a delivery of grain in the bushel implied that the grower of the crop was to have the straw. In *Corey v. Struve*, 16 Cal. App. 310, 116 Pac. 975, the tops of sugar beets grown on shares were held to belong to the landlord, largely by reason of a local custom. The present case is not closely analogous to any of those cited, because the portion of the vegetation eaten by the grazing cattle was not a part of the matured crop—it did not help to make up the finished product of the

farming operation. The use made of the wheat field, resulting in no injury to the crop or the land, was an incidental advantage accruing from its temporary possession and control.

The petition alleges that by the implied terms of the contract the plaintiff was entitled to a share in the proceeds of the pasturage, but that is a mere conclusion of law, and does not change the force of the allegations as to the facts concerning the contract which was actually made. It is suggested that the pasturage of the wheat amounted to the removal of the crops, giving a right of attachment. Gen. Stat. 1915, § 5982. This position is untenable, for it is not claimed that any injury to the crop resulted.

The conclusion announced is reached on the theory that the contract amounted to a lease, but no intimation is intended that a different result would have followed had it been interpreted as a cropper's agreement.

[2] 2. The legal question involved in the appeal from the judgment for the defendants on the second cause of action is substantially the same as that already considered. The trial court refused to give an instruction to the effect that the contract contemplated that the land should not be pastured by either party, and instructed the jury that, in the absence of an agreement to the contrary, the defendants had a right to pasture the growing wheat, being responsible to the plaintiff, however, for any damage to the land resulting therefrom. This is in accordance with what we have already decided; and, as the verdict implied a finding that no injury resulted, the plaintiff could not have been prejudiced by the instruction in any event.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 680)

DRYSDALE v. WETZ et al. (No. 21403.)*
(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. EVIDENCE ⇐260 — DECLARATIONS — CONSPIRACY—ORDER OF PROOF.

The order in which proof of a conspiracy is received rests to a large extent in the discretion of the court, and in this case it is held that defendants were not prejudiced by the admission in evidence of declarations made by one of the defendants before proof of the conspiracy; it being followed up by sufficient evidence to establish the existence of the conspiracy as alleged.

2. TRIAL ⇐296(1)—INSTRUCTION—CONSTRUCTION AS A WHOLE.

An instruction is not to be condemned by separating from its context language in one part of it and ignoring the instruction as a whole.

3. APPEAL AND ERROR ⇐928(2)—CONSPIRACY ⇐19, 21—EVIDENCE ⇐563(7)—TRIAL ⇐254—ASSAULT AND BATTERY—INSTRUCTIONS—PROOF—PRESUMPTIONS.

Objections to certain instructions examined, and held to be without merit; the abstract making no reference to the other instructions given.

4. APPEAL AND ERROR \S 882(8)—CONDUCT OF WITNESS—PREJUDICE—COMPLAINT.

While testifying as a witness, one of the defendants made a voluntary statement outside of the case which called for a rebuke by the court and an admonition not to repeat the offense. *Held*, that the incident was not likely to have prejudiced defendants, but if it did they cannot complain.

(Additional Syllabus by Editorial Staff.)

5. CONSPIRACY \S 19—EVIDENCE.

In an action for damages for an assault and battery, alleging defendants' conspiracy, the fact that defendants were seen together shortly before the assault was evidence of a criminal conspiracy to harm the plaintiff.

6. CONSPIRACY \S 19 — EVIDENCE — CROSS-EXAMINATION.

In such action, cross-examination of a defendant as to whether he had not had considerable litigation since he came to the county, and whether he had not said that he had plenty of money, and that the boys could spend it, and that he was going to keep plaintiff out of his money as long as possible, was not error.

Appeal from District Court, Barber County.

Action by James B. Drysdale against William Wetz and others. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 171 Pac. 8.

G. M. Martin, of Medicine Lodge, for appellants. J. N. Tincher, of Medicine Lodge, A. L. Noble, of Winfield, and Seward I. Field, of Medicine Lodge, for appellee.

PORTER, J. The plaintiff sued to recover actual and exemplary damages for an assault and battery, alleging that the defendants unlawfully conspired to assault and beat him. The jury returned a verdict in his favor for \$1,000, upon which judgment was rendered, and the defendants appeal.

Fred Wetz filed a separate answer admitting that he had struck the plaintiff, but alleged provocation by plaintiff's insults and threats. Separate answers were filed by the other two defendants denying any conspiracy or participation in the assault. William Wetz is the father of Herman and Fred Wetz. The plaintiff had been employed by defendants on their ranch in Barber county, and had been discharged or for some reason left their service, and had sued them before a justice to recover his wages. The alleged assault occurred on the street in Kiowa on the 18th of July, immediately after the jury in the civil action in the justice court had returned a verdict in his favor against the defendants for the amount he claimed to be due.

[1] On the trial of this action one of plaintiff's attorneys testified that on the return day of the summons in the civil action William Wetz appeared before the justice to have that case continued, and in the presence of the justice repeatedly cursed Drysdale, and threatened that if he tried to have a lawsuit with him, "he would get his boys and kill him," and that the justice of the

peace had difficulty in quieting Wetz. The allegation in the petition was that on or about July 18th the defendants conspired together to commit the assault. It is objected that no conspiracy had yet been shown, and that the testimony of the witness concerning the declarations by one of the alleged conspirators was inadmissible. It was followed up, however, by abundant evidence tending to show the conspiracy; and the order of proof in such cases rests largely in the discretion of the trial court. The admission of the evidence at the time could not have prejudiced the defendants. Only general objections were made to its admission, and there was no request for an instruction limiting its effect or scope.

[2] The court gave the following instruction:

"As I have heretofore said to you the defendant Fred Wetz in his answer admits that he struck the plaintiff once at the time and place set out in plaintiff's petition, and you are instructed that this admission by the defendant Fred Wetz is binding upon him for all of the purposes of this trial, and the jury will consider it as an admitted fact in the case in so far as the defendant Fred Wetz is concerned, but no further."

It is seriously insisted that the language, "for all of the purposes of this trial," justified the jury in considering the admission in the answer of Fred Wetz as evidence of the alleged conspiracy. The complaint is merely another instance of an attempt to condemn an instruction by separating from its context language of the court without considering the instruction as a whole. The court distinctly charged that the answer was to be considered by the jury as an admitted fact in the case "in so far as the defendant Fred Wetz is concerned, but no further."

[5] We cannot agree with the contention urged in the defendants' brief that the fact that the old man and his boys were seen together immediately before the assault was no evidence of a criminal conspiracy to harm the plaintiff. The plaintiff testified that just before the assault his wife and children drove up in a buggy, and he was standing by the side of the buggy in the street talking to them; that just then he looked and saw the three defendants standing talking together a short distance away. This was a circumstance tending in connection with the other testimony to show a conspiracy on the part of the defendants to commit the assault.

[3] A careful examination of the instructions complained of discloses that the objections urged against them are without merit. The court properly instructed that the alleged conspiracy might be proved by circumstantial evidence, and it was not the duty of the court to comment upon the evidence, and inform the jury what circumstances in the evidence would justify them in finding that a conspiracy existed. The abstract sets

out instructions 6, 8, 9, 12, and 14, which are complained of, and omits all reference to the others which the court gave. We must assume that the court covered the issues in the other instructions given. Instruction No. 9 is criticized on the theory that it authorized the jury to find a fact from circumstantial evidence. This was proper. *Bank v. Freeburg*, 84 Kan. 235, 114 Pac. 207. The court pointed out no special circumstances in evidence as being convincing, but left the jury to determine the inferences to be drawn from the circumstances proved. Instruction No. 12 is not open to the objection that it puts all damages into one catalogue and disposes of them under the same rule of proof. The instruction, which relates to actual damages, charged the jury to estimate the damages from the facts and circumstances in proof, and to consider these in connection with their knowledge, observation, and experience. There was no error in charging that it was not necessary that any witness should express an opinion as to the amount of the damages.

There was evidence showing that the defendants were tried in the police court for the alleged assault and entered pleas of guilty. The court refused a requested instruction that this evidence was not conclusive of the guilt of the defendants, but should be considered in connection with all of the evidence for the purpose of determining whether or not the defendants, or any of them, assaulted the plaintiff as charged in the petition. As observed, we are not informed what the other instructions charged. While the requested instruction might have been given, no prejudice is shown by its refusal; and there is no force in the contention that the jury were permitted to consider the record in the police court as a basis for exemplary damages. Besides, the requested instruction made no reference to the question of damages.

[8] On cross-examination William Wetz was asked if he had not had considerable litigation since he came to Barber county, and also whether he had not stated that "he had plenty of money and the boys could spend it," and that he was going to keep Drysdale out of his money as long as possible. We perceive no error in permitting these questions on cross-examination. They are the only ones to which timely objections were made.

[4] While testifying as a witness, William Wetz made this remark:

"If my boy just struck that boy's face, and you come and make a howl, and it is not as much as when old man Roosevelt got shot."

Thereupon the court admonished him as follows:

"Do not refer to any President of the United States, or ex-President. Treat them with respect. I don't want you to do that again in this court."

It is seriously insisted that "this chastisement" by the court prejudiced William Wetz before the jury. The court saw fit to rebuke the witness for making a voluntary statement which had nothing to do with the case. The plaintiff's rights should not suffer, especially since the incident was not likely to have seriously prejudiced the rights of the defendants.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 539)

JONES v. HARPER. (No. 21105.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

TAXATION—§704—EXECUTION OF TAX DEED—NOTICE—VALIDITY OF DEED.

In the statutory notice that tax deeds will be issued on a date named, upon sales of three years before, unless the land is sooner redeemed, the statement of the amount of "taxes, charges and interest calculated to the last day of redemption" should not include the delinquent tax of the year preceding such notice, where the land was bid in for the county, and the certificate has not been assigned. A tax deed based upon a notice in which such charge is included is properly set aside on that ground when attacked within five years.

Appeal from District Court, Gray County.

Ejectment by Nina W. Jones against R. S. Harper. Judgment for plaintiff, and defendant appeals. Affirmed.

John Harper, of Cimarron, and Scates & Watkins, of Dodge City, for appellant. Harry Brice, of Cimarron, for appellee.

MASON, J. The plaintiff in ejectment recovered a judgment, and the defendant appeals. The defendant claims under a tax deed less than five years old. The trial court held that it was voidable because the amount required to redeem was overstated in the notice of the conveyance of unredeemed lands. The case turns upon the correctness of this ruling.

The land was offered for sale for the delinquent tax of 1910, on September 5, 1911, and bid off for the county. The certificate was not assigned until September 7, 1914. On April 2, 1914, the statutory notice was published, stating that unless the land was redeemed on or before September 7, 1914, a tax deed would be issued. (It would seem that the date named should have been September 5th, but this does not affect the determination of the case in any way.) The statute required the notice to show "the amount of taxes, charges and interest calculated to the last day of redemption." Gen. Stat. 1915, § 11446. In arriving at this amount the treasurer included the tax of 1913, which had not been paid, together with the penalty which had accrued in December, and one which was to accrue in June, and the costs of advertising a sale in September, 1914. In support of

the correctness of this practice it is argued that the purpose of the notice is to advise the owner of the precise sum he would be required to pay in order to redeem upon the last available day—September 7, 1914. It is true that, as it turned out, if the owner had attempted to redeem at that time he would have been required to pay the tax of 1913 (together with the June penalty, and the costs of advertising the land for sale in September, 1914), because on that day, not having been paid, it was properly added to the lien evidenced by the certificate. Gen. Stat. 1915, § 11426. It is also true that on the date of the first publication of the redemption notice (April 2, 1914) the tax of 1913 was in a sense due and was a lien on the land, because under the statute that condition arose on November 1st. Gen. Stat. 1915, § 11348. Moreover, the failure to pay half of the 1913 tax on December 20th rendered the whole of it subject to be "collected as provided by law." Gen. Stat. 1915, § 11396. But it could not have been known on April 2d that an additional penalty was to accrue in June, for the owner might have chosen to escape it by paying the tax; and it could not have been known that the payment of the 1913 tax would be necessary to a redemption made on September 7th. Apart from the possibility of the tax being paid, an assignment of the certificate might have been made to an individual between April 2d and September 7th; in that case the payment of the 1913 tax would not have been required of the assignee (*Gibson v. Trisler*, 73 Kan. 397, 85 Pac. 413), nor of any one who redeemed after such assignment, unless in the meantime the holder of the certificate had paid it and caused it to be indorsed thereon (Gen. Stat. 1915, § 11437). Inasmuch as the tax sale certificate was still owned by the county, the statute required four weeks' notice to be given that on the first Tuesday of September, 1914 (September 1st) the land would be sold for the tax of 1913, but when that time arrived, the certificate not having been assigned, instead of a new sale being made, the amount of the 1913 tax was added to the amount of the lien represented by the certificate of the first sale. Gen. Stat. 1915, § 11426. By the express terms of the statute the land was subject to sale for the tax of 1913 only in case it was not paid by June 20, 1914. Gen.

Stat. 1915, § 11408. While the tax of 1913 was in a sense delinquent when the redemption notice was made out, in April, 1914, it had not become a charge in connection with the sale made in 1911; it had not been added to the amount required to redeem from that sale, nor could it then have been known that it ever would become a part of that amount. The machinery had not yet been set in motion for the enforcement of the tax of 1913—for the sale of the land for its payment, or for adding its amount to the sum for which the first sale was made. In 1914, the first Tuesday of September (the day of the tax sale) happened to come on the first day of the month, so that in this instance the time for the charging of the tax of 1913 to the sale of 1911 arrived before the period allowed for redemption had expired. But a tax sale made on the first Tuesday of September in 1912 (September 3d) would have been ripe for a deed on September 4, 1915, and the 1914 tax could not have been added to the amount due under the sale until September 7th. It is therefore clear that the notice published in April, 1915, could not include the tax of 1914, as a part of the amount required to redeem from the sale of 1912. An interpretation that would result in the delinquent tax of the prior year being sometimes included and sometimes excluded, according to the day of the month on which the tax sale happens to fall, is not one to be favored. We conclude that the tax of 1913 should not have been included in the amount stated in the redemption notice.

The overstatement of the amount required by the statute is a ground for setting aside the deed. *Shinkle v. Meek*, 69 Kan. 368, 76 Pac. 837. In *Watkins v. Inge*, 24 Kan. 612, a tax deed was upheld in which the unpaid tax of the preceding year was not included in the amount named in the redemption notice. In behalf of the appellant it is suggested that the opinion contains an intimation that the notice was defective in this regard, but that the defect was not sufficient to avoid the deed. There the court merely passed on what was before it, but determined that the deed was valid, even assuming that the tax of the preceding year should have been shown.

The judgment is affirmed. All the Justices concurring.

(100 Wash. 619)

PETERSON v. CITY OF SEATTLE.
(No. 14453.)

(Supreme Court of Washington. March 22, 1918.)

1. MUNICIPAL CORPORATIONS ⇨791(2)—DEFECTIVE SIDEWALKS — NOTICE — PRESUMPTIONS.

Notice of a defect in any portion of the street of a city may be imputed to the city, from the existence thereof for such time as would ordinarily bring it to the knowledge of reasonably prudent officers, charged with the duty of maintaining such street in a safe condition for travel.

2. MUNICIPAL CORPORATIONS ⇨791(2)—DEFECTIVE SIDEWALKS — NOTICE — PRESUMPTIONS.

When a defect in a sidewalk exists in a dense business section of a large city, where the city is charged with a much greater degree of care in maintaining its streets in a safe condition for public use, the city ought to be presumed to know of defects therein, which are or might be reasonably expected to endanger persons traveling thereon, very soon after the coming into existence of such defects.

3. MUNICIPAL CORPORATIONS ⇨819(6)—DEFECTIVE SIDEWALKS — NOTICE — PRESUMPTIONS.

Where a defective trapdoor was in a sidewalk in a dense business part of the city and the door was smooth and springy, indicating improper construction, and the surface thereof was very smooth, suggesting that it had been there for a long time, and the city offered no evidence on the question of notice, the trial court was warranted in imputing to the city knowledge of the defect.

4. EVIDENCE ⇨207(2) — DEFECTIVE SIDEWALKS—ACTIONS FOR INJURIES—NOTICE.

In action for injuries on sidewalk, where plaintiff's counsel offered to file certified copy of claim filed with the city, a copy of which was attached to the complaint, and counsel for the city said, "I would like to have your honor look at it," the fact of filing the claim was admitted, though not the sufficiency of form.

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by August Peterson against the City of Seattle. Judgment for plaintiff, and the City appeals. Affirmed.

Hugh M. Caldwell and Frank S. Griffith, both of Seattle, for appellant. Thomas J. Casey, of Seattle, for respondent.

PARKER, J. The plaintiff, Peterson, seeks recovery of damages for personal injury which he claims to have sustained as the result of the negligence of the defendant city in maintaining or permitting to exist a dangerous defect in one of its sidewalks situated in the business section of the city. Trial in the superior court for King county sitting without a jury resulted in findings and judgment in favor of the plaintiff, awarding him damages in the sum of \$500, from which the city has appealed to this court.

The principal contention here made by counsel for the city is that the evidence fails to show that the city had notice of the existence of the defect in the sidewalk which

caused respondent's injury. There was no evidence introduced showing actual notice on the part of the city, so our problem is, Was the defect such as to warrant the trial court in concluding that notice thereof should be imputed to the city? Respondent testified in part as follows:

"I was walking down on First avenue, and there was a little snow and ice, and I, as I come near that hotel, * * * the Wright hotel, walking along the same as I always do, and all at once I just fell back, just tight as I could, and my feet went up in the air, and I lay stunned there. * * * There are some trapdoors, and they are rounding, and also they were slippery, and they also were sprung, * * * so that they go down. * * * Q. Tell the court what kind of sidewalk it is all around those trapdoors, whether it is a board sidewalk, or a cement sidewalk. A. It is cement. I haven't seen any all over the city—I never saw any such trapdoors. It is a public death trap. There ought to be some other doors, which are rough; but those are perfectly smooth, and then rounded, and they give way. Q. What do you mean by them giving way? A. Sink down. Q. When there is weight applied to them on the upper side? A. Yes, sir; when you step on them in the middle they sink down. Q. Does the cement sidewalk sink down if you step on that? A. No; it is the trapdoor. The sidewalk is all right. It is only the trapdoors that knocked me out. * * * Q. The sidewalk was all covered with snow wasn't it? A. Yes, sir. * * * Q. Was it uncovered at that time so you could see it; that is it was so you could see the iron? A. No. * * * Q. Did you clear it off? A. I did not clear it off. My foot did. * * * Q. You were able at that time to observe the door and look at it. Did you examine it that day? A. No, sir; but I have examined it many times since. Q. How many people do you think walk over that sidewalk in a day? A. I don't know; lots of them. Q. Thousands of them? A. Yes. * * * Q. I say snow is pretty dangerous stuff. A. It is the doors themselves, and the giving away. If they had been solid I never would have slipped. * * * Q. How much did those doors give? A. Give an inch or two. Q. Aren't they smooth and level with the sidewalk? A. They are smooth and round. * * * They are smooth and level with the sidewalk, but there is a kind of rounding, just as smooth as glass too, and when you step on them, unless they fixed them, they give way. * * * Q. You have been down there a number of times since? A. Yes. Q. Are they the same now as they were then? A. They look the same."

None of this testimony is disputed. Indeed, the city offered no evidence upon the trial. We note that the leading questions above quoted were asked respondent by counsel for the city upon cross-examination. We have quoted the testimony only in so far as it touches the question of imputed notice of the defect to the city; there being no question presented here as to the existence of the defect or as to its being the proximate cause of respondent's injury.

Counsel for the city rely upon our decisions in the following cases: Wilton v. Spokaue, 73 Wash. 619, 132 Pac. 404, L. R. A. 1917D, 234; Belles v. Tacoma, 79 Wash. 200, 140 Pac. 324; Chase v. Seattle, 80 Wash. 61, 141 Pac. 180; MacDermid v. Seattle, 93 Wash. 167, 160 Pac. 290.

In the Wilton Case independent contractors doing construction work for the city had left a concealed charge of dynamite in the street. Some time after the completion of the work the plaintiff, a workman engaged in setting power line poles, came in contact with the dynamite, causing it to explode, resulting in his injury. The city had no actual notice of it being there, and it was held that no notice thereof could be imputed to the city, since the dynamite was concealed and "there was no sort of diligence that the city could have exercised which would have made it acquainted with the fact." Plainly that is quite a different situation from the one here involved, in so far as we are concerned with the question of imputed notice to the city.

In the Belles Case the alleged defect consisted of a very shallow worn depression in the floor of the waiting room of the city's municipal dock. The depression was only about a quarter of an inch below the common level of the floor. While it was held as a matter of law that such a small defect in the floor would not render the city liable in damages, upon the question of knowledge of the defect being imputed to the city authorities, we said:

"True, the officers of the city could have discovered, by an examination of the floor, that the particular plank complained of had worn faster than other planks surrounding it, and that its center was, to a certain degree, lower than such surrounding planks. But they were not bound by this to assume that it was in such a defective condition as to be dangerous. The common observations of their everyday life would tell them that it was not so. * * *

That was little else than a holding that the defect was so insignificant in character that even knowledge of it on the part of the city would not be knowledge that its existence was suggestive of danger to the people passing over it. We are not satisfied that this defect can be so viewed.

In the Chase Case the alleged defect was in a street partly closed to public travel because of the construction of a sewer therein, and known to be so closed by the plaintiff, who was injured by driving upon it. The principal ground of the decision against the plaintiff was his own negligence and want of care. The particular defect, however, had existed only a few hours, and was evidently caused by rain falling the night previous, and therefore, under the particular circumstances of the case, knowledge thereof was held not imputable to the city. It was not a defect at a point where there was supposed to be any considerable amount of travel at the time. We think that decision is not controlling in this case.

The MacDermid Case is in point here only in that it lays down a general rule touching the comparative degree of care a city must exercise in maintaining its streets and sidewalks under differing conditions in different portions of the city. On page 170 of 93

Wash., on page 291 of 160 Pac., of the decision we said:

"The third claim of error is that the court erred in using this language in an instruction: 'In a remote locality, a suburb of the city, where the highway is seldom or infrequently used, the same degree of care would not be expected as in a locality where crowds assemble and where travel is frequent.' This is only part of an instruction, in which the court charged the jury that the degree of care imposed by law on the city in maintaining its streets was in proportion to the danger to be apprehended from the use of the streets, and that in determining such question the circumstances and surroundings with regard to the place of accident should be taken into consideration. Reading this instruction as a whole, we see no fault in it."

This had reference to the question of imputed notice to the city of the defect. There was no proof of actual notice in that case. The defect here in question, causing the injury to respondent, was in a sidewalk located in a dense business section of the city, where thousands of people passed every day, so the rule approved in the MacDermid Case seems applicable here.

[1, 2] That notice of a defect in any portion of the street of a city may be imputed to the city, from the existence thereof for such time as would ordinarily bring it to the knowledge of reasonably prudent officers charged with the duty of maintaining such street in a safe condition for travel, seems to be well-settled law. See *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847, in addition to the cases above noticed. If the defect be one existing in a remote and sparsely populated residence suburb of the city where there is but little travel and little occasion for diligence on the part of the city officers looking to the care of streets, no doubt a defect of no very serious nature would not be presumed to be known to the city authorities for some considerable time following its coming into existence. And a very serious and dangerous defect in such an isolated district it would also seem should be presumed to become known to the city authorities in a shorter time. It would also seem that, when a defect in a sidewalk exists in a dense business section of a large city, where the city is charged with a much greater degree of care in maintaining its streets in a safe condition for public use, the city ought to be presumed to know of defects therein, which are or might be reasonably expected to endanger persons travelling thereon, very soon after the coming into existence of such defects. These considerations lead to the conclusion that the question of the time within which notice of a defect in a public street should be imputed to the city is determinable largely from the circumstances of each particular case.

[3] We have then these facts which seem to us sufficient to warrant the trial court in imputing to the city knowledge of the defect in question: (1) The existence of the defective trapdoor in the sidewalk in a dense busi-

ness part of the city; (2) the smooth and springy condition of the trapdoor, suggesting the probability of accident to some one passing over it, especially in that locality where so many people passed over it; (3) the probability that the then condition of the trapdoor was the result of its manner of construction; and (4) the smoothness of the surface of the trapdoor, suggesting that it was not recently placed there. These facts may not very conclusively support the trial court's decision on the question of the city's imputed knowledge of the defect; but, since the city offered no evidence touching this question, we feel constrained to leave the trial court's conclusion undisturbed.

[4] Some contention is made in appellant's behalf that respondent cannot recover because of failure of proof of the filing of his claim with the city prior to the commencing of this action. The filing of his claim in due form was pleaded by respondent, and a copy thereof attached to his complaint. The general denial of the city in its answer seems to deny this allegation of respondent's complaint. When respondent's case was rested at the trial, his counsel said to the court, "Outside of the certified copy of the claim which I will file, if counsel insists on it, that is the plaintiff's case," to which counsel for the city replied, "I would like to have your honor look at it." Counsel for the city did not make any motion or further remarks to the trial court suggesting failure of proof in this particular. A copy of the claim being attached to the complaint and before the court, we think, under the circumstances, the remarks of counsel for the city should be construed as a waiver of formal proof of the filing of respondent's claim. In other words, the attitude of counsel for the city should be construed as an admission of the fact of filing the claim, though not of its sufficiency as to form. It is not now contended, however, that it was deficient in form.

The judgment is affirmed.

ELLIS, C. J., and WEBSTER, J., concur.

(100 Wash. 515)

AYLMORE et al. v. CITY OF SEATTLE.
(No. 14353.)

(Supreme Court of Washington. March 12, 1918.)

1. LIMITATION OF ACTIONS \Leftrightarrow 32(2)—**TAKING PROPERTY FOR PUBLIC USE — ACTIONS FOR COMPENSATION.**

Although landowner who stands by and allows a municipality to take his property by irregular means and use it for a street may be estopped to sue for the recovery of the land, he can still sue for compensation any time before the municipality has acquired title by prescription, and hence Code, § 159, subd. 1, relating to actions for trespass upon real property, and section 165, relating to actions for which provision is not otherwise made, and the period of limitations applicable to actions for the re-

covery of consequential damages to property not appropriated, do not apply.

2. ESTOPPEL \Leftrightarrow 93(1) — **ACQUIESCENCE — IMPROVEMENTS—COMPENSATION.**

One who by his acts induces another to put valuable improvements on his land under the belief that he will not reclaim the property will not be allowed to recover possession, but he is entitled to compensation.

Department 1. Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by Reeves Aylmore, Jr., and others, against the City of Seattle. Judgment for defendant, and plaintiffs appeal. Reversed.

S. H. Kelleran, of Seattle, for appellants. Hugh M. Caldwell and James A. Dougan, both of Seattle, for respondent.

WEBSTER, J. This is an action to recover the possession or, in the alternative, the value of property alleged to have been taken and appropriated to public use. The amended complaint in the cause, which was commenced on October 17, 1916, alleges in substance that the plaintiffs are the owners of three parcels of land in the city of Seattle; that in 1913 the defendant, without their consent, entered upon and commenced to improve the property as parts of certain public thoroughfares, which improvement was completed and the streets opened for travel in the summer of 1914; that the defendant is now devoting the property to such public use without the plaintiffs' consent and without having condemned or paid therefor, or acquired title thereto, and that in 1913 the plaintiff Aylmore notified the defendant in writing that it was proceeding in the premises without having complied with the law, and requested that an action be instituted for the purpose of condemning and paying for the property, which request was, on October 20, 1913, denied. The prayer is for the recovery of the land, or, in the alternative, that plaintiffs have judgment for its value.

The defendant answered, pleading among other defenses the two-year and the three-year statutes of limitation. Thereafter in due time the case came on for trial before a jury, and when the plaintiffs called their first witness the defendant objected to the introduction of any evidence upon the ground that it affirmatively appeared from the amended complaint that the action was barred by limitation, which objection was sustained and judgment of dismissal entered. The plaintiffs have appealed.

Whether the action is barred depends upon which of the various statutes of limitation is applicable to a proceeding of this character. Appellants assert that the action, being one for the recovery of compensation guaranteed by the Constitution to the owner of land taken for public use, is not barred until the defendant has acquired title to the property by prescription. Respondent contends that the

plaintiffs, having stood by and permitted the city to take and improve the property as portions of public streets, are estopped from maintaining ejectment for the recovery of the land, and are restricted to an action for damages which action is barred either by subdivision 1 of section 159 of the Code, relating to actions for trespass upon real property, or by section 165, relating to actions for which provision is not otherwise made.

[1] The precise question thus presented is one of first impression in this court. It is manifest however, that the action is not governed by the three-year statute. We have repeatedly held that a municipality, in taking private property for public use, acts in its sovereign capacity and not as a trespasser. Having the right to take, whatever its procedure or lack of procedure, it is not a wrongdoer. *Kincald v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820; *Casassa v. Seattle*, 75 Wash. 367, 134 Pac. 1080; *Domrese v. Roslyn*, 89 Wash. 106, 154 Pac. 140.

Nor is it controlled by the period of limitation applicable to actions for the recovery of consequential damages to property not appropriated. The only sense in which this action may be considered as one for damages is that the amount sued for is unliquidated. The city has not damaged appellants' property, but has actually taken it from them. They are not proceeding to recover for an injury to property, but are seeking to obtain just compensation in the way of payment for private property actually taken and devoted to public use.

The rule applicable to actions for damages properly so called is stated in *Lewis on Eminent Domain* (3d Ed.) § 968, in this language:

"Whenever there is an unlawful entry upon property for the purpose of appropriating it to public use, or whenever it is injured by the construction or operation of public works, so as to afford the owner a cause of action, the owner may have redress by any of the appropriate common-law remedies, and the general statute of limitations will apply thereto."

While the rule with respect to actions seeking compensation for property actually taken is stated in section 967 of the same work as follows:

"We have seen that, where property is entered upon and appropriated to public use without complying with the law, the owner may waive the tort and sue for his just compensation. The same rule applies where the entry is by consent and the question of compensation is left for future adjustment. In such cases the action for just compensation is not barred, except by adverse possession for the requisite period to establish a title by prescription."

The reason for this distinction is perfectly obvious. A corporation possessing the right of eminent domain may acquire property for its public uses in one of three ways only: (a) By purchase; (b) by condemning and paying for the property in the manner provided by law; and (c) by adverse possession for the statutory period. If the right of the

owner to recover compensation for property actually taken is barred before the expiration of the prescriptive period, this anomalous situation will result: He will continue to be the owner of the property until he loses his title by adverse possession, yet during the interval he cannot exercise a single act of beneficial ownership or do any act to toll the running of the statute. He will be deprived of the use and enjoyment of property which belongs to him, both in law and in equity, while the one who has taken it without title either legal or equitable can exercise over it every right ordinarily incident to ownership. We are unable to appreciate a condition where an owner is deprived of all right of enjoyment, while another who holds no sort of title to the property may use and deal with it as his own. Title cannot be invested where none has been divested. To hold otherwise is to sanction a custom belonging to an age long since passed, which permitted one to acquire property of another merely by taking it provided he was strong enough to retain it.

"Where the Constitution either expressly, or as interpreted by the courts, requires compensation to be first made for property taken for public use, a law which casts the initiative upon the owner and requires him to prosecute his claim for compensation within a time limited or be barred, is invalid. When under such a Constitution property is appropriated to public use without complying therewith, the owner's right to compensation is not barred, except by adverse possession for the prescriptive period." *Lewis, Eminent Domain* (3d Ed.) § 966.

See, also, *Nichols on Eminent Domain* (2d Ed.) p. 958; *Randolph on Eminent Domain* § 393; *Mills on Eminent Domain* (2d Ed.) § 346; 10 R. C. L. p. 236.

In the case of *Salt Lake Inv. Co. v. Oregon Short Line R. Co.*, 46 Utah, 203, 148 Pac. 439, decided by the Supreme Court of Utah in 1914, it is said:

"The evidence shows the entry and taking to have been in March or April, 1906. The action was commenced in December, 1912, more than six and less than seven years from the taking. The contention is first made that the action is barred by provisions of Comp. Laws 1907, § 2877, subdiv. 2, which provide that 'an action for waste or trespass of real property' must be commenced within three years. And, if that section is held not applicable, then the further claim is made that the action is barred by the provisions of section 2883, which provide that 'an action for relief not hereinbefore provided for must be commenced within four years.' The complaint is broad enough to recover on the theory stated by the appellant 'compensation for the taking of private property for public use.' The case was tried by both parties, and was without objection submitted to the jury, on that theory. The pleadings admit a taking for a public use and an exclusive and continuous occupation and possession, without the consent of the plaintiff and without the institution of eminent domain or condemnation proceedings. We think in such case neither section referred to is applicable, but that the provisions of section 2860 requiring actions or defenses founded on realty to be commenced within seven years are. By those provisions the action is not barred. Our Constitution and statute require compensation to be first made

for private property taken for public use; and, where property is entered upon and appropriated to public use without complying with the law, the owner may waive the tort and sue for his just compensation. In such case the action is not barred, except by adverse possession for the required period, here seven years."

See, also, *Lehigh Valley R. R. Co. v. McFarlan*, 43 N. J. Law. 605; *McClinton v. Pittsburgh, etc., R. Co.*, 66 Pa. 404; *Organ v. Memphis, etc., R. Co.*, 51 Ark. 235, 11 S. W. 96; *Levee Com'rs v. Dancy*, 65 Miss. 335, 3 So. 568; *Pawnee County v. Storm*, 34 Neb. 735, 52 N. W. 696; *Kime v. Cass County*, 71 Neb. 677, 99 N. W. 546, 101 N. W. 2, 8 Ann. Cas. 853; *Doyle v. Kansas City, etc., R. Co.*, 113 Mo. 280, 20 S. W. 970; *Texas West. R. Co. v. Cave*, 80 Tex. 137, 15 S. W. 786; *Chicago, etc., R. Co. v. Johnson* (Tex. Civ. App.) 156 S. W. 253; *Faulk v. Missouri River, etc., R. Co.*, 28 S. D. 1, 132 N. W. 233, Ann. Cas. 1913E, 1130 and note; *Johnson v. Ditch Co.*, 32 S. D. 499, 143 N. W. 959; *Burrall v. Am. Tel. & Tel. Co.*, 224 Ill. 266, 79 N. E. 705, 8 L. R. A. (N. S.) 1091.

We are not unmindful that the authorities are in conflict upon the question here involved, but we are convinced the rule supported by the foregoing authorities is the one sustained by the better reasoning.

[2] While this court has held in numerous cases that a landowner who stands by and permits a corporation to go upon his land and construct thereon an expensive public improvement without having acquired the right so to do, either by agreement or condemnation, is estopped from thereafter maintaining an action in ejectment or a suit for injunctive relief, but is confined to an action for compensation, yet the application of the principle is no broader than the reason upon which it is based. The rule rests in equitable estoppel, and is sustained by considerations of public policy. Where one stands by and sees his property taken and improved at large expense for the convenience and welfare of the public, and thereafter seeks to enjoin such use of the property, or to eject the occupant therefrom, and thus cause great damage to the corporation on the one hand and serious inconvenience to the public on the other, he is justly denied such relief for the reason that he can be adequately protected by receiving compensation. But it does not follow that he may be permanently deprived of his property without compensation, or that he shall be placed in any worse position, so far as his right to a money judgment is concerned, than he would have occupied had he not acquiesced in the improvement. Where one is aware of the situation and desires to insist upon his strict legal rights, he should proceed without unnecessary delay. If by his declarations or conduct he induces another to believe that he does not intend to assert such rights, but is willing to waive them for a just compensation, and the other party in reliance thereon goes ahead with the

improvement in the expectation that payment of a fair compensation will be accepted in lieu of the rights thus surrendered, the courts may thereafter properly refuse to enforce those rights and compel him to accept compensation as fixed by an impartial tribunal. In other words, the failure to pursue appropriate procedure to acquire the property is not fatal to the rights of the party in possession provided it elects to make full and adequate compensation to the owner, but it cannot hold the undisturbed possession of the property of another and elect not to pay. As was said by Judge Rudkin in *Slaght v. Northern Pacific Railway Co.*, 39 Wash. 576, 81 Pac. 1062:

"If a judgment in ejectment at law, or decree of injunction in equity, would have the effect of stopping the operation of the railroad, or disabling it from discharging its duties to the public, there would be strong and controlling reasons why such judgment or decree should not be awarded. But, if proceedings are stayed as in this case, and the only effect of the judgment in ejectment is to compel the railway company to make compensation for the property taken, we see no valid objection to such proceeding, on the ground of public policy or otherwise."

Upon what principle of law, justice, or reason can it be said that because one clothed with the right to condemn private property fails to exercise it, and without complying with the law goes upon the property of another and carries out its public purposes without hindrance or interference from the owner, it should not thereafter be required to do what it should have done in the first instance—make just compensation to the owner? Why should the property holder whose acquiescence has redounded to the benefit and convenience of the taker and whose right to compensation is in lieu of his property have any less period in which to recover the amount due him than he would have had to reclaim his property had he not thus accommodated the corporation? Why should a municipality which has not exercised a right conferred upon it by the sovereignty in the manner defined by the author of the right gain an additional advantage over a private owner by virtue of its own unauthorized procedure?

Moreover, to hold that the action for compensation is barred in two years would be to read an exception into the ten-year statute relating to the recovery of real property. The effect of such a decision would necessarily be to permit a title to real property, for all practical purposes, to be acquired by adverse possession for the period of two years, when in all other cases it could only be acquired in ten years.

We think it is too plain for serious debate that while the owner may not by an action of ejectment recover the property itself, where he has acquiesced in its being taken without condemnation, he may maintain an action in the nature of ejectment to obtain the substi-

tuted relief. His right of recovery is founded upon and grows out of his title to the land, and until such title is lost by adverse possession he should have the right to maintain an action to recover that which represents the property itself. Any other view is to sacrifice substance to mere form.

In *Kincaid v. Seattle*, supra, Judge Chadwick said:

"The remedy of the one whose property is taken is immaterial so long as it leads to compensation as provided in the Constitution."

Precisely so. But when the remedy afforded amounts to a denial or a curtailment of such constitutional right it ceases to be immaterial. Thenceforth it is violence done to the rights of the injured owner, if not to the Constitution itself. While the respondent's position may square with the precept that unto every one that hath shall be given, but from him that hath not shall be taken away even that which he hath, the Constitution of Washington will not admit of its application to this class of cases.

We conclude that the case does not fall within the two-year statute for the reason that it is governed by the limitation prescribed in the ten-year statute.

The judgment is reversed.

ELLIS, C. J., and FULLERTON, PARKER, and MAIN, JJ., concur.

(100 Wash. 524)

JACOBS et ux. v. CITY OF SEATTLE.
(No. 14266.)

(Supreme Court of Washington. March 12, 1918.)

1. LIMITATION OF ACTIONS §28(1)—COMPENSATION—EMINENT DOMAIN—IMPLIED CONTRACT.

Action for compensation, which Const. art. 1, § 16, requires to be paid, for damage to property from an act done in the exercise of the power of eminent domain—operation by a city of an incinerator on adjoining property—is within Rem. Code 1915, § 159, subd. 3, prescribing a three years' limitation for an action on "a contract or liability * * * implied."

2. LIMITATION OF ACTIONS §55(5)—ACCRUAL OF RIGHT TO COMPENSATION—EMINENT DOMAIN.

Damage to adjoining property from operation of a city incinerator in the exercise of the power of eminent domain commences not necessarily from its completion and first operation, as regards limitation of action for compensation therefor; but this is matter of proof.

3. COSTS §32(2)—TWO TRIALS—PREVAILING PARTY.

Under Rem. Code 1915, § 476, providing that in an action in the superior court the prevailing party shall be entitled to his costs and disbursements, plaintiffs are entitled to their costs and disbursements incurred on the first trial; demurrer to the complaint having been sustained after the jury had been impaneled and the case was proceeding to trial on the merits, and they in effect having been wholly successful on the appeal therefrom, as well as on the trial on remand, though the court on such appeal held that their second cause of action did not state

facts entitling them to relief; that cause of action being in substance the same as the first cause of action properly pleaded, except that it was grounded on negligence of defendant, instead of on the theory of recovering compensation for damages from exercise of power of eminent domain, which was that of the first.

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by George Jacobs and wife against the City of Seattle. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hugh M. Caldwell and James A. Dougan, both of Seattle, for appellant. Jay C. Allen, of Seattle, for respondents.

PARKER, J. The plaintiffs Jacobs and wife seek recovery of compensation for damage to their real property, caused and to be caused by the defendant city of Seattle in the exercise of its power of eminent domain, the amount of which compensation had not been in any manner ascertained or determined prior to the commencement of this action. Trial in the superior court for King county sitting with a jury resulted in verdict and judgment awarding the plaintiffs compensation in the sum of \$1,000, from which the city has appealed to this court.

This is the second appeal of this case to this court. The first appeal was taken by the plaintiffs from a judgment of the superior court dismissing the case upon sustaining the city's demurrer to the plaintiffs' complaint and their electing not to plead further. That appeal was disposed of by our decision reported in 93 Wash. 171, 160 Pac. 299, L. R. A. 1917B, 329, reversing the judgment of the superior court and remanding the case to that court, holding that the first cause of action of the complaint alleged facts entitling them to recover though their second cause of action did not. The allegations of respondents' first cause of action are set out, in substance, in considerable detail in our former decision. We deem it sufficient here to state that it is therein alleged in substance that the city erected a garbage incinerator building and plant on a lot adjoining respondents' lot, upon which they have three dwelling houses; that the city has commenced and continues to operate its plant, causing to be brought to it large quantities of refuse and garbage which it burns therein, and in doing so causes damage to respondents' property, in that obnoxious vapors, steam, smoke, ashes, and pieces of partly burned garbage are thrown over and upon respondents' property, which it threatens to continue to do, materially and permanently impairing its desirability and usefulness and lessening its value; and that the city has never acquired the right to so maintain and operate its incinerator, and thereby so damage respondents' property, by any condemnation proceeding looking to the

ascertainment and payment of the damage so suffered by respondents. Upon the remanding of the case to the superior court, following the decision of this court, the city answered respondents' first cause of action, denying the allegation of damages therein made and pleading affirmatively that respondents' cause of action accrued more than three years prior to the commencement of this action, and is therefore barred by both the two-year and the three-year statutes of limitation.

[1] The principal contention here made in the city's behalf, to which all other contentions worthy of serious consideration are incidental, is that respondents' right of recovery is barred by the statutes of limitation. It appears from the evidence, and is conceded, that the city built its incinerator building and plant more than three years prior to the commencement of this action. The city also began to operate its plant to some extent more than three years prior to the commencement of this action. It, however, became a question in the trial of the case, according to respondents' theory, which was adopted by the trial court, when the operation of the incinerator first became such as to result in actual damage to respondents' property. This question was accordingly submitted by the court to the jury for a special finding thereon in addition to its general verdict, and in response thereto a special verdict was returned by the jury with its general verdict, as follows:

"We, the jury, find that the damage to the plaintiffs' property by reason of the operation of the defendant's incinerator commenced in May, 1912."

This action was commenced in November, 1914, which, it will be noticed, was 2½ years after the commencement of respondents' damage, as found by the jury. The evidence is conclusive that the mere building of the city's incinerator building and plant did not and would not result in any damage to respondents' property, and the evidence amply sustains the special verdict, that the operation of the incinerator was not such as to damage respondents' property until May, 1912, when, as the jury might well conclude from the evidence, the really damaging operation of the incinerator commenced, though it had been operated to some extent prior to that time. This, we shall assume for the present, was when respondents' cause of action accrued, for the purpose of determining whether or not it was barred at the expiration of two years thereafter, as contended by counsel for the city.

Let us be reminded as we proceed that this is not an action seeking recovery of damages as for a tort committed by the city, but is an action to recover compensation for damages resulting from the operation of the incinerator by the city, which it is doing and avowedly intends to continue to do in the exercise of its power of eminent domain, in so far as

resulting damage to respondents' property is concerned. Of course, if this were an action seeking recovery of damages for the commission of a tort, and treated as such by both respondents and the city, respondents' right of action would not be barred as to damages accruing within the statutory period immediately prior to the commencement of the action. Counsel for the city carefully avoid making defense upon any such theory, but adopt the eminent domain theory upon which respondents prosecute their claim for compensation, manifestly to make sure that there shall be but one recovery, if any be had by respondents, and also to the end that the statute of limitation may be invoked against respondents' claim as one entire claim of compensation for the acquiring by the city of the right to so continue to operate its incinerator in the future to the damage, if any, of respondents' property. In keeping with this theory of the nature of the case the trial judge instructed the jury, in substance, that respondents' compensation, if any be awarded them, is to be measured by the difference in the market value of their property immediately before and immediately after the commencement of the damage, a measure manifestly in this case applicable only to a single permanent damage to the freehold. Our decision upon the former appeal is in entire harmony with this theory of the case.

Counsel for the city contend that the limitation applicable to respondents' cause of action is that prescribed by section 165, Rem. Code, reading as follows:

"An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

While counsel for respondents contend that the three years prescribed for the commencement of the several kinds of action mentioned in section 159, Rem. Code, is applicable; relying upon subdivision 3 of that section, reading as follows:

"An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument."

Does the obligation on the part of the city to pay the compensation here sought by respondents arise upon "a contract or liability * * * implied," within subdivision 3 of section 159 above quoted? We are of the opinion that it does; even though that subdivision relates only to contractual obligations, as seems to be held by our own and other decisions. Having in mind that the state has granted to the city the power of eminent domain, and that the city is manifestly maintaining and operating its incinerator, and intends to continue to do so as an exercise of that sovereign power in so far as thereby damaging respondents' property is concerned, and having in mind that the state from which the city acquired that power has by article 1, § 16, of its Constitution, guaranteed that, "No private property shall be taken or damaged for public or private use with-

out just compensation having been first made, or paid into court for the owner," it seems to us there is but little room for arguing that the city did not impliedly promise to pay to respondents compensation for such damage as might result from its continuing operation of its incinerator, at the time such operation actually commenced to damage respondents' property. If one appropriating my goods, though his act be purely tortious, he possessing no power of eminent domain, I may sue for and recover from him the value of them as for a sale thereof to him upon an implied promise by him to pay therefor, which is elementary law; by what sort of logic then can it be held that a city, possessing the power of eminent domain, taking or damaging my property, not tortiously but by claim of right under its power of eminent domain, does not impliedly promise to compensate me therefor as guaranteed by the sovereign state from which the city acquired the very power it assumed to exercise in taking or damaging my property? Such has been held to be the nature of such an obligation by the highest court in our land.

In *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846, there was involved the taking of private property, land, and water rights by the government in connection with the construction of a waterworks dam in the Potomac river, without condemnation proceedings, and the seeking of compensation therefor by the owner in a suit against the government prosecuted in the court of claims. The jurisdiction of the court of claims depending upon the obligation of the government being one arising upon implied contract, it became necessary to determine the nature of the obligation in that respect. Holding that the government was liable to the owner as upon an implied contract to pay for the land and water rights taken, and that therefore the court of claims had jurisdiction to entertain the action against the United States, Justice Harlan, speaking for the Supreme Court, said:

"* * * We are of opinion that the United States having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the court of claims of actions founded upon any contract, express or implied, with the government of the United States."

While that decision dealt with what seems to have been an actual taking of property rather than the mere damaging of it, we are reminded that our constitutional guaranty is that "compensation" shall be made when

private property is "damaged" as well as when it is "taken" for public use. Manifestly there can be no difference in the nature of the city's obligation, whether it takes or damages private property for a public use, under our constitutional guaranty. We here note that the words "contracts, express or implied," used in the statute defining the jurisdiction of the court of claims, are identical in meaning with the words "contract, * * * express or implied," used in our statute of limitation (subdivision 3, § 159, Rem. Code) above quoted.

In *United States v. Lynah*, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539, there was involved the question of jurisdiction of the United States Circuit Court, dependent upon the claim of the plaintiff arising upon contract. The claim was one of compensation for the overflow and rendering valueless of the plaintiff's land by the government's improvement of the Savannah river. The law as announced in the *Great Falls Mfg. Co.* Case was adhered to; the court holding that the plaintiff's right of recovery rested upon an implied promise on the part of the government to pay for the damage which was in effect a taking of the plaintiff's land because of the extent of the damage, though the plaintiff was not divested of legal title to his land by such damaging of it, nor until compensation was made therefor. In that decision the following decisions of the court, rendered after the *Great Falls Mfg. Co.* decision, are cited and reviewed as lending support to this view of the law: *Hollister v. Benedict Mfg. Co.*, 113 U. S. 59, 5 Sup. Ct. 717, 28 L. Ed. 901; *Great Falls Mfg. Co. v. Atty. Gen.*, 124 U. S. 581, 8 Sup. Ct. 631, 31 L. Ed. 527; *United States v. Palmer*, 128 U. S. 262, 9 Sup. Ct. 104, 32 L. Ed. 442; *United States v. Berdan Firearms Co.*, 156 U. S. 552, 15 Sup. Ct. 420, 39 L. Ed. 530. Following which, 188 U. S. at p. 465, 23 Sup. Ct. 355, 47 L. Ed. 539, Justice Brewer, speaking for the Supreme Court, said:

"The government may take real estate for a post office, a courthouse, a fortification, or a highway, or in time of war it may take merchant vessels and make them part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others."

In the case before us the question is presented in substance exactly as in the *Great Falls Mfg. Co.* and *Lynah* Cases above quoted from, in that title to the property there taken and here damaged was and is conceded to be in the plaintiffs, without any claim of right on the part of the government or the city to take or damage the property without compensation.

This court, in *Kincaid v. Seattle*, 74 Wash. 617, 621, 134 Pac. 506, expressed views quite in harmony with those of the Supreme Court

of the United States upon this subject. Though not involving our statutes of limitation, the decision does deal with the nature of a claim of compensation for damages resulting from an act of the city done in the exercise of its power of eminent domain. The question was as to the necessity of the plaintiff filing his claim of compensation with the city as a prerequisite to his right to sue in the courts thereon. Judge Chadwick, speaking for the court, said:

"Having the right to take, a municipality, whatever its procedure or even lack of procedure, is not a wrongdoer. The remedy of the one whose property is taken is immaterial so long as it leads to compensation as provided in the Constitution. The city is bound to make compensation under a compact no less formal than the Constitution itself and it cannot defeat this constitutional right by a charter provision or an ordinance, nor can the Legislature take it away by any arbitrary requirement, although we may admit that it could, as in all other cases, fix a time within which an action must be brought to recover damages that have not been first ascertained and paid. The city must be held to adopt the guaranty of the Constitution and make it its promise, for we know of no law that will impute to the city, when exercising the sovereign power of the state, a willful intention to disregard the right of a citizen."

The logic of that decision is that the claim was not required to be filed with the city as a prerequisite to the right to sue in the courts thereon, because it did not rest upon tort, nor was it a claim for damage, strictly speaking, growing out of a contract or a breach thereof; but it was a claim for compensation which the city by its act, done in the exercise of its power of eminent domain, impliedly promised to pay.

The word "damage" has been often loosely used as descriptive of the recovery an owner becomes entitled to because of the exercise of the power of eminent domain resulting in damaging instead of the taking of his property. It seems to us that the word has not been so used in its proper legal sense. We do not use the word "damage" to describe the recovery upon a promissory note or any other promise, express or implied. The word "damage," when used as descriptive of the recovery to be awarded as the result of damage flowing from an act done in the exercise of the power of eminent domain, plainly means only compensation impliedly promised to be paid for such damage. Article 1, § 18, of our Constitution, uses the word "compensation," not "damage," as descriptive of the recovery the owner of damaged property is entitled to. This suggests that the word "compensation" was used therein advisedly in recognition of the fact that such recovery is not upon the theory of tort obligation, whether it be awarded in a condemnation proceeding or in an action seeking recovery of compensation after the damaging of property for public use. We make these observations not in a spirit of criticism, yet we ap-

prehend that this indiscriminate use of the word "damage" has led both the bar and the courts to forget sometimes the real nature of a claim such as is here involved.

We now proceed to notice the decisions of this court relied upon by counsel for the city to support their contention that the two-year statute of limitation (section 165) above quoted, is controlling in this case. It may be conceded that some of these decisions, read apart from the facts and exact questions considered therein, do seem to support this contention. We think, however, it will appear as we proceed that subdivision 3 of section 159, Rem. Code, above quoted, fixing at three years the limitation for the commencement of actions upon "a contract or liability * * * implied," has never been invoked or considered by this court with reference to a claim such as is here involved.

In *Sargent v. City of Tacoma*, 10 Wash. 212, 38 Pac. 1048, there was involved a cause of action accruing more than three years prior to the suing thereon. It was an attempt to recover for injury to property resulting from a change of street grade. The trial court held the action to be barred, apparently upon the theory that it was for trespass and was therefore barred by subdivision 1, § 115, Hill's Code (now subdivision 1, § 159, Rem. Code), prescribing three years as the limitation for the commencement of actions for waste or trespass upon real property. Affirming the trial court, upon appeal this court said:

"If actions of this kind are regarded as trespasses upon real property, the three years' limitation created by Code Proc. § 115, covered this case; but if they are not, then Code Proc. § 120, limiting actions for relief not otherwise provided for to two years, did cover it."

No mention of, and apparently no consideration whatever was given to, subdivision 3 of the same section, here relied upon by respondents. Nor was any consideration given to the claim other than as a trespass or pure damage claim arising in tort. We do not regard that decision as a controlling holding that subdivision 3 did not apply to the facts of that case.

In *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1, 76 Pac. 298, 102 Am. St. Rep. 881, we have a case of damage to the plaintiff's property by the overflow of water from the company's ditch. While the company, we assume, possessed the power of eminent domain, the case was both prosecuted and defended upon the theory that the plaintiff's claim was one for damages as the result of negligence, a tortious wrong, on the part of the company. More, it was for an act of alleged negligence which neither party claimed was or could have been the result of the exercise of the power of eminent domain. There apparently was no thought of the company's claiming any rights under its eminent domain power. Briefly, putting aside subdivi-

vision 3 of the three-year statute relating to "contracts" as not being applicable to the case because that section relates to contractual liabilities only, the court, speaking through Judge Hadley, proceeds to learnedly discuss the possible applicability of subdivision 1 of the three-year statute relating to trespass, and reaches the conclusion that the act complained of was not trespass, and therefore that subdivision did not apply to the case. The final result was that the court held the two-year general statute applicable. Bal. Code, § 4805, now Rem. Code, § 165. We think that decision is not controlling of the proper disposition of this case.

In *Denney v. Everett*, 46 Wash. 342, 89 Pac. 934, 123 Am. St. Rep. 934, it seems to have been squarely held that compensation for damage resulting to private property from the city's change of a street grade must be sought in an action commenced within two years following the change; this upon the theory that the two-year general statute (section 4805, Bal. Code, now section 165 Rem. Code) applies to such an action. There is but brief discussion of the law in that decision; the court being content to rest it upon the decision in *Suter v. Wenatchee Water Power Co.*, and noticing only as to whether the three-year trespass statute or the two-year general statute applies. We think that decision does not furnish an answer to this case.

In *State ex rel. Whitten v. Spokane*, 92 Wash. 667, 159 Pac. 805, we have a case similar to the *Everett* Case, in that it involved damages to private property resulting from the change of a street grade by the city. That was an attempt to mandamus the city to institute condemnation proceeding to the end that Whitten, the owner of the property damaged by the change of grade, might have his compensation therefor ascertained by a jury. After holding that he was not entitled to mandamus because he had an adequate remedy at law by an action to recover compensation, it was held that his right of action to recover compensation was barred by the two-year general statute under the holding in the *Everett* Case, making no other citation of authority. It now seems to us that these two decisions are largely the result of counsel and the court for the moment losing sight of the real nature of a claim of compensation for damages for the change of a street grade, done in the exercise of a city's power of eminent domain. In the *Everett* Case the theory that the city changed the grade in the exercise of its eminent domain power apparently was not suggested or considered at all; while the *Spokane* decision merely follows the *Everett* decision, evidently without thought on the part of counsel or the court that an action for compensation would be other than an action to recover as for a tort.

Our attention is also called to *Welch v. Seattle & Montana R. Co.*, 56 Wash. 97, 105 Pac. 166, 26 L. R. A. (N. S.) 1047. A critical reading of that case will disclose that it was prosecuted and defended upon the theory of recovering damages for trespass and tort. The only question presented or discussed was whether the three-year trespass statute or the two-year general statute applied.

We now notice three decisions of other courts relied upon by counsel for the city. In *Chicago & E. I. R. Co. v. McAuley*, 120 Ill. 160, 11 N. E. 67, it was held that an action "to recover damages" (so called by the court) resulting to adjoining property from the construction and operation of the company's railroad, was barred in five years and accrued when the railroad was constructed and put in operation. The action seems to have been assumed to be one to recover damages as for tort, and was held barred by section 15 of chapter 83 of the Statutes of Illinois, a portion of which is quoted by the court in its opinion as follows:

"Actions * * * to recover damages for an injury done to property, real or personal, * * * and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued."

We find the whole of that section in *Hurd's Revised Statutes of Illinois of 1874*, reading as follows:

"Actions on *unwritten contracts*, expressed or implied or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." Page 675.

We italicize the words to be noticed particularly. The notes thereunder indicate that the section had been the law since 1849. The damage in question appears to have commenced in 1872, while this section was in force; so even if counsel and the court had treated the action as one to recover on an implied contract, the holding would have been the same. We think this decision is not out of harmony with our conclusion here reached.

In *Luckey v. City of Brookfield*, 167 Mo. App. 161, 151 S. W. 201, recovery was sought for damages resulting from the construction and commencement of the use of a sewer by the city eighteen years prior to the commencement of the action. The main question seemed to be, When did the cause of action accrue? It was held to have accrued upon the construction and commencement of the use of the sewer, though the damage resulting from such use was somewhat intermittent during the eighteen years. The opinion does not tell us what the terms of the statute were, but holds that the action was barred at the expiration of ten years from the accrual of the cause of action, and that there arose but one cause of action. The

opinion seems to mean that the action was barred in ten years because the city acquired a prescriptive right at that time to so maintain and use its sewer. It might be plausibly argued upon this theory that respondents' cause of action here sued upon would not be barred until the expiration of the time when the city would acquire by prescription the right to damage respondents' property in the manner it is doing, which seemingly would be ten years. We need not pursue this interesting inquiry in this case, since the three-year implied contract limitation statute saves respondents' claim in any event. Our recent decision in *Aylmore v. Seattle*, 171 Pac. 659, and the decision in *Smith v. City of Sedalia*, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711, are of interest in this connection.

In *Atchison, T. & S. F. R. Co. v. Lauterback*, 8 Kan. App. 15, 54 Pac. 11, recovery was sought for damages resulting from the construction of the company's railroad six years prior to the commencement of the action. The right of action was held barred under section 12, c. 95, General Statutes of that state of 1897. No part of the statute is quoted, nor is its substance stated in the opinion, but turning to that section in the compilation of the statutes referred to, we find that "an action upon a contract not in writing, express or implied," must be commenced within three years. This, it seems probable to us, was the statute the court had in mind, though the last subdivision of the section relating to "relief not hereinbefore provided for" would also seem to bar the right of action. We note that that action seems to have been viewed as one seeking compensation for damages resulting from the exercise of the company's power of eminent domain rather than one of recovery as for tort. We see nothing in this decision inconsistent with our conclusion here reached.

[2] It is contended in the city's behalf that the trial court erred in its rulings upon the admission of evidence and in its instructions to the jury, in that it did not rule that respondents' right to compensation for damages, if any they had, accrued, and the statute of limitation began to run against such right, at the time of the construction of the incinerator, which, as we have noticed, was more than three years prior to the commencement of this action. We think it is clear that the trial court could not have so ruled as a matter of law; first, because the court could not determine as a matter of judicial knowledge that the mere construction of the incinerator building and plant would cause damage to respondents' property, nor could it judicially know that the then prospective operation of the incinerator would damage respondents' property; and, second, because the evidence all but conclusively shows that respondents' property was not damaged by the construction of the incinerator nor by the operation thereof until May, 1912, 2½ years

prior to the commencement of this action, as found by the jury. It is argued that our decision upon the former appeal in effect holds that the damage must as a matter of law be deemed to have commenced, if at all, upon the construction of the incinerator. We do not so read it. That decision may mean that it might be found from evidence as a matter of fact that the damage, if any, commenced at the time of the construction of the incinerator and its then prospective operation. But surely it was not intended as holding that the court would take judicial notice that the construction and operation of an incinerator is necessarily such that the nature and extent of the damage, if any, which might thereby be inflicted upon adjoining property could be foretold at the time of the completion of the plant and before it is put into operation. There may be some decisions relating to the construction and operations of railroads lending some support to counsel's contention, but even those we think will be found to regard the commencement of the operation of the railroad as the commencement of damage to property not actually taken, and that to be the time of the commencement of the running of the statute of limitation against recovery of compensation for such damage. Such a view may find justification in the fact that the manner of operation of railroads and the effect thereof upon adjoining property is largely a matter of common knowledge. But if that be so as to railroad operation, it is not so as to incinerators. The operation of an incinerator might or might not necessarily cast offensive fumes, odors, smoke, ashes, etc., upon and over adjoining property. What the effect of the operation of a particular incinerator in this respect is or becomes is a matter of proof. We conclude that the trial court correctly ruled upon the admission of evidence and in the giving of its instructions here complained of.

[3] Some contention is made against the allowance of costs and disbursements to respondents incurred by them upon the first trial. It seems that at the time the court sustained the city's demurrer to respondents' complaint and dismissed the case it had proceeded to the stage that a jury had been impaneled and the case was proceeding to trial on the merits; respondents having then summoned witnesses for the trial. Respondents were in effect wholly successful upon the first appeal and upon the trial resulting in the judgment here appealed from. Clearly they are now entitled to costs and disbursements incurred upon the first trial, though that proved abortive, but not from any fault of theirs. Rem. Code, § 476. It is true that this court held that respondents' second cause of action did not state facts entitling them to relief, and to that extent may be said to have approved the trial court's ruling, but that cause of action was in substance the same as the first cause of action

pleaded, except that it was grounded upon negligence on the part of the city instead of upon the theory of recovering compensation for damages resulting from the city's exercising its power of eminent domain. Had the trial court merely sustained the city's demurrer to the second cause of action and allowed the case to proceed to trial upon the first cause of action, there would not have been these witness fees for two trials.

The judgment is affirmed.

ELLIS, C. J., and FULLERTON and WEBSTER, JJ., concur.

(25 Wyo. 463)

BOARD OF COUNTY COM'RS OF CARBON COUNTY v. UNION PAC. R. CO.
(No. 907.)

(Supreme Court of Wyoming. April 1, 1918.)

1. CONSTITUTIONAL LAW — 38—VALIDITY OF STATUTE—TESTS.

The true test of the validity of a statute regularly enacted is whether or not it violates limitations imposed by the Constitution either in express terms or by clear implication.

2. COUNTIES — 192—DONATIONS—VALIDITY.

Laws 1915, c. 55, authorizing a tax by counties for aid of fair associations, is void for violation of Const. art. 16, § 6, prohibiting counties from making donations to any association except for necessary support of the poor.

Certified Questions from District Court, Carbon County; V. J. Tidball, Judge.

Suit by the Board of County Commissioners of the County of Carbon against the Union Pacific Railroad Company. On question certified by District Court as to validity of Laws 1915, c. 55, as to fair aid. Statute held void.

A. J. Roster, of Rawlins, for plaintiff. Herbert V. Lacey and John W. Lacey, both of Cheyenne, for defendant.

BEARD, J. In this case the constitutionality of chapter 55 of the Session Laws of 1915 having arisen in the district court, that court upon the joint motion of the parties and upon its own motion reserved its decision of the question, and under the provisions of sections 5136, 5137, and 5138 of the Compiled Statutes of 1910 certified that question to this court for its decision. The question arose upon a demurrer to the plaintiff's petition, the substance of the material averments of which are: That Carbon County Fair Association was and is a private corporation organized and existing under and by virtue of the laws of this state, having its principal office and place of business in Carbon county. That said association, according to its articles of incorporation, was organized for the purposes of conducting fairs within said county, and for the development of the resources of said county. That on June 2, 1915, the said association by its proper officers duly made application in writing to the plaintiff, in the

manner provided by law, for an appropriation by plaintiff of the sum of \$2,500 in the manner provided in said chapter 55, S. L. 1915, and in conformity therewith. The plaintiff granted said application, and thereafter on September 7, 1915, levied a tax of \$.00016 on each dollar of the assessed valuation of the taxable property within said county for the year 1915, to pay said association said sum. That defendant's proportionate share of said tax upon its property subject to taxation in said county for said year was \$691.14. That on December 31, 1915, defendant served a notice in writing upon the county treasurer of said county that it refused to pay said tax or any part thereof, and has ever since refused to pay the same. The defendant demurred to the petition on the ground that it failed to state facts sufficient to constitute a cause of action, and in various forms and language challenged the constitutionality of said chapter 55.

The first section of said chapter 55, which is the only one involved here, is as follows:

"Whenever it appears to the board of county commissioners of any of the several counties of the state that a county fair association has been duly incorporated under the laws of Wyoming, whose articles of incorporation show that the association was organized for the development of the county resources and that the association has expended in actual money the sum of not less than two thousand (\$2,000.00) dollars for improvements, and that the association is being managed by competent and reputable business people, and whose executive officers shall make an application in writing for financial assistance, the board of county commissioners of such county may levy upon all taxable property in such county a tax on each and every dollar of assessed valuation, which tax shall be levied and collected in a manner provided by law for levying and collecting of state and county taxes, and contribute the amount so levied and collected to the purposes of such fair association: Provided, however, that the tax so levied shall amount to a sum of not to exceed twenty-five hundred (\$2,500.00) dollars in a first class county, two thousand (\$2,000.00) dollars in a second class county, and fifteen hundred (\$1,500.00) dollars in a third class county for each and every calendar year."

Counsel for defendant contend that said section violates the provisions of section 6, article 16, of the Constitution of this state, which reads:

"Neither the state nor any county, city, township, town, school district, or any other political sub-division, shall loan or give its credit or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation."

The questions certified by the district court to this court for its decision are seven in number, or rather the single question of the constitutionality of said statute is stated in seven different forms which need not be here set out at length.

[1, 2] The true test of the validity of a statute regularly enacted is whether or not it

violates limitations imposed by the Constitution either in express terms or by clear implication. 12 C. J. 749. In this case the constitutional limitation upon the power of the state, counties, etc., is expressed in clear and definite language, susceptible of but one construction, viz. the absolute prohibition of the state or any political subdivision thereof from loaning or giving its credit or making donations to or in aid of any corporation, except for the necessary support of the poor. In this instance the appropriation made by the plaintiff to said association was unquestionably a donation by the county to and in aid of said corporation, and the statute attempting to authorize it comes clearly within the constitutional prohibition. That it was the intention of the framers of the Constitution and the people in adopting it to prohibit all such donations as this statute attempts to authorize is made still more certain by the single definite exception contained in the section. Nor are we without precedent for so holding. Under a quite similar provision of the Constitution of Pennsylvania a statute providing for the support, out of the county treasury of the sick and injured poor, when under treatment in hospitals conducted by private corporations, was held unconstitutional as being in violation of the provision:

"The General Assembly shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association, [institution] or corporation; or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual." Const. art. 9, § 7; *Wilkesbarre City Hospital v. County of Luzerne*, 84 Pa. 55.

See, also, *Garland v. Board of Revenue of Montgomery County*, 87 Ala. 223, 6 South. 402.

The Attorney General of this state also advised the county attorney of Uinta county, in an opinion dated February 6, 1917, that said statute violated the provisions of section 6, article 16, of the Constitution, and was void.

The conflict between the statute in question and the constitutional provision is so apparent and direct that, reluctant as the court is to declare an act of the Legislature invalid, we are convinced that we would not be discharging our duty in this instance if we did otherwise. We therefore hold that section 1, chapter 55, of the Session Laws of 1915, is unconstitutional and void; and as such holding fully answers the several questions reserved and submitted to this court for decision, no further answers need be returned.

POTTER, C. J., and MENTZER, District Judge, concur. Justice BLYDENBURGH having announced his disqualification to sit in this case, Hon. Wm. C. MENTZER, Judge of the First Judicial District, was called in and sat in his stead.

(31 Idaho, 319)

FOLEN v. SAXTON et al.

(Supreme Court of Idaho. March 8, 1918.)

1. PRINCIPAL AND AGENT ⇨105(1)—SALE OF MORTGAGED CHATTELS—LIABILITY FOR PROCEEDS.

Authorization given by a mortgagee to a mortgagor to sell mortgaged chattels and apply the proceeds on the indebtedness does not create such a relation of principal and agent between the parties as will charge the former with a payment not received by him, but made to the latter, as part of the purchase price upon an attempted sale thereof, which was never consummated, where the party who made the payment dealt with the mortgagor as principal and without knowledge of the mortgagee's consent or of the conditions upon which it was predicated.

2. REPLEVIN ⇨134—CLAIM AND DELIVERY BOND—AFFIDAVIT—EVIDENCE.

In an action on a claim and delivery bond, the affidavit made by the plaintiff in the original proceeding, stating the value of the property taken, may be admitted in evidence as tending to prove that fact.

3. REPLEVIN ⇨124(2)—CLAIM AND DELIVERY BOND—LIABILITY OF SURETIES.

Sureties on a claim and delivery bond are liable, above the value of the property taken, but within the penalty thereof, for the costs incurred in the original action.

4. REPLEVIN ⇨124(2)—ATTORNEY'S FEE—INDEBTEDNESS—CLAIM AND DELIVERY BOND.

An attorney's fee in a stated amount, stipulated for in a chattel mortgage to become due upon foreclosure, becomes part of the debt secured thereby, upon the commencement of foreclosure proceedings, and may be recovered by a mortgagee in a suit upon a claim and delivery bond given to procure possession of the mortgaged chattels from the sheriff after foreclosure proceedings were commenced.

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action on claim and delivery bond by J. J. Folen against C. E. Saxton, A. H. Lang, as Coroner, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

G. W. Lamson, of Nampa, for appellants. R. B. Scatterday, of Caldwell, and Chas. F. Koelsch, of Boise, for respondent.

MORGAN, J. Most of the facts necessary to an understanding of this case will be found in *Saxton v. Breshears*, 21 Idaho, 333, 121 Pac. 567, which was an action in claim and delivery, brought by Saxton, appellant herein, to recover possession of a quantity of hay held by the sheriff of Canyon county under foreclosure proceedings instituted by the above-named respondent upon two chattel mortgages. The judgment rendered in that action against Saxton for the return of the hay, or for the value thereof, with costs, remaining unsatisfied, respondent commenced this action against the appellants Saxton, Lang, as coroner, and Strode and Murray, who are sureties on the claim and delivery bond, to recover an amount equal to the balance due on respondent's notes, payment of which had been secured by the mortgages, together with costs on appeal paid in the claim and delivery action. Trial was had

before the court without a jury. This appeal is from a judgment for plaintiff, and from an order denying a motion for a new trial.

[1] The trial court found that Saxton failed to return the hay or to pay any part of the value thereof to respondent, except \$372.50, which was paid on May 1, 1909. This finding is assigned as error in that, it is contended, appellants are entitled to an additional credit of the \$100 mentioned in *Saxton v. Breshears*, supra, the sum paid to Norton, the mortgagor, as part of the purchase price of the hay upon an attempted sale thereof to Saxton which was never consummated. This \$100 was never turned over to respondent, and it does not appear that when Saxton paid it he understood Norton was acting in the capacity of agent for the mortgagee, but, we must assume from the evidence, he dealt with him as principal, not knowing of, nor relying upon, the consent of respondent that the property be sold. The authorization given by respondent to Norton to sell the hay and apply the proceeds on the indebtedness, payment of which was secured by mortgages thereon, did not, under these circumstances, create such a relation of principal and agent between them as to entitle the former to the money (5 R. C. L. 444, § 79; *Maier v. Freeman*, 112 Cal. 8, 53 Am. St. Rep. 151, 44 Pac. 357; *Smith v. Crawford County St. Bank*, 99 Iowa, 282, 61 N. W. 378, 68 N. W. 690; *Minneapolis Threshing Machine Co. v. Calhoun*, 37 S. D. 542, 159 N. W. 127; *White Mt. Bank v. West et al.*, 46 Me. 15; *Smith v. Clark*, 100 Iowa, 605, 69 N. W. 1011; *Carr v. Brawley*, 34 Okl. 500, 125 Pac. 1131, 43 L. R. A. (N. S.) 302), nor charge him with a payment which he did not receive, but which was made to the latter (*Schaeffer v. Mutual Benefit L. Ins. Co.*, 38 Mont. 459, 100 Pac. 225; *Jackson v. Badger*, 35 Minn. 52, 26 N. W. 908; *Pancoast v. Dinsmore*, 105 Me. 471, 75 Atl. 43, 134 Am. St. Rep. 582).

[2] Appellants contend that the finding that Saxton took 100 tons of hay is not supported by the evidence. An examination of the record discloses that he took but 90 tons. Objection is also made to the finding that the total value of the property, at the time it was taken, was \$800, appellants assuming it to mean a value of \$8 per ton. It was evidently so intended. The claim and delivery affidavit, made by Saxton, was properly admitted as evidence of the value of the hay (*Capital Lumbering Co. v. Learned*, 36 Or. 544, 59 Pac. 454, 78 Am. St. Rep. 792), and the statements therein contained, together with other evidence admitted upon that point, are sufficient to support a finding to the effect that it was worth \$8 per ton. The erroneous finding to the effect that 100 tons, of a total value of \$800, were taken is harmless, since the 90 tons taken, at \$8 per ton, after deducting the proper credit, amounted to more than the sum of principal, interest, and attorney's

fee secured by respondent's mortgages. This court said in *Blackfoot Stock Co. v. Delamue*, 3 Idaho, 291, 29 Pac. 97:

"In an action of replevin, where the verdict is in favor of the defendant, whose ownership is special, by reason of a chattel mortgage or other lien, the measure of his damages in case a return cannot be had is the account due him upon his lien if within the value of the property."

Appellants insist that if the value was \$8 per ton at the time of taking the evidence shows Saxton increased it from \$5 per ton to that amount by baling the hay, and that its value before it was baled, should be the basis for determining their liability. In support of this contention they cite section 3446, Rev. Codes, which is, in part, as follows:

"Every person who, while lawfully in possession of an article of personal property, renders any service to the owner thereof, by labor or skill, employed for the protection, improvement, safe-keeping, or carriage thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due him from the owner, for such service."

At the time the hay was baled it was the property of, and in the possession of, Norton, subject to respondent's mortgages (*Saxton v. Breshears*, supra), and any compensation due to Saxton for baling it was due from Norton, not from respondent.

[3] Appellants object to the inclusion in the judgment of \$69.50 allowed as costs against Saxton on appeal in the claim and delivery action. The rule is that in an action on a claim and delivery bond, the sureties are, above the value of the property taken, but within the penalty of the bond, liable for costs incurred in the original action. *Carlson v. Dixon*, 14 Or. 293, 12 Pac. 394.

[4] Objection is also made to the attorney's fees, upon foreclosure, included in the judgment, which were stipulated for in the mortgages. Such fees become part of the secured indebtedness, upon the commencement of foreclosure proceedings, and were properly included. *De Costa v. Comfort*, 80 Cal. 507, 22 Pac. 218; *Jones on Chattel Mortgages*, § 448.

We find no prejudicial error in the record. The judgment and order appealed from are affirmed. Costs are awarded to respondent.

BUDGE, C. J., and RICE, J., concur.

(31 Idaho, 324)

DONOVAN v. BOISE CITY.

(Supreme Court of Idaho. March 8, 1918.)

1. TRIAL — 165 — MOTIONS FOR NONSUIT — INFERENCES.

A motion for nonsuit admits the truth of plaintiff's evidence and of every fact which it tends to prove or which could be gathered from any reasonable view of it, and he is entitled to the benefit of all inferences in his favor which the jury would have been justified in drawing from the evidence had the case been submitted to it.

2. NEGLIGENCE \Rightarrow 136(26)—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

Contributory negligence is generally a question of fact for the jury, and only becomes one of law, authorizing a nonsuit, when the evidence introduced on behalf of the plaintiff is reasonably susceptible of no other interpretation than that the conduct of the injured party contributed to his injury, and that, because of his negligence and carelessness, he did not act as a reasonably prudent person would have acted under the circumstances.

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by O. U. Donovan against Boise City. From a judgment for defendant, plaintiff appeals. Reversed.

Laurel E. Elam, of Boise, for appellant. S. L. Tipton and Perky & Brinck, all of Boise, for respondent.

MORGAN, J. This action was commenced by appellant to recover damages for injuries to his person and property resulting from an accident which, he contends, was caused by the negligence and wrongful act of respondent. At the close of the introduction of evidence upon appellant's part a motion for nonsuit was sustained upon the ground that the evidence showed the accident resulted directly and proximately from his own negligence. Judgment was entered accordingly, and the case is before us upon appeal therefrom.

It appears that about 9 o'clock on the evening of September 30, 1913, while appellant was riding on a motorcycle in an easterly direction on the south side of Warm Springs avenue, one of the residence streets in Boise City, he collided with a team and wagon in charge of, and being driven by, an employé of respondent along the same side of the street on which appellant was traveling, but in the opposite direction. It further appears that as a result of the collision the team was frightened, and trampled upon or kicked appellant; also that some damage was done to his motorcycle. It is his contention that the wrongful act and negligence upon the part of respondent consisted in its agent and employé driving the team, which was being used in street-cleaning work, on the wrong side of the street; that had it proceeded on the other side, in the direction it was going, or had it been going in the opposite direction, on the side it occupied, the accident would not have occurred. The evidence further discloses that shortly prior to the collision appellant was traveling about 13 or 14 miles an hour; that his engine began to work badly, by reason of some obstruction in the carburetor, and that in order to correct it he changed from high to low speed and flooded the carburetor, which caused him to look down momentarily, and reduced his velocity to about 8 or 10 miles an hour; that when he was about 75 feet from the place of the accident he looked up and was, at that time, under an arc light, had returned to high

speed, and was again going 13 or 14 miles an hour. He testified:

"I probably went, oh, I should judge, 55 or 60 feet, until I noticed the team directly in front of me. The horses' heads appeared to be coming towards me, and, after passing out from under the glare of the arc light, it is hard for a few seconds to see anything, after you get outside of the ring thrown by the light. The horses were coming towards me. I turned my machine toward the sidewalk and put my engine free and put on the brake, and was almost stopped when the team struck me."

Respondent's motion for nonsuit and the trial court's observations in ruling upon it indicate that the acts of negligence relied upon consisted of the speed at which appellant was traveling, the fact that he had, a short time prior to the accident, adjusted his engine while the motorcycle was in motion, and that by ordinary care and observation he would have seen the team and wagon in time to have avoided the collision. The record does not disclose that the rate of speed at which appellant was traveling was unusual for drivers of motor vehicles in that part of the city. The evidence shows the adjustment of the engine was completed at a time when appellant was about 75 feet from the team, and that it is customary for motorcyclists to remove obstructions from the carburetors of their engines while the machines are in motion and in the manner adopted by appellant. With respect to his conduct immediately prior to and at the time of the accident, appellant testified, upon cross-examination:

"Q. You think you could stop it in 15 or 18 feet? A. Yes, sir. Q. When you first saw the wagon, did you put on the brake? A. Yes, sir; just the minute I seen them directly in front of me I put on the brake. Q. And you were then not more than 15 or 18 feet away from them? A. Just about 15 feet. Q. Had you been looking in front of you. A. Yes, sir. Q. And you didn't see the wagon till you were 15 or 18 feet away from it? A. I didn't see the wagon until I was about 15 feet away from it."

[1] A motion for nonsuit admits the truth of plaintiff's evidence and of every fact which it tends to prove or which could be gathered from any reasonable view of it, and he is entitled to the benefit of all inferences in his favor which the jury would have been justified in drawing from the evidence had the case been submitted to it. *Later v. Haywood*, 12 Idaho, 78, 85 Pac. 494; *Pilmer v. Boise Traction Co., Ltd.*, 14 Idaho, 327, 94 Pac. 432, 15 L. R. A. (N. S.) 254, 125 Am. St. Rep. 161; *Colvin & Rinard v. Lyons*, 15 Idaho, 180, 96 Pac. 572; *Culver v. Kehl*, 21 Idaho, 595, 123 Pac. 301; *S. Idaho Adventists v. Hartford F. Ins. Co.*, 26 Idaho, 712, 145 Pac. 502; *Shank v. Great Shoshone & Twin Falls W. Pw. Co.*, 205 Fed. 833, 124 C. C. A. 35.

[2] Contributory negligence is a matter of defense. Section 4221, Rev. Codes. It is generally a question of fact for the jury, and only becomes one of law, authorizing a nonsuit, when the evidence introduced on be-

half of the plaintiff is reasonably susceptible of no other interpretation than that the conduct of the injured party contributed to his injury, and that, because of his negligence and carelessness, he did not act as a reasonably prudent person would have acted under the circumstances. 29 Cyc. 631; Jackson v. City of Grand Forks, 24 N. D. 601, 140 N. W. 718, 45 L. R. A. (N. S.) 75.

It cannot be said, from the evidence introduced by appellant, as a matter of law, that he was negligent. The ruling on the motion for nonsuit was erroneous.

The judgment is reversed. Costs are awarded to appellant.

BUDGE, C. J., and RICE, J., concur.

(102 Kan. 573)

BIERNACKI v. RATZLAFF. (No. 21336.)*

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐1002—VERDICT—CONFLICTING EVIDENCE.

Rule followed that a verdict and judgment supported by substantial, though conflicting, evidence cannot be disturbed on appeal.

2. NEW TRIAL ⇐104(1)—NEWLY DISCOVERED CUMULATIVE EVIDENCE — DISCRETION OF COURT.

Rule followed that the production of cumulative evidence in support of a motion for a new trial is addressed to the sound discretion of the trial court, and does not require the granting of a new trial as a strict matter of right.

3. AUTOMOBILE COLLISION—EVIDENCE.

Evidence examined, and held sufficient to support a verdict and judgment for damages arising from a collision of automobiles on the public highway.

Appeal from District Court, Ford County. Action by Joseph Biernacki against John Ratzlaff, with cross-petition by defendant. Judgment for plaintiff, and defendant appeals. Affirmed.

J. B. Hayes, of Minneola, for appellant. L. A. Madlson and Carl Van Riper, both of Dodge City, for appellee.

DAWSON, J. This was an action, and a cross-action for damages arising from a collision of two automobiles on the public highway.

The plaintiff's petition in substance alleged that on the evening of February 19, 1916, he was driving his automobile southward on the west side of the public road at a moderate rate of speed, and that the defendant was driving his automobile northward on the west side of the road (wrong side for defendant) at a high and dangerous rate of speed, and through this negligence of the

defendant a collision occurred which injured the plaintiff and damaged his machine.

The defendant's answer denied plaintiff's allegations, and in a cross-petition he alleged that he was driving northward on the east side of the road at a moderate rate of speed, and that the plaintiff was driving his car southward on the east side of the road (wrong side for plaintiff at a high and dangerous rate of speed, and that through this negligence of plaintiff the collision occurred which injured the defendant and damaged his machine.

The cause was tried to a jury, which returned a verdict for plaintiff for \$350, and judgment was rendered thereon.

Defendant assigns two errors: (1) That the verdict was contrary to the evidence, and (2) that he was entitled to a new trial on his showing of newly discovered evidence.

[1] The court has read the abstracts of the evidence with care, and it cannot be said that the verdict was contrary to all the evidence. While the testimony of the witnesses was conflicting, a substantial part of it tended to support the allegations of plaintiff's petition and to support the verdict. The problem for the trial court and jury was simply to determine which of the witnesses were telling the truth and which of them were not. Wildeman v. Faivre, 100 Kan. 102, 106, 163 Pac. 619; Matassarini v. Street Railway Co., 100 Kan. 119, 120, 121, 163 Pac. 796.

[2, 3] In support of the motion for a new trial the defendant produced affidavits of several new witnesses which tended to prove that the tracks of plaintiff's automobile were on the east side of the road, where plaintiff's car under the circumstances had no right to be, and that the broken glass of the defendant's windshield was on the east side of the road where his car had a right to be. This evidence would tend to show that the plaintiff, and not the defendant, was the wrongdoer. But there was a good deal of evidence pro and con on both these phases of the controversy adduced at the trial, and the rule governing the granting of new trials on cumulative evidence controls. Strong v. Moore, 75 Kan. 437, 89 Pac. 895; Simmons v. Shaft, 91 Kan. 553, 139 Pac. 614; Pittman Co. v. Hayes, 98 Kan. 273, 157 Pac. 1193.

In appellant's brief there is some discussion of the duty of one who is in danger to avoid that danger when he can do so, and some discussion of the rights, duties, and privileges of travelers on the highway. But no error is assigned touching these matters, and nothing can be discerned therein which affects the judgment.

Affirmed. All the Justices concurring.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied April 12, 1918.

(24 N. M. 302)

MAKEMSON v. DILLON et al. (No. 1897.)

(Supreme Court of New Mexico. Feb. 25, 1918.)

*(Syllabus by the Court.)***1. PUBLIC LANDS —55—TRESPASS — STATE LANDS—LEASE—INJUNCTION.**

During the interim between the selection of indemnity or lieu lands by the state and the approval of the selection by the Secretary of the Interior, under the provisions of the Enabling Act of Congress (Act Cong. June 20, 1910, c. 310, 36 Stat. 557), the state has such an interest in the lands covered by the selections as entitled it to lease the same, and the lessee may maintain an injunction against trespassers upon the same.

2. PUBLIC LANDS —53—INDEMNITY SELECTIONS—STATUTES.

Sections 4636 and 4637, Code 1915, held not to apply to lands covered by indemnity or lieu selections by the state.

3. PUBLIC LANDS —55 — LEASE OF STATE LANDS—RENT—STATUTES.

Sections 5190, Code 1915, requires lands to be leased by the state at not less than 2 per cent. of their true value, to be determined by appraisal. The minimum purchase price fixed in section 10 of the Enabling Act for lands selected by the state and lying east of a certain prescribed meridian is \$5 per acre. This provision, however, is not controlling upon the rental value of these lands. The appraised value of these lands may be less than the minimum price prescribed by Congress in the Enabling Act, and as, in this case, no showing was made by the appellants that the lands were worth the minimum purchase price, they are not in a position to question the action of the state land commissioner in leasing the lands at 5 cents per acre per annum.

4. PUBLIC LANDS —55 — STATE LANDS—"OWNED"—STATUTE.

The word "owned," as used in section 5189, Code 1915, is held to apply to any lands in which the state has any right or interest (citing Words and Phrases, Own).

5. APPEAL AND ERROR —1010(1)—FINDINGS OF FACT—REVIEW.

Findings of fact, which are supported by substantial evidence, cannot be successfully questioned in this court.

6. APPEAL AND ERROR —1078(1)—ARGUMENT—CONSIDERATION.

A proposition, not argued in this court, will not be considered.

7. PUBLIC LANDS —55—STATE LANDS—TRESPASS—RIGHT OF LESSEE.

Section 5226, Code 1915, which makes it a criminal offense to use for any purpose any land belonging to the state, unless it is leased or purchased, furnishes no remedy to a lessee, and is not exclusive of the right to injunction for intentional trespasses upon such leased lands.

*(Additional Syllabus by Editorial Staff.)***8. PUBLIC LANDS —53—INDEMNITY LANDS—GRANTS "SUBJECT TO APPROVAL" OF SECRETARY OF INTERIOR.**

The words "subject to the approval," as used in Enabling Act, § 11, providing that all lands granted in quantity or as indemnity shall be selected under the direction and subject to the approval of the Secretary of the Interior, are not to be regarded as giving him direction to arbitrarily refuse a selection for no reason at all, but are to be understood to mean that he shall investigate and pass upon and render judgment as to whether the lands selected are

within the terms of the grant, and, if so, it is his duty to list them to the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Subject to.]

Appeal from District Court, Roosevelt County; McClure, Judge.

Action for injunction by Harry Makemson against A. Roscoe Dillon and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. E. Pardue, of Ft. Sumner, for appellants. A. B. Renehan, of Santa Fé, amicus curiæ, for the State. K. W. Edwards, of Ft. Sumner, and G. L. Reese, of Portales, for appellee.

PARKER, J. Appellee brought this action for an injunction against appellants, to restrain them from cutting and breaking appellee's fences, and driving, herding, and grazing their cattle and live stock upon certain lands so inclosed. It appears that the state had filed application in the United States land office at Ft. Sumner, N. M., for the selection, as indemnity or lieu lands, of all of the premises in question, except a small portion thereof which was held in private ownership by the appellee, and except another small portion thereof which he held as lessee of some third persons, which said application of the state had been duly allowed by the register and receiver of said land office. It further appears that thereafter the appellee entered into contracts with the state of New Mexico whereby he leased the said lands from the state for the period ending September 30, 1920, for the purpose of pasturing and grazing said lands, and for all purposes incident thereto. He went into possession of the said lands, and fenced the same, and grazed cattle and horses thereon. It further appears that thereafter the appellants committed a series of intentional trespasses upon the said lands, by driving, herding, and grazing their cattle and live stock thereon.

[1] A preliminary injunction was awarded by the court against the appellants, and upon a return to the order to show cause why the injunction should not be made permanent a hearing of the facts was had before the court, and the injunction was made permanent. The appellants defended upon the ground, principally, that although the lands in question had been applied for by the state, and the application had been allowed by the local land office, the said applications were still pending before the secretary of the interior, and had not yet been approved by him. These lands were applied for by the state under the provisions of the act of Congress enabling the people of New Mexico to form a state government. 36 Stat. 557. The pertinent provision of that act is contained in section 11, and is as follows:

"That all lands granted in quantity or as indemnity by this act shall be selected, under the direction and subject to the approval of the Secretary of the Interior, from the surveyed, unreserved, unappropriated, and nonmineral public lands of the United States within the limits of said state. * * *

The indemnity lands referred to in section 11 are lieu lands, to take the place of such of sections 2, 16, 32, and 36 as might be lost to the state by reason of being mineral, or having been sold, reserved, or otherwise appropriated or reserved by or under the authority of any act of Congress, or where they were wanting or fractional in quantity, or where settlements thereon with a view to pre-emption or homestead or improvement thereof, with the view to desert land entry before the survey thereof in the field, as provided in section 6 of said enabling act.

Counsel for appellants takes the position that an indemnity selection, such as the one is in this case, requiring the approval of the Secretary of the Interior, gives to the state no title nor rights in the land until such approval has been had. He relies upon several cases which will be examined. He cites *Clemmons v. Gillette*, 33 Mont. 321, 83 Pac. 879, 114 Am. St. Rep. 814. This was a trespass case quite similar to the case at bar in facts. It differs radically from the case at bar, however, in an important and controlling feature. In that case the lands were unsurveyed, and the state of Montana had assumed to lease to the plaintiff an unsurveyed school section. The plaintiff had obtained a lease and had been in possession of the school section for two years, but when the controversy arose his lease had expired by reason of the fact that the state refused to renew the same. This left the plaintiff with no other right to the possession than such as he obtained by virtue of his inclosure made under the lease from the state for the two preceding years. Incidentally the court discussed the nature of the right of the state in school sections prior to the public surveys. The court correctly determines that in a case of that kind, by reason of the fact that no particular land is identified by survey, the state can have no power to either convey the fee or to grant a lease, there being no identification of the subject-matter, and the court cites *U. S. v. Montana L. & M. Co.*, 196 U. S. 573, 25 Sup. Ct. 367, 49 L. Ed. 604, which supports the doctrine announced in the Montana case.

In *Wisconsin Central Railroad Co. v. Price County*, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687, the question was presented to the Supreme Court of the United States as to when the title to lieu lands passed from the government to a railroad grantee, and as a consequence when the same lands became subject to taxation by the state. The court cites and quotes from *Witherspoon v. Duncan*, 4 Wall. (71 U. S.) 210, 18 L. Ed. 339, to the effect that, where lands have been entered

at, they become the private property of the entryman; the government holding merely the naked legal title in trust for him. In that case the court distinguishes between grants of lands to railroads of certain alternate sections within certain specified place limits and those which are denominated lieu lands, and points out that in such cases, by reason of the provision of the statute requiring the approval of the Secretary of the Interior to such lieu selections, no title vests in the grantee until such approval has been had. The basis for the distinction seems to be that the Secretary of the Interior is charged with the duty of judicially determining whether there were any deficiencies in the lands granted which were to be supplied from indemnity lands, and, in the second place whether the particular indemnity lands selected could be properly taken for those deficiencies, and the court says:

"Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remain unaffected in their title."

This is a leading case on the subject. It is to be observed, however, in this connection, that the question in that case was as to when the title passed from the government to the railroad, so as to be subject to taxation—an entirely different question from the one in the case at bar, as will be hereafter pointed out.

Counsel for appellee relies upon *Weyerhaeuser v. Hoyt*, 219 U. S. 380, 31 Sup. Ct. 300, 55 L. Ed. 258, in which the court in an exhaustive opinion held that, during the interim between the applications for lieu lands and the approval by the Secretary of the Interior, the lands were withdrawn from entry, so that no rights could be acquired under the Timber and Stone Act by a person making claim subsequent to the application of the railroad company for the lieu selections. In *Northern Pacific Railway Co. v. Houston*, 231 U. S. 181, 34 Sup. Ct. 113, 58 L. Ed. 176, it is held that lands embraced in the list of indemnity selections filed by the railroad company with the Land Department, and subsequently approved by the Secretary of the Interior, were not subject to entry or purchase under the federal land laws during the interim between the date of filing and the date of such approval.

Olive Land & Dev. Co. v. Olmstead (C. C.) 103 Fed. 568, is also cited and relied upon. Counsel on both sides, it seems to us, have overlooked an important and controlling consideration in the discussion of this case. The question in this case is not whether the title to school indemnity lands has passed to the state prior to the approval of the selections by the Secretary of the Interior. We think it may be conceded that such title has not passed to the state. The question in this case, however, is as to what interest the state acquires under its lieu selections and during the interim between the

selections and the approval by the Secretary of the Interior. That the state acquires some beneficial interest in the property seems apparent.

The only two cases which we have found which discuss the specific question involved in this case are two cases from Utah. In *Brigham City v. Rich*, 34 Utah, 130, 97 Pac. 220, Brigham City had commenced the construction of an electric light plant; the water to generate such power had to be conducted through a pipe line, and a portion of such pipe line had been constructed up to a point where it became necessary to cross the land described in the complaint. The city was unable to agree with the defendant and brought condemnation proceedings. The defendant, Rich, entered into an agreement with the state of Utah whereby he made application for the selection by the state of the land and paid the required fees. On the same day the state made the selection under the grant to it by the United States, which application was approved by the register and receiver of the United States land office at Salt Lake City. Immediately after making the agreement with the state, Rich entered into possession of said lands. The selection was afterward approved by the Secretary of the Interior, but had not been approved when the proceeding was commenced. Section 13 of the Enabling Act of Utah (Act Cong. July 16, 1894, c. 138, 28 Stat. 107) is in almost the identical language of the portion of section 11 in our Enabling Act above quoted. It requires the selections to be made under the direction of the Secretary of the Interior. Ours differs from the Utah section only in one particular, and that is that ours reads "under the direction and subject to the approval of the Secretary of the Interior." We do not regard this variation as important. The court says:

"The contention of appellant's counsel is that under the facts as found by the court the title and ownership of the lands in question were in the United States on the 30th day of October, 1902, when this proceeding was commenced; that the title to the same did not pass out of the United States until April 30, 1903, when the Secretary of the Interior approved the selection thereof by the state of Utah; and that the doctrine of relation, with regard to the passing of the title, cannot be invoked in this case. Upon the other hand, counsel for Brigham City claim that the grant made by the United States was a grant in present; that when the state of Utah made the selection of the lands, which was approved by the Secretary of the Interior, the title thereto vested in the state of Utah, as of the date of the passage of the Enabling Act, or, at least, as of the date the state made the selection of the land. * * * It seems to us that the grant contained in section 12 of the Enabling Act was one in present, and was based upon three conditions, namely: (1) That the lands shall be selected from unappropriated public lands of the United States; (2) that they shall be selected within the limits of the state of Utah; and (3) that they shall be nonmineral in character. * * * The phrase that the lands 'shall be selected under the direction of the Secretary of the Interior,'

as we view it, was not a condition upon which the grant was made, but merely one of the means by which the lands should be identified and the grant made effective as to any particular parcel. As we have seen, the grant consisted of a specific number of acres, and within specified limits. The words of the grant are that 'the following grants of land are hereby made to said state.' This is not a promise or agreement to grant at some future time, nor upon the happening of some future event, nor upon any condition, but is an absolute grant in present of a specified quantity of land. The mere fact that something remained to be done to identify the particular parcels by selecting them did not affect the grant itself. True, the legal title may, in fact, have remained in the United States until the land was actually selected and identified, but such title was held in trust for the benefit of the state of Utah. The right to the quantity of land specified in the act was in the state of Utah from and after the approval thereof; but the title to any particular parcel was held in trust by the United States until selection was made by the state of Utah. We do not think it was within the power of the Secretary of the Interior to prevent the state of Utah from acquiring the title to any particular parcel of land, if such parcel fell within the terms of the grant itself. His duty was discharged, and his power exhausted, when he found that the land fell within the terms of the grant. If the land selected was not such as was granted, or if it was outside the limits of the grant, the title thereto would fail, not because the Secretary of the Interior refused to approve the selection, but because the selection was not within the original terms of the grant. To hold otherwise would be tantamount to holding that the grant was made by the Secretary of the Interior, and not by Congress. Congress, no doubt, could have directed that officer to make conveyance by patent of certain lands if he found that the conditions imposed, if any, had been complied with. Congress, however, did not do this. It made the grant, and authorized no one either to convey or to withhold a conveyance of the title."

In *McKinney v. Carson*, 35 Utah, 180, 99 Pac. 660, there was an action at law for damages for a trespass very similar to the trespass in the case at bar. The defense interposed was the same defense that title had not passed from the government to the state, and therefore the state's lessee had no cause of action for the trespass complained of. The selections in this case had been filed and approved in the local land office, but had not received the approval of the Secretary of the Interior. Objection was made to the introduction of the contract of lease upon the grounds stated. This selection was rejected by the Secretary of the Interior, with the consent of the state and the lessee, and it was urged that, the selection having been rejected, the state never acquired any right in the premises and therefore could confer none upon the lessee. The court said:

"It is asserted that, since the selection made by the state was rejected by the Secretary of the Interior, the state never had any right or title to the land, and, if the state had none, it could confer none. It will be observed that the selection made by the state was approved by the local land office June 9, 1902, and that respondent went into possession under a contract from the state. The state, therefore, was acting under a selection made by it which had been duly filed and approved by the local land office. In

a very recent case, entitled *Brigham City v. Rich* [34 Utah, 130] 97 Pac. 220, we held that a grant to the state of Utah under the Enabling Act was a grant in present: that a selection duly made by the state and filed and approved by the Secretary of the Interior vested the title in the state of Utah from the date of the approval of the Enabling Act. We further in effect held that, if the lands selected by the state were not mineral and were located within the state of Utah, the Secretary of the Interior was powerless to defeat the rights of the state, because the grant was not dependent upon his act of approval. In other words, the refusal of the Secretary of the Interior to make the approval did not necessarily affect the passing of title, but his approval was evidence of the facts that the lands were of the character designated in the enabling act and were subject to the grant; if, therefore, the selected lands in fact were of the character granted in the Enabling Act that then the Secretary could not, by a mere rejection, defeat the rights of the state, since the enabling act conferred no such power upon him. If our conclusions in that case are sound, it follows that the state of Utah acquired such a right in the lands in question that it could agree to sell them to one desiring to purchase unless the lands were mineral lands. There is no claim that the lands in question were such, nor is it contended that the selection made by the state was rejected for that reason. From anything that is made to appear, therefore, the state could have insisted upon its right to the land in question, and the respondent could likewise have done so. The mere fact that the state and the respondent acquiesced in the action of the Secretary of the Interior, whether such action was well founded or not, can make no difference so far as the appellant is concerned. The respondent had the exclusive right to the possession of the land until the selection made by the state was canceled with its consent, and until respondent acquiesced in the cancellation of the contract and surrendered up possession. But we think the respondent had the right of possession as against the appellant, who was a mere intruder, upon still another ground. Under the enabling act the state certainly had the exclusive right to select unoccupied and unclaimed nonmineral lands. The right of selection carried with it the right to take possession and to continue in such possession, at least until some one with a better right claimed the lands, or until they were found to be mineral in character. If the state had this right, it could transfer the right of possession to another, and the person who obtained it would certainly have the right to exclude mere intruders who had no right in or to the land whatever. The right of possession would continue until the United States insisted upon its higher right, that of true owner. As against appellant, therefore, who was a mere intruder without any rights, the respondent's rights must prevail."

[8] This latter case goes further than it is necessary to go in the case at bar, for the reason that here there has been no disapproval by the Secretary of the Interior. These two cases are the only cases we have been able to find dealing with the specific question involved, and we regard the reasoning of the cases not only as sound, but unanswerable. The grant to New Mexico is to be effectuated by selection, not only of these lands granted in quantity, but also as indemnity, and they are to be selected under the direction and subject to the approval of the Secretary of the Interior. The words "subject to the ap-

proval" we do not regard as giving the Secretary of the Interior discretion to arbitrarily refuse a selection for no reason at all. These words are to be understood to mean that the Secretary of the Interior shall investigate and pass upon and render judgment as to whether the lands selected are within the terms of the grant, and, if so, it is his duty to list them to the state.

[2] 2. Certain minor considerations are presented in the brief of appellants, some of which will be noticed. It is argued that the lands in question are public lands within the terms of sections 4636 and 4637, Code 1915, and as such are common pastures, and are therefore not subject to exclusive occupation by lessees from the state. The proposition is clearly without foundation. At the time of the passage of those two sections (1862) there were no public lands in the territory of New Mexico, except lands of the United States. The statute, therefore, necessarily referred to the common use of the public domain. This statute can have no application at this time to lands which have been selected by the state under a grant from Congress.

[3] 3. Appellants present the proposition that the record shows that these lands were leased to the appellee at 5 cents an acre, and that section 5190 of the Code requires lands to be leased at not less than 2 per cent. of the true value, to be determined by appraisalment. It is further pointed out that the minimum purchase price fixed in section 10 of the Enabling Act for these lands is \$5 per acre. The conclusion is sought to be drawn that the minimum rental on such lands must be 2 per cent. of \$5, which would be 10 cents per acre. This is an erroneous assumption. The statute of the state requires the leasing of lands at 2 per cent. of their appraised value, which may be less than the purchase price fixed by Congress in the Enabling Act. No showing was made by appellants that the appraisalment on these lands was at any particular price, and, even if the appellants were, in any event, in position to question the contract between the state and the third party, they would certainly be required to make a showing of failure on the part of the land commissioner if they desired to take advantage of that fact.

[4] 4. Appellants seek to attack this lease of appellee on the ground that section 5189, Code 1915, authorizes the leasing only of such lands as are "owned" by the state, and that therefore there is no authority to lease them until title has been acquired. Counsel for appellee point out that the word "owned" has various meanings, and in this connection he argues correctly that the word means any right or interest in the land, citing 6 Words and Phrases, p. 5130, and *Baltimore & O. R. Co. v. Walker*, 45 Ohio St. 577, 16 N. E. 475.

[5] 5. Appellants complain of the failure

of the court to sustain their demurrer to the evidence. The demurrer to the evidence was general in terms, and was based entirely upon its assumed insufficiency to warrant a continuance of the injunction. The court made findings of fact, all of which were supported by substantial evidence, and no error, therefore, can be successfully predicated in this court on the refusal of the court to sustain the demurrer.

[6] 6. Appellants assert that the complaint of appellee states no cause of action for equitable relief. The proposition is not argued, and will therefore be dismissed without further comment.

[7] 7. Counsel for appellants argue that by reason of the provisions of section 5226, Code 1915, which makes it a criminal offense to use for any purpose any land belonging to the state without being leased or purchased, that such statute is the sole remedy against appellants, and that, consequently, injunction will not lie. This is a plain misconception of the principle that where a new right, or means of acquiring it, is conferred by statute, and an adequate remedy for its invasion is given by the same statute, the parties are confined to the statutory remedy. It is no remedy to appellee for the trespass upon his leased lands to prosecute the offender criminally. The only remedy that the appellee had in the premises was either an action for damages, or an action for an injunction, which latter he chose.

We find no error in the record, and for the reasons stated the judgment of the court below will be affirmed; and it is so ordered.

HANNA, C. J., and ROBERTS, J., concur.

(177 Cal. 656)

LEE v. HIBERNIA SAVINGS & LOAN SOC.
et al. (S. F. 7917.)

(Supreme Court of California. March 2, 1918.
Rehearing Denied April 1, 1918.)

1. INFANTS \S 58(2)—DEEDS—EFFECT.

Under Civ. Code, \S 33, prohibiting a minor under the age of 18 from making a contract relating to real property, a deed of trust executed by a girl under the age of 18 was absolutely void, notwithstanding her mature appearance, and no legal duty devolved upon her as a condition of disaffirming the deed to restore the consideration.

2. INFANTS \S 57(1)—DEEDS—EFFECT.

Where the grantee of a minor under 18 years of age, on learning that at the time of the deed she was under such age, and when she then represented herself to be over 18, persuaded her to ratify and confirm the deed when in fact she was then under 18, such ratification and confirmation were ineffectual to validate the deed.

3. TRIAL \S 395(5)—FINDINGS—ULTIMATE FINDING OF FACT.

Though findings should be construed most strongly in support of the judgment, an ultimate finding of fact, drawn as a conclusion from the probative facts previously found, can-

not stand if the specific facts upon which it is based do not support it.

4. INFANTS \S 58(2)—DEEDS—VALIDITY.

Under Civ. Code, \S 33, prohibiting a minor under the age of 18 from making a contract relating to real property, and section 35, authorizing a minor to disaffirm either before or after attaining majority, but requiring repayment of consideration if the minor was over 18, where the court found that plaintiff was under 18 when she made a trust deed, it could not also find that she was estopped by her conduct, and her mature appearance from disaffirming without tendering back the consideration.

Department 2. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Suit by Sibyl M. Lee, a minor, by her guardian ad litem, Kate C. Perry, against the Hibernia Savings & Loan Society and others. From the judgment rendered, defendants R. McColgan and others appeal. Affirmed.

Cullinan & Hickey, of San Francisco, for appellants. Frank W. Sawyer, Sydney Schlesinger, and Tobin & Tobin, all of San Francisco, for respondents.

VICTOR E. SHAW, Judge pro tem. While in form this action is one to quiet title, its real purpose was to have declared void two instruments in so far as they affected the lot described in the complaint and owned by plaintiff. One of these instruments is a mortgage executed by plaintiff, together with her mother and brother, on August 1, 1913, to the Hibernia Savings & Loan Society, upon property which included that herein involved. The other is a deed of trust executed by the same parties on August 6, 1913, whereby the same property was conveyed to R. McColgan and F. W. Morrison, trustees, to secure a loan of money made by Daniel A. McColgan. The ground upon which plaintiff sought relief was that at the time of the execution of these two instruments she was a minor under the age of 18 years. The court made findings and conclusions of law, followed by a judgment for plaintiff quieting her title as against the Hibernia Savings & Loan Society, and in favor of defendants Morrison and the McColgans whose interest in the property was founded upon the deed of trust. Thereafter the court made an order, granting plaintiff's motion, made under section 663 of the Code of Civil Procedure, to vacate and set aside the judgment in favor of said last-named defendants upon the ground that the conclusions of law were inconsistent with the facts found. The conclusions of law were thereupon amended, and a new judgment conformable thereto entered in favor of plaintiff, the effect of which was to declare the deed of trust, as well as the mortgage, void. The appeal is from this judgment, and prosecuted by Morrison and the McColgans, whose chief contention is that the findings do not support the amended conclusions of law and judgment.

The findings, other than as to facts herein-

before stated, which are material to the controversy, are as follows: "That the plaintiff, Sibyl M. Lee, became 18 years of age on the 31st day of December, 1914." That at the time when plaintiff executed the deed of trust on August 6, 1913, given in consideration of the loan so made, she did not inform Daniel A. McColgan that she was under 18 years of age. That about November or December, 1913, defendant learned that plaintiff was under 18 years of age when she executed the deed of trust, and upon his threatening to have the trust executed on account of default in paying said note she represented that she would be 18 years of age on December 31, 1913, and promised if he would forego sale of the property on account of such default and advance to her and her mother an additional \$500 under the security of the trust deed, she would, after December 31, 1913, ratify and confirm the same. That such sum was advanced prior to January 14, 1914, on which date plaintiff and her mother, both knowing the same to be false, made affidavit that Sibyl became 18 years of age on December 31, 1913, and on the same day (January 14th) ratified and confirmed the trust deed by executing an instrument fully set out in the findings wherein she stated: "I also ratify and confirm that certain deed of trust, dated August 6, 1913, made and executed * * * by myself in favor of Daniel A. McColgan." That plaintiff prior to commencement of the action never disaffirmed her said acts in executing said deed of trust. That but for the security of said deed of trust defendant will be unable to enforce payment of the loan so made to plaintiff. That defendant was deceived by said affidavits as to plaintiff's age, who, on August 6, 1913, had the physical appearance and mentality of an adult woman.

Section 33 of the Civil Code provides that "a minor cannot give a delegation of power, nor under the age of eighteen, make a contract relating to real property, or any interest therein;" and section 35 of the Civil Code provides that contracts, other than those specified in sections 36 and 37 of the Civil Code, of which this is not one, so made by minors under 18 may be disaffirmed by the minor himself either before his majority or within a reasonable time afterwards, but as to contracts of the character here involved made by minors over 18 years of age the consideration must, as a condition of such disaffirmance, be restored to the party from whom it was received.

[1] Under these provisions and as declared in *Hakes Investment Co. v. Lyons*, 166 Cal. 557, 137 Pac. 911, the deed of trust so executed by plaintiff on August 6, 1913, was, notwithstanding her mature appearance as found by the court, absolutely void, and no legal duty devolved upon her, as a condition of disaffirming the deed, to restore to defendants the consideration received therefor from them. *Lackman v. Wood*, 25 Cal. 147-153.

[2] This being true, it is equally clear that since she was not 18 until December 31, 1914, her act on January 14, 1914, in executing the instrument purporting to confirm and ratify such deed of trust was likewise ineffectual for the purpose of validating the deed.

Appellants insist, however, that the findings of fact as to them show that she is estopped from asserting that she was under 18 years of age at the times in question. In support of this contention they rely upon the fact that, following the findings hereinbefore referred to, the court found as follows:

"That by reason of the facts herein set forth and found, the said Sibyl M. Lee is and ought to be estopped and prevented from asserting or proving, and ought not to be permitted and ought not to be and will not be permitted to assert or prove that she was on the 14th day of January, 1914, or at any time after the 31st day of December, 1913, or that she is, or at the commencement of this action was, under the age of 18 years."

[3] The rule is that findings should be construed most strongly in support of the judgment. *Cooley v. Brunswick Drug Co.*, 30 Cal. App. 58, 157 Pac. 13; *Ballou v. Sunflower Gold Mining Co.*, 165 Cal. 557, 132 Pac. 1036. The finding above quoted, and upon which appellants rely, is not one of fact, but a conclusion of law which the trial court, as stated, found from "the facts herein set forth and found." *Fritz v. Mills*, 12 Cal. App. 113, 106 Pac. 725. Even an ultimate finding of fact which is drawn as a conclusion from the probative facts previously found cannot stand if the specific facts upon which it is based do not support it. *Matter of Forrester*, 162 Cal. 493, 123 Pac. 283; *McKay v. Gesford*, 163 Cal. 243, 124 Pac. 1016, 41 L. R. A. (N. S.) 303, Ann. Cas. 1913E, 1253.

[4] The court specifically found that plaintiff, at the time when she executed the instruments, was under 18 years of age, hence she was incapable of making the deed. While it is true, as stated by appellants, that this court in *Hakes Investment Co. v. Lyons*, supra, in discussing an alleged estoppel in a like case, said, "There must be some act which is the equivalent of the execution of a new contract, or something which operates as an estoppel," nevertheless, such acts to operate as an estoppel must be performed after the minor reaches an age where she has capacity to act. To hold otherwise and say that, notwithstanding the express statutory declarations, a minor under 18 years of age is, because of her mature appearance and false representations as to her age, estopped from disaffirming a conveyance of real estate without restoring the consideration received therefor would nullify and destroy the plain provisions of sections 33 and 35 of the Civil Code.

The judgment and order are affirmed.

We concur: MELVIN, J.; WILBUR, J.

(177 Cal. 661)

TAINTER v. BRODERICK LAND & INVESTMENT CO. et al. (S. F. 7907.)

(Supreme Court of California. March 4, 1918.)

1. FRAUDULENT CONVEYANCES — 74(4) — RIGHTS OF CREDITORS.

Civ. Code, § 3442, making void as to existing creditors a conveyance by an insolvent without consideration, does not apply where the creditor attacking a transfer was not an existing creditor at the time of the conveyance, and there is no allegation that the debtor was then insolvent or in contemplation of insolvency.

2. FRAUDULENT CONVEYANCES — 261 — PLEADING — SUFFICIENCY.

In suit to set aside an alleged fraudulent conveyance, allegation that the debtor "is insolvent" relates to the time of the beginning of the action, and does not show insolvency at the time of the conveyance.

3. TRUSTS — 371(2) — RESULTING TRUSTS — FRAUDULENT CONVEYANCE.

In suit to set aside alleged fraudulent conveyance, where plaintiff claimed on the theory that a resulting trust arose in favor of the debtor, under which plaintiff could claim, but alleged that there was no consideration for the conveyance, such allegation showed that there was no trust, in view of Civ. Code, § 847, stating that trusts in real property are those only specified in the title, and section 853, providing for resulting trusts where title to land is taken in the name of another than him who paid the consideration, since the absence of consideration prevented application of the statute.

4. TRUSTS — 371(2) — OPERATION OF LAW — PLEADING — SUFFICIENCY.

Complaint alleging that plaintiff was a judgment creditor of the debtor, who caused a corporation to be formed to take title to land of which he would continue in possession, only the legal title being transferred and that such transaction was to hinder his creditors, but failing to allege that he was then insolvent, did not show a trust under which the judgment creditor could claim which arose by operation of law under Civ. Code, §§ 852, 2217, 2223, 2224, as to trusts by operation of law, or voluntary trusts, and as to involuntary trusts arising from fraud or mistake.

5. TRUSTS — 13 — AGREEMENT — CONVEYANCE WITHOUT CONSIDERATION.

A conveyance without consideration creates no trust in favor of the grantor.

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Suit by Frank L. Tainter against the Broderick Land & Investment Company and others. From a judgment sustaining demurrer to the complaint, plaintiff appeals. Affirmed.

Arthur Crane, of San Francisco, for appellant. James H. Boyer, of San Francisco, for respondents.

SHAW, J. The demurrer to the complaint was properly sustained. The object of the action was to subject to the payment of the plaintiff's judgment certain real estate standing in the name of the defendant corporation.

The complaint alleges that on June 10, 1908, Dudley was the owner of the property; that Dudley, Upham, and Meigs agreed to organize a corporation for the purpose of saving said property from Dudley's creditors, and provid-

ing that Dudley should remain in possession thereof, and that the title should be transferred to the proposed corporation without consideration, and for the purpose of defrauding Dudley's creditors; that in pursuance of said agreement said defendants caused the defendant corporation to be incorporated, and on July 13, 1908, caused Dudley to convey said property to said corporation "without consideration, and for the purpose of changing the legal title only"; that Dudley continued in possession of the land thereafter and used and still uses it as his own, and that said corporation holds the legal title thereto for and on behalf "of its true owner, said E. C. Dudley"; that but for said "resulting trust in his favor, and said ownership of said property, said defendant E. C. Dudley is wholly insolvent." It further alleges the recovery of a judgment by Tainter against Dudley on October 8, 1914, and that the same was given upon a demand for money advanced and after the conveyance to said defendant corporation by Dudley, and that said judgment is wholly unpaid. Execution had been issued thereon and returned wholly unsatisfied.

[1, 2] Section 3442 of the Civil Code provides that a transfer of property without valuable consideration "by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors." As the plaintiff was not an existing creditor of Dudley at the time of this transfer, and as there is no allegation that at the time of said transfer Dudley was either insolvent or in contemplation of insolvency, this provision has no application to this case. *Atkinson v. Western D. Syndicate*, 170 Cal. 506, 150 Pac. 360; *Bull v. Bray*, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576. The allegation is that he "is insolvent." This relates to the time of the beginning of the action. The record does not show the date of the beginning of the action. The complaint in question is the third amended complaint. But as the judgment recovered by plaintiff was given in October, 1914, which must necessarily have been prior to the beginning of the action, while the transfer was made in July, 1908, it is apparent that there is no allegation that Dudley was insolvent or in contemplation of insolvency at the time of the transfer.

[3] The appellant contends that the allegations of the complaint are sufficient to show that a resulting trust in the property exists in favor of Dudley, and therefore that the plaintiff may avail himself of Dudley's interest in the property and subject the same to his judgment. The facts alleged do not show the existence of any resulting trust. By section 847 of the Civil Code, it is declared that trusts in real property "are those only which are specified in this title." The only trust mentioned that bears any re-

semblance to the trust claimed in this case is that provided in section 853, that "when a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." Such a trust arises only when there is a consideration paid. The allegation that there is no consideration takes the case out of the provisions of that section.

[4] The only other trust which could exist under the Code is that declared by the third subdivision of section 852, that is, trusts created by operation of law. There are no allegations sufficient to constitute a trust created by operation of law. Such a trust is designated as "an involuntary trust." Civ. Code, § 2217. An involuntary trust arises when one wrongfully detains a thing from the owner (section 2223), or gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act (section 2224). There are no allegations in the complaint to show that the corporation gained the property by any of these means.

[5] A conveyance without consideration creates no trust in favor of the grantor. *Tillaux v. Tillaux*, 115 Cal. 668, 47 Pac. 691; 1 Perry on Trusts, § 162. Hence there is no showing of any trust estate in Dudley which could be reached either by him or by the plaintiff as his creditor.

The judgment is affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

(177 Cal. 678)

PEOPLE v. SCHOON. (Cr. 2099.)

(Supreme Court of California. March 6, 1918.
Rehearing Denied April 4, 1918.)

1. HOMICIDE §253(1) — MURDER — EVIDENCE—SUFFICIENCY.

Evidence held to sustain conviction of murder in the first degree.

2. JURY §97(1,3) — QUALIFICATION — BIAS.

Where a juror stated that he had formed no opinion and had no bias against an ex-convict or an I. W. W., challenge for actual bias was properly disallowed, although he did not state a belief in defendant's innocence.

3. JURY §133 — QUALIFICATION — BIAS.

Where a juror on his examination made conflicting statements, the court could properly determine whether he was biased, and it was not, as matter of law, error to disallow the challenge for actual bias.

4. CRIMINAL LAW §444—EVIDENCE—MAPS—AUTHENTICATION.

In prosecution for murder, a map could properly be used in evidence as a diagram for the purpose of illustration only if shown to be accurate.

5. CRIMINAL LAW §404(4) — DEMONSTRATIVE EVIDENCE.

In prosecution for murder, there was no error in admitting in evidence a pair of gloves found in deceased's pocket.

6. CRIMINAL LAW §448(2) — EVIDENCE — CONCLUSION.

In prosecution for murder, a witness could say that at the time the shots were fired he then thought he saw somebody lying on the sidewalk at the point of the killing; such statement not being his conclusion, but the result of his personal observation.

7. CRIMINAL LAW §407(1)—ADMISSIONS—SILENCE.

In prosecution for murder, a witness could testify that when accused was arrested an officer broke accused's pistol, smelled it, and said it had recently been fired, and that accused made no denial; such evidence tending to show tacit admission.

8. CRIMINAL LAW §407(1) — EVIDENCE — ADMISSIONS.

In prosecution for murder, a witness could say that another said to him, in accused's presence, that, "This is the gun we took from him," which statement accused did not deny; there being no conflict as to the identity of the pistol.

9. CRIMINAL LAW §412(3) — EVIDENCE — STATEMENTS OF ACCUSED.

Statements of accused, after he was arrested, denying the accusation, and denying other statements of those who arrested him, though, taken with other facts, they tended to establish his guilt, were admissible, since they were not confessions.

10. CRIMINAL LAW §1137(5) — APPEAL — INVITED ERROR—ADMISSION OF EVIDENCE.

Claim of error in admitting evidence that one accused of murder was under a sentence of deportation as an undesirable alien cannot be sustained, where such evidence was admitted by stipulation in which defendant's attorney concurred.

11. CRIMINAL LAW §1141(1) — PREJUDICIAL ERROR—EVIDENCE—PRESUMPTION.

Emphasis during trial on fact that one accused of murder was a member of the I. W. W. cannot be presumed to have been prejudicial.

In Bank. Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Joseph Schoon was convicted of murder, and from the judgment and an order denying motion for new trial, he appeals. Affirmed.

W. H. Briggs and Fred H. Moore, both of Stockton, and S. Luke Howe and Roy Hibbitt, both of Sacramento, for appellant. U. S. Webb, Atty. Gen., for the People.

ANGELLOTTI, C. J. The defendant was informed against for the crime of murder, in the unlawful killing of John L. Brisco, a police officer of the city of Stockton. He was convicted of murder in the first degree, and prosecutes this appeal from the judgment and from an order denying his motion for a new trial.

[1] It is claimed that the evidence given on the trial is not sufficient to sustain the verdict. Defendant and a companion, who had come to Stockton on the evening of February 4, 1917, and spent the evening and night up to about 1 o'clock visiting several saloons and a restaurant begging, were arrested about 1 o'clock a. m., February 5, 1917, at the corner of Weber and El Dorado streets by deceased, and taken by him toward the police station, which fronted on Bridge street, between El Dorado street on the west and Hunter street

on the east, distant about 104 feet from El Dorado street. Deceased turned with his two prisoners from El Dorado street into Bridge street. Almost immediately thereafter was heard a shot in the vicinity of the police station, and, according to the testimony of many witnesses, shortly thereafter three shots in quick succession. There were officers in the police station, and many people in the Hotel Stockton, which occupied an adjoining block, who were roused by the shooting and who were able to give material evidence. There was testimony to the effect that immediately after the first shot a voice was heard to cry, "Oh, my God!" and then came the three shots in quick succession. A little alley adjoined the police station on the east, running from Bridge to Channel street. On the sidewalk of Bridge street, at the easterly corner of this alley, the deceased was found prostrate and dying from a bullet wound through his body. Near him was his revolver with three empty cartridges therein. The defendant and his companion had disappeared, and the companion has never been found by the authorities. The testimony quite clearly indicated that, after being shot, the deceased had attempted to pursue his assailant or assailants, firing three shots from his revolver, and had succeeded in reaching the corner where he fell. The deceased was at once taken to the emergency hospital, where he almost immediately died. His body was then taken to the morgue, where, on removing his clothing, a bullet was found between his skin and shirt which gave every evidence of being the bullet which had passed through his body. Within about an hour from the time of the shooting the defendant was captured by the officers at a point quite a distance from the police station, where apparently he was endeavoring to conceal himself. There was testimony that he was perspiring and breathing heavily, and gave every indication of having been running. A 38-caliber pistol was found in one of his pockets, fully loaded, and an extra cartridge in a vest pocket. There was testimony on the part of those who examined the pistol to the effect that it showed it had been very recently discharged. There was testimony to the effect that the bullet found in the clothing of deceased was in all respects such a bullet as would be discharged from defendant's pistol. There was also evidence to the effect that the coat of deceased show that at the time of the shooting of deceased the muzzle of the weapon was so close to his body that it left the carbon from the powder on his coat. We are at a loss to see how, in the face of this proof, it can be held that the verdict is without sufficient support in the evidence.

Certain errors in the proceedings in the trial court are alleged.

[2] 1. It is claimed that the trial court erred in disallowing the challenge for actual bias to one Franklin C. Turner, who had been

called and examined as to his qualifications to serve as a juror. The record shows that Mr. Turner did not serve as a juror in this case. He was excused on peremptory challenge by the defendant. Regardless of this, however, the court did not err in disallowing the challenge for actual bias. His examination showed him to be absolutely qualified in all respects to serve as a juror. He had formed or expressed no opinion; had no prejudice whatever; it would not make any difference that the man was an ex-convict or an I. W. W.; he would require the state to prove the case, beyond a reasonable doubt before he would convict; he would presume him innocent until the evidence established his guilt. The whole contention of appellant in regard to this juror is based on the fact that he could not say that, as matter of fact, he then had no doubt of his innocence. It has never been held that absolute belief of a defendant's innocence is an essential qualification of a juror. All that he meant by his statement was that in view of the charge there might be something against the defendant.

[3] 2. It is claimed that the court erred in disallowing a challenge for actual bias to Juror F. E. Russell. Mr. Russell was the twelfth juror sworn to try the cause, and the peremptory challenges of the defendant had then been exhausted. To our minds, a reading of the entire testimony of the juror on his voir dire shows that he was entirely unprejudiced, and in such a condition of mind that he could and would try the case fairly and impartially. While some of his answers, taken alone, might indicate a possible prejudice in the event that certain facts appeared in evidence, the case is one fully covered by what was said in *People v. Ryan*, 152 Cal. 364, 371, 92 Pac. 853, to the effect that where answers of the juror to questions of counsel are contradictory, the trial court must decide which of the answers most truly shows the juror's mind, and its decision is binding on the appellate court. We see no reason to doubt the correctness of the action of the trial court in this matter.

[4] 3. The map used in evidence as a diagram for the purpose of illustration only was shown to be an accurate diagram in all material respects. We see no error in the action of the trial court in regard thereto.

[5] 4. Why it was error to admit in evidence a pair of gloves found in a pocket of the clothing of deceased is not pointed out, and we can see no ground for the claim.

[6] 5. The trial court did not err in refusing to strike out a portion of an answer given by Mr. Neumiller, a witness who, hearing the shots, went to his window in the Hotel Stockton, from which he could see the police station and Bridge street in the vicinity thereof. He said:

"I saw some one come from the police office and rush down Bridge street towards Hunter, and I thought then I saw somebody lying on

the sidewalk there opposite the vestibule of the saloon."

The witness was simply stating the result of his personal observation. In substance, he said that looking at the place indicated it appeared to him that somebody was lying on the sidewalk there. He was not positive as to this, but it then seemed to him that such was the case. There is no legal objection to such testimony. Whatever objection there may be to the same goes purely to its weight, which is a question for the jury. See, as bearing on this matter, *People v. Rolfe*, 61 Cal. 540; *People v. Soap*, 127 Cal. 410, 59 Pac. 771; 1 *Wigmore on Evidence*, § 658, p. 753.

6. No reason is stated why the court erred in refusing to strike out a portion of the testimony of L. J. Hansen, and we can conceive of none.

7. What we have said as to the refusal of the court to strike out a portion of the testimony of Mr. Neumiller applies equally to the action of the court in regard to the testimony of Mr. Tulan.

[7] 8. When the defendant was arrested and his pistol taken from him, some of the officers, in his immediate presence and hearing, broke it and smelled it and said it had been recently fired. The defendant remained silent, making no denial. A motion to strike out testimony of Frank Prahser to this effect was denied. In view of our decisions there was no error in this. Defendant's conduct in the face of this action and this statement of the officers, in his presence and hearing, there being no reason why he would not feel at liberty to reply and deny, was evidence tending to show a tacit admission by him of the truth of the statement of the officers, the weight of which was a question of fact for the jury. See *People v. Amaya*, 134 Cal. 536, 66 Pac. 794.

[8] 9. The same thing is true as to the testimony of Dr. L. R. Johnson that, "Mr. Perryman said 'this is the gun we took from him, Doctor.'" It may properly be added that there was no conflict of evidence as to the identity of the pistol, that matter being proved by a great amount of testimony which was in no degree questioned.

[9] 10. A shorthand reporter was allowed to testify to statements made by the defendant to the district attorney and other officers shortly after his arrest, in response to questions asked by the district attorney. A great part of this came in without objection of any kind being made. A part was introduced by defendant's attorney. The objection urged here is that the statements were not free and voluntary, but were obtained through the "old-fashioned third degree sweat process." The record indicates that there was no improper inducement of any kind, and that the defendant when questioned in a perfectly proper and ordinary way, without the slightest pressure, answered freely. There was no acknowledgment of guilt by the defendant in

these statements. He steadily insisted that he did not discharge his pistol that night; that it had not been out of his pocket until taken therefrom at the time of his arrest; that he saw no one shoot; that he heard some shots, saw his companion run, and ran himself, etc. There was nothing in the nature of a confession. As said in *People v. Miller*, 122 Cal. 87, 54 Pac. 524:

"The term 'confessions' is restricted to acknowledgments of guilt. 1 *Greenleaf on Evidence*, 170. This court said in *People v. Parton*, 49 Cal. 632, 'An admission of a fact, not in itself involving criminal intent, is not to be rejected as evidence (without the preliminary proof) merely because it may, when connected with other facts, tend to establish guilt,'"

See, also, *People v. Le Roy*, 65 Cal. 613, 4 Pac. 649; *People v. Velarde*, 59 Cal. 461.

[10] 11. For some reason defendant's attorney deemed it to defendant's advantage to get before the jury the fact that at the time of the shooting defendant was under sentence of deportation from the country to his native country (Holland) as an undesirable alien, having been paroled from the state prison at San Quentin on that condition, and that while being transported in the custody of federal officers with that end in view, he had escaped from such officers somewhere "in the Dakotas," about two months before, and had ever since been at large. He had produced a witness to prove certain of these facts, when, at his own suggestion, these matters were stipulated. The same things were subsequently substantially disclosed by the testimony of admissions and statements made by the defendant. It is now urged that the acceptance of such a stipulation was prejudicial error necessitating a reversal. We do not see how any claim of error can be predicated on this action of the court, insisted on, as it was, by the defendant's attorney. It may have been an ill-advised thing for the defendant to himself show these facts, but as to that we are not at all satisfied. Doubtless the district attorney, who, by reason of defendant's previous admissions, knew the facts, could have made proof thereof as evidence of motive for the killing—to show that the circumstances were such that the defendant deemed it necessary to resort to any means in order to escape from the custody of the officer. Perhaps the attorney for the defendant, knowing this, very properly concluded that it would be advisable for defendant to frankly admit the facts himself, rather than have the matters proved against him by the state, especially as he might fairly claim that such facts explained his flight from the scene of the shooting on a theory other than that of guilt in the matter of the killing, viz. the desire to escape a return to the state prison for violation of his parole, and deportation, which would be almost certain to follow his arrest and any investigation into his antecedents. Certainly we would not be warranted in reversing the judgment

because the defendant, through his counsel, saw fit to adopt this policy in his defense.

[11] On the oral argument much stress was laid on the fact that it was disclosed on the trial that the defendant was a member of the "Industrial Workers of the World," or the "I. W. W.," as it is commonly known, having joined it two or three months before his arrest. It is claimed that this must have prejudiced him in the minds of the jurors. An examination of the record has disclosed no action or ruling of the trial court relative to this matter that can be held erroneous. We are not warranted in assuming that the jurors were influenced by this fact in arriving at a verdict.

No other point is made in support of the appeal. We have examined the whole record and find therein nothing that would warrant us in ordering a reversal.

The judgment and order denying a new trial are affirmed.

We concur: SLOSS, J.; MELVIN, J.; SHAW, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 660)

IN RE EWER'S WILL. (S. F. 8557.)

(Supreme Court of California. March 2, 1918.)

1. EXECUTORS AND ADMINISTRATORS — 315
(6)—DECREE OF DISTRIBUTION—CONCLUSIVE-
NESS.

A decree of final distribution "that in accordance with the provisions of the will" residue shall be distributed to N. "as trustee for E. B. E." is not contrary to a will providing that on death of E. B. E. the trust estate should go to A. E., and the two must be construed together.

2. EXECUTORS AND ADMINISTRATORS — 315(6)
—DECREE OF DISTRIBUTION—CONSTRUCTION.

The rule that a decree of distribution prevails over provisions of the will where the two conflict is one of necessity, and where the necessity does not exist, the decree should be construed so as to be consistent with the will, if possible.

In Bank. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

In the matter of the trust created by the last will of Warren B. Ewer, deceased. The beneficiary, Eliza B. Ewer, having died, her special administrator, Jesse L. Healy, petitioned for distribution, and Alfred Ewer appeared claiming the trust property. From an order in favor of the latter, the special administrator appeals. Affirmed.

Watt, Thornton & Watt and Watt, Miller, Thornton & Watt, all of San Francisco, for appellant. Carter P. Pomeroy, of San Francisco, for respondent.

SHAW, J. The decree of final distribution of the estate of Warren B. Ewer, deceased, recited:

"That in accordance with the provisions of the last will and testament of said deceased the said residue now remaining in the hands of said executor should be distributed as follows: To

Ora S. Ewer, widow, \$5,000. To Eliza B. Ewer, surviving daughter, \$500. * * * To Chas. E. Naylor, as trustee for Eliza B. Ewer, \$25,000."

The decree then provided:

"That the residue of said estate hereinabove particularly described and mentioned be, and the same is hereby, distributed as follows: To Ora S. Ewer, widow \$5,000. To Eliza B. Ewer, surviving daughter, \$500. To Chas. E. Naylor, as trustee for Eliza B. Ewer, \$25,000."

The will of Warren B. Ewer bequeathed \$25,000 to Chas. E. Naylor on certain trusts therein described, and provided that upon the death of Naylor the Mercantile Trust Company should succeed him as such trustee. Naylor afterwards died and the trust company was substituted as his successor. Eliza B. Ewer, the beneficiary named in the decree, died on January 4, 1917. The appellant, Jesse L. Healy, was thereupon appointed special administrator of her estate. After her death the trust company filed its final account, and asked that the trust be closed, and that the corpus of the estate be ordered distributed to the party entitled thereto. Upon the hearing of this account and petition Healy, as administrator of Eliza B. Ewer's estate, appeared and asked distribution of the balance remaining in the hands of the trustee, on the ground that the decree of distribution vested the title thereto absolutely in Eliza B. Ewer, and that upon her death it descended to her heirs and became a part of her estate. Alfred Ewer also appeared and claimed that by the terms of the trust he was entitled to distribution of the said residue remaining in the hands of the trustee. The court held in favor of Alfred Ewer, and ordered that the residue be paid over to him by the trustee. From this order Healy appeals.

It is the contention of the appellant that the direction in the decree of distribution of the estate of Ewer to distribute \$25,000 to Chas. E. Naylor "as trustee for Eliza B. Ewer" is unconditional and positive, and that no other person is thereby given any interest in the property; that the beneficial interest and equitable title vested in Eliza B. Ewer accordingly, in consequence whereof at her death it descended to her heirs. The respondent claims that by virtue of the reference in the decree to the last will of Warren B. Ewer the court may look to said will to determine the nature of the trust upon which Naylor was to hold the money distributed to him.

[1] We are of the opinion that the contention of the respondent is correct. The rule is well established that where the decree of distribution is contrary to the provisions in the will, the decree controls and prevails over the terms of the will with respect to the distribution of the property; in other words, that the will cannot be used to impeach the decree of distribution. *Goad v. Montgomery*, 119 Cal. 557, 51 Pac. 681, 63

Am. St. Rep. 145; *McCloud v. Hewlett*, 135 Cal. 368, 67 Pac. 333. But while the will cannot be used to impeach the decree, it can be used to explain it where the decree taken alone is uncertain, vague, or ambiguous. In *McCloud v. Hewlett*, supra, the court said:

"It is true that the judgment is a final determination of the rights of the parties to the proceeding, and that the will cannot be used to impeach the judgment, although it may be referred to in aid of the judgment where necessary."

A similar ruling was made in *Horton v. Winbiger*, 165 Pac. 428. The direction to pay the \$25,000 to Chas. E. Naylor, as trustee for Eliza B. Ewer, gives no information as to the nature of the trust upon which the money was to be held. The decree further provided that Naylor should be required to give a bond as trustee before distribution was made to him, and it also named Alfred Ewer as the "residuary legatee." The finding that the residue remaining in the hands of the executor should be distributed "in accordance with the provisions of the last will and testament of said deceased," together with the other references in the decree, sufficiently incorporated the provisions of the will into the decree for the purposes of reference to aid the decree and ascertain the nature of the trust. The will was a part of the record of the proceedings in the estate, and it may therefore be considered for the purpose stated. Turning to the will, we find that it bequeathed to Naylor as trustee \$25,000, "to be held by him and finally disposed of by him or his successor as hereinafter specified." The money was to be invested by the trustee so as to produce an income. Such income was to be paid to Eliza B. Ewer, daughter of the decedent, and at her death—

"the unexpended portion of the principal sum thereof shall be delivered by my said trustee to my residuary legatee hereinafter named, or to his surviving child or children should he not survive my said daughter, my intention being that when my said daughter is deceased the said principal sum of twenty-five thousand dollars or the remainder thereof shall go to and will have been delivered by said trustee or his successor to my said residuary legatee or to his surviving children."

The will also declared:

"I give, bequeath and devise unto my nephew, Alfred Ewer * * * all the rest, residue and remainder of my property and estate of whatever kind and description, and wherever situated, including therein the unused or unexpended balance of the aforesaid sum of \$25,000.00 comprising the trust fund herein created."

Interpreting the decree in connection with the will, therefore, the nature of the trust is made entirely clear. The trustee named, or his successor in case of his death, was to use the income for the benefit of the daughter Eliza B. Ewer during her lifetime, and was then to deliver the unexpended balance to the residuary legatee, Alfred Ewer. Taking the two documents together, there is no ambiguity or doubt in regard to the final distribution of the trust estate.

[2] The rule that the decree of distribution prevails over the provisions of the will where the two are in conflict is one of necessity. It should not be applied in cases where the necessity does not exist, and if reasonably possible the decree should be construed so as to be consistent with the will, and so as to incorporate the will into it as a part of its directions, rather than to give it a meaning which conflicts with the provisions of the will. There was no controversy as to the meaning of the will, and we cannot ascribe to the court any purpose or intent to dispose of the estate contrary to its terms. While a single phrase of the decree, apart from the context, though indefinite in itself, could possibly be construed as a distribution of the fund absolutely to Eliza B. Ewer, yet the decree as a whole shows that the intention of the court making it was to give the fund over to the trustee to hold and dispose of it upon the trust stated in the will, and in accordance therewith. It should, therefore, be given that effect. We think the court below properly directed that the money be paid to the residuary legatee, the respondent herein.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; VICTOR E. SHAW, Judge pro tem.; SLOSS, J.; RICHARDS, Judge pro tem.; MELVIN, J.

(177 Cal. 685)

COOPER v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.
(L. A. 5342.)

(Supreme Court of California. March 6, 1918.)

MASTER AND SERVANT §361—WORKMEN'S COMPENSATION ACT—RELATIONSHIP—PARTNER—"PARTNERSHIP"—"EMPLOYÉ."

Where a mining partnership, sending one of its members to examine a mine which the firm owned, agreed to pay him expenses and \$5 a day for his time on the trip, and he was killed at the mine by operation of machinery owned and operated by the firm, his widow was not entitled to compensation, he not being an employé of the firm under the Workmen's Compensation Act (St. 1913, p. 284) § 14; the definition of the term "partnership" as "an association of two or more persons for the purpose of carrying on business together and dividing its profits between them" implying that each of its members shall render such services to the firm as he is able, and without compensation, in the absence of special agreement to the contrary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Partnership; Employé.]

In Bank. Certiorari by Eva L. Cooper to review the action of the Industrial Accident Commission in proceedings under the Workmen's Compensation Act to recover compensation for death of W. L. Cooper, in which relief was denied. Application dismissed, and order of the commission affirmed.

Willis I. Morrison, of Los Angeles, for petitioner. Schweitzer & Hutton, of Los An-

geles, and Redman & Alexander, of San Francisco (Christopher M. Bradley, of San Francisco, of counsel), for respondents.

RICHARDS, Judge pro tem. This is a petition for a writ of certiorari by which we are asked to review the action of the Industrial Accident Commission in its order denying relief to the petitioner herein, who was the applicant before it. The facts of the case are undisputed and present but one question for our determination. The applicant, Eva L. Cooper, is the widow of one W. L. Cooper, deceased. Said W. L. Cooper was at one time the owner of certain mining claims located in the county of Inyo. In the month of October, 1916, he took part in the organization of a mining partnership formed for the purpose of taking over his said mining claims, of which partnership he then became, and up to his death continued to be, one of the members. Within a month or so after the formation of this partnership its superintendent made certain reports as to conditions at the mine, which led the members of the firm to request Mr. Cooper, who was a practical mining engineer, to go to the mine and resample it and verify certain of his former reports, upon the strength of which the property had been taken over by the partnership. It was agreed that his expenses on the trip should be paid by the firm, and also that he should be allowed \$5 per day for his time, the latter amount to be paid out of the proceeds of certain shipments of ore which the firm was about to make. Cooper went to the mine pursuant to this arrangement, and while there was injured through the operation of a bucket tram owned and operated by the firm of which he was a member, from which injuries he died. His widow thereupon applied to the Industrial Accident Commission for relief against the partnership, and its insurer, the Ocean Accident & Guarantee Corporation. Upon the hearing the commission denied relief to the applicant upon the sole ground:

"That at the time of his injury and death said W. L. Cooper was a member of said copartnership, and therefore was not an employé of such copartnership within the meaning of section 14 of the Workmen's Compensation, Insurance, and Safety Act, and this commission is without jurisdiction over the parties hereto."

This presents as the sole matter for review the following question:

"Does a member of a partnership performing services for it under an agreement such as that here presented come within the terms of the Workmen's Compensation Act so as to entitle his widow to compensation from the firm of which he is a member, and from its insurer, against injuries to its employés? In other words, was the deceased an employé of the firm of which he was a member, within the intent and meaning of the Workmen's Compensation Act?"

We are constrained to hold that the Industrial Accident Commission was correct in its conclusion upon this subject. Ordinarily the relation between a partnership and its mem-

bers performing services for it is not the relation of employer and employés. The definition of the term "partnership" as "an association of two or more persons for the purpose of carrying on business together and dividing its profits between them" implies that each of its members shall render such services to the firm as he is able, and without compensation, in the absence of special agreements to the contrary. In the rendition of such services the partner is acting in no sense in the capacity of a servant or employé subject to the direction, or it may be discharge, of his firm acting as his master or employer. This court has held that in the absence of a special agreement to the contrary, one partner may not recover against his firm or fellow partners for the value of any services he may have rendered to the partnership (*Nevills v. Moore Mining Co.*, 135 Cal. 561, 87 Pac. 1054), and has further decided that even in the case of a contract for particular services at an agreed salary, an action at law was not maintainable by a partner thereon until there had been an accounting and settlement of the partnership affairs (*Dukes v. Kellogg*, 127 Cal. 563, 60 Pac. 44; *Ross v. Cornell*, 45 Cal. 133).

The Workmen's Compensation Act clearly does not contemplate such a mixed relation as that existing between partners, wherein each member of the partnership is at the same time principal and agent, master and servant, employer and employé; and wherein each, in any services he may render, whether under his general duty as a partner, or under a special agreement for some particular service, is working for himself as much as for his associates in carrying on the business of the firm. The obvious intent of the act was to substitute its procedure for the former method of settling disputes arising between those occupying the strict relationship of master and servant, or employer and employé, by means of actions for damages, with their pleas of negligent acts or omissions in the way of providing suitable places to work, or proper appliances and the like, and with their defenses of assumed risks, or of the negligence of fellow servants, or of contributory negligence, and with the uncertainties or inequities incident to jury trials, all elements of damage, defense, or consequence, which obviously could not arise out of the partnership relation.

The instant case illustrates this aptly. The decedent was fatally injured through the giving way of the standards of a bucket tram being operated at the time, by reason either of its improper construction or negligent operation. Had the decedent survived to sue for his injury, he could not recover against his firm or his associates upon the plea that the appliance was defectively constructed, for the reason that as a member of the firm he was as fully responsible for such defects as were his fellow members thereof; nor could he recover for the negli-

gent operation of the appliance by the employés in charge of it, for they were his own employés as much as they were the employés of his fellow partners; nor, as to such employés, could he be said to be a fellow employé, without involving the legal aspects of the case in hopeless contradictions. In a word, the law relative to compensation as between master and servant, or employer and employé, for injuries suffered by the latter, contemplates two persons standing in this opposed relation, and not the anomaly of one person occupying the dual relation of master and servant, employer and employé, plaintiff and defendant, or person entitled to a judgment or award in his favor and person bound to pay a part thereof out of his own proportionate share of the partnership property and the balance, amounting possibly to the whole thereof, out of his own individual estate. Evidently the Workmen's Compensation Act did not contemplate these anomalies in its ample and detailed provisions for compensation to injured workmen and to those dependent upon them. We are cited to numerous cases by the appellant bearing upon the question of the power of a partner to make a contract of employment with his firm, but to no cases which hold that such a person when injured in the course of such service would be entitled to compensation under any of the various Workmen's Compensation Acts which have come into existence in this country and in England of recent years. On the other hand, our attention is directed by the respondent to the fact that the Workmen's Compensation Act of this state is derived from the English act of Parliament upon the same subject, and that said act has been there construed as inapplicable to a partner seeking compensation for injuries from the firm of which he is a member. In the case of *Ellis v. Ellis Company*, 7 W. C. C. 97, which was practically identical as to its facts with the case at bar, it was said:

"The question is whether the deceased can be considered as a 'workman' within the act, and the members of the partnership as his employers. The act is not applicable to such a case as the present, where the person injured is in the position of both employer and employed. An arrangement between partners such as we have here in which one partner agrees to do work for the partnership in respect of which he is to be paid what are called 'wages,' does not really create the relation of employers and employed. Such an arrangement is, in reality, nothing more than a mode of adjusting the accounts between the partners. It does not alter the fundamental position of each partner, which is that of a coadventurer with each member of the partnership. A person who is a partner cannot put himself into the position of not being a partner, or into the position of being a 'workman' being employed when he is really the person giving employment. The whole act depends upon the difference of the relation of employer and employed. Section 1 contemplates a relation between two parties, between an employer and the person whom he employs, and I do not think that one person can be both em-

ployer and employed. It is only necessary to analyze the position of the deceased to see that he cannot be a 'workman.' He was not a person in the employment of employers such as is contemplated by the act."

We are in accord with these views and adopt them as applicable to our local statute and to the instant case. It follows that the application for a writ should be dismissed and the order of the commission affirmed.

It is so ordered.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHAW, J.; SLOSS, J.; MELVIN, J.

(177 Cal. 668)

In re ALLEN'S ESTATE.

ALLEN v. ELLIOTT.

(S. F. 8368.)

(Supreme Court of California. March 5, 1918.)

1. WILLS §52(5)—MENTAL CAPACITY—BURDEN OF PROOF.

The burden is on contestant to prove the existence of alleged delusions of testator.

2. WILLS §55(3)—DELUSIONS—SUFFICIENCY OF EVIDENCE.

To prove the existence of alleged delusions of testator, contestant must show, not only that they had no existence in fact, but also that there was no evidence, however slight or inconclusive, of any fact upon which the belief could be founded.

3. WILLS §53(5)—DELUSIONS—ADMISSIBILITY OF EVIDENCE.

In determining the issue of insane delusions, the jury might consider testator's nature and temperament, his advanced age, the circumstances under which statements by him were made, his habits of life, and the general conduct of contestant and her sister towards him.

4. WILLS §55(3)—DELUSIONS—SUFFICIENCY OF EVIDENCE.

Evidence held insufficient to show testator was the victim of insane delusions when he made the will.

5. WILLS §53(5)—DELUSIONS—EVIDENCE.

Where the belief of testator that contestant and her sister, testator's daughters, had large sums of money loaned out and in bank was the chief delusion alleged to have contributed to the making of the will, evidence of contestant's wealth was competent to show such belief was not a delusion, but founded in truth, and also as tending to show testator had, in fact, as declared by him, made ample provision for his daughters, since their needs, depending upon what they possessed, would be the measure of what constituted ample provision.

6. TRIAL §45(1)—PRESENTATION OF OBJECTIONS—EVIDENCE.

Where in will contest answer was excluded to question as to what witness observed in testator's appearance, conversation, and acts, with reference to his being rational, because witness had not first stated, as provided by Code Civ. Proc. § 1870, whether he believed testator to have been of unsound mind, but counsel refused to reframe his question as thus suggested, and failed to clearly indicate to the court that the evidence sought was as to acts and conduct, he could not complain of the exclusion of such evidence, which, it not being made to appear that it was sought to establish the existence of insane delusions, could not be deemed prejudicial.

7. WILLS §54(3) — EVIDENCE — TESTATOR'S DECLARATIONS.

Evidence of testator's declarations, made prior to the execution of the will, that he intended to leave his property to the beneficiaries under the will was admissible.

8. WILLS §54(2) — CONTEST — EVIDENCE.

In a will contest, evidence that testator was opposed to the marriage of one of his daughters, which occurred after the execution of the will, was admissible; testator having left his property to nephews instead of his next of kin, consisting of such daughter, and her sister, contestant of the will.

9. WITNESSES §268(8) — CROSS-EXAMINATION — INCONSISTENT STATEMENTS.

In will contest, where contestant, testator's daughter, testified he had been insane since 1897, it was proper cross-examination to show that, in action by deceased in his lifetime to set aside his deed to contestant and her sister, contestant had filed a verified answer, alleging that at the time of the execution of the deed, in 1909, he was sane and sound mentally.

10. WITNESSES §379(7) — CROSS-EXAMINATION — INCONSISTENT STATEMENTS.

Where contestant's sister testified that testator, her father, had always been insane, witness' answer in suit by deceased in his lifetime to set aside deed to these daughters, wherein she adopted the answer of her sister, and confirmed the same "as fully as if she had originally joined therein," was admissible, since it could not be assumed that witness, in so adopting the answer of her sister, was unfamiliar with its contents.

11. WILLS §54(1) — CONTEST — ADMISSIBILITY OF EVIDENCE.

In a will contest, involving the issue of testamentary capacity, the court properly permitted both parties great latitude in evidence as to the conduct, acts, and declarations of testator, both before and after executing the will.

12. APPEAL AND ERROR §928(2) — PRESUMPTIONS — INSTRUCTIONS.

On appeal it is assumed, in absence of contrary showing, that the jury were properly instructed as to the application of facts proved.

13. TRIAL §62(2) — REBUTTAL EVIDENCE.

Where some witnesses for proponent, in testifying to testator's sanity, referred to specific acts in connection with the erection of a building by him subsequent to the making of the will, evidence offered by contestant, consisting of testimony of the architect for the building, as to the extent testator looked after its construction, was properly excluded as not being in rebuttal of any facts testified to by proponent's witnesses.

14. WILLS §52(5) — CONTEST — BURDEN OF PROOF.

It devolved upon contestant to prove, not only such delusions, but that the will was made as the result thereof.

Department 2. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Application by John Elliott to probate will of Andrew Allen, to which Jane A. Allen filed contest. From adverse judgment, and an order admitting the will to probate, contestant appeals. Affirmed.

See, also, 169 Pac. 364.

E. K. Taylor, of Alameda, and P. J. Crosby, of Oakland, for appellant. McNair & Stoker, Elliott Johnson, and R. W. Palmer, all of San Francisco, for respondent.

VICTOR E. SHAW, Judge pro tem. Andrew Allen died January 20, 1916, at the age of 79 years, leaving a duly executed olographic will dated March 29, 1911, which John Elliott, therein named as executor, filed, with his petition to have the same probated. By the terms of the will deceased left his estate, consisting of real estate and improvements worth approximately \$25,000, and subject to a mortgage of \$11,000, to two nephews. His next of kin consisted of two daughters, Hannah J. Pearson and Jane A. Allen, for whom, he stated in the will, he had amply provided by deeds of gift and money. Jane A. Allen filed a contest of the will based upon the alleged ground that at the time of its execution by her father he was of unsound mind and without capacity to make a will. The issue as to this question was tried by a jury which returned a verdict that deceased was of sound mind when he executed the will, and in accordance with such verdict judgment was rendered against the contestant and an order made admitting the will to probate. The contestant appeals from this decree and order.

Appellant, while not claiming that deceased was insane in the broad sense of the term, insists that he was a victim of insane delusions, in the absence of which he would not have made the will whereby nothing was left to his daughters. In her brief appellant specifies a number of alleged delusions entertained by her father, among which was the fact that in his will and also in declarations made by him, he stated that he had amply provided for his daughters by gifts of property and money; that deceased believed that his daughters were conspiring against him; that there would be no one to care for him; that they were guilty of immoral acts; that he drew \$7,000 from the bank, and went to Ireland on a visit of ten days, and on his return stated that he came back because it rained; that he was suspicious of his daughters and others; that he used abusive language toward them, and magnified innocent trifles into grave offenses.

[1-4] The burden was on contestant to prove the existence of the alleged delusions, and to do this it not only devolved upon her to show that they had no foundation in fact, but also that there was no evidence, however slight or inconclusive, of any fact upon which the belief could be founded. The alleged conduct and opinions of deceased in the instant case are very similar to the grounds upon which the husband contested the will of his wife in the case of Estate of Scott, 128 Cal. 57, 60 Pac. 527, wherein the question here involved was fully considered, and the court in discussing the sufficiency of the evidence to establish the existence of an insane delusion, among other things, said:

"The court, however, was not authorized to hold that she [the testatrix] was under an in-

sane delusion in reference to these propositions [delusions], unless it was satisfied, from the evidence before it, not only that these charges against him were without any foundation in fact, but also that there was no evidence of any facts brought to her knowledge from which she might form a belief, however irrational or inconclusive it might be, in the existence of the acts or purposes with which she charged him, and, in addition thereto, that she did in fact believe that he was guilty thereof."

In *American Seamen's Friend Soc. v. Hopper*, 33 N. Y. 619, as touching a similar question, it was said:

"On questions of testamentary capacity, courts should be careful not to confound perverse opinions and unreasonable prejudice with mental alienation."

To like effect is *Smith v. Smith*, 48 N. J. Eq. 566, 25 Atl. 11. In the determination of the question it was proper for the jury to consider Allen's nature and temperament, his advanced age, the circumstances under which the statements were made, his habits of life, and the general conduct of his daughters towards him. The typewritten transcript of the testimony touching the acts and conduct of the deceased and upon which the claim of appellant is made covers some 750 pages. No purpose could be subserved by an extended reference to it. Briefly stated, the evidence tends to prove that deceased, notwithstanding his advanced age, was strong and robust, both mentally and physically, possessed of a dominating nature, his anger easily aroused, and at times violent in language and severe in manner towards his daughters, whom, though possessed of considerable property, upwards of \$20,000, of which their father had given them, not only refused to advise and confide in him as he requested them to do, but pursued a course of conduct well calculated to arouse his suspicion and create as to them a feeling of distrust as to their loyalty, and thus in his mind afford just ground for the belief that they were ungrateful and without affection for him. Feeling that his childless daughters, well advanced in life, were amply provided for, he not unnaturally, in view of all the circumstances, turned to the sons of a deceased brother, whom he had a few months before the making of the will visited in Ireland, and upon these bestowed the remainder of his property. We cannot say that the verdict is not justified by the evidence. On the contrary, had the respondent offered no evidence, the jury, upon that alone presented by contestant, might very properly have deemed it insufficient proof that testator was the victim of insane delusions when he made the will.

[6] Rulings of the court in admitting evidence as to the wealth of contestant are assigned as error. The belief entertained by Allen that his daughters had large sums of money loaned out and in bank was the chief delusion alleged to have contributed to the making of the will; hence evidence which tended to establish such fact was clearly

competent in that its purpose was to show that such belief was not a delusion, but founded in truth. Moreover, such evidence was properly admissible as tending to show that he had in fact, as declared by him, made ample provision for his daughters in giving them the home ranch worth \$20,000. Their needs, depending upon what they possessed, would be the measure of what constituted ample provision.

[6] Mr. Armstrong was called as a witness for contestant, and upon qualifying as an intimate acquaintance of deceased during a period of 45 years, was asked:

"What, if any facts, did you observe in the conduct, appearance, conversation, or any other thing pertaining to Mr. Allen, during two years prior to the making of the will which would cause you to believe or infer that he was not entirely rational?"

—to which an objection was sustained, the court saying that if the witness was called as an intimate acquaintance for the purpose of testifying as to the testator's sanity, he must first, as provided in subdivision 10 of section 1870 of the Code of Civil Procedure, state whether he believed the testator to have been of unsound mind. Notwithstanding this suggestion, counsel for contestant refused to comply therewith, and again asked the following:

"I will ask you * * * prior to March, 1911, what, if anything, did you observe in Mr. Allen with reference to his appearance, or rather observe in his appearance, conversation or acts, with reference to his being rational or irrational?"

—to which a like objection was sustained. The objection urged was to the form of the question, and the court clearly pointed out that counsel for contestant should, as provided by statute, first ascertain from the witness whether or not in his opinion Allen was of sound or unsound mind. Nevertheless, counsel refused to change the form of the questions, which were objectionable in that the inquiry was not directed to the mental condition of testator, but to acts with reference to whether he was rational or irrational. Since the court called counsel's attention to the fact that his questions were objectionable in form, it was his duty, if an opinion was desired, to reframe the questions in compliance with the suggestion made, or, if not, then have clearly indicated to the court that the evidence sought was as to acts and conduct. Not having done so, he is in no position to complain of the alleged error, which, since it was not made to appear that it was sought thereby to establish the existence of insane delusions, cannot be deemed prejudicial.

[7, 8] Objection urged to the ruling of the court in admitting evidence of testator's declarations made prior to the execution of the will that he intended to leave the property to his nephews is without merit (*Cyc.* vol. 40, p. 1026); and likewise without merit is the objection that the court committed error in permitting respondent to introduce

evidence showing that the testator was opposed to Hannah's marriage to Pearson, which occurred after the execution of the will.

[9, 10] At the trial contestant testified that her father had been insane since 1897. Thereupon, on cross-examination, it was made to appear that Allen had brought an action against his daughters to set aside the deed whereby he conveyed to them certain real estate, and that in said action contestant had filed a verified answer to the complaint, therein alleging that at the time of the execution of said deed, to wit, in March, 1909, her father was sane and sound mentally. We are unable to perceive any ground upon which to base the claim that the admission of such evidence was improper. If, for no other reason, it was clearly competent for the purpose of impeaching the witness. Her sister Hannah was also a party to the action to set aside the deed, and in connection with the answer of contestant so offered in evidence, proponent likewise offered the answer of Hannah A. Pearson, who, on the trial of the contest, testified that her father had always been insane, but in the answer referred to she adopted the answer of her sister, and confirmed the same "as fully as if she had originally joined therein." We cannot assume, as appellant insists, that Hannah in so adopting the answer of contestant was unacquainted with its contents.

[11, 12] Under the rulings of the court both parties to the controversy were permitted great latitude as to the conduct, acts, and declarations of the testator, both before and after executing the will. In these rulings there was no error, since "in will contests involving the question of testamentary capacity the evidence is permitted to take a wide range, covering a long space of time in each direction" (Cyc. vol. 40, p. 1023; Estate of Baker, 168 Pac. 881), and while such evidence is important only as it bears upon the condition of testator's mind at the very time of the execution of the will (Estate of Wilson, 117 Cal. 262, 49 Pac. 172, 711), we must assume, since the contrary is not shown, that the jury was properly instructed as to the application of the facts proved.

[13] We find no merit in appellant's contention that the court erred in denying her offer of rebuttal evidence. It appears that subsequent to the making of the will Allen caused to be erected upon a lot on O'Farrell street in San Francisco an apartment house costing some \$25,000, executing a mortgage thereon for part of the money necessary to construct the building. Some of the witnesses for proponent in testifying to Allen's sanity referred to specific acts in connection with the erection of this building. It was sought by contestant to show by the architect who drew the plans for the building the extent to which Allen looked after

its construction, and the court very properly held that the evidence offered was not in rebuttal of any facts testified to by proponent's witnesses.

[14] As stated, it devolved upon contestant to establish, not only the existence of the beliefs which it is alleged Allen entertained, but prove that there was no evidence, slight and inconclusive though it might be, which could have produced the belief; and, furthermore, if found that he was the victim of such alleged delusions, that the will made was the result thereof.

The judgment and order are affirmed.

I concur: MELVIN, J.

WILBUR, J. I concur in the foregoing opinion. With reference to what is said concerning an insane delusion I concur because of the fact that the question as to what constitutes an insane delusion has heretofore been treated by this court as a question of law, and the court has defined, as a matter of law, what constitutes an insane delusion. In this, I think, the court has been in error. An insane delusion is one that is the product of a disordered mind, produced because of the disorder. In other words, it is a symptom of a condition of mental disease. The question of whether or not a person is suffering from mental disease is a question of fact, to be determined in the light of increasing medical knowledge. To say that a person is not suffering from an insane delusion because his conduct in reference thereto does not measure up to a legal standard is, in my opinion, as fallacious as it would be to say that, as a matter of law, a man does not have syphilis if he does not have the symptoms which were recognized as indicia of the disease before the discovery of the Wassermann test, which, modern research has disclosed, practically demonstrates the existence or non-existence of syphilis. Insanity is one of the least understood of the ailments which afflict humanity. It is a fertile field for investigation and happily is receiving that investigation at this time. If the legal definition of an insane delusion can be upheld at all on principle it is because of the fact that the courts regard other forms of insane delusions or of mental disease as too difficult of proof as a basis for decisions by courts and juries. In that view and in that view only, do I think that a legal definition of an insane delusion can be upheld on principle, and even in that case we ought not to close the door to such developments of modern research as may be able to make more certain proof of insanity. For illustration, the evidence in this case discloses that the decedent frequently spoke of his daughters as immoral. It is conceded that they were chaste and virtuous. It seems to me that, in determining whether or not this should

be regarded as the product of a diseased mind, or the outbursts of an unreasonable, eccentric, and angry man, there should be a wider latitude than that given by the accepted definition of an insane delusion. *Estate of Scott*, supra. Dr. Ernest Dozier, who qualified as an expert in this case by testifying that he was doing special scientific investigation in human mental diseases at the Napa State Hospital, and had and continued to have for 2 years important medical supervision of a large number of insane persons, testified that the deceased was suffering from general paresis, was mentally unsound, and "harbored what seemed to me unsystematized delusions of persecution by all persons." "An unsystematized delusion is one that is composed of elements that are more or less fleeting and changeable and which do not cohere so as to constitute a definite opinion in the patient's mind." Wharton & Stille's Medical Jurisprudence, vol. 1, § 400. Some of the symptoms of paresis are thus stated by the foregoing authority:

"General paresis often begins insidiously, and among its earliest symptoms are perversions of the moral faculties. These lead to all sorts of lapses, some trivial, but some quite otherwise. At first there is a change of character and disposition. The patient may have spells of despondency, then elation. He does odd and unusual things. He is * * * extravagant with money. * * * His morals suffer. * * * He may be restless and irregular in his habits. * * * In some cases the patients start off aimlessly on a journey, without enough money. * * * The mental faculties are variously impaired. The judgment is weakened, the common sense lost, the logical processes curiously at fault. The patient has queer and absurd impulses and propensities; he becomes boastful, indifferent to appearances. * * * The emotions, or affections, are impaired, and the patient loses his normal fondness and care for his wife and children. A close observer may sometimes detect the beginning of delusions, such as mark especially the second stage. Occasionally, in the very early stage, he is conscious of feeling ill; he recognizes something is going wrong with him." Section 890, Id.

The decisions in this state seem only to recognize the systematized delusions. Section 400, Id.; *Estate of Scott*, supra.

"It is characteristic of monomania or paranoia, as distinct from most other forms of insanity, that the delusions are systematized. The one other form of insanity in which this feature is seen to anything like the same extent is melancholia; but melancholia is distinguished from monomania by the emotional depression. * * * " Wharton & Stille's Med. Jur. § 1028.

"Persecutory delusions may occur in several varieties of insanity." Section 1028, Id.

Courts, no doubt, have been driven to the rigid rule above mentioned by the proneness of juries to attempt to make wills for decedents in accordance with their own ideas of what is just and proper, seizing upon incidents of eccentricity as a basis for such decisions. But where the question as to whether or not a person is insane arises on a trial for insanity in proceedings for commitment

to an asylum, experience has shown that unexperienced jurors fly to the other extreme. In this case we have evidence which would have justified a finding of the jury either for or against the validity of the will.

For the reasons in the main opinion and upon all points of law discussed therein and for the reasons hereinbefore given in addition thereto I concur.

(177 Cal. 642)

PEOPLE v. MOONEY. (Cr. 2079.)

(Supreme Court of California. March 1, 1918.)

1. HOMICIDE \S 332(4)—APPEAL—CREDIBILITY OF WITNESSES.

In homicide case it cannot be contended on appeal that a witness could not have seen certain happenings from where he was standing, as the credibility of the witness was for the jury.

2. HOMICIDE \S 332(2)—REVIEW—INCONSISTENT TESTIMONY.

No matter how inconsistent the testimony of a witness, or of two witnesses, for the state in a homicide case, a reviewing court cannot reject the testimony; the jury having the right to choose and act on the part it believes.

3. HOMICIDE \S 268 — ALIBI — QUESTION FOR JURY.

Whether defendant in homicide case was at the scene of the crime *held*, under the evidence, a question for the jury.

4. HOMICIDE \S 173 — EVIDENCE — ADMISSIBILITY—MATERIALITY.

A warm, bloody ball bearing and a fragment of a newly fractured ball bearing, found at the scene of and soon after the explosion of a bomb, were properly admitted in evidence as tending to show the composition of the bomb.

5. HOMICIDE \S 174(6) — EVIDENCE — MEANS OF COMMITTING CRIME.

Where bomb contained three kinds of cartridges, firearms and cartridges found in the rooms of alleged perpetrators of an explosion in which persons were killed were admissible to show defendants had means at hand to commit the crime.

6. CRIMINAL LAW \S 338(1)—SCOPE OF EXAMINATION.

The tendency of modern decisions is to admit any evidence in a criminal case which may have tendency to illustrate or throw any light on the transaction in controversy, leaving its weight to the jury.

7. HOMICIDE \S 338(2)—REVIEW—HARMLESS ERROR.

If it was error to incidentally admit in evidence a pistol found in defendant's room in a homicide case, the crime having been committed with a bomb, it could not be prejudicial.

8. HOMICIDE \S 174(6) — EVIDENCE — RELEVANCY.

In homicide case, where crime was committed with bomb containing three kinds of cartridges, the jury were entitled to consider the quantity and fact of mixture of "22 long" and "22 short" cartridges in a can found in defendant's room, together with a 22 rifle in the room.

9. HOMICIDE \S 234(5)—MURDER—CONSPIRACY—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to establish a conspiracy between accused and another to murder with a bomb.

In Bank. Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Thomas J. Mooney was convicted of murder in the first degree, with penalty of death, and he appeals. Affirmed.

See, also, 166 Pac. 999; 167 Pac. 696.

W. Bourke Cockran, of New York City, and Maxwell McNutt and John G. Lawlor, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and C. M. Flickert, Dist. Atty., and Edward A. Cunha, Asst. Dist. Atty., both of San Francisco, for the People.

PER CURIAM. The defendant, Thomas J. Mooney, was convicted of the crime of murder in the first degree, the jury fixing the death penalty as punishment for said crime. After denial of his motion for a new trial by the trial judge the defendant was sentenced to be hanged. This appeal is from the judgment and from the order denying his motion for a new trial.

On July 22, 1916, a preparedness parade was in progress in San Francisco, thousands of patriotic citizens being participants therein. During its progress and while a portion of the parade was passing the corner of Steuart and Market streets a bomb was exploded, killing a number of people and wounding many more. One of the victims was Hetta Knapp, and the defendant was indicted for and convicted of her murder. Other persons were also charged with these murders, and one Warren K. Billings was convicted, prior to the trial of defendant Mooney. On appeal to the District Court of Appeal his conviction was affirmed, and he is now undergoing life imprisonment. *People v. Billings* (App.) 168 Pac. 396.

Pending this appeal a motion was made which purported to be a motion for a reversal. This motion was based, not upon the merits, but was founded primarily upon the fact that the Attorney General, believing from evidence which had been discovered after the conviction and after the order denying defendant's motion for a new trial that a new trial should be had, sought to stipulate with counsel for defendant for a reversal of the judgment and order. This motion was denied, and as it is important in this and in all cases to keep in mind the functions of the Supreme Court, we deem it proper to quote from the opinion pronounced upon the denial of that motion. *People v. Mooney*, 167 Pac. 696. In that opinion the following language was used:

"By express provision of our Constitution, the jurisdiction of both the Supreme Court and the District Courts of Appeal in criminal cases is specially limited. As to the Supreme Court, 'appellate jurisdiction on appeal from the superior courts' is given 'on questions of law alone, in all criminal cases where judgment of death has been rendered.' Const. § 4, art. 6. This is our only jurisdiction. The provision means that an appeal in such cases is allowed solely for the purpose of obtaining the determination of this court as to whether there has been any error of law in the proceedings of the trial court. We have no other questions to deter-

mine, and may lawfully determine no other question. If we find no substantial error of law, we must affirm the judgment of the lower court. It is clear, too, that in the consideration of such an appeal, for this limited purpose, we are confined to the record sent to us from the court below. This was very clearly stated by this court in the first decision of the case of *People v. Bowers*, 18 Pac. 680, where it was sought to have this court take into consideration what purported to be the written confession of another that he was the guilty party, made after the taking of the appeal. The court said that, if the events occurred as stated in the brief of the appellant's counsel, the facts would entitle the defendant to a new trial on the ground of newly discovered evidence, if presented in time to the court below, but that they were not so presented, and could not be so presented, because they occurred pending appeal. Because it so clearly states what is obviously the law on this subject, we quote from the opinion: 'While it is admitted by counsel for appellant that ordinarily no argument could be made here upon facts occurring after appeal taken, it is urged that the evidence which has been discovered in this case "is of so grave a character, and points so strongly to the innocence of this defendant, that, however informally it may have come to the attention of the court, this or any other court of competent jurisdiction should say that he shall not be executed until it shall have been submitted, in common with other evidence in the case, to a jury of his country." But manifestly the court has no authority to consider these matters as thus presented. They are no part of the record sent to us from the court below, and there is no provision of law by which newly discovered evidence may be presented to this court in the first instance. The remedy in such cases rests with the executive. He alone can afford relief.'

The cause is now before this court on the merits of the appeal, and we shall proceed to examine the record in accordance with our duty as outlined above and to consider the various assignments of error and the arguments thereon presented by counsel in the case for defendant and for the state of California.

Defendant's counsel at the outset freely admit that Hetta Knapp was the victim of a foul murder. Indeed, they introduced evidence for the avowed purpose of proving that the explosion was caused by a bomb, but not of the sort which, according to the evidence offered by the people, brought death to her. In other words, the only sort of explosive with which the prosecution sought to connect the defendant herein was concealed in a suitcase or valise deposited on the sidewalk near the southwest corner of Steuart and Market streets, while defendant's counsel sought to prove that the murders were perpetrated by means of a bomb hurled through the air and exploded upon contact with the sidewalk.

The appeal is based upon the alleged insufficiency of the evidence to support the verdict and upon asserted errors of law alleged to have been committed in the admission and exclusion of testimony.

The record shows without conflict that near the hour of 2 o'clock on July 22, 1916, there was in progress upon Market street, one of the principal thoroughfares of the city

of San Francisco, a great procession known as the "Preparedness Parade." Thousands of persons, moved by patriotic impulses, participated in the parade, and other thousands gathered on Market street and other avenues upon the line of march to witness the pageant. Suddenly came the death-dealing explosion, and among the victims was Hetta Knapp, who was killed by a fragment from the bomb.

Before reviewing the evidence which, according to the contention of the Attorney General, connects the defendant with the perpetration of the crime, we will examine that upon which the prosecution depended to support the theory that the explosive was contained in a suitcase and operated by some sort of time device which took effect after the container had been deposited on the sidewalk near the line of a building at the corner of Steuart and Market streets, because defendant's counsel earnestly contend that the "suit case theory" was unsupported, while their theory of a thrown bomb was absolutely established. By testimony which we shall have occasion to treat more in detail in the course of this opinion a suit case was described as being in the possession of Mooney and of his codefendant, Billings, shortly before the explosion near the scene of the crime. Immediately after the explosion an indentation in the sidewalk and one in the wall of the building were evident. On the street and sidewalk were found cartridges, loose bullets, cartridge shells of three calibers, namely, 22, 32, and 38, pieces of four-inch wrought iron pipe and parts of a malleable iron cap of the same measure as the pipe. Some pieces of pipe were hurled several hundred feet. Across Steuart street, on the roof of a building, two pieces of brass wire were found. These, according to the testimony of an expert witness, were winders of alarm clocks, but could not have belonged to the same clock. Near the same place was discovered a ring, which, according to expert testimony, might have been the supporting ring of a clock. Some fragments of fiber of the sort used in the manufacture of cheap suit cases, as well as some small pieces of leather, were picked up near the situs of the explosion, and that which appeared to be the handle of a cheap suit case was found shortly after the explosion on the opposite side of the street, while on the roof of a building across the street small pieces of a valise frame were discovered. A ball bearing five-eighths of an inch in diameter and part of another ball bearing of the same size were found on the day of the murder in Steuart street. In the bodies of some of the victims were bullets of 32 and 22 caliber. A piece of a cartridge shell was found in the body of one of the persons who were killed, and fragments of pipe were in the bodies of other victims. Other pieces of pipe fell near witnesses who produced these particles. It was argued, and we think with reason, that

these pieces of pipe formed part of the container of the explosive material used in the manufacture of the bomb. At the trial there were produced a 22-caliber rifle, some cartridges to fit it, a pistol loaded with 32-caliber cartridges and some ball bearings, which, according to the testimony, had been found in the room occupied by Billings. In Mooney's home, according to the testimony, were found a pistol and 38 and 32 caliber cartridges.

Appellant's counsel say that, granting for argument's sake that Billings placed a suit case at about the place where the explosion subsequently occurred, and that thereafter no suit case was found, but fragments of one were discovered, there is no evidence that the suit case contained the explosive or that it was detonated by means of a time device. With this contention we cannot agree. All of the circumstances outlined above point to a corroboration of the theory of the prosecution. Mrs. Kennedy, a witness called by the prosecution, testified that just before the explosion occurred she saw a suit case on the sidewalk against the wall of the building. It seemed to be larger than the ordinary suit case which a traveler usually carries on a journey. It was noticed by the witness two or three minutes before the explosion, and it occupied the place where the hole or depression in the sidewalk caused by the said explosion afterwards appeared.

T. K. Stateler, general agent of the Northern Pacific Railway, was participating in the parade with the Grand Army of the Republic. This organization moved out of Steuart street to join the parade, but before the old soldiers marched out of Steuart street Mr. Stateler, according to his sworn testimony, saw a suit case exactly at the place afterwards indented by the force of the explosion. He said that his attention was directed to it because he was tired and he thought of sitting upon the suit case while waiting for his post to move, but finally he selected another place to sit because he would not like to have any one use his own suit case for a seat. He estimated the time which elapsed before leaving Steuart street to move with his command as about 10 minutes. He had marched about 200 feet down Market street when he heard the explosion.

James McDougall, a lad of 13 years of age, was in the parade carrying a streamer attached to the banner of the First California Volunteers. At the time of the explosion this regiment was going out of Steuart street into Market street. About 10 minutes before marching the lad saw, as he testified, a suit case at the place where afterwards he observed the hole made by the explosion. He thought it was "kind of funny that a suit case would be there that day of the parade." He described it as being of the usual length, but somewhat wider than the ordinary suit case, and light brown in color.

It will thus be seen that the physical facts

as described by the witnesses support a conclusion that the explosive was fired from within a suit case or valise, and if the testimony tending to establish such facts was credited by the jurors (as undoubtedly it must have been), it formed a sufficient basis for the verdict. But in addition to the physical facts disclosed by the testimony and the exhibits there was testimony connecting the defendant with the possession of a suit case shortly before the explosion and tending to show conduct on his part indicative of a consciousness that the said suit case contained something the possession of which made him apprehensive of detection by the police.

One of the witnesses, John MacDonald, testified that he arrived at the southeast corner of Steuart and Market streets about 20 minutes to 2 o'clock p. m. He stood 12 or 15 feet off of Market street on Steuart. Shortly after he took this station he saw Warren K. Billings, Mooney's codefendant, coming on Steuart street toward Market street from the direction of Mission street. According to this witness, Billings carried a suit case which he placed upon the sidewalk against the wall of the building near the corner. Asked to describe the actions of Billings as he approached the corner, the witness said:

"Well, he was carrying the suit case and his head was working on a pivot, and he looked all excited as if he was worrying about something. That is what called my attention to him first."

After depositing his burden on the sidewalk, Billings walked to the corner and pushed open the door of a saloon. At that instant Thomas J. Mooney, the defendant, came out of the saloon, and then he and Billings stood on the sidewalk talking. Mooney pulled out his watch, looked at it, and looked towards the Ferry Building at the eastern extremity of Market street. Then, according to this witness, Billings left his companion, and was soon lost to MacDonald's sight in the crowd. MacDonald's attention was then, he said, called back to Mooney, who took out his watch again, put his hand to his face as if in study, and "looked alongside the building." He then turned, passed through the crowd, and was lost to the sight of the witness. MacDonald also testified that the suit case was placed upon the exact spot which was afterwards indented by the explosion. Witness said that the suit case was left by Billings "about 2 o'clock." After Mooney went away, as the witness testified, the latter walked very slowly down Market street to the Alameda Coffee House, about 150 feet distant, and upon his arrival there he heard the explosion.

Another witness, F. C. Oxman, who stated that he was a cattle dealer, residing in Eastern Oregon, also testified regarding the happenings at and near the scene of the explosion. He said that as he stood at the corner of Steuart and Market streets about 15 minutes of 2 o'clock he saw an automobile driven by Israel Weinberg, in which Mooney,

his wife, Rena Mooney, and Billings were passengers; that the defendant was on the front seat holding a suit case on the running board; that Billings jumped excitedly and rapidly from the rear seat; that he took the suit case from Mooney; that another man whom witness did not identify also jumped from the rear seat and came onto the sidewalk near the place where Oxman was standing; that this man took the suit case from Billings; and that then Billings and the other man walked along Steuart street in a direction away from Market street. Mooney, he said, stood near him, and seemed to be watching the other two men. He testified that Mooney seemed very excited, and by his manner attracted his (Oxman's) attention; that after Billings and his companion had gone some distance the former took the suit case and set it down on the walk by the side of the building; that they then returned and went in the door of the building—he was not sure whether all of them did so or not; that directly they came out, and Mooney said:

"Give it to him and let him go; we must get away from here; the bulls will be after us."

Further testifying, Oxman said that Billings gave something to the other man, who then departed; that Billings first and then Mooney went to Weinberg's automobile; that Mooney, after Billings left him, looked at his watch, glanced over to the place where the suit case was, and then followed Billings to the motor car. The vehicle then turned into Steuart street and went up that street.

[1] It is argued by counsel for defendant that MacDonald could not have seen the people and their movements described by him because of the crowd between him and the opposite side of the street. While such an argument may be properly addressed to a jury, it has no place here. Whether or not the witness was telling the truth was a matter peculiarly for the jury.

[2] But counsel insist that the stories of these two witnesses are so inconsistent that they could not possibly have been testifying about the same persons. Their stories, counsel say, are self-destructive, and therefore, a verdict based in part upon their testimony should be set aside. Even if their stories were vitally contradictory, it would not follow that this court could disturb the judgment. Inconsistencies in the details of statements of witnesses may be looked for. Truthful witnesses may be expected to agree substantially, but to differ circumstantially, in their attempts to describe the same occurrence. Even inconsistencies in the different parts of the testimony of a witness would not justify a court of review in rejecting all of his story after a jury had received and acted upon a part of it. As Mr. Justice Henshaw said in delivering the opinion of this court in *People v. Durrant*, 116 Cal. 179-200, 48 Pac. 75, 79:

"If a witness should absolutely discredit his own testimony by swearing to opposite statements so that one or the other must be false, under our laws his testimony is not of necessity to be rejected. It is still evidence in the case. Under such circumstances the jury must receive and weigh it. They are bound to look upon it with suspicion and distrust, and may reject it. But, upon the other hand, they may as they determine accept as true one or the other of the contradictory asseverations. Thus, upon a review of the evidence by this tribunal, we may not examine with minuteness claims that witnesses are discredited, or that their testimony is unworthy of belief, or look to see whether some other conclusion might not have been warranted by the evidence. *Blythe v. Ayers*, 102 Cal. 254 [36 Pac. 522]. 'Ad questionem juris respondent iudices, ad questionem facti respondent iuratores;' and than this no maxim of the old law has been more carefully preserved in its integrity under our system."

But we do not see that the stories of these witnesses are so utterly incompatible as counsel would have us find them. It is quite within the bounds of reason that both saw parts of the same circumstances and occurrences but that Oxman saw more than the other witness could observe from the place which he occupied. But we cannot tell what may have been the exact mental processes of the jurors. For all we know they may have rejected all of Oxman's testimony and may have acted entirely upon that of MacDonald; or the reverse may have been true; or they may have credited parts only of the testimony of each witness. All that this court may do is to determine whether or not there is sufficient evidence of any sort to support the verdict, and we cannot escape the conclusion that it is amply supported.

While Oxman and MacDonald were the only witnesses who stated that they saw Mooney at Stuart and Market streets near the time of the murders, there was other testimony which, if the jurors believed it, established the relationship of Mooney and Billings. In this case, as in the case of *People v. Billings*, witnesses testified that they saw Billings with a suit case at 721 Market street less than four-fifths of a mile from the junction of Market and Stuart streets shortly before his arrival at the scene of the crime. Miss Sadie Edeau said that she saw Billings on the roof of the building at 721 Market street. He had a suit case in his hand and was leaning over the edge of the building. Witness, as she said, was standing on the sidewalk, and after seeing Billings she moved to a place in front of the Kamm Building nearby, and while there saw Mooney and his wife coming from the direction of 721 Market street. She stated that the Mooneys rushed into the entrance to the Kamm Building, and he placed something for his wife to sit upon; that at that time Billings was talking as he stood near the edge of the sidewalk to police officer Moore, whom the witness did not then know; that then Billings walked over and met Mooney near the middle of the sidewalk; and that then Billings and the Mooneys walked eastward towards

the ferry and in the direction of Stuart street. Then she saw Israel Weinberg get into an automobile which stood near the place where Billings and the police officer had been standing. He drove away towards the east.

Herbert A. Wade, principal of a government school in Hawaii, testified that he was in the vicinity of 721 Market street on the afternoon of July 22, 1916; that while he was looking into a showcase containing an exhibit of a dental office, Warren K. Billings passed him, and went up the steps into the office; that Billings had a suit case; that afterwards witness saw a man and a woman there, but could not identify them as the Mooneys.

Police Officer Earl R. Moore as a witness told the jury of seeing Billings in front of 721 Market street shortly before the parade. Moore was clearing the street of automobiles in preparation for the procession. One car was standing near the curb, and the officer sounded its horn in an effort to attract the attention of the owner. Finally Billings walked out to the sidewalk, and in response to an inquiry said that he did not own the automobile, but that the owner would be there "in a minute." At this juncture duty called the policeman away, and when he returned the car had disappeared.

Mrs. Nellie Edeau substantially corroborated the testimony of her daughter, Miss Sadie Edeau, and said that after Mr. and Mrs. Mooney joined Billings she heard the latter say: "We have to make the ferry before two o'clock."

Peter Vidovich told of a visit to the office of a dentist at 721 Market street on the afternoon of July 22, 1916, and of there meeting Billings as the latter was going up the stairway. Billings, he said, had a suit case. He described it as resembling a drummer's sample case. By the testimony of George H. Speed, who described himself as the "secretary of the I. W. W.," the prosecution sought to establish the fact of communication between Billings and Mooney on the 19th of July, three days before the commission of the murders. He testified, that, on that day, he carried a note from Billings to Mooney, who said he would meet the writer at the "Blast" office. The "Blast," as was developed on the cross-examination of Detective Sergeant Proll, was an anarchistic paper.

[3] It will be seen from the review of testimony given above that both the manner of placing the deadly bomb and the defendant's guilty connection therewith find abundant support in the evidence. The defense introduced evidence tending to contradict the showing of the use of a bomb concealed in a suit case and also that of the presence of the defendant near the scene of the crime, but, as the jury resolved this conflict of testimony against the defendant, we may not disturb the verdict. No principle of law is more firmly established than this.

Appellant's counsel, while conceding, as of course they must, that where conflicting testimony is given upon any matter pertinent to the questions at issue in a trial, this court is powerless to set aside the verdict of a jury, nevertheless contend that the showing of Mooney's absence from the corner of Steuart and Market streets at the time when the suit case was left there is so complete as to amount to a demonstration, and that therefore this court should reverse the judgment and order from which defendant has appealed. In this behalf they call our attention to the testimony of a witness for the people, Capt. Matheson of the San Francisco police department, who, speaking of the time of the explosion, testified as follows:

"It was at six minutes past two. I happened to look at the clock in the Ferry Building, and I looked at the clock in the saloon which had stopped at the time of the explosion."

Mr. and Mrs. Mooney both testified that they spent all of the time after the head of the procession came in view and until the parade had passed on the roof of the Eilers building at 975 Market street, except a few moments during which the defendant went to his wife's studio in the building to get a newspaper. There was testimony which, if believed by the jurors, would have corroborated this account. Certain pictures were introduced in evidence. These were the work of a young man who photographed the people on the roof of the Eilers Building. Some of the photographs showed defendant at that place, which was more than 6,000 feet from the corner of Steuart, and Market streets and more than 7,000 feet if a journey were made between the two places by way of Mission street, which is parallel with Market street. These pictures also show a clock on a building near by, and, according to the time indicated, Mrs. Mooney was on the roof at 2 minutes of 2 o'clock, and she and her husband were there at 1 minute after 2 and at 4 minutes after 2. Assuming that the clocks involved in the testimony were correct, we cannot see that the alibi is, as counsel for defendant contend, scientifically established. All of the testimony regarding the time when the suit case was placed on the sidewalk merely approximated the hour. The length of time during which the suit case was seen by the witnesses who testified that they observed it was estimated by them, and we cannot say that within the estimates as given, if they were taken as substantially correct by the jury, the defendant could not have proceeded by automobile from the scene of the purposed explosion to the Eilers Building and to the roof before the operation of a time device to detonate the bomb. All of these matters pertaining to the alleged alibi were before the jury. It was for the jurors to say from the evidence whether or not any real alibi was established.

[4] Certain errors are asserted to exist by

appellant's counsel. These are based upon the admission of certain evidence. A ball bearing found in Steuart street by witness Ormston was properly admitted. It was found, as the witness testified, very soon after the tragedy in the immediate vicinity of the explosion, and it had blood on it and was warm. These circumstances would justify a conclusion that it had formed a part of the bomb. The fragment of a ball bearing found by witness Airola was also admissible. It was picked up about 15 minutes after the explosion, and the fractured part was bright as if the break were very recent. This would indicate that a great force had been applied to the metal very recently, and the jurors would be but following the simplest logic if they found it to have been one of the fragments of the bomb.

[5-7] The firearms and cartridges found in the room occupied by Billings and the cartridges found in defendant's room should have been admitted, as they were. The cartridges found in Mooney's room were of the kind and caliber of those picked up afterwards at the scene of the explosion. They indicated possession by the defendant of the means for the perpetration of the crime. All of the other alleged errors have been discussed in *People v. Billings*, and we again adopt the ruling of the District Court of Appeal and the part of the opinion relating thereto as follows:

"The fact that the cartridges found in the room of the defendant after the commission of the crime were of the same character and caliber of those found in the bodies of the victims of the explosion was admissible as tending in a measure to show that the defendant had the means at hand to commit the crime charged against him, in the manner and by the means which it was shown were employed to commit the crime. 1 *Michie on Homicide*, pp. 851, 855, 857, 859; 21 *Cyc.* 945.

"While it is true that no ball bearings were found in the bodies of the victims of the explosion, nevertheless the ball bearings admitted in evidence were found, immediately after the explosion, in the midst of other things which, when considered in connection with all of the circumstances shown in evidence concerning the character of the explosion and its effect, apparently constituted a part of the bomb, and were therefore admissible as tending in some degree to show what were the constituent elements of the bomb. In this connection it may be noted that 'the tendency of modern decisions is to admit any evidence which may have a tendency to illustrate or throw any light on the transaction in controversy, or give any weight in determining the issue, leaving the strength of such tendency or the amount of such weight to be determined by the jury.' *Moody v. Peirano*, supra [4 *Cal. App.* 411, 88 *Pac.* 380].

"The presence in evidence of the pistol found in the defendant's room came in as a mere incident to the testimony which showed the result of the search of defendant's room, and, conceding that it was improperly admitted in evidence, we cannot conceive how it could have prejudiced the defendant."

[8] The evidence at the trial was to the effect that the cartridges found in the room occupied by Billings were contained in a tin can. The bullets were of the caliber known as "22 short" and "22 long," similar to those

found near the place of the murder. The can was almost half filled with these cartridges, and the two kinds were mixed together. There was a piece of paper around the top of the can. The jurors were of course, entitled to consider the quantity and the manner of assembling these cartridges as indicating whether they might have been acquired for use in the manufacture of a bomb or for the small rifle which was also found in Billings' room.

[9] There was testimony sufficient, if credited by the jury, to establish a conspiracy between Billings and Mooney to commit the crime.

From the record before us it appears that the defendant was confronted by testimony from many sources which fully supports the verdict found by the jury. He was defended with great ability in the superior court, and he was similarly represented in this court. We cannot find that he was deprived of any right, statutory or constitutional, or that any material error of law was committed calling for a reversal of the judgment or an abrogation of the order denying his motion for a new trial.

The judgment and order are affirmed.

(36 Cal. App. 40)

NEAL v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA.
(Civ. 1817.)

(District Court of Appeal, Third District, California. Jan. 24, 1918.)

MASTER AND SERVANT §417(3)—WORKMEN'S COMPENSATION ACT—CERTIORARI—TIME FOR FILING.

Where order of Industrial Commission denying petition for rehearing was made and entered December 22d, an application for certiorari to appellate court to review such order, filed by the clerk January 24th following, came too late, and writ will be denied, in view of Workmen's Compensation Insurance and Safety Act (St. 1917, p. 875) § 67a, providing that within 30 days after the application for a rehearing is denied any party affected may apply to the Supreme Court or District Court of Appeal for writ of certiorari or review, for the purpose of having the lawfulness of the rehearing inquired into and determined.

Application by E. E. Neal for a writ of certiorari against the Industrial Accident Commission of the State of California. Denied.

E. E. Neal, in pro. per.

PER CURIAM. The petitioner in the above-entitled case seeks a writ of certiorari to review the proceedings wherein on his application to the respondent above named for a rehearing, his petition was denied. It appears from the petition herein that the order denying the rehearing of which petitioner makes complaint was made and entered December 22, 1917. Section 67a of the Workmen's Compensation Insurance and

Safety Act of 1917 (Stats. 1917, p. 875) provides that:

"Within thirty days after the application for a rehearing is denied, or, if the application is granted, within thirty days after the rendition of the decision on the rehearing, any party affected thereby may apply to the Supreme Court of this state, or to the District Court of Appeal of the appellate district in which such person resides, for a writ of certiorari or review, * * * for the purpose of having the lawfulness of the original order, rule, regulation, decision or award, or the order, rule, regulation, decision or award on rehearing inquired into and determined."

The petition was received at the office of the clerk of this court and was filed on January 24, 1918. The application for the writ comes too late, and the writ is therefore denied.

(36 Cal. App. 88)

PEOPLE v. SMITH. (Cr. 713.)

(District Court of Appeal, First District, California. Jan. 28, 1918. Rehearing Denied by Supreme Court March 28, 1918.)

1. WEAPONS §2 — CARRYING CONCEALED — STATUTE—CONSTITUTIONALITY.

St. 1917, p. 221, § 3, providing that every person who carried in any municipal corporation any pistol, revolver, or other firearm concealed upon his person without license, shall be guilty of a misdemeanor, and guilty of a felony if previously convicted of any felony, or any crime made punishable by the act, is a reasonable police regulation.

2. CONSTITUTIONAL LAW §208(1) — CARRYING CONCEALED WEAPONS—CLASS LEGISLATION.

St. 1917, p. 221, § 3, is not objectionable as class legislation, since it operates uniformly on all persons in the same category; there being reasonable basis for the classification.

3. CONSTITUTIONAL LAW §203 — CARRYING CONCEALED WEAPONS — "EX POST FACTO" STATUTE.

St. 1917, p. 221, § 3, is not objectionable, as ex post facto, on account of the provision prescribing a heavier penalty for one previously convicted.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ex Post Facto.]

4. WEAPONS §2 — CARRYING CONCEALED — SUBJECT FOR STATE LEGISLATION.

The subject of carrying weapons is not purely a municipal affair; the prevention and the punishment of crime being always a proper subject for state legislation.

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Charles Smith was convicted of a violation of St. 1917, p. 221, relating to and regulating the carrying, possession, sale, or other disposition of firearms capable of being concealed on the person, etc., and he appeals. Judgment affirmed.

R. M. Royce, of Oakland, for appellant. U. S. Webb, Atty. Gen., and John H. Rordan, Deputy Atty. Gen., for the People.

LENNON, P. J. The defendant was charged with the violation of section 3 of chapter 145 of the Statutes of 1917. The information also charged him with a prior con-

viction of grand larceny. Upon his arraignment the defendant pleaded guilty of the crime charged, and admitted the prior conviction. The indeterminate sentence provided by law was thereupon imposed, directing that the defendant be taken and confined in the state prison at San Quentin for a period not to exceed five years.

[1] This is an appeal from the judgment in which the only question raised is as to the constitutionality of the section of the statute under which defendant was charged and convicted. That section reads:

"Every person who carries in any city, city and county, town or municipal corporation of this state any pistol, revolver, or other firearm concealed upon his person, without having a license to carry such firearm as hereinafter provided in section six of this act, shall be guilty of a misdemeanor, and if he has been convicted previously of any felony, or of any crime made punishable by this act, he is guilty of a felony." Stats. 1917, p. 221.

The section in question is a reasonable police regulation. *Ex parte Cheney*, 90 Cal. 617, 27 Pac. 436; *Ex parte Luening*, 3 Cal. App. 76, 84 Pac. 445.

[2] While the statute provides a heavier penalty for one who has been previously convicted of a felony than for one who has suffered no prior conviction, nevertheless it operates uniformly upon all persons in the same category, and there is a reasonable basis for the classification. Therefore it is not objectionable as class legislation.

[3] Nor does the provision prescribing a heavier penalty for one previously convicted of a felony render the law *ex post facto*. "A law is not objectionable, as *ex post facto*, which, in providing for the punishment of future offenses, authorizes the offender's conduct in the past to be taken into the account, and the punishment to be graduated accordingly." *Ex parte Gutierrez*, 45 Cal. 429.

[4] The objection that the subject of carrying weapons is purely a municipal affair is not well taken. The prevention and punishment of crime is always a proper subject for state legislation.

Judgment affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

(36 Cal. App. 114)

PEOPLE v. ELGAR. (Cr. 566.)

(District Court of Appeal, Second District, California. Jan. 31, 1918.)

1. CRIMINAL LAW §371(9) — EVIDENCE — SUBSEQUENT ACT.

In a prosecution for rape, evidence of a subsequent act was admissible to show the lascivious disposition of defendant toward the prosecuting witness, and the consequent probability of the commission of the prior act.

2. CRIMINAL LAW §823(1) — INSTRUCTION — DATE OF OFFENSE.

In a prosecution for rape committed May 6th, there being evidence of two acts, committed

then and May 14th, the instruction that it was not incumbent on the prosecution to prove the exact time and place of the offense, it being sufficient that the prosecution establish its commission beyond a reasonable doubt at any time within three years prior to the filing of information August 8th, was erroneous, though the court told the jury that if they believed that defendant on or about May 6th did willfully, unlawfully, and feloniously have and accomplish an act of sexual intercourse with and upon the person of the prosecuting witness, they should find him guilty as charged.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Jim Elgar was convicted of rape, and from the judgment, and an order denying his motion for new trial, he appeals. Reversed, and cause remanded.

T. A. Wells, S. M. Johnstone and M. C. Atchison, all of Los Angeles, for appellant. U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., and Robert B. Camarillo, of Los Angeles, for the People.

WORKS, Judge pro tem. The appellant was convicted of the crime of rape, and was sentenced to not less than 50 years in the state prison. The appeal is from the judgment and from an order denying a motion for a new trial.

[1, 2] There is evidence in the record which tends to show that the appellant committed two acts of rape upon the prosecuting witness, one about May 6th, the other about May 14th, both in 1917. The information charges that the act was committed on or about the 6th day of May, 1917, and the district attorney told the jury, near the commencement of the trial, that he selected the act of May 6th, or thereabouts, as the one upon which he would ask for a conviction. This statement was made in connection with a remark of the court showing the reason for the admission of evidence as to the act of May 14th. Evidence of that act was of course admissible to show the lascivious disposition of the appellant toward the prosecuting witness and the consequent probability of the commission of the act of May 6th (*People v. Koller*, 142 Cal. 621, 76 Pac. 500); but the court instructed the jury that:

"It is not incumbent upon the prosecution to prove the exact time and place when the offense, for which the defendant is being tried, occurred; it is sufficient if the prosecution established the commission of said crime, beyond a reasonable doubt, at any time within three years prior to the filing of the information in this case, which information was filed in this court on the 8th day of August, 1917."

This instruction was erroneous. Its subject-matter comes directly within the strictures passed upon a similar instruction in *People v. Williams*, 133 Cal. 165, 168, 65 Pac. 323, 324 (and see, also, *People v. Harlan*, 29 Cal. App. 600, 156 Pac. 980), although in that case there was evidence of many illicit acts:

"A verdict of guilty could have been rendered under such an instruction, although no two jurors were convinced beyond a reasonable

doubt, or at all, of the truth of the charge, as to any one of these separate offenses. Even worse than that was possible. As to every specific offense which there was an attempt to prove, and which could be met by proof, the defendant may have established his defense, and yet upon the general evidence of continuous crime, which, in the nature of things, he could only meet by his personal denial, he may have been convicted. And how could he defend when he was not informed as to what particular offense, out of hundreds testified to by the prosecutrix, he was to be tried? * * * In this case, as well as in any other, the prosecution must charge a specific offense, and the conviction, if one is had, must depend upon the proof of that offense alone. Other incidents are important only as tending to prove the one specific offense for the alleged commission of which defendant is on trial."

It is true that in this case the court told the jury, in another instruction:

"If you believe * * * that the said Jim Elgar, on or about the 6th day of May, 1917, * * * did willfully, unlawfully, and feloniously have and accomplish an act of sexual intercourse with and upon the person of one Clementina Elgar, * * * you should find him guilty as charged in the information."

That, however, does not materially help the situation. The mention of May 6th in the instruction just quoted did not eliminate the damage done by the other instruction, in which the jury was plainly told, without mention of dates, however, that they might convict appellant of the commission of the crime charged to have been committed on May 6th if they believed from the evidence that he had committed one on either May 6th or May 14th.

There are other errors shown by the record, but as they pertain to questions which are not likely to come before the court on a new trial, we do not deem it necessary specifically to mention them.

The judgment and order are reversed, and the cause remanded.

We concur: CONREY, P. J.; JAMES, J.

(36 Cal. App. 68)

STANSBURY v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.
(Civ. 2446.)

(District Court of Appeal, Second District, California. Jan. 26, 1918.)

MASTER AND SERVANT — 373 — WORKMEN'S COMPENSATION—"COURSE OF EMPLOYMENT."

An employé injured while repairing a clamshell dredge which his employer intended to sell was not injured in the course of his employer's business of leasing road-making machines.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

Original application by Charles Stansbury for a writ of review to annul an award to W. J. Husong under the Workmen's Compensation Act, made by the Industrial Accident Commission of the State of California. Award annulled.

Hocker & Austin, of Los Angeles, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

WORKS, Judge pro tem. The respondent Industrial Accident Commission allowed compensation to W. J. Husong for an injury received while he was in the employ of petitioner, and petitioner now asks that the award be annulled. It is conceded that the employment was casual. It is also contended by petitioner that the injury did not occur in the usual course of his business. The commission found that petitioner "was in the business of leasing certain road-making machinery and outfit, and that it was necessary and in the usual course of said business to keep the said machinery and outfit in repair; that the work and employment of the applicant at the time of his injury was the repairing of such machinery, and was therefore in the usual course of the business of the employer."

The finding that petitioner was engaged in the business of leasing road-making machinery and outfit is amply supported by the evidence, but the finding that the applicant was injured while making repairs on machinery used in that business finds no support whatever in it. In addition to the machinery used in the business, the petitioner had in his possession a certain clamshell dredge, which he had acquired from a contractor who had been using it in harbor work. It was in no sense road-making machinery or equipment. This dredge petitioner was about to lease to another, with an option to purchase the same, but some repairs were necessary upon it before it could go out. The applicant for compensation was employed to make these repairs, and was injured while prosecuting the labor. The work being performed by the applicant was no more nearly in the course of the employer's business of leasing road-making machinery than if it had been the work of shoeing a horse or repairing a mowing machine owned by the employer. The case is directly within the rule laid down in *Maryland Casualty Co. v. Pillsbury*, 172 Cal. 748, 158 Pac. 1031. The award is annulled.

We concur: CONREY, P. J.; JAMES, J.

(36 Cal. App. 90)

GORDON v. PERKINS et al. (Civ. 2272.)

(District Court of Appeal, First District, California. Jan. 30, 1918.)

1. APPEAL AND ERROR — 1015(5) — REVIEW — QUESTIONS OF FACT — DENIAL OF NEW TRIAL.

Where motion for new trial on the ground that the jury rendered a quotient verdict was denied, the finding that such verdict was not determined by a resort to chance will not be disturbed on appeal; the evidence thereon being conflicting.

2. DAMAGES \Leftrightarrow 108—MEASURE OF DAMAGES—DAMAGE TO REAL PROPERTY.

In an action for damages to a small parcel of real property composing part of a larger tract, defendant cannot complain that the damage was measured by the amount of damage to the portion destroyed, and not the depreciation of the entire tract.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by John Gordon against Charles R. Perkins and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. A. Pettis, of Ft. Bragg, and Preston & Preston and M. H. Iversen, all of Ukiah, for appellants. Robert Duncan, of Ukiah, for respondent.

KERRIGAN, J. This is an appeal from a judgment against defendants in an action wherein plaintiff sought to recover damages for injuries to certain real property committed by the defendants. Such of the facts as are necessary to an understanding of the points herein discussed will be stated in the course of the opinion.

In his brief the plaintiff makes a preliminary motion to dismiss the appeal upon the ground that the notice to the clerk to prepare the transcript on appeal was not given within the time specified in section 953a of the Code of Civil Procedure after notice of the entry of judgment. As to that motion the conclusion we have reached on the merits of the appeal renders unnecessary a consideration of that question.

[1] The first point presented for a reversal of the judgment is that the trial court erred in denying the motion for a new trial made on the ground of the misconduct of the jury; the defendants claiming that the jury determined the amount of its verdict by a resort to chance.

According to the affidavits filed by the defendants on said motion, the verdict of the jury was reached by each juror specifying a sum to which he believed the plaintiff entitled (a maximum of \$1,000 having first been agreed upon), dividing the aggregate of the figures thus obtained by 12, and adopting the quotient as the amount of the verdict. Assuming that a verdict reached in this manner is one found by chance, and will be set aside (*Dixon v. Pluns*, 98 Cal. 384, 33 Pac. 268, 20 L. R. A. 698, 35 Am. St. Rep. 180; *People v. Richards*, 1 Cal. App. 566, 82 Pac. 691), still in the present case, according to the affidavits filed by the plaintiff on the motion, it appears that after the amount of the proposed verdict was ascertained in the manner stated the jurors deliberated and consulted among themselves, and as a result of such subsequent deliberation decided, independent of the agreement that had been made concerning the manner of reaching the verdict, that the sum so ascertained represented in their opinion the amount of damages to

which the plaintiff was in fact entitled. The record therefore presents a conflict of evidence on the question of whether the verdict was determined by a resort to chance; and the court having found on such conflict in favor of the plaintiff, the action of the court will not be disturbed on appeal. *Dixon v. Pluns*, 101 Cal. 511, 35 Pac. 1030; *McDonnell v. Pescadero Stage Co.*, 120 Cal. 479, 52 Pac. 725.

[2] Passing to the next point made by the defendants, the plaintiff in this action claims damages for injury to a small portion of a quarter section of land belonging to him caused by the defendants. It appears that the defendants, acting for the state fish and game commission, went upon the land of the plaintiff and removed a dam which obstructed the free movement of migratory fish up and down a stream flowing through said land. At the trial plaintiff, over the objection of the defendants, introduced evidence tending to show the amount of damage to the portion of the land permanently injured. Defendants here argue, as they did in the trial court, that the true measure of damages in a case like this is the amount of the damage to the whole tract. Doubtless in a case where it is shown that the injury to a portion of the property has depreciated the market value of the entire tract the correct measure of damages is that stated by the defendants, but in the present case no such question is presented, the plaintiff claiming damages for injury merely to the portion destroyed, and that, we think, is the least to which he is entitled. We can conceive of no similar case where the damage to the whole would be less than that to a portion; and, if this be true, how can the defendants be heard to complain?

What we have said in discussing the last point disposes of other contentions of the defendants concerning certain of the instructions to the jury. The instructions as a whole fairly state the law applicable to the facts of the case.

Judgment affirmed.

We concur: **LENNON, P. J.**; **BEASLY**, Judge pro tem.

(36 Cal. App. 41)

PEOPLE v. WAGNER. (Cr. 412.)

(District Court of Appeal, Third District, California. Jan. 25, 1918.)

1. CRIMINAL LAW \Leftrightarrow 1131(3)—APPEAL—FAILURE TO APPEAR—FAILURE TO FILE BRIEF—ELECTION OF ATTORNEY GENERAL.

Where a criminal appeal was placed on the calendar of the January term, 1918, of the appellate court, and, when the cause was in its regular order called for hearing, neither of the two attorneys of record of defendant appeared orally to argue the appeals, and there was not, and is not now, a brief filed by such attorneys in support of the appeals, though the transcripts containing the record on appeal were filed Au-

gust 3, 1917, and the attorneys for defendant duly notified by the clerk of the appellate court that the case would be called for argument and submission Monday, January 14th, the Attorney General could move on notice to dismiss the appeals or submit the cause for decision on the record.

2. CRIMINAL LAW §511(6)—CORROBORATION OF ACCOMPLICES—STATUTE.

In a prosecution for larceny of rope, tents, and other articles, testimony of the wife of the person to whose premises defendants had the stolen property hauled from the premises of the owner that she saw defendant at her home at about 9 o'clock of the night of the larceny, heard him ask her husband to go to the place where the stolen articles had been left by him, and haul them home, and saw the rope, tents, etc., at her home the following day, was sufficient corroboration of the testimony of an accomplice to satisfy the demands of Pen. Code, § 1111.

3. LARCENY §55 — SUFFICIENCY OF EVIDENCE.

In a prosecution for larceny of rope, tents, and other articles, evidence held to support verdict of guilty.

Appeal from Superior Court of Sacramento County; Malcolm C. Glenn, Judge.

Harry Wagner was convicted of grand larceny, and from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

George E. Foote, of Sacramento, and P. J. Wilkie, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was by an information charged with and by a jury convicted of the crime of grand larceny, in the superior court of Sacramento county, and has appealed to this court from the judgment of conviction and the order denying his motion for a new trial.

[1] The case was placed on the calendar of the January, 1918, term of this court, and when the cause was in its regular order called for hearing neither of the two attorneys of record of the defendant appeared orally to argue the appeals, nor was there then, or is there now, a brief filed by said attorneys in support of the appeals, although the transcripts containing the record on appeal were filed on the 3d day of August, 1917, and the attorneys for the defendant duly notified by the clerk of this court that the case would be called for argument and submission on Monday, January 14, 1918. Under this state of the record there was either one of two courses only to be pursued by the Attorney General, viz.: To move, upon notice, to dismiss the appeals; (2) the submission of the cause for decision upon the record. People v. Magri, 32 Cal. App. 536, 163 Pac. 503; People v. Coates, 32 Cal. App. 533, 163 Pac. 502; People v. Maschini, 33 Cal. App. 424, 165 Pac. 546. The Attorney General elected to adopt the latter course; hence we have been required to examine the record to as-

certain whether upon the face thereof there are errors compelling a reversal.

The defendant and three other parties were jointly charged with the larceny of a quantity of rope, a number of tents, and other articles, of the aggregate value of over \$200 and the personal property of one Charles Ross. The crime was committed in the month of January, 1917, in the city of Sacramento.

[2, 3] The evidence need not be set out herein in detail. It is sufficient to say with respect to the proofs that there is ample testimony to support the conclusion of the jury that the defendant and at least one of the other men jointly charged with him stole the articles described in the information on a night in the said month of January, and had them hauled from the premises of the owner to the home of one Gilfillen, who owns an express wagon and carries on an express business, and that said articles were kept at Gilfillen's residence for several days, when the defendant and one of his codefendants, one Cummings, had them removed to another place in Sacramento. Two of the witnesses introduced by the people to support the prosecution were codefendants of the accused. Upon the close of the people's case the defendant, through his attorneys, moved the court to advise the jury to acquit on the ground that the testimony of the said witnesses, one of whom was confessedly an accomplice of the defendant in the commission of the crime, had not been corroborated as required by section 1111 of the Penal Code. The court denied the motion and properly so. The testimony of Mrs. Gilfillen that she saw the defendant at her home at about 9 o'clock of the night of the larceny, heard him ask her husband to go to the place where the stolen articles had been left by him (Wagner) and haul them to his (Gilfillen's) home, and saw the rope, tents, etc., at her home the following day, itself constituted sufficient corroboration of the testimony of the accomplices to satisfy the demands of the statute in that respect. There was, however, other corroboration of the accomplices in the testimony of another witness, who declared, under oath, that a few days after the goods were stolen he packed them at the request of Wagner and one of his confederates. Our conclusion is that the verdict is sufficiently supported by competent evidence.

We have examined the court's charge, and in it we have found no error. It presented to the jury in clear language all the principles of law pertinent to the case as made by the information and the evidence.

Nor have we discovered any error prejudicial to the rights of the accused in the rulings of the court touching the admissibility of evidence.

The case seems to have been well and fairly tried, and the verdict, so far as we are

capable of judging from the bare record, is just.

The judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(35 Cal. App. 69)

NELSON et ux. v. COLTON et al. (Civ. 1794.)
(District Court of Appeal, Third District, California. Jan. 26, 1918.)

1. VENDOR AND PURCHASER §176—ACREAGE—DEFICIENCY—REDUCTION OF PRICE.

Evidence held sufficient to sustain a finding that land was purchased without regard to acreage, and that grantees did not rely on any statement of grantor as to acreage.

2. APPEAL AND ERROR §1010(1)—FINDINGS OF COURT—REVIEW.

Where findings are supported by evidence which is not upon its face unbelievable, they cannot be disturbed upon review.

3. FRAUDS, STATUTE OF §116(5)—AUTHORITY OF AGENT—NECESSITY OF WRITING.

That an agent to sell land had no written authority to sell land as required by Civ. Code, § 1624, subd. 5, is a matter between the vendor and the agent alone, and does not concern the purchaser.

4. DEEDS §58(2)—DELIVERY OF DEED.

If purchaser of land employs attorney of vendor to take care of his part of the transaction, he can make him trustee to receive the deed so as to pass title to him immediately upon delivery to the attorney, although he gives the attorney no authority to accept delivery.

5. DEEDS §62—DELIVERY OF DEED TO UNAUTHORIZED AGENT—RATIFICATION BY ACTION.

Where purchaser of land sued to reduce price of land on account of shortage in acreage, he ratified any unauthorized acts of another in accepting and recording the deed for him.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Carl A. Nelson and Jennie Nelson, his wife, against B. F. Colton, O. G. Hopkins, and Fred J. Harris. Judgment for defendants, and plaintiffs appeal. Affirmed.

C. A. S. Frost and Francis V. Keesling, both of San Francisco, and S. Luke Howe and Downey, Pullen & Downey, all of Sacramento, for appellants. Fred J. Harris, O. G. Hopkins, and Thomas B. Leeper, all of Sacramento, for respondents.

HART, J. This is an appeal by the plaintiffs from a judgment rendered and entered against them and in favor of the defendants.

The controversy leading to the action arose over a sale of a tract of land in Sacramento county by the defendants to the plaintiff Carl A. Nelson. The claim of the plaintiffs is that, in the negotiations resulting in the sale, the defendant B. F. Colton falsely represented to the plaintiffs that the land in question embraced at least 263 acres; a survey of the land after the sale having disclosed that the tract sold contains 240.52 acres only. The purchase price of the property sold was \$40,000, and the principal object of

the action is to secure an abatement of the purchase price "in the sum of \$152 for each acre of shortage in the quantity of said land, less than 263 acres," to secure a reformation of the promissory note given by the plaintiffs to the defendants for the balance of the purchase price of the land and the trust deed given by the plaintiffs to secure the payment of said note, and to enjoin the defendants from selling or offering for sale the real property described in said trust deed for the purpose of satisfying said note.

The complaint charges that, before the sale was consummated and while the plaintiff was negotiating for the purchase of the land, the defendant B. F. Colton, for the purpose of inducing the said plaintiff to purchase said tract of land, represented to said plaintiff that said tract contained 275 acres; that "thereafter, and at the time of the delivery of the deed hereinafter mentioned, defendant Colton represented to plaintiffs that said tract actually contained about 263 acres, instead of 275 acres, as he had theretofore stated." It is further alleged:

"Said statement was made for the purpose of deceiving plaintiffs and of thereby inducing plaintiffs to purchase said tract, and did deceive and did thereby induce plaintiffs to purchase it. Plaintiffs thereupon purchased said tract, relying upon said representation, and believing it to be true, and that said tract did contain about 263 acres."

It is alleged that said tract of land never at any time contained 263 acres or more than 240.52 acres, and that, when representing to the plaintiffs that the said tract contained 263 acres, the said defendant Colton "well knew said statement to be untrue, and that said tract of land did not contain more than 240.52 acres." The complaint further alleges that the actual value of said tract, as well as the value thereof agreed upon by the plaintiffs and the defendant Colton at the time of said sale, was \$152.00 per acre.

The defendants, replying to the complaint, admit and deny certain of the averments of said pleading, and then set up the following affirmative defense:

"That plaintiffs bought said land as a tract; that quantity was not a material consideration or part of said transaction; that defendants viewed said tract of land several times and walked over and upon the same several times; that defendant Colton correctly pointed out the boundaries of said tract to plaintiffs; that plaintiffs had full knowledge of the boundaries of said tract and full knowledge of the size of said tract; that plaintiffs had as good an opportunity as did defendant Colton to learn the exact acreage in said tract; that plaintiffs did not buy said tract by the acre, but bought the same as a tract, as it was inclosed by its boundaries; that the agreed price of said tract of land was \$40,000 for the tract as a whole; that plaintiffs bought said tract as they saw it; that they relied upon their own observation and did not rely upon any representation made by defendant Colton as to the number of acres in said tract."

The findings briefly are: That it was not a part of the agreement of sale that the pur-

chase price of \$40,000 was to be based upon the number of acres embraced in the tract sold; that said Colton informed the plaintiffs that it would take \$40,000 to buy said place, regardless of the number of acres in said tract, and that he informed the plaintiffs that he would not take any less amount than \$40,000 for said tract; that said tract was bought and sold as a tract and as an entirety and not by the acre; that the buyer of said land was upon the same and the boundaries thereof were correctly pointed out to said buyer on three different dates prior to said sale; that the said parties never agreed that the purchase price of said land should be \$152.09 per acre, or for any price per acre; that the description contained in the deed to said property is the correct description of said land, the boundaries of said land being correctly set forth and described therein, and that the plaintiffs received from said sale "and now are in the possession of all the land that defendant Colton sold to plaintiffs"; that, prior to making the contract of sale, plaintiffs informed one Thomas Jenkins that they were about to purchase said land for \$40,000, and asked said Jenkins if in his opinion said place was worth that sum, and whether he would advise them to pay said sum therefor, and that said Jenkins thereupon informed plaintiffs that said place was worth \$40,000, and advised plaintiffs to pay said sum therefor; that plaintiffs relied upon the advice so given by said Jenkins and acted thereon; that the defendant Colton made no fraudulent representations to plaintiffs, nor were plaintiffs influenced to purchase the tract by reason of any fraudulent representations made to them by said Colton; that plaintiffs, upon learning of the shortage of acres in said tract, did not offer to rescind said contract and restore the same to said Colton, nor have they at any time since learning of such shortage in the number of acres in said tract offered to rescind or offered to restore said land to said Colton.

The judgment is assailed solely upon the ground that the findings do not derive sufficient support from the evidence. The facts are:

That in the month of September, 1913, one A. J. Crawford, a real estate dealer in the city of San Francisco, having previously been informed that the defendant Colton desired to sell his farm—the land in question—went to said farm for the purpose of seeing and interviewing Colton with the view of securing a contract with him authorizing him (Crawford) to sell the land. Crawford on that occasion met Colton and his wife, apprised them of the purpose of his visit, and proposed to them the agreement referred to. Colton said to Crawford that sometimes he felt that he would like to sell the place and at other times he did not feel so disposed. After considerable negotiation, however, Colton, on the 31st day of December, 1913, gave Crawford verbal authority to sell the place,

together with the improvements and the personal property on the farm, for the sum of \$40,000. Crawford, having known the plaintiff Carl A. Nelson for about a year before the authority to sell the Colton place was given him, and knowing that Nelson desired to purchase some farming land, called on the latter and submitted the Colton proposition to him. Crawford and Nelson visited and inspected the land in question on three different occasions prior to the 15th day of January, 1914. Crawford, testifying as a witness for the plaintiffs, said:

"Mr. Nelson asked me, I think, on two different occasions when I was out on the ranch, if I thought there were 275 acres in that tract; I told him I did not know, I presumed so, somewhere near it; the man that lived there ought to know about the acreage that he had. I did not know; I could not tell you what was there—did not make any difference, acreage, the acres; I was selling the place for \$40,000 and some horses and implements."

Crawford said that the first time he visited the land with Carl A. Nelson he pointed out to the latter the boundaries of the land.

"I showed him where the land lay and the fences around it. * * * We next visited the land on the 11th [of January, 1914]. At that time Mrs. Nelson and my wife accompanied us. Mr. Nelson and I walked out in the field around the barn, barnyard, and around the buildings. * * * I think Mr. Nelson asked me if I thought there were 275 acres in the place. I told him I thought there were. I stated the place had not been surveyed; I had no means of knowing. Mr. Nelson said he guessed there was enough land there. I told him it didn't make any difference as to the number of acres—that it took \$40,000 to buy the property. I told Mr. Nelson Mr. Colton thought there were 275 acres in the place, but that it had not been surveyed, but that it did not make any material difference as to the acres, that the price was \$40,000 just as it was, with the improvements."

On the 14th day of January, 1914, Carl A. Nelson informed Crawford that he would take the land on the terms stated and on the following morning he and Crawford left San Francisco for Sacramento for the purpose of completing the deal. Arriving at the latter place, Nelson and his wife executed and delivered to Crawford a written agreement of purchase, and at the same time made to Crawford a payment of \$1,000 of the first or cash payment which was to be made upon the execution of the deed. Crawford further testified:

"When we were there [Sacramento] Mr. Nelson called up Tom Jenkins, who at that time was supervisor there; asked him if he knew the Colton ranch. I was at the Land Hotel at the time he called him up. Mr. Jenkins told Mr. Nelson he knew the place. Mr. Nelson asked Mr. Jenkins what he thought about the place and Mr. Jenkins told Mr. Nelson it was a good ranch. Mr. Nelson told him he was thinking about taking it and was going to pay \$40,000 for it and wanted to know if Mr. Jenkins thought it was worth that. As I understood, he said that it was. Mr. Nelson told me he said so, and as near as I can understand the phone."

It appeared that Attorney Busick, of Sacramento, was the attorney of the defendant Colton. After the conversation over the telephone between Nelson and Jenkins, above

narrated, Crawford and Nelson went to Busick's office. Nelson had urgent business in San Francisco and was required to leave for that city that day, and he left the matter, so far as he was concerned, to be attended to by Judge Busick, saying to the latter that "he could take care of his business, too," and at the same time paying the attorney a fee. Thereafter Judge Busick drew up the deed from Colton and his wife to the Nelsons and a trust deed from the latter and his wife to the defendants Harris and Hopkins, as trustees, to secure the payment of the unpaid balance of the purchase price of the land in question. These instruments were recorded in the office of the county recorder of Sacramento county, on the 22d day of January, 1914, at the request of the said Busick, the balance of the first payment (\$8,000) having been paid by Nelson to Judge Busick.

The defendant Colton testified that he first met Crawford about the 28th day of December, 1913, at his farm. Crawford called to ask whether he desired to sell the farm and Colton replied in the affirmative. Colton then told Crawford that the land had never been surveyed, but that he was of the opinion that it contained from 263 to 275 acres. Colton then made an oral agreement with Crawford whereby the latter was given authority to sell the farm as it stood—improvements and certain personal property—for the sum of \$40,000. For his services in making the sale, Crawford's commission was to be governed by the number of acres in the tract, to be later ascertained by a survey thereof.

Colton testified that he met Carl A. Nelson for the first time at the land in question, on one of the early days of the month of January, 1914. At that time he told Nelson that he did not know precisely how many acres the tract contained, but that he believed it embraced from 263 to 275 acres. He then pointed out the boundaries of the land to Nelson. He further testified that the land was originally bought by himself and brother, and the same jointly conveyed to them; the deed reciting that the tract contained 269 acres. He said, though, that the land had always been assessed as a tract containing 263 acres, and that he had always paid the taxes on that number of acres.

Mrs. Colton, wife of the defendant of that name, testified to the payment by Nelson of the sum of \$7,000 to her husband upon the execution of the deeds referred to above; said sum being the balance due on the first payment. She also testified that Attorney Busick prepared the deeds; that she and her husband executed the one conveying the land to Nelson; and that she delivered said deed to said Busick, with instructions that he deliver the same to Nelson.

The plaintiff Carl Nelson said that, prior to the purchase, Crawford had told him that

there were about 275 acres in the tract; that subsequently Crawford told him that a survey of the land had been made and it was found to contain only 263 acres. The witness said that, in making the deal, he figured on the basis of 263 acres. He said that Colton had told him that he had paid taxes on 263 acres. The deed from the Coltons to Nelson recited that the tract contained "263 acres, more or less."

The agreement between Colton and Crawford as to the latter's compensation for negotiating the sale of the land was to be whatever he could get for the land in excess of \$135.50 per acre. In other words, Colton wanted to net that sum per acre on the sale. On the 18th day of January, and after Nelson had agreed to buy the land and had made a payment of \$1,000 on the bargain, as evidence of good faith, Colton had the land surveyed for the purpose of ascertaining the exact number of acres it contained, and thus arrive at the amount of Crawford's compensation. The survey was made, and thus it was ascertained that there were in the tract 240.52 acres only. Not satisfied with the first survey, Colton caused the land to be resurveyed; the result as to the number of acres being approximately the same. Colton testified that he expected to receive something like \$37,000 net for the land, and that, being greatly disappointed over the result of the survey and the amount he was to receive beyond the compensation to be paid to Crawford, he told both the latter and Nelson that he "wanted to back out of the thing—that I would give \$100 and back out."

[1] The foregoing involves a statement substantially of all the testimony, and it must be plainly manifest therefrom that the court was warranted in finding, as it did find, that at no time, until the survey of the tract was made at the instance of Colton himself, as above shown, did the latter know precisely how many acres the tract contained; that until such survey he was of the opinion that it contained at least 263 acres. That Colton honestly believed that the tract contained more than the number of acres that the survey disclosed is shown, not only by the fact that he had always paid taxes on the basis of 263 acres but also by the fact that he was so disappointed in the shortage of acres as so disclosed that he offered to pay Crawford and Nelson \$100 to rescind the agreement of sale. It does not appear that Nelson concerned himself sufficiently about the number of acres in the tract before the sale to ask for a survey of the land. Colton had expressed to him the opinion, he testified, that there were about 275 acres in the tract; but he was willing to assume that it embraced only 263 acres, presumably because Colton had told him that on that number of acres he had paid taxes. So far as this transaction is concerned, it does not appear

that he intended to take steps necessary to the ascertainment of the precise quantity of land in the tract, and it is probable that no controversy would ever have arisen upon that point had Colton himself not caused a survey to be made. As to the good faith of Colton, it is to be observed that it is hardly reasonable to suppose that, had he known or had reason to believe that the tract contained less than 263 acres he would have entered into an agreement with Crawford with respect to the latter's compensation for effecting a sale which would have necessitated a survey of the land to ascertain its precise quantity. Indeed, that Colton himself must have been, as he declared, greatly surprised and disappointed when he learned that the actual quantity of land in the tract had fallen far short of what he believed it to be is well supported by the consideration that the shortage resulted in a corresponding reduction of the amount that he expected to net on the sale. It made several thousands of dollars difference to him.

But we may cast aside further consideration of the allegations and claim of fraud in Colton's representation as to the number of acres in the tract as wholly immaterial, for there is, as we have shown, evidence sufficient to support the finding that the land and certain personal property thereon were sold without regard to the number of acres in the tract. The plaintiffs' own witness Crawford so testified, and his testimony upon that proposition was corroborated by that of Colton. The fact, therefore, if it was a fact, that Colton did not reveal to Nelson the result of the survey of the land made after the contract of purchase was entered into by Nelson, and the further fact that Colton received a payment on the purchase price with knowledge of the shortage of acres, as shown by such survey, are of no material consequence in this controversy. And, for the same reason, it is of no material importance that the land is described in the deed of the Coltons by metes and bounds and as containing "263 acres, more or less." In other words, in view of the finding (upon sufficient evidence, as we have seen) that "it was no part of said contract or agreement that said purchase price of \$40,000 was to be based upon the fact that there were about 263 acres in said tract" and that "defendant Colton informed plaintiffs that it would take \$40,000 to buy said place, regardless of the number of acres in said tract," the fact that the acreage was found upon a survey of the tract to be less than the parties believed when the sale was made, and the further fact that the deed from the Coltons to the plaintiffs described the land as containing more acreage than it actually embodied, present considerations which can justly exert no influence on the decision of this case.

[2] This court cannot repudiate findings deduced from evidence sufficient to warrant

or support them. To the contrary, where findings derive support from evidence which is not upon its face unbelievable, the facts found must be accepted by a reviewing court as having been proved. In this case, therefore, there being nothing inherently improbable in the testimony upon which the findings are evidently founded, the facts found must be accepted as the established facts of the controversy. This is only the statement of an obvious and elementary rule of law. The result is that we are required to accept it as the established fact in this case that the contract of sale and purchase was not based upon the number of acres in the tract, but that the agreement was that the land was to be sold and was so sold to Nelson for the sum of \$40,000.00 as an entirety or without regard to the number of acres that it contained.

It follows that the authorities cited by learned counsel for the plaintiffs upon the question of the alleged fraud and misrepresentations of the defendant Colton as to the quantity of land of which the tract consists, and upon the proposition that from the fact that the tract is farm land the presumption follows that "acreage is material," have no application to this case.

[3] The point is made that the sale was void for the reason that Crawford's authority to sell the land was not in writing, as required in such cases by section 1624, subd. 5, of the Civil Code. In its application to this case, there is clearly no force in the point. Whether Crawford was legally authorized to make a binding contract for the sale of the land, was a matter entirely between him and Colton, the owner of the land. The latter has not questioned Crawford's authority or act in that regard. On the contrary, he ratified all that Crawford did under his verbal authority by conveying the land to Nelson. Moreover, the act of Nelson in agreeing to purchase and in purchasing the land very obviously showed that he then had no objection, or reason to make any, to Crawford's alleged want of legal authority to make the sale, even if he were in any position to make a valid objection thereto.

[4, 5] It is next urged that Judge Busick was without authority to accept delivery of the Colton deed for the plaintiffs, and it is hence argued that there never was a delivery of said deed and, therefore, there was no legal conveyance of the land to the Nelsons.

Carl A. Nelson, it will be remembered, called at Busick's law offices with Crawford, knowing that Busick was to represent the Coltons in the transaction, and employed the lawyer to attend to his part of the transaction. Precisely how far Busick's authority to act for the plaintiffs in the transaction extended, the testimony does not show. Nor is it important that the limit of Busick's authority should be shown, so far as the

(36 Cal. App. 94)

BROWN v. LEMON COVE DITCH CO.

(Civ. 1779.)

(District Court of Appeal, Third District, California. Jan. 31, 1918.)

1. APPEAL AND ERROR ⇨1002—VERDICT ON CONFLICTING EVIDENCE.

Verdict based on conflicting evidence will not be disturbed.

2. MASTER AND SERVANT ⇨235(2) — DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE—DUTIES OF SERVANT.

Where the employé of a ditch company had charge of its flume, it being a part of his duty to keep it in repair, and he being authorized to obtain tools or material required, so that if any defect existed it was the employé's fault, and not imputable to the ditch company, the latter was not liable to the employé's administratrix for his death from the defect.

3. MASTER AND SERVANT ⇨236(4)—DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE.

The employé of a ditch company, in charge of its flume 30 inches wide, 17 or 18 inches deep, with cross-pieces 8 feet apart made out of boards 2 inches by 4, the flume being about 11 feet from the ground, was guilty of negligence contributing to his death in a fall from the flume where he attempted to walk along the flume which had no board extending along its length and over the cross-pieces, he being a man of advanced age and excessive weight.

4. EVIDENCE ⇨472(5) — OPINION — FACT IN ISSUE.

In an action for death of the employé of a ditch company in a fall from its flume, where the theory on which the case was tried required the jury to find as a material fact whether a board was on top of the flume just prior to the accident, to permit a witness to state that it looked to him that it was so situated, and that deceased had stepped on the board in such a way as to cause it to slip, was equivalent to a ruling that he might declare that it appeared to him that the ditch company was not negligent as claimed in not maintaining a proper passageway along the flume, and such opinion of the witness was inadmissible.

5. TRIAL ⇨96—MOTION TO STRIKE ANSWER—FAILURE TO SPECIFY PART.

Where plaintiff, in her motion to strike out a witness' answer as unresponsive, did not specify the particular portion of the answer, a part of which was not objectionable, that she desired eliminated, the ruling denying the motion was technically justifiable.

6. TRIAL ⇨91—MOTION TO STRIKE TESTIMONY—OBJECTION TO TESTIMONY.

Where motion was made to strike out an answer, somewhat of the nature of an opinion of the witness, but responsive to the question, to which no objection was made, the objection to the testimony was too late.

7. TRIAL ⇨105(1)—INCOMPETENT TESTIMONY—ELUCIDATION.

The fact that no motion was made to have a witness' answer on cross-examination stricken out did not warrant further effort on redirect to elucidate such answer, which was incompetent as hearsay.

8. TRIAL ⇨29(2)—REMARK OF COURT—OPINION ON WEIGHT OF EVIDENCE.

In an administratrix's action for death of a servant, where plaintiff was asked about a conversation between deceased and his employer's superintendent, the purpose being to show a promise to furnish running boards on the flume where the servant was killed, and, on objection, after some discussion between counsel, the court said that it would not be competent until they proved that there were no running boards at the

present point is concerned. Mrs. Colton, one of the grantors, testified that, after she and her husband had signed and acknowledged their deed to the Nelsons, she left the instrument with Judge Busick to hand over to Mr. Nelson and that she instructed him so to deliver it. This amounted to a delivery, so far as the grantors were concerned, and, although not necessarily bound by Busick's act in accepting delivery of the deed if they did not authorize him to do so, and did not desire to be so bound, the Nelsons, as they appeared to have done, could nevertheless treat Busick as their trustee, in which case full title would pass to the Nelsons the moment of the delivery to Busick. *Bury v. Young*, 98 Cal. 451, 33 Pac. 338, 35 Am. St. Rep. 186; *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 300; *Crozer v. White*, 9 Cal. App. 612, 621, 100 Pac. 130. But it seems to be the position of the appellants that, because Busick, in the place of immediately making a physical delivery of the instrument to the Nelsons, first caused the deed, with the deed of trust by the Nelsons to secure the payment of the unpaid balance on the purchase price, to be filed for recordation in the office of the county recorder, there was not a delivery to the Nelsons. But the point, even if under other conceivable circumstances tenable, is without force in its application to this case. The Nelsons do not claim in this action that they did not acquire title to the land in a valid way or that the title thereto is not in them. To the contrary, the very theory of this action here is that they are the owners of the land, and presupposes that the conveyance by which title was vested in them conformed to the law as to all the formal and other requisites of a conveyance of real property. Moreover, assuming that Busick was not authorized to bind them by his act of accepting delivery of the deed, and was not authorized to cause it to be recorded before delivering it into their physical possession, and that there was for those reasons or either of them no delivery either in fact or in law, still the fact remains that the Nelsons did accept title to the land and thereby ratified every unauthorized act of Busick in connection with the transaction, so far as they were concerned therein.

There are some other points made and many cases cited on all the points discussed in the briefs, but the findings which have herein been specially considered are so well buttressed by the evidence and so clearly decisive of the case in favor of the defendants that it is deemed entirely unnecessary to consider the points not already noticed or to examine herein the cases referred to. The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

point where the servant fell, such remark, though unfortunate, was not erroneous, as the court had in view only the order of proof; and if defendant believed that the suggestion of the court might be interpreted as an expression of opinion on the credibility of any witness or the weight of the evidence, she should have specifically objected.

9. MASTER AND SERVANT \S 270(8)—**DEATH OF SERVANT—EVIDENCE—IMMATERIALITY.**

In an administratrix's action against a ditch company for death of its servant in a fall from its flume, it being apparent that the absence of boards at other points of the flume did not contribute to the fall and death, testimony as to the condition of the flume at other points was properly excluded as immaterial.

10. APPEAL AND ERROR \S 1058(3) — **HARMLESS ERROR—EVIDENCE.**

In such action, ruling excluding testimony of a witness as to the condition of the flume at other points was harmless where other witnesses testified without objection that boards were missing at other points, the matter was admitted by some of the ditch company's witnesses, and there was no evidence to the contrary.

11. TRIAL \S 46(2)—**SHOWING OF PURPOSE OF QUESTION.**

In an action for death of a servant, plaintiff administratrix should have stated her purpose in asking a witness what was the state of his feelings toward the administratrix, representative of the deceased servant's estate; it not being apparent to the trial court at the moment that the purpose was to show that the witness was not friendly to the administratrix.

12. APPEAL AND ERROR \S 969 — **VISITING SCENE OF ACCIDENT—DISCRETION OF COURT—STATUTE.**

Under Code Civ. Proc. \S 810, committing to the discretion of the court the matter whether the jury shall visit the scene of an accident in suit, the appellate court could not predicate error on the refusal of the request of an administratrix suing her decedent's employer for his death to have the jury visit the scene of the accident.

13. MASTER AND SERVANT \S 356—**COMPARATIVE NEGLIGENCE—REPEAL.**

The Roseberry Act (St. 1911, p. 796), affirming the doctrine of comparative negligence, was repealed by the Workmen's Compensation Act (St. 1913, p. 279), which does not recognize the doctrine.

14. MASTER AND SERVANT \S 352 — **INJURIES TO SERVANT — COMPARATIVE NEGLIGENCE — WORKMEN'S COMPENSATION ACT.**

Under Workmen's Compensation Act, repealing the doctrine of comparative negligence, administratrix of servant killed in service, to recover from the corporation employer for the death at common law, must show gross negligence and willful disregard of the life, limb, or bodily safety of the servant on the part of an elective officer of the corporation, and the action cannot be maintained if the accident was due to the servant's contributory negligence.

15. TRIAL \S 252(11)—**INSTRUCTION—SUPPORT BY EVIDENCE.**

In an action for death of a servant in a fall from a flume, though no witness could swear positively that there were boards or a board on the top of the flume, but it was a fair inference from the testimony of certain witnesses that the flume was so supplied, there was evidentiary support for the hypothesis suggested by an instruction as to the presence of boards.

16. TRIAL \S 253(9) — **INSTRUCTIONS — CONFLICT.**

In an action for death of a servant, an instruction which would have nullified another instruction and evidence as to contributory neg-

ligence, and the asserted condition that the deceased servant had complete charge of the flume from which he fell and was killed, was properly refused.

17. TRIAL \S 253(4)—**INSTRUCTION—IGNORING ISSUES.**

In an action for death of a servant, instruction requiring a verdict for plaintiff, regardless of the servant's contributory negligence, was properly refused.

18. ESTOPPEL \S 98(3)—**PERSONS AFFECTED.**

If the employé of a ditch company agreed to keep the flume, from which he fell and was killed, in safe condition, he would be estopped from urging his want of authority as an excuse for his failure to attempt at least to comply with his agreement, and his administratrix is in no better position.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Rennie C. Brown, as administratrix of the estate of Marcellus Brown, deceased, against the Lemon Cove Ditch Company, a corporation. From judgment for defendant, plaintiff appeals. Affirmed.

J. C. Thomas, of Oakland, and Edwards & Smith, of Dinuba, for appellant. Farnsworth & McClure, of Visalia, for respondent.

BURNETT, J. The action was for damages for the death of one Marcellus Brown, alleged to have been caused by the negligence of the defendant. The trial was by a jury, the verdict was in favor of said defendant, and from the judgment entered thereon the appeal has been taken.

The particular ground of complaint is declared in the following allegations:

"That the defendant is now, and was at all times herein mentioned, the owner and in possession of certain flume, conduit, or structure built of wood, used, owned and operated by the said defendant for irrigating purposes. That on or about the 4th of March, 1914, the deceased, Marcellus Brown, while regularly employed by the aforesaid defendant, and while caring for and attending the aforesaid flume of the defendant pursuant to the performance of his duties while in the actual employ of the said defendant, came to his death on the day last aforesaid, by falling from the said flume or conduit; the said fall being the proximate cause of the death of the said deceased. That the fall was sustained through and by reason of the negligence of the defendant in failing to make, build, prepare, or provide a proper walk, footpath, or passage over and upon said flume for the use of the said deceased, and by requiring the said deceased to, and the said deceased did, inspect, repair, pass over, and traverse the said flume without any walk or passageway safe and suitable upon which the deceased might or could walk or travel during the performance of his duties as aforesaid. That the said deceased * * * had prior to the said accident * * * called the attention of the said defendant to the defective and dangerous walkway, to wit, two weeks before said accident causing his death, and the said defendant then and there, upon its attention having been called thereto, and the deceased having pointed out the dangers thereto attached to the said defendant, and the said defendant promised to make and prepare a proper walkway over and upon the said flume, and the deceased relying upon the said promises of the said defendant continued to, as aforesaid, perform the duties as a servant of the said de-

defendant. That the said defendant though promising to, as aforesaid, utterly failed to make, erect, contrive, or place upon the said flume, a proper walkway by which deceased could pass over."

[1, 2] Plaintiff seems to have regarded the case as governed by the general law of negligence, and it was tried upon that theory. In accordance with this view the verdict of the jury is amply justified upon several grounds. In the first place, there is substantial evidence to support the theory that the "walkway" at the point where the accident occurred was in a proper and safe condition. The testimony to that effect is quoted in the brief of respondent, but we can see no good in reproducing it. Granting that plaintiff introduced some evidence to show that said "walkway" at said point was defective and dangerous, the most that we can say in his favor is that the evidence as to defendant's negligence was substantially conflicting. Again, the showing is strong to the point that the deceased had charge of said flume, that it was a part of his duty to keep it in repair, that he was authorized to obtain whatever tools or material might be required for that purpose, and that he actually did perform such work. The jury could properly accept this as the real situation, and, doing so, it would be their duty to find that if any defect existed it was entirely the fault of the deceased, and not imputable at all to respondent. The principle of law applicable to such condition is stated and discussed in *Duffy v. Hobbs, Walls & Co.*, 166 Cal. 210, 135 Pac. 1093, L. R. A. 1916F, 806, and *Peterson v. Beck*, 27 Cal. App. 571, 150 Pac. 788.

[3] Furthermore upon the theory, which is earnestly contended for by appellant, that at the point where deceased fell from the flume there was no board extending along the length of the flume and over the cross-pieces, it probably should be held that he was chargeable with such carelessness, and with such recklessness in regard to his own safety, as would prevent a recovery under the doctrine of contributory negligence, there being no claim by appellant that such defense may not be made, as alleged in the answer. To see how unmistakable appears the great carelessness of the deceased, if we accept said theory, we may recall these facts: The flume was 30 inches wide and 17 or 18 inches deep, with cross-pieces or taps across it about 3 feet apart made out of boards 2 inches thick by 4 inches wide, and at the place where deceased fell the flume was about 11 feet from the ground. According to the testimony for appellant the deceased knew that the way was unsafe, and he had complained of it. Nevertheless he deliberately attempts to make the dangerous passage with the situation aggravated by the circumstance of his age and of his excessive weight. That his adventure under such circumstances manifested in no slight degree the want of ordi-

nary care can hardly be disputed. His conduct would seem to constitute a greater departure from the course of common prudence exacted of every individual than that exposed and discussed in *Brett v. Frank & Co.*, 162 Cal. 735, 124 Pac. 437.

Treating this action, therefore, as subject to the general law of negligence, it is extremely doubtful whether a verdict for the plaintiff would be supported. However, we may waive the question whether the verdict, regardless of any errors that may have been committed, could legally have been rendered for the plaintiff, and proceed to pay some attention to the specifications of the alleged mistakes of the trial court.

[4, 5] The witness, Z. L. Brown, was asked this question:

"But at the place where he fell you do not know whether there was a board or not?"

He answered:

"I do not know whether he knocked this one off on his fall; that it tilted with him, or it had been off before; but from appearances to me, it looked like that he had partly slipped on and had stepped on the end, and it had tilted with him and pitched off with him."

Then followed:

"Q. You do not know anything about that; you are just guessing at it?"

"The Court: The witness has answered.

"Mr. Thomas: I move that that part of the answer be stricken out, as not responsive to the question."

The motion was denied. It is no doubt true, as stated in *Healy v. Visalia, etc.*, R. R. Co., 101 Cal. 585, 36 Pac. 125, that "the border line between fact and opinion is often very indistinct, and the statement of a fact is frequently only an opinion of the witness," but the theory upon which the case was tried required of the jury to find as a material fact in the case whether said board was on top of the flume just prior to the accident, and to permit the witness to state his opinion that it was so situated was equivalent to a ruling that he might declare that it appeared to him that defendant was not negligent in the respect claimed by the plaintiff. It appears to us, without citing the authorities, that the opinion of the witness was not admissible and that portion of his answer might very properly have been stricken out. However, the motion was made simply upon the ground that it was not responsive to the question, and appellant did not specify the particular portion that he desired eliminated. Hence the ruling was technically justifiable.

[6] The second complaint as to the rulings of the court involves the denial of a motion to strike out an answer somewhat of the nature of an opinion, but it was responsive to the question to which no objection was made. The objection was therefore too late.

[7] On cross-examination of Z. L. Brown he was asked what the walk boards were used for, and after answering the question he volunteered a statement as to a conversation which he had with his brother, the deceased.

No objection was made to it, but on redirect examination appellant attempted unsuccessfully in face of an objection to have the witness state definitely when this conversation took place. The matter was purely hearsay and not relating to the subject involved in the question of respondent, and the fact that no motion was made to have the answer stricken out did not warrant any further effort to elucidate the incompetent testimony. Besides, the witness had stated when the conversation occurred and its repetition would have accomplished no good.

[8] The plaintiff was asked about a conversation between the deceased and J. E. Pogue, superintendent of respondent, the purpose being to show a promise to furnish running boards, and, an objection being made, after some discussion between counsel, the court said:

"It would not be competent until you prove that there were no running boards at the point where he fell."

Complaint is made of this remark as an invasion of the province of the jury in that it amounted to a declaration by the court that no such proof had been offered, whereas it is contended that a witness had already testified to that effect. No doubt the expression was somewhat unfortunate, but we think from the context and the language used that the court had in view only the order of proof, and that it was so understood by the jury. If appellant believed that the suggestion of the court might be interpreted by the jury as an expression of opinion on the credibility of any witness or the weight of the evidence he should have specifically objected in order that the court might obviate any such result. Moreover, we find in the instructions a clear statement as to the right and duty of the jury to pass upon these considerations, and an unmistakable disclaimer of any right or disposition by the judge to decide or to express any opinion upon any question of fact. Under the circumstance, said remark could have resulted in no harm.

[9, 10] It is contended that the court was in error in refusing to allow a certain witness to testify as to the condition of the flume at other points than the one where the deceased fell, it being declared by the trial judge:

"So far as the condition of the flume at other points it is immaterial in this case. No matter what the condition was at other points, that would not cause the accident."

Generally speaking, no doubt, there must be some causal connection between the accident and the negligence to permit evidence of the latter, and since it is apparent that the absence of boards at other points did not contribute to the fall and death of the deceased, it would seem that the ruling was correct. But assuming that such evidence was admissible to show willful and wanton negligence on the part of respondent, it is sufficient to say that no such issue was tendered

by the complaint. Besides, several witnesses testified without objection that boards were missing at other points, it was admitted by some of the witnesses for the defendant, and there was no evidence to the contrary. The ruling then, at any rate, was without prejudice. Indeed, the defense as to the boards was that they were properly supplied at the place of the accident, and that the whole matter was under the control and direction of decedent. There are several other similar rulings of which complaint is made, but they do not require special notice.

[11] The court might properly have allowed the witness Pogue to answer the question:

"Just or what is the state of your feelings towards Rennie Brown, representative of the estate of this man?"

However, it was probably not apparent to the court at the moment that the purpose of appellant was to show that the witness was not friendly to the plaintiff, and appellant should have stated what he had in view in asking the question. The record shows simply that the witness was recalled for one question, that it was propounded and an objection made upon the general grounds and sustained by the court. Besides, the ruling is not argued, it simply being noted in the brief of appellant, and we may dismiss it without further comment.

[12] We cannot say that there was error in the refusal of the request to have the jury visit the scene of the accident. Under section 610 of the Code of Civil Procedure this is committed to the discretion of the court, and we find no abuse of that discretion. Indeed, the practice is a dangerous one, as is well known to the profession, and from an examination of the record herein we are satisfied that nothing would have been gained had the request been granted.

As to the instructions, it is claimed that the two, No. 12 and No. 30, are contradictory and irreconcilable. But appellant is entirely at fault in this contention. The former is based upon the theory that it was the duty of defendant to keep the flume in a safe condition, and the latter that the decedent was charged with that responsibility. There was evidence to support either theory, and said instructions announced the principle of law applicable to either situation.

[13, 14] We can see no error in the following instruction:

"If a person's own want of ordinary care is the proximate cause of his injury or death, this is contributory negligence on his part, and no damages can be recovered from another person for such injury or death, even though the negligence of such other person may also have been a cause of the injury or death, and therefore if it appears from the evidence in this case that deceased, Marcellus Brown, in walking along said flume, negligently and carelessly (from lack of ordinary care) made a misstep and fell, which fall resulted in his death, and that the proximate cause of his death was due to want of ordinary care on his part, then plaintiff cannot recover in this action and your verdict must be for the defendant."

The contention of appellant as to this instruction is that it ignores the doctrine of "comparative negligence," as provided in what is known as the Roseberry Act of 1911. But that law was repealed by the Workmen's Compensation Act of 1918, and the accident herein occurred after the latter statute became operative. The said Compensation Act does not recognize the doctrine of "comparative negligence." Indeed, that statute provides that the remedy provided therein shall be the exclusive remedy for the securing of damages against an employer for the death of or injuries to the employé, except "that when the injury was caused by the employer's gross negligence or willful misconduct, and such act or failure to act causing such injury was the personal act or failure to act on the part of the employer himself, or if the employer be a partnership on the part of one of the partners, or if a corporation, on the part of an elective officer or officers thereof, and such act or failure to act indicated a willful disregard of the life, limb, or bodily safety of employés, any such injured employé may, at his option, either claim compensation under this act or maintain an action at law for damages." The plaintiff chose the latter alternative, and it is therefore plain that in order to prevail he must have shown "gross negligence" and "willful disregard of the life, limb, or bodily safety of the employé" on the part of an elective officer of the corporation, and we think it equally plain that his action would be defeated by the fact that the accident was due to the contributory negligence of the deceased. It may be added that the instruction is not in conflict with the doctrine of comparative negligence, since it contemplates a condition wherein there could be no slight negligence on the part of the deceased.

[15] The only objection made to instruction No. 32 is that there is no evidence in the record that there were boards or a board on top of the flume at the particular place where Mr. Brown fell. Appellant is mistaken in that contention. It is true no one could swear positively that such was the case, but it is a fair inference from the testimony of certain witnesses that the flume was so supplied at that point, and it could not be said that there was no support for the hypothesis suggested by said instruction.

[16] Appellant complains of the action of the court in refusing certain instructions prepared by him. The first of these was properly rejected because it instructed the jury to find for the plaintiff if they believed the flume was not properly supplied with running boards by the superintendent of respondent. It would have nullified the instruction and evidence as to contributory negligence

and the asserted condition that the deceased had complete charge of the flume.

The instruction directing the jury that they could not assume that it was the duty of the deceased to provide the runway simply because he was the foreman might well have been given, but it was sufficiently covered by other instructions, particularly the one defining the duty of the "foreman" and also of the "superintendent."

[17] The instruction proposed reciting the duty of the employer was properly refused because requiring a verdict for the plaintiff, regardless of the contributory negligence of decedent. As far as the instruction embodied a correct principle of law, it was covered by the charge given by the court.

[18] There was no error in refusing this instruction:

"You are instructed that an officer of a corporation has no authority to delegate special powers conferred upon him which involves the exercise of judgment or discretion, unless he is expressly authorized to do so, and the burden of showing such authority is upon the party alleging such delegation."

The said principle, although unobjectionable in some cases, has no application here. The deceased, if he agreed to perform said duty, would be estopped from urging his want of authority as an excuse for his failure to attempt at least to comply with his agreement, and his administrator would be in no better position. Besides, if the superintendent had no power to delegate such authority, the corporation might ratify the act, and it may be further said that the authority in controversy did not involve judgment and discretion, the purchase and placing upon a flume of walking boards being a very simple matter and not requiring any special skill.

The last refusal complained of does not involve prejudicial error. As to the duty of the superintendent, it is covered by the instructions given, and, like some other instructions proposed, it ignored the doctrine of contributory negligence, and, besides, it directed a verdict for the plaintiff if the jury believed that the defendant was chargeable with the want of ordinary care, whereas, as we have seen, it was necessary to show gross negligence.

Another important point made by respondent is that the complaint fails to show that plaintiff was entitled to any relief in this action. The position is taken in view of the peculiar provision of the Workmen's Compensation Act to which we have already referred. There is force in the contention, but we need not consider it, as we are satisfied that for the reasons already stated, the judgment should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

(36 Cal. App. 80)

PARKINSON v. LANGDON et al.
(Civ. 1661.)

(District Court of Appeal, Third District, California. Jan. 28, 1918.)

1. LANDLORD AND TENANT §331(2)—BREACH OF LEASE—PROFITS—STATUTE.

Where plaintiff leased land to defendants, they to plant it to beans and to share the crop with plaintiff in certain proportions for defendants' breach and failure to plant, under Civ. Code, § 3300, providing that for the breach of an obligation arising from contract, the measure of damages is the amount which will compensate the party aggrieved for all the detriment proximately caused, or which, in the ordinary course of things, would be likely to result, plaintiff could recover the profits which would ordinarily and naturally in the usual course of things have been derived from defendants' performance of their contract.

2. LANDLORD AND TENANT §331(6)—BREACH OF SUBLEASE—RELATION OF SUBLESSOR TO LESSOR—IMMATERIALITY.

The relation of plaintiff to his lessor was immaterial in plaintiff's action against his own lessees for breach of their contract to plant the land to beans and share the crop.

Appeal from Superior Court, Sacramento County; Charles O. Buslick, Judge.

Action by J. B. Parkinson against C. H. Langdon and another. From judgment for plaintiff, defendants appeal. Affirmed.

Elliot & Atkinson, of Sacramento, for appellants. White, Miller, Needham & Harber, of Sacramento, for respondent.

CHIPMAN, P. J. It is alleged in the complaint: That on May 29, 1915, plaintiff and defendants entered into a contract of lease whereby defendants as tenants of plaintiff agreed, among other things, to cultivate and farm to beans for the proper cropping season of 1915, and in a good and farmerlike manner certain lands and, among others, a portion described as part of section 8, township 9 north, range 4 east, containing 40 acres, more or less, which was "to be staked out and designated by plaintiff as provided in said contract of lease." That plaintiff, shortly after the execution of said contract, "did stake off and designate the 40 acres of said section 8 to be included in and to be the 40 acres subject to said contract," and that about May 29, 1915, plaintiff put defendants in possession of said 40-acre tract pursuant to said contract. That said 40 acres was fertile land capable of producing profitable crops of beans, and that "a good, abundant, and profitable crop of beans could have been easily grown and produced thereon during the cropping season of 1915, which season extends from about June 1st to September 25th of the year." That plaintiff has duly performed all the conditions and covenants undertaken by him to be performed. That about June 15, 1915, the said contract was by mutual consent of the parties thereto "modified so that it was understood and agreed that plaintiff's share of the bean crop for the

season of 1915 to be grown and produced by defendants on said 40 acres in said section 8 should be only 45 per cent. of the crop instead of 50 per cent., as specified in said original agreement, but said original agreement was not in any other respect changed or modified." It is then alleged: That defendants did not plant said 40 acres of land or attempt to plant upon the same any crop of beans or any crop whatever, "and did not at the proper season, or at any time, or at all, till and cultivate said land, or any part thereof, in a good and farmerlike manner, or in any manner whatever, or at all," and did not in any manner prepare said land for the planting and raising of a crop of beans, or any crop, during said season, and did not plant the said land to beans or to any crop whatever, but "allowed the proper time and season for the plowing of said ground and for the planting and sowing of a crop of beans thereon, and for the cultivation of said crop, to go-by; and defendants wholly failed, neglected, and refused to cultivate said 40 acres, or to raise, or attempt to raise, and produce any crop whatever thereon." That had defendants "at the proper time and in the proper manner prepared said land for the planting of a crop thereon, and had sown and planted said 40 acres to beans, and had at the proper season and in a good and farmerlike manner tilled and cultivated said crop and otherwise performed the covenants and conditions of said contract to be performed by them, said 40 acres of land would have produced and yielded for the bean-cropping season of 1915 a large, abundant, profitable, bounteous, and valuable crop, and that plaintiff's share thereof, pursuant to the terms of said contract, would have been no less than 450 sacks of beans, of the value of \$1,620, in which sum plaintiff has been damaged by defendants because of their failure to perform their contract aforesaid, and by reason of their neglect, failure, and refusal to comply with the conditions thereof, and to plant and cultivate, grow, and harvest a crop of beans on said 40 acres of land pursuant to the terms of said contract."

Among the provisions of said contract of lease, it was provided that the land was to be used for the purpose of raising a crop of beans thereon, and for no other purpose, unless agreed upon between the parties; that the defendants "shall till and cultivate in a good and farmerlike manner all of the said premises which are susceptible of profitable tillage and cultivation, and, in proper season, shall sow and plant the same in the crop above specified, and shall furnish the necessary seed therefor of clean and sound quality, and, in the proper season, shall harvest the said crop, and immediately upon harvesting thereof shall deliver to the owner in the field, and without expense to the owner, except that the owner shall provide sufficient

sacks to contain his share of the crops, a full fifty-hundredths (.50) share, quantity and quality considered, of all of the crop harvested on the aforesaid section 8."

In their answer defendants admit the execution of the contract as alleged, with its subsequent modification as alleged, but deny that the plaintiffs staked off the 40 acres as alleged in the complaint, and deny that it is rich and fertile land capable of profitable tillage and cultivation for the production of profitable or any crops of beans, and deny that a profitable crop of beans could have been easily or otherwise grown on said land during the cropping season of 1915 or otherwise; deny that plaintiff put the defendants in possession of the said lands; admit as to said 40 acres the defendants did not plant or raise or grow or cultivate a crop of beans or any crops thereon during the cropping season of 1915, and allege that "without fault on their part, by reason of the overflowed and flooded condition of said land at all times during the proper season for the cultivation of the same in 1915, it was impossible to profitably or otherwise cultivate said 40 acres of land to beans or to put in or grow any crops thereon during the cropping season of 1915."

The cause was tried by the court without a jury. The court found, among other things: "That said 40 acres was and is land capable and susceptible of profitable tillage and cultivation, and capable of producing a profitable crop of beans, and that a profitable crop of beans could have been grown and produced thereon during the cropping season of 1915 by compliance with the terms of said lease. That plaintiff duly performed and complied with all the conditions and covenants of the said contract of lease on his part to be performed and complied with." That defendants did not, nor did either of them, plant or attempt to plant or grow or cultivate a crop of beans on said land during the season of 1915, and no crop was produced thereon during that season. "That plaintiff has not received, nor will he receive, any rental or rent whatever from said land for the bean-cropping season of 1915. The court further finds that if defendants had farmed in a good and farmerlike manner the land above described, and had sown and planted the said 40 acres to beans, and had at the proper time tilled and cultivated said crops, said 40 acres would have produced and yielded for the bean-cropping season of 1915 a profitable crop of beans," and that said land "would have produced a valuable and profitable crop of beans of an average yield of not less than ten 100-pound sacks per acre," and would have brought 3½ cents per pound delivered in the field, and the plaintiff's share thereof would have been \$630 at the time for delivery thereof to plaintiff.

Judgment was entered accordingly in favor of plaintiff for the sum of \$630, with interest and costs. Defendants appeal from

the judgment, and bring the record here under the alternative method.

Appellants challenge the sufficiency of the evidence to sustain the findings as to the quantity of beans the land would have produced had it been cultivated in accordance with the terms of said lease. Plaintiff's evidence consisted, in part, of the testimony of witnesses who were familiar with bean growing as a branch of farming and with this particular 40 acres of land; its adaptability to raising beans; its condition in respect of moisture, and other factors affecting the practicability of planting beans in time to mature a crop during the season of 1915. They also testified that they were acquainted with the land immediately adjoining the land in question and in the immediate neighborhood of like quality surrounded with like conditions, and the yield of beans grown on such land with proper cultivation during the cropping season of 1915. They also testified to the quantity of beans the land in question would have produced in 1915 had it been properly prepared, planted to beans, and cared for in a farmerlike manner. So far as we can discover, the testimony went to every fact necessary to show that this 40-acre tract was good bean land; that it could have been planted to beans in time to have matured the crop, and would have produced the quantity found by the court had defendants complied with the terms of their contract. It is true there was conflict in respect of some of the material facts, but the trial court resolved whatever doubt may have been created by such conflict, and with its decision on the facts we cannot interfere.

Appellants contend that the court adopted an erroneous measure of damages, and should have limited the damage to the rental value of the land, thus presenting the pivotal question in the case. Section 3300 of the Civil Code provides that:

"For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom."

No hard and fast rule can be formulated by which it may be determined with invariable certainty to what cases or class of cases the Code section applies, and under what circumstances it may be said that the detriment caused by the breach of a contract was "proximately caused" by the breach, or was of such a character as "in the ordinary course of things would be likely to result therefrom." The application of the rule depends much upon the facts in the given case. In the case of *Friend & Terry L. Co. v. Miller*, 67 Cal. 464, 8 Pac. 40, plaintiff sued to recover for lumber sold and delivered to defendant by plaintiff. Defendant introduced evidence tending to show that he contracted with plaintiff for certain piles and lumber to be used in pursuance of a

contract with the drainage commissioners, which he had agreed to finish within a given time, all of which was known to plaintiff, who agreed to furnish the same when required. Defendant then offered to prove that plaintiff failed to furnish the piles in time, whereby he was delayed in the completion of his contract and failed to realize the money therefor, which he would otherwise have received from the state through the drainage commission. Said the court:

"By the delay of the latter in delivering the piles defendant suffered loss, was compelled to pay for the use of a pile driver, lost his time, and sustained other expenses which he proved, and as the verdict was for less by \$700 than the amount claimed and proved by plaintiff, we may reasonably infer defendant was allowed a deduction on account of the damages thus sustained. He sought, but was prevented from proving, the loss he sustained by failure to collect the money due him from the state."

The court held that the failure of plaintiff to deliver the piles in time was the remote cause of defendant's failure to receive payment from the state, and the reason for so holding was thus stated:

"This is not a loss 'which in the ordinary course of things would be likely to result' from a failure to deliver under the contract. It was damages which could not well have been contemplated by the parties when they entered into the contract."

But as to the other damages claimed, the statute afforded a rule of compensation. In further explanation, the court said:

"The failure of defendant to secure compensation from the state was a result brought about by the interposition of other agencies, dependent upon independent causes over which plaintiff and defendant had no control, and could not have contemplated. It was a loss which * * * was too remote to have been contemplated."

This decision had its counterpart, as was pointed out in the opinion, in a case cited at section 254 of Field on Damages, where the contract was to furnish a threshing machine to a farmer within three weeks, knowing it was needed at the time agreed, and after reasonable efforts to secure the crop, the plaintiff's wheat was injured by the necessary delay in saving it and in consequence of a rain; the farmer sustained further damage from a fall in the market price of wheat before it could be kiln-dried and got ready for sale. He was held entitled to recover the loss by the injury to the wheat, but not to the change in the market, as the former might well have been in the contemplation of the parties, but not the latter.

The rule is thus stated in 8 Ruling Case Law, 505:

"As in the case of damages for breach of contract generally, a recovery may be had for loss of profits when, and only when, the loss is such as might naturally be expected to follow the breach. Profits which would ordinarily, naturally, and in the usual course of things have been derived from performance, and the loss of which flows directly and naturally from the breach of the contract itself, may be recovered, since they are naturally incident to the contract, and may be fairly supposed to have been

within the contemplation of the parties when it was made."

The line of distinction between profits which are remote, consequential, or not within the contemplation of the parties, and those which are proximate and absolute and certain, and within the contemplation of the parties, "seems to rest in the question whether they are to arise directly out of the contract in question or its subject-matter, and to constitute the immediate fruits of the contract, or whether they are to result from collateral engagements or enterprises. Where the profit to be made was the inducement to the contract, such profit is the measure of damages. So a recovery may be had for the loss of profits which are the direct and immediate fruits of the contract itself. Such profits are not to be regarded as consequential, remote, or speculative in character, but are regarded as part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, and the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation." Id.

[1] The foregoing is about as satisfactory an explanation of the philosophy of the rule as we can find in the books, and, it seems to us, furnishes a safe guide to a solution of the question here. The contract plainly shows that the land was to be planted to a specific crop, and none other. Both parties understood this and contracted with reference to that understanding. Plaintiff's compensation was to be measured by an agreed per centum of this specific crop, and not otherwise. Given, land suitable for growing beans; condition of soil, climate, moisture, etc., favorable to the production of a profitable crop, and nothing supervening to prevent such result except the failure of the contracting party to do what his contract required of him, it seems to us we have a clear case where the loss to the lessor "is such as might naturally be expected to follow from the breach," and that he would be entitled to the "profits which would ordinarily and naturally, and in the usual course of things, have been derived from performance," and furnishes an instance where "the loss flows directly and naturally from the breach of the contract itself," and is recoverable, since the loss is "naturally incident to the contract, and may be fairly supposed to have been within the contemplation of the parties when it was made."

In *Rice v. Whitmore*, 74 Cal. 619, 16 Pac. 501, 5 Am. St. Rep. 479, defendant had leased certain land to plaintiff on which the latter was to sow grain, paying one-fourth of the grain raised as rental. Defendant failed to give plaintiff possession of the land, and plaintiff recovered the value of a crop that might have been raised on the land by an average farmer during the term, less the cost of raising it. In the case of

Allen v. Los Molinos Water Co., 25 Cal. App. 208, 143 Pac. 253, defendant was under contract to furnish plaintiff water for irrigating his crop of potatoes. Defendant failed to keep its contract, and plaintiff lost his crop. It was held that under section 3300, Civil Code, the measure of damages was the market value of the potatoes, at the selling place, which would have been produced had defendant kept its contract, less the expense of growing and marketing the crop. Similarly held in a similar case—Chambers v. Belmore Land & Water Co., 33 Cal. App. 78, 164 Pac. 404, applying the rule as stated in Teller v. Bay, 151 Cal. 209, 90 Pac. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779. A somewhat analogous case is Holt Manufacturing Co. v. Thornton, 136 Cal. 232, 68 Pac. 708. There the contract was to commence harvesting the wheat on the 5th of July, whereas the plaintiff did not begin the work until the 15th. Plaintiff sued for services, and defendant counterclaimed that by reason of plaintiff's delay in commencing the work the wheat was shelled out and lost to defendant. Plaintiff claimed that the loss was too remote and speculative to be considered as the result of its breach. It was held otherwise. Said the court:

"This loss was not speculative or remote; and although it was, no doubt, somewhat difficult to fix the amount of the loss with great accuracy, still there was ample evidence to show an amount of damage exceeding that found by the jury. It has often been held that damages may be recovered for the destruction of merely immature growing crops, although there was no absolute certainty that they would ever mature; for 'he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages'"—citing Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62.

[2] Error is alleged in refusing to allow defendants to show in the cross-examination of plaintiff, when called as a witness, that plaintiff was a subtenant of the owner of the land, and was released by his lessor from payment of rent. The relation of plaintiff to his lessor was immaterial. Holt Manufacturing Co. v. Thornton, supra.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

(68 Okl. 56)

GERMAN-AMERICAN BANK OF BLACKBURN et al. v. RUSH et al. (No. 8418.)
(Supreme Court of Oklahoma. March 12, 1918.)

(Syllabus by the Court.)

APPEAL AND ERROR 997(2), 1002—OVER-
RULING OF DEMURRER TO EVIDENCE—VER-
DICT—AFFIRMANCE.

In an action for damages for breach of contract, where it appears the evidence reasonably tends to support the allegations of the petition and to sustain the plaintiffs' theory, the judgment of the lower court in overruling a demurrer to the evidence will not be reversed; and, there being a conflict in the evidence on the is-

ssues properly submitted to the jury, the judgment based upon the verdict will not be set aside by this court.

Error from District Court, Pawnee County; Geo. E. Merritt, Judge.

Action by J. J. Rush and others against the German-American Bank of Blackburn and another. Judgment for plaintiffs, and defendants bring error. Affirmed.

McNeill & McNeill, of Pawnee, for plaintiffs in error. McCollum & McCollum, of Pawnee, for defendants in error.

OWEN, J. This proceeding is prosecuted to reverse the judgment of the county court of Pawnee county, rendered in an action brought by the defendants in error against the plaintiffs in error for damages sustained by the breach of a contract, under the terms of which, it was alleged, plaintiffs in error were to return to defendants in error certain personal property taken under a chattel mortgage.

The assignments of error are to the action of the court in overruling a demurrer to the evidence of the plaintiffs below and to the sufficiency of the evidence to support the judgment. The controversy was whether the defendants had a right to retain possession of one of the mules, described in the mortgage, in satisfaction of court costs accrued in another lawsuit, and until one of the plaintiffs signed another deed. It was admitted by Poos, acting for himself and for the bank, that he had retained the mule for that purpose. The testimony on this point was conflicting, it being the contention of the plaintiffs below that all the chattels were to be returned to them upon the delivery of a certain deed, and that their part of the contract had been fully complied with. We have examined the evidence as it appears in the case-made, and there was sufficient competent evidence sustaining this contention to require the case to be submitted to the jury. The issues were submitted under instructions requested by the defendants.

There being competent evidence reasonably tending to support the verdict, under the settled rule in actions of this character, the judgment of the lower court will be affirmed. All the Justices concur.

(68 Okl. 57)

BILBY et al. v. ROBERTS et al. (No. 8633.)
(Supreme Court of Oklahoma. March 12, 1918.)

(Syllabus by the Court.)

APPEAL AND ERROR 773(2)—BRIEFS—DIS-
MISSAL.

No brief having been filed on behalf of the plaintiffs in error, nor cause shown for the failure to file at the time the cause is assigned for submission, the appeal will be treated as abandoned, and accordingly dismissed.

Error from District Court, Muskogee County; R. P. De Graffenried, Judge.

Action between J. S. Bilby and others and Cleveland Roberts and others. Judgment for the latter, and the former bring error. Dismissed.

Rittenhouse & Brown, of Wagoner, for plaintiffs in error. Watts & Molony, of Wagoner, for defendants in error.

PER CURIAM. This cause comes on to be heard upon the motion of the defendants in error to dismiss the appeal filed herein, upon the ground that "plaintiffs in error have not filed brief within the time required by law and the rules of this court."

The records show that this cause was set for submission upon the merits on the 12th day of February, 1918; that upon said date no brief had been filed by the plaintiffs in error, nor cause shown for the failure to file at that time. No brief on behalf of either party has since been filed. In *Dykes v. Markham*, 44 Okl. 669, 146 Pac. 434, the syllabus reads:

"No briefs having been filed on behalf of the plaintiff in error, nor cause shown for the failure to file at the time the cause is assigned for submission, the appeal will be treated as abandoned, and accordingly dismissed."

To the same effect is *El Reno Vit. Brick & T. Co. v. Raymond Co.*, 44 Okl. 676, 146 Pac. 21.

Upon the authority of these cases the appeal herein is dismissed.

AMERICAN CENT. INS. CO. v. BOYLE. (No. 8383.)

(Supreme Court of Oklahoma. March 12, 1918.)

(Syllabus by the Court.)

INSURANCE — 632 — FIRE INSURANCE — PETITION — CAUSE OF ACTION.

Where a fire insurance company issues its standard policy insuring plaintiff against loss by fire of certain personal property therein described, "while located and contained as described herein, and not elsewhere, to wit: [Describing the building wherein the property is located]," a petition which fails to state that at the time of fire the insured property was located in said building fails to state a cause of action. *Miller v. Conn. Fire Ins. Co.*, 47 Okl. 42, 151 Pac. 605.

Commissioners' Opinion, Division No. 3. Error from District Court, Coal County; J. H. Linebaugh, Judge.

Action by Charles May, Constable, against J. W. Boyle and the American Central Insurance Company, with cross-petition by defendant Boyle. Demurrer of American Central Insurance Company to the answer of cross-petition of defendant Boyle overruled, and judgment rendered for Boyle against the company, and it brings error. Reversed, and cause remanded, with directions for a new trial.

Scothorn & McRill, of Oklahoma City, for plaintiff in error. Geo. Trice, of Coalgate, for defendant in error.

PRYOR, C. This action was commenced on the 26th day of February, 1914, in the district court of Coal county, Okl., by Chas. May, constable, against J. W. Boyle and the American Central Insurance Company, to recover on a certain insurance policy given to insure against loss by fire. The questions presented on appeal arise out of the controversy between the insurance company and J. W. Boyle, the insured. The policy sued upon was issued by the insurance company to J. W. Boyle, insuring property belonging to the said Boyle. In his answer to the petition of the plaintiff, Chas. May, and in his cross-petition against the said insurance company, the said Boyle claimed that he was the owner of the property insured, and was entitled to the proceeds provided for in the policy for the loss sustained by reason of the destruction of his property. The defendant the American Central Insurance Company demurred to the answer and cross-petition of J. W. Boyle on the ground that the cross-petition did not state facts sufficient to constitute a cause of action against it. The demurrer was overruled by the trial court, and on trial judgment was rendered for the cross-petitioner, J. W. Boyle, against the insurance company, from which judgment the insurance company appealed.

There are several questions raised on appeal by the insurance company, but the only question that is deemed necessary to decide is the question as to whether or not the petition states facts sufficient to constitute a cause of action. The policy sued upon is the Oklahoma standard fire insurance policy provided for in section 3482, Revised Laws of 1910, which contains the provision that the property shall be insured against loss while located on premises described in the policy, and not elsewhere.

It is the contention of the insurance company that the cross-petition of the insured, Boyle, does not state a cause of action in that it fails to allege that the property at the time that it was alleged to have been destroyed by fire was located in the building in which it was located at the time of the issuance of the policy, and in which it was to remain during the continuance of the policy. The allegation of the cross-petition in regard to the destruction of the property covered by the insurance policy is as follows:

"That thereafter, to wit, on or about the 9th day of January, A. D. 1914, the defendant's stock of merchandise covered by said policy of insurance was totally destroyed by fire; that the value of said stock of merchandise so destroyed by fire at the time of its loss was the sum of eight hundred dollars (\$800.00)."

This question has been presented squarely to this court in several cases, and it has been decided by this court that an allegation that

the property was located at the time of its destruction on the premises or in the building as provided in the policy is essential to the legal sufficiency of the petition, and a petition that fails to contain this allegation is fatally defective. *Miller v. Conn. Fire Ins. Co.*, 47 Okl. 42, 151 Pac. 605. There was neither amendment made at the trial of said cause, nor is there any evidence curing this defect in the petition. Therefore, under the above authority, it must be held that the petition falls to state facts sufficient to constitute a cause of action.

It follows that the judgment of the lower court should be reversed, and the cause remanded, with directions for a new trial.

PER CURIAM. Adopted in whole.

(36 Cal. App. 93)

PEOPLE v. JACOBS. (Cr. 411.)

District Court of Appeal, Third District, California. Jan. 31, 1918. Rehearing Denied by Supreme Court, April 1, 1918.)

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Albert Jacobs was convicted of the infamous crime against nature, and appeals. Affirmed.

Charles E. Davis, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The whole record in this case has been examined with care, and it appears that no error whatever was committed. The offense of the infamous crime against nature was charged in the information with legal sufficiency, the trial was fairly conducted in every way, the instructions to the jury were complete and accurate, and the testimony as to guilt was overwhelming and conclusive; there being two unimpeached witnesses to the overt act and no adverse showing being made by the defendant.

The judgment and the order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(54 Colo. 408)

MUHLSTEIN v. CROKE. (No. 9337.)

(Supreme Court of Colorado. Feb. 4, 1918. Rehearing Denied April 1, 1918.)

Error to Adams County Court, W. C. Hood, Jr., Judge.

Action by Thomas B. Croke against Louis Muhlstein. Judgment for plaintiff, and defendant brings error. Affirmed.

Carl H. Cochran, of Denver, for plaintiff in error. Harry Behm, of Brighton, for defendant in error.

PER CURIAM. This matter comes before the court on an application for a supersedeas. An examination of the records and briefs clearly discloses no error before the trial court, and for such reasons the application for supersedeas is denied, and the judgment affirmed.

McANAW v. WILLIAMSON. (No. 6814.)

(Supreme Court of Oklahoma. March 12, 1918.)

(Syllabus by the Court.)

REPLEVIN ~~67~~72—JUDGMENT—EVIDENCE.

The evidence in this cause is examined, and held, that there is not sufficient legal evidence to sustain the verdict and judgment of the trial court.

Commissioners' Opinion, Division No. 3. Error from County Court, Comanche County; H. N. Whalin, Judge.

Replevin by D. E. McAnaw against G. E. Williamson. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions to grant a new trial.

W. C. Henderson, of Lawton, for plaintiff in error. A. G. Sechrist and B. M. Parmenter, both of Lawton, for defendant in error.

PRYOR, C. This is an action in replevin, commenced on the 20th day of September, 1912, by plaintiff in error for the possession of chattels under and by virtue of the chattel mortgage given to secure the payment of a certain promissory note. The parties appear the same here as in the trial court, and are referred to as plaintiff and defendant.

The petition of the plaintiff contains the usual allegations in replevin where possession is sought under and by virtue of a chattel mortgage. The property was delivered to the plaintiff on default of defendant to give redelivery bond. The defense of the defendant is that he had an agreement with the plaintiff for an extension of the time of payment of said note, and it was agreed between the plaintiff and defendant that the defendant should retain possession of the property and sell the same to pay off the note and mortgage, and retain the surplus, if any. He also asks in his prayer \$100 damages for the wrongful bringing of replevin action. There is no allegation in the answer as to any damages sought by defendant.

The cause was tried to a jury. The jury returned a verdict in favor of defendant for the restitution of the property seized under the writ of replevin or the value thereof, fixing the value at \$615.50, and awarding the defendant \$762 damages, for the wrongful detention of the property. The defendant entered remittitur for the \$615.50, and the court thereupon rendered judgment on the

verdict against the plaintiff for \$762 damages. From this judgment the plaintiff appealed.

The assignment of errors of the plaintiff may be stated generally that the judgment is contrary to law and the evidence, and that the damages, if the defendant is entitled to damages at all, are excessive.

A thorough examination of the evidence of the defendant relative to the damages sought to be recovered convincingly establishes the fact that the damages allowed by the jury in this cause are clearly excessive. Giving the defendant the advantage of the very highest estimate of damages suffered by him as shown by his evidence, it could not possibly exceed one-half of the amount of damages allowed by the jury. The jury fixed the value of the defendant's interest in said property at \$615, and allowed damages far in excess of this value. The only damages claimed by the defendant was damage for being deprived of the use of the property.

It is hard to conceive on what theory the defendant is entitled to damages at all in this cause. After the jury returned a verdict he filed a remittitur of the \$615, the value of the property fixed by the jury and given as a substitute for the return of the property. This in effect was a confession that the plaintiff was entitled to the possession of the property. If so, there was no basis for damages in this cause. Therefore this judgment should be reversed, and the cause remanded, with directions to grant a new trial.

PER CURIAM. Adopted in whole.

(68 Okl. 57)

CHICAGO, R. I. & P. RY. CO. v. STEINBERGER. (No. 8628.)

(Supreme Court of Oklahoma. March 12, 1918.)

(Syllabus by the Court.)

CARRIERS \Rightarrow 280(8)—SHIPPER ACCOMPANYING LIVE STOCK—CARE REQUIRED.

The owner and shipper of live stock, accompanying the shipment while in transit for the purpose of feeding and caring for same under contract with the carrier, has the implied consent of the company to cross over the tracks of its yards for the purpose of looking after his property, while the car is delayed in the yards of the company, awaiting further transportation to its destination. In such case the company owes to the plaintiff the duty of exercising reasonable care for his safety.

Error from District Court, Stephens County; Cham Jones, Judge.

Action by P. Steinberger against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. H. Moore, C. O. Blake, R. J. Roberts, and J. E. Du Mars, all of El Reno, and Bond & Kolb, of Duncan, for plaintiff in error. Ledbetter, Stuart & Bell, of Oklahoma City,

and Womack & Brown, of Duncan, for defendant in error.

KANE, J. This was an action for damages for personal injuries, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. Upon trial to a jury there was a verdict for the plaintiff, to reverse which this proceeding in error was commenced.

The petition alleged, in substance, that at the time of his injury the plaintiff was in Oklahoma City, in charge of a car of live stock being shipped by him over defendant's line of railway; that while said car was in the yards of said company at said point waiting further transportation to its destination, the same was moved from its original location to another place in said yards; that on this account the plaintiff was required to pass across the tracks of the defendant in order to get to his said car of stock for the purpose of feeding and caring for the same, as under his contract of carriage with the company he was required to do; that he was directed by the agents and servants of said defendant in charge of said yards as to the location of his said car of stock, and was given directions by them as to how to reach said car of stock, being directed by them to cross said tracks of the defendant; that while returning from said car to the yard office after caring for said stock, one of the engines of the defendant railway ran against and struck said plaintiff, and hurled him to the ground and injured him; that the agents and servants in charge of said engine ran the same against said plaintiff without giving any warning of its approach, either by ringing the bell or blowing the whistle, or by any other sign, and that said train was going at a rate of speed exceeding the speed of six miles an hour, and was running at a speed in excess of the limit provided by the ordinances for the running of trains and engines through said city.

It is conceded that there is evidence reasonably tending to support the verdict of the jury, the only assignments of error relied upon for reversal being directed against the action of the trial court in refusing to give defendant's requested instructions Nos. 5 and 8, and in giving certain other instructions over the objection of the defendant. In their brief counsel for plaintiff in error have resolved their various assignments of error into one proposition, which they state as follows:

"That if the plaintiff went into the yards looking for his car, after he had been instructed to remain in the yard office until notified by the yardmaster, he was, while in the yards, a trespasser, and the defendant owed him no duty except not to wantonly or willfully injure him."

It is true that there was some evidence tending to show that after the car had been set to the chutes and the cattle fed and wa-

tered, the plaintiff was advised by the yardmaster that the car would be taken out about 9 o'clock that night, and that in the meantime the plaintiff must stay in the office of the yards until he was notified the car was ready to move; that the plaintiff, after remaining in the office until after the time he was told his car would leave, became uneasy for fear he would be left, and went down into the yards looking for his car, in disregard of the directions of the yardmaster. We are unable to agree with counsel that this, if true, would constitute the plaintiff a trespasser. The general rule is that the owner and shipper of live stock accompanying the shipment while in transit for the purpose of feeding and caring for same under contract with the carrier has the implied consent of the company to cross over the track of its yards for the purpose of looking after his property, while the car is delayed in the yards of the company, awaiting further transportation to its destination. In such case the company owes to the plaintiff the duty of exercising reasonable care for his safety. 23 Am. & E. Enc. (2d Ed.) 739; *Elgin, etc., Ry. Co. v. Thomas*, Adm'x, 115 Ill. App. 508; *Railway Co. v. Cole*, 149 Pac. 873. The mere fact that the yardmaster directed the plaintiff to remain at the yards office until he was notified that his car was ready to go does not change the rule. There is nothing in the evidence tending to show that the plaintiff was required to remain at the yards office by any well-known established rule of the company, or that the yardmaster was authorized by such rule to require the plaintiff to do so. In these circumstances, the plaintiff was entitled to such reasonable freedom of action in the performance of his contract with the carrier as the circumstances required, and whether he was negligently exceeding this reasonable freedom of action or not, at the time he was injured, was a question for the jury.

Finding no reversible error in the record, the judgment of the court below must be affirmed.

BRADY v. RATKOWSKY. (No. 8287.)

(Supreme Court of Oklahoma. March 12, 1918.)

(Syllabus by the Court.)

1. TRIAL ~~109~~ — JUDGMENT ON MOTION — OPENING STATEMENT.

Motion for judgment upon the opening statement of counsel should be denied, unless in said statement there is a solemn admission of facts made for the purpose of removing said facts from the realm of controversy, and which facts so admitted show that the party making the statement is not entitled to recover.

2. TRIAL ~~109~~ — OPENING STATEMENT OF COUNSEL—MOTION FOR JUDGMENT.

The opening statement made by the defendant in this case carefully examined, and found not sufficient upon which to predicate a judgment for plaintiff.

Commissioners' Opinion, Division No. 1. Error from County Court, Tulsa County; J. W. Woodford, Judge.

Action by Abraham Ratkowsky against R. C. Brady. Judgment for plaintiff, motion for new trial overruled, and defendant brings error. Reversed and remanded, with instructions to set aside the judgment rendered.

I. J. Underwood, of Tulsa (Biddison & Campbell, of Tulsa, of counsel), for plaintiff in error. Hulette F. Aby, W. F. Tucker, and A. K. Swan, all of Tulsa, for defendant in error.

COLLIER, C. In this cause the defendant in error, hereinafter styled plaintiff, brought suit to recover from the plaintiffs in error, hereinafter named defendants, upon a verified account for goods, wares, and merchandise alleged to have been sold by plaintiff to defendant. The defendant filed a verified answer, denying each and every material allegation in plaintiff's petition alleged. Plaintiff's attorney made the following opening statement:

"Gentlemen, the proof on the part of the plaintiff in this case will tend to show that certain goods, consisting chiefly of furs, were made up for this defendant, and that they were shipped to the defendant, and that no part of the account, which amounts to \$283.95, has ever been paid. That is all the proof we will introduce."

Attorney for the defendant made the following opening statement:

"Gentlemen of the jury, the evidence in this case on behalf of the defendant will disclose the fact that the defendant does not owe this plaintiff one cent. There are some goods sent by this plaintiff to the defendant at one time, but they were sent under a special understanding with the traveling salesman of this plaintiff. These goods consisted of fur goods, and were shipped here with the understanding that if this defendant discontinued handling fur goods, as she was contemplating doing at that time, the plaintiff would take the goods back, and all she would have to do would be to notify them and ship them. In other words, the sale wasn't a complete sale, and this defendant decided, after the goods had been sent, to discontinue handling fur altogether, and sent these goods back before they were taken from the original package. They were sent back in the package they came in, in the same condition as when they arrived, and the evidence will disclose that this defendant has never received one cent from the goods that were sent her, and that she does not have in her possession at this time any of the goods, but sent them back to the plaintiff according to the original agreement."

Upon conclusion of the statement of the defendant's attorney, the plaintiff moved for judgment on the opening statement of the defendant, for the reason that their defense clearly is an affirmative defense and must be specially pleaded, and is not admissible under a general denial, which motion was sustained, and judgment entered for the plaintiff for \$283.95 and costs. Thereafter a motion was filed for a new trial, which mo-

tion was overruled and duly excepted to, and defendant brings error.

[1, 2] There is but one question involved in this case, Was the opening statement of defendant sufficient upon which to predicate judgment in favor of the plaintiff? If we admit, as contended by plaintiff, that new matter was set up in the opening statement which was not pleaded, and which it was necessary to plead to legally admit evidence in support thereof, we are of the opinion, and so hold, that the proper procedure would have been to have objected to the introduction of such evidence, and the statement of such new matter not being within the issue joined, was no ground upon which to predicate a judgment on the statement.

The answer of the defendant raised an issue of facts, especially as to the price and quantity of the goods involved in the itemized statement attached to plaintiff's petition, and it cannot be said that there is anything in said opening statement that was a solemn admission that said itemized statement was correct, either as to the amount of goods or their value as therein stated, and that said admission was made to remove said facts from the realm of controversy. In *First State Bank of Keota v. Bridges*, 39 Okl. 355, 135 Pac. 378, it is said:

"A motion for a peremptory instruction of a verdict upon the opening statement of defendant should, of course, be denied, unless such statement contains a distinct and unequivocal admission of fact absolutely entitling plaintiff to judgment."

In the well-considered case of *Patterson et al. v. Morgan*, 155 Pac. 69, it is held:

"An oral admission of a material fact, made by an attorney in his opening statement to the jury, if distinct and formal, and made for the purpose of dispensing with the formal proof of some fact at the trial, is a solemn admission, and conclusive upon the party making such admission."

Applying the rule of the *First State Bank of Keota v. Bridges*, supra, and of *Patterson et al. v. Morgan*, supra, to the opening statement made by the attorney of the defendant in the instant case, the trial court committed prejudicial error in rendering judgment for the plaintiff on the opening statement of the attorney for the defendant.

This cause is reversed and remanded, with instructions to set aside the judgment rendered.

PER CURIAM. Adopted in whole.

(48 Okl. 58)

CHICAGO, R. I. & P. RY. CO. v. PRUITT.
(No. 8073.)

(Supreme Court of Oklahoma. March 12, 1918.)

(Syllabus by the Court.)

CARRIERS §159(3)—BILL OF LADING—CLAIM BY SHIPPER—SUFFICIENCY.

A claim for the value of a shipment of grain misdelivered by the carrier is sufficiently made

to satisfy the requirements of the bill of lading that any claim based on failure to make delivery shall be made in writing within four months after the time for delivery has elapsed, where it appears that the defendant and the plaintiff negotiated a settlement of plaintiff's claim by letter before the expiration of the four-month period, and that the claim was declined after the expiration of such period on grounds other than that plaintiff had not complied with the four-month clause of the bill of lading.

Error from County Court, Garvin County; W. R. Wallace, Judge.

Action by J. H. Pruitt against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. J. Roberts, C. O. Blake, W. H. Moore, and John E. Du Mars, all of El Reno, for plaintiff in error. C. L. McArthur, of Chickasha, for defendant in error.

KANE, J. This was an action commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, praying for judgment in the sum of \$81.81 and costs, for the loss of a quantity of grain out of a certain shipment made from Galva, Ill., to Lindsay, Okl., over the lines of the defendant railway company. The cause was tried upon an agreed statement of facts, with bill of lading attached, after consideration of which the trial court entered judgment for the plaintiff in the amount claimed, to reverse which this proceeding in error was commenced.

The bill of lading for the shipment is upon the standard form approved by the Interstate Commerce Commission, and contains a clause requiring the claim for loss or damage to be made in writing to the carrier at the point of delivery or origin, within four months after delivery. The agreed statement of facts, in so far as it is necessary to notice it, reads as follows:

"It is agreed that no written claim was filed with the defendant by the plaintiff in the period of four months, as is required by said bill of lading for the loss of any part thereof, and it is further agreed that the defendant and the plaintiff negotiated settlement of plaintiff's claim by letter both before and after the expiration of the four-month period above referred to, and that the claim was declined on other grounds than that plaintiff has not complied with the four-month clause of the bill of lading."

The only assignment of error presented for review raises the question whether the foregoing agreed statement of facts shows a substantial compliance with the four-month clause of the bill of lading. We are of the opinion that it does. The case at bar seems to be similar in many respects to *Georgia, F. & A. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948. In that case the uncontroverted evidence showed that the shipper, having made an investigation in response to the communication of the traffic manager of the railway company, tele-

graphed to the latter five days after the arrival of the goods at destination as follows:

"We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment, as we cannot handle."

In the preceding telegrams which passed between the parties the shipment had been adequately identified, so that this final telegram established beyond question the particular shipment referred to. The Circuit Court of Appeals found from this evidence that no claim was filed by the shipper as required by the bill of lading. The Supreme Court, assuming that this finding was in effect a construction of the four-month provision, as requiring a more formal notice than that which was actually sent, held that, as the notice given apprised the carrier of the character of the claim of the plaintiff, it sufficiently complied with the provisions.

Similarly in the case at bar it was agreed that no written claim was filed within the period of four months, but it was also stipulated that the parties had negotiated a settlement by letter within that time, which was afterwards repudiated by the company; and, unless we assume that the first part of the stipulation has reference only to a formal claim in writing in strict compliance with the provision, the subsequent part thereof serves no purpose whatever. As counsel seem to agree that the four-month clause cannot be waived, the agreed statement of facts must have been drawn in the form in which we find it for the purpose of presenting the questions whether the negotiated settlement of plaintiff's claim by letter before the expiration of the four-month period constituted a substantial compliance with the four-month clause of the bill of lading, and whether such compliance constituted the making of a claim within the meaning of the provision.

Inasmuch as it is now settled that these questions must be answered in the affirmative (*Georgia, F. & A. Ry. Co. v. Blish Milling Co.*, supra), the action of the trial court to that effect must be affirmed. All the Justices concur.

(68 Okl. 59)

LONDON et al. v. MERCHANTS' NAT.
BANK et al. (No. 9303.)

(Supreme Court of Oklahoma. March 12, 1918.)

(Syllabus by the Court.)

APPEAL AND ERROR §545 — NECESSITY OF BILL OF EXCEPTIONS—MOTION.

A motion for leave to be made a party to an action and the ruling of the court thereon, not constituting a part of the record, cannot be reviewed on appeal, unless made a part of the record by case-made or bill of exceptions.

Error from District Court, Le Flore County; W. H. Brown, Judge.

Action by the Merchants' National Bank and others against John London and another. Judgment for plaintiffs, and defendants bring

error and move to stay execution. Motion praying for stay of execution overruled.

London & London, Neal & Neal, and Bagwell & Ellerbee, all of Poteau, for plaintiffs in error. Oglesby, Cravens & Oglesby, of Ft. Smith, Ark., and McAdams & Haskell, of Oklahoma City, for defendants in error.

KANE, J. This cause comes on to be heard upon the motion of the plaintiffs in error, wherein they pray for an order commanding the sheriff of Le Flore county to refrain from selling the land involved at foreclosure sale pending the determination of the question involved in the above-entitled proceeding in error.

It seems that the district court of Le Flore county rendered a certain judgment in favor of the Merchants' National Bank of Ft. Smith, Ark., and against Horace F. Rogers and Stella W. Rogers, for the sum of \$11,587.71, together with interest, costs, and attorney's fees, and for the purpose of satisfying said judgment decreed the foreclosure of a mortgage on certain lands situated in said county, and on the same day overruled the motion of the plaintiffs in error herein to be made parties to said suit; that thereafter the plaintiffs in error herein lodged in this court their petition in error, with a transcript of the record and proceedings of the district court of Le Flore county, Okl., attached, for the purpose of reviewing the action of the trial court in overruling said motion to be made parties to said suit. Thereupon the motion now under consideration was filed as above stated.

The defendants in error appear for the purpose of resisting this motion, and say that the same ought to be overruled for the following reasons, to wit: (1) The Supreme Court is without jurisdiction of said proceedings in error for the reason that no notice of the appeal was given by the plaintiffs in error, as required by law; (2) the questions sought to be presented by plaintiffs in error, to wit, the action of the trial court in overruling their motion to be made parties to said cause is not reviewable by this court on a transcript of the record in the absence of a case-made or bill of exceptions. As the last of these grounds for denying the relief prayed for seems to us to be well taken, we do not deem it necessary to notice the other two. It has been the rule in this jurisdiction from a very early date that motions and the rulings thereon cannot be reviewed upon a transcript of the record; the reason assigned therefor being that such motions, without a bill of exceptions or case-made, do not constitute a part of the record below and therefore cannot be brought to the Supreme Court by transcript. *McMechan v. Christy*, 3 Okl. 301, 41 Pac. 382. Applications of this rule to many different sorts of motions may be

found illustrated in the following cases: *Stonebraker-Zea Cattle Co. v. Hilton*, 34 Okl. 225, 124 Pac. 1062; *Singleton v. Kennamer*, 27 Okl. 564, 112 Pac. 1026; *Masoner v. Bell*, 20 Okl. 618, 95 Pac. 239, 18 L. R. A. (N. S.) 166; *Lamb v. Young*, 24 Okl. 614, 104 Pac. 335.

Although this seems to be the first case in which we have been called upon to determine whether a motion for leave to be made a party to an action and the ruling thereon can be reviewed without case-made or bill of exceptions, it seems to us that the cases cited are in point in principle. The precise question has arisen in several other jurisdictions whose courts hold with practical unanimity that even where the parties seeking to intervene have gone so far as to file pleadings without obtaining leave of court to intervene, the pleadings so filed by them constitute no part of the record, unless made so by bill of exceptions. *Carpenter v. Bell*, 25 S. W. 109, 15 Ky. Law Rep. 649; *United States Fid. & Guar. Co. v. Rainey*, 120 Tenn. 357, 113 S. W. 397; *Shaeffer v. Central of Georgia Ry. Co.*, 6 Ga. App. 282, 64 S. E. 1107.

For the reason stated, the motion praying for stay of execution must be overruled. It is so ordered. All the Justices concur.

MODERN WOODMEN OF AMERICA v. TERRY. (No. 8568.)

(Supreme Court of Oklahoma. March 12, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §1001(1), 1010(1) — **VERDICT OR FINDINGS—CONCLUSIVENESS.**

Where the evidence reasonably tends to support the verdict of the jury or the finding of the court, such verdict or finding is conclusive on this court upon appeal.

2. APPEAL AND ERROR §1097(1) — **SECOND APPEAL—LAW OF CASE—SAME FACTS.**

A question decided by the Supreme Court on a former appeal becomes the law of the case in all its subsequent stages, and will not ordinarily be reversed upon a second appeal of the same case, when the facts are substantially the same.

3. PARTIES §51(3) — **DEFENDANTS—ACTION FOR MONEY JUDGMENT.**

In a legal action, like the present, in which the plaintiff seeks only a money judgment, she cannot be compelled to bring in and to admit other parties than those whom she has chosen as defendants.

Commissioners' Opinion, Division No. 2. Error from District Court, Okmulgee County; Earnest B. Hughes, Judge.

Action by Cora B. Terry against the Modern Woodmen of America. Judgment for plaintiff, and defendant brings error. Affirmed.

Truman Plantz, of Warsaw, Ill., Geo. G. Perrin, of Rock Island, Ill., and Geo. L. Bowman, of Kingfisher, for plaintiff in error. W. W. Wood and W. W. Witten, both of Okmulgee, for defendant in error.

GALBRAITH, C. This is an action to recover the amount of a benefit certificate issued by the plaintiff in error to John E. Bobbitt, and was commenced by Cora B. Terry, claiming to be the beneficiary named in the said certificate.

This is the second appeal in this case. The decision of the first appeal was filed December 21, 1915. See *Modern Woodmen of America v. Terry*, 153 Pac. 1127. The appeal in this case was prosecuted from the ruling of the trial court in sustaining a demurrer to certain parts of the answer of the defendant therein, wherein was set up certain defenses to the plaintiff's claim, and the history of the issuance of the certificate to Bobbitt was set out. It was admitted therein that the assured had died while in good standing, and that proper proof of his death had been submitted, but it was alleged that the company was not liable because the beneficiary named in the original certificate issued to Bobbitt in 1900, wherein his mother was named as beneficiary, had been changed and his wife named as beneficiary in the new certificate issued in 1905, and that his wife was a resident of the state of Washington and beyond the jurisdiction of this court, and was making claim for the amount of the certificate from the defendant, and that the application of the assured to change the beneficiary of his certificate, signed by him July 9, 1912, requesting that the plaintiff, Cora B. Terry, his sister, be named beneficiary therein, had been received by the company July 17, 1912, one day prior to the death of the assured, and that the new certificate, naming Cora B. Terry as beneficiary, was not issued until July 30th, after the death of the assured, and therefore the change in the beneficiary was never properly made, and the plaintiff had no right to maintain suit. The trial court held that this matter constituted no defense to the plaintiff's claim, and sustained a demurrer thereto.

This court affirmed that ruling on appeal, and announced the law of the case so far as the issues presented upon that appeal are concerned. One of the issues presented on that appeal was whether or not the steps taken July, 1912, to change the beneficiary in the certificate in compliance with the written request of the assured, dated July 9, 1912, was sufficient to effectuate such change. This court returned an affirmative answer to that question. When the mandate was returned to the trial court the defendant amended its answer setting up two affirmative defenses, to wit: One, that the request for the change of the beneficiary made July 9, 1912, was executed at a time when the assured did not have mental capacity to make such a request, and, another, that Aurene C. Bobbitt, wife of assured, had brought suit in the courts of the state of Washington to recover

the amount of said certificate, and that that suit was still pending and undetermined, and on that account no cause of action accrued to the plaintiff in this action. The language to the prayer was, "Therefore no right of action accrued to the plaintiff herein."

[1, 2] The law of this case has been determined by this court on the first appeal. There is little left for determination on the second appeal. The first ground of the affirmative defense set up in the amended answer, namely, that the assured was without mental capacity to request the change of beneficiary in the certificate, in July, 1912, and therefore no change of beneficiary could have been made in compliance with the request made therefor, apparently seeks to open up and relitigate an issue that was determined by the decision of the first appeal. Ordinarily this cannot be done. *Modern Brotherhood of America v. Beshara*, 158 Pac. 613; *Krauss v. Potts*, 156 Pac. 1162; *Bash v. Howald*, 157 Pac. 1154. But, assuming that such a defense was avoidable at that time, it only presented a question of fact for the determination of the trial court. The court upon all the evidence found that the insured was competent to make the request, this finding, being supported by the evidence is therefore binding on this appeal. *Berryhill v. Thrallkill*, 160 Pac. 875; *Frazier Brick Co. v. Herber*, 162 Pac. 205.

In support of the second ground of defense set up in the amended answer, it is contended that Mrs. Bobbitt, a resident of the state of Washington, had filed suit in the courts of that state, seeking to enforce her claim, and asking that the society pay her the amount of the certificate, and that that suit was still pending and undetermined, and that by reason of that fact no cause of action accrued to Cora B. Terry in this action, and that her action should be dismissed. If the insurance association wished to avoid the possibility of a double liability on this certificate, by reason of their being two claimants as beneficiaries, they had a perfect right under the procedure to have paid the fund into court and to have asked that the claimants thereto be brought in and requested to establish their respective claim in order that the rightful claimant to the fund might be determined in the action, and this action might have been abated until the necessary steps had been taken to have done this. Section 4696, Rev. Laws 1910. Mrs. Bobbitt acquired no vested interest in the certificate prior to the death of Bobbitt. *Grand Lodge, K. of P., of Oklahoma v. Moore et al.*, 168 Pac. 659. Parties without the jurisdiction of the court might have been brought in by substitute service, as provided by section 4722, Rev. Laws 1910. The association did not elect to proceed as these statutes directed, but sought to take advantage of the situation to

defeat one or both claims. This object cannot be accomplished in the manner attempted.

[3] The fact that Mrs. Bobbitt was making claim to the fund and had instituted suit in the courts of the state of Washington to enforce that claim, and that such suit was pending and undetermined, was insufficient to establish that a cause of action did not accrue to Mrs. Terry in the instant case. This was an action at law, wherein Cora B. Terry sought a money judgment only. The rule is announced by this court in the second paragraph of the syllabus in *Goodrich v. Williamson*, 10 Okl. 588, 63 Pac. 974, as follows:

"In a legal action, like the present, in which the plaintiff seeks nothing but a money judgment, he cannot be compelled to bring in and to admit other parties than those whom he has chosen as defendants."

In the case relied upon by the plaintiff in error (*Rumsey v. New York Life Insurance Co.*, 59 Colo. 71, 147 Pac. 337) the contract of insurance was different from that involved in the instant case, in this, that the New York Life policy required, as a condition to a change in the beneficiary named in the policy, that the name of the new beneficiary shall be indorsed on the policy by the company at the home office. In that case the request for the change of beneficiary had been made and received by the home office of the insurance company, but the indorsement of the change had not been made on the policy, for the reason that the beneficiaries named therein resided at Honolulu and had refused to surrender the policy for such indorsement to be made upon request therefor. Rumsey brought suit on the policy in the courts of Colorado without making the beneficiary a party thereto, on the theory that everything required of him had been done in order to effectuate a change of the name of the beneficiary, and therefore it should, in equity, be held that the change had in fact been made. The court held that this would require a decision relative to the rights of the beneficiary, who had possession of the policy, but was not a party to the suit, and that this could not be done, and granted a nonsuit. It was this ruling of the trial court that was affirmed by the Supreme Court of Colorado in the above case. That Cora B. Terry could not be compelled to make Mrs. Bobbitt a party to this action is sustained by the federal court in *New York Life Ins. Co. v. Smith*, 67 Fed. 696, 14 C. C. A. 637, as shown by the following excerpt from the opinion:

"It is earnestly argued by the plaintiff in error that J. B. Murphy is an indispensable party as a defendant, and that this action cannot be maintained without his being made a party, and that, in the event that he could not be brought within the jurisdiction of the court, the action should be dismissed. Ergo, if this position is sound, the same objection could be made to any action brought by Murphy, and the insurance company would go scot free, and obtain a judgment in both cases for its costs. Nevertheless, if the law casts upon the defend-

ant in error the burden of procuring the presence of Murphy, it would be her misfortune if she had not or could not do so. We are of the opinion that the law imposes upon her no such burden."

It may be unfortunate for the insurer that it took the chance of a double liability on the certificate involved in this action, but Cora B. Terry is in no way responsible for such hazard. She seems to have been clearly within her rights in prosecuting her claim and in seeking to establish her right to this fund in the manner she did as disclosed by the record. No prejudicial errors having been shown by a consideration of the assignments of error, we conclude that the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

(68 Okl. 60)

ATCHISON, T. & S. F. RY. CO. v. WOLVERTON et al. (No. 7611.)

(Supreme Court of Oklahoma. March 12, 1918.)

(Syllabus by the Court.)

1. RAILROADS \Leftrightarrow 60—REMOVAL OF STATION—FINDING OF COMMISSION—EVIDENCE.

In a hearing before the Corporation Commission, involving the removal of a railway station from its present location to another, which it was alleged would be more convenient for the inhabitants of a nearby village, the probable cost to the company of removing said station and the facilities connected therewith came into question. Qualified witnesses on behalf of the railway company testified that such removal would cost in the neighborhood of \$24,000. Without any witnesses testifying to the contrary, the commission found that, "from viewing the grounds and general knowledge of the cost of way and structure" the estimate of the appellant was about twice the actual cost. *Held*, that such finding was not supported by the evidence.

2. RAILROADS \Leftrightarrow 60—ORDER FOR REMOVAL OF STATION—REASONABLENESS.

Record examined, and *held*, that the order appealed from is unreasonable and unjust.

Appeal from Corporation Commission.

Proceeding by C. L. Wolverton and others, Red Rock, Okl., and the State of Oklahoma, against the Atchison, Topeka & Santa Fé Railway Company. From an order of the Corporation Commission, the Railway Company appeals. Order set aside.

J. R. Cottingham and S. W. Hayes, both of Oklahoma City, for appellant. S. P. Freeling, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for appellees.

KANE, J. This is an appeal from an order of the Corporation Commission, requiring the appellant to move its depot from its present location at the town of Red Rock, and to build and maintain a new depot and shipping facilities at a proposed new location, using in the new structure such materials as in the old depot and platforms may be valuable. The proceeding in which the order complained of was issued was instituted by a number of the

citizens of the town of Red Rock, their complaint alleging in substance that Red Rock is a town of about 600 inhabitants; that the station, as now located, is almost one-half mile from the principal street of the town; that the present location of the depot is down in a bottom, where Red Rock creek overflows the land on the west side, where people have to cross to get to the depot, making it muddy the greater part of the time in wet weather, and sometimes working a hardship on every one; that the site selected for a new depot is situated near the principal street of the town, is high and dry, and an ideal place for a depot; that as the station is now located the inhabitants of the town cannot build a sidewalk to the depot, for the reason that there are two Indian allotments and a section line between the town and the depot.

The grounds urged by the appellant in opposition to the removal of the station to the site selected may be briefly stated as follows: (1) That at the proposed location required by the order the depot and yards of appellant company must be placed in a cut from 8 to 10 feet deep; (2) that in order to re-establish at said location its yards, passing and industry tracks, a very large hole a short distance south of the location must be filled by the company; (3) practically all the company's facilities at the present location of its depot must be removed to the new location, at a total cost of exceeding \$24,000, after allowing credit for the use of all the available material in the company's facilities at its present location; (4) that, if the depot is established in the new location upon the expenditure of the foregoing amount, it will be upon a dangerous grade of six-tenths per cent. as against a practicable grade of three-tenths per cent. at its present location; (5) that all of the heavy freight traffic, which comes to the company at this depot, must reach it by coming down an embankment into this 10-foot cut at the new location, and, in being hauled out, must be carried over this elevation; (6) that the drainage into this cut and upon the depot grounds must be taken care of, and can be done only at expense to the company; (7) after all the expenditures have been made which this order will require, the operation of the company's trains at the new location, because of the steeper grade and because of the location of its facilities and yards in a deep cut, cannot be conducted with the safety and general convenience with which they can be and are carried on at the present location; and (8) 90 per cent. of the patronage of the company at this depot are inconvenienced and not as adequately served by the appellant as at its present location.

The appellant introduced evidence reasonably tending to support these objections, and no evidence was offered in opposition thereto. The commission found generally that the allegations of complainants' complaint were es-

tablished, and further found that, "from viewing the grounds and general knowledge of the cost of way and structures," the estimate of the appellant as to the cost of removing the station was about twice the actual cost, unless it is its intention to make an allowance of something like \$10,000 for a depot building. Thereupon, without making any findings as to the existence or nonexistence of the grounds urged by the appellant against the removal of the station, the commission entered its order requiring such removal, conditioned upon the citizens of the town of Red Rock acquiring and furnishing to the appellant title to a strip of land sufficient for a station site, and further conditioned that said citizens acquire and open up as a public highway the land necessary for the extension of Main and Fourth streets, from the east limits of the town to the intersection with the west line of additional right of way to be acquired.

[1] The first assignment of error argued by counsel for appellant in their brief is to the effect that the finding of the commission that the estimate of the appellant as to the probable cost of removal was about twice what it would actually cost is entirely unsupported by the evidence. We are unable to find any evidence in the record supporting this finding. Indeed, the finding does not purport to be based upon evidence given by witnesses whose testimony we can weigh on appeal, but purports to be based merely upon a view of the grounds by one or more of the commissioners and their general knowledge of the probable cost of such work. In *St. L. & S. F. R. Co. v. Sutton et al.*, 29 Okl. 553, 119 Pac. 423, it was held:

"Neither the commission nor the court, as a matter of law, takes notice of such matters."

In these circumstances, there being no evidence in the record on this point, except that of the witnesses for the appellant, we must rely upon the evidence given under oath, and not upon the estimate of the commission, based upon a view of the grounds and general knowledge, the extent of which we have no means of determining. Taking this as a basis for reviewing the record before us, we find the uncontradicted evidence establishes substantially the following state of facts:

[2] The station at Red Rock, which was built several years prior to the location of the present town of Red Rock, is comfortable and in good repair, and the passenger facilities are ample for the business offered and transacted at that point. The depot is a few hundred feet less than a half mile from the main street of the town of Red Rock, not farther in distance and not so far as the distance at several other towns in the state on the line of the appellant. The public road leading from the town down to the depot is the ordinary country road. There are practically no sidewalks in Red Rock, except on Main street, and the road from the depot to

the town is the average good country road. The main section lines north and south and east and west cross near the depot at its present location, and the bulk of the freight shipped from Red Rock consists of live stock, grain, and hay, which do not come from the town of Red Rock, but from the surrounding country, and the depot at its present location is most available for that class of business. The present site for the location of the depot was selected with the view of the location of the present system of side tracks, etc., for the accommodation of the patrons of the railway, and the present facilities are located in the best possible manner for the operation of the road. A station located at the new site would be in a cut about 10 or 12 feet deep, a great part of which is solid rock, and to make a location at this point would require the excavation of earth, loose rock, and solid rock 10 or 12 feet high and 100 feet wide, and would require a fill-in to the south at about Fourth street, and the taking out of a cast iron drain box theretofore placed by the company for the purpose of draining the extensive area contiguous to the company's right of way. The construction of the depot at the end of Main street would require the town to do heavy excavating to get anything like an easy approach from the street to the depot down to the bottom of the cut, and would create a drainage area which would cause the water to flow down to the depot grounds and result in a great inconvenience to the patrons of the road. In addition to this, the trains of the company would have to stop on almost a maximum grade, which would make the operation nearly impossible, as well as dangerous, and the placing of the depot farther south on Fourth street would require a great deal more filling in and incur great expense to the company; that it would be impossible to remove part of the facilities at Red Rock to the new location, as contemplated by the order of the commission, and leave the remainder at the old location. To do so would practically require a double set of facilities at Red Rock, a town of 500 or 600 people; and to install new facilities at the new location, in the way of side tracks, house tracks, and industrial tracks for the relocation of grain elevators now upon the company's tracks, would be to change these facilities, not so as to increase their convenience to 90 per cent. of the business done at this station, but to endanger and make more inconvenient said facilities to the patronizing public, and, unless the other facilities are moved to the new location, it will require additional expense in station force to operate the same, and, on account of the distance of such facilities from the depot, the danger of operation will be increased. The estimate of the cost of removal was made upon two plans, one of which contemplated the removal of the depot from the present location to the proposed location without reducing the grade, and shows

that the cost thereof would be \$14,454.76. The second plan contemplates the removal of the depot and side tracks from the present location to the proposed location and reducing the grade to six-tenths of 1 per cent., and that the cost thereof would be \$24,466.44. These items of cost, after allowing credit for the use of all material taken from the present structure at the present location, did not include the building of a new depot, but only the expense attending the removal of the present depot from the present location. It was also shown that the operating conditions would require the reduction of the grade, and therefore the company would be required to incur the estimated expense under the second plan, which would be approximately \$24,000.

As against these considerations the commission offset the fact that the new location would be a shorter distance from the village, and that a sidewalk can be constructed to the location of the proposed new depot, while it would be impracticable to build a sidewalk to the present location of the depot. In our judgment, the mere statement of the facts, as above disclosed demonstrates the unreasonableness of the order appealed from. We are therefore of the opinion that, in the circumstances shown, it would be unreasonable to require the railway company to remove its station to the new location at the great cost and inconvenience to it which the enforcement of the present order would require, merely for the somewhat doubtful advantages such removal would afford the patrons of that station residing in the town of Red Rock. Moreover, in view of the policy of retrenchment and economy in the management and control of railroads made necessary by the great war, in which we are now engaged, it seems to us that it would be more than unreasonable to require this change of location at heavy expense to the railroad company without some great and far-reaching public necessity being clearly shown therefor. In the case at bar Mr. Kouns, the general manager of the appellant, stated on the stand that, in order to avoid the expense of making this change and the great inconvenience that would result in the operation of the road from such a change, the company would build a sidewalk all the way from the present station platform to the end of Main street, free of expense to the town of Red Rock. This, it seems to us, would overcome the principal inconvenience caused the inhabitants of the town by the present location. We also notice that, pursuant to the order of the commission, the inhabitants have purchased a site for the new station at a cost to them of \$600, and stand ready to present the same to the appellants. To adjust this matter, the representatives of the appellant offer to procure a purchaser for the strip of land thus acquired, at a price that would

refund to the people of Red Rock all the money they expended in obtaining the same, and such offer is now renewed in the brief of their counsel. With these equitable adjustments, which we have no doubt will be promptly and in good faith carried out by the company, we believe the people of Red Rock should be content for the present.

For the reasons stated, the order of the Corporation Commission is found to be unreasonable; and it is therefore set aside and held for naught. All the Justices concur.

JOHNSTON, Sheriff, et al. v. BRADLEY.
(No. 8165.)

(Supreme Court of Oklahoma. Jan. 29, 1918.
Rehearing Denied March 26, 1918.)

(Syllabus by the Court.)

APPEAL AND ERROR 6773(5)—BRIEFS—REVERSAL.

Where plaintiff in error has completed his record and filed it in this court and has served and filed a brief, in compliance with the rules of this court, and the defendant in error has neither filed a brief nor offered any excuse for such failure, the court is not required to search the record to find some theory upon which the judgment may be sustained; and, where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the plaintiff in error or the rights of the parties.

Commissioners' Opinion, Division No. 3. Error from County Court, Sequoyah County; W. B. Wall, Judge.

Action between John E. Johnston, Sheriff of Sequoyah County, and another and Sallie Bradley. Judgment for the latter, and the former bring error. Reversed, and cause remanded for new trial.

McCombs & McCombs, of Sallisaw, for plaintiffs in error. A. T. West, of Coalgate, for defendant in error.

BLEAKMORE, C. This proceeding is properly before the court; the petition in error and case-made having been filed on April 3, 1916. Plaintiffs in error, in compliance with the rules of the court, have served and filed their brief, which appears reasonably to sustain the assignments of error, but defendant in error has neither filed a brief nor offered excuse for such failure. The established rule in this case is that:

"Where plaintiff in error has completed his record and filed it in this court, and has served and filed a brief, in compliance with the rules of this court, and the defendant in error has neither filed a brief nor offered any excuse for such failure, the court is not required to search the record to find some theory upon which the judgment may be sustained; and, where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the plaintiff in error or the rights of the parties." *Purcell Bridge & Transfer Co. v. Hine*, 40 Okl. 200, 137 Pac. 668.

The judgment of the trial court should be reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

KING v. MITCHELL et al. (No. 7666.)
(Supreme Court of Oklahoma. Jan. 29, 1918.
Rehearing Denied March 26, 1918.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD \Leftrightarrow 107—GUARDIAN'S SALE—COLLATERAL ATTACK—WHAT CONSTITUTES.

Where, in an action to recover possession and quiet title to lands, the plaintiff, in order to establish title in herself, assailed the record of the county court appointing a guardian for her, who as such, pursuant to the order of the court, thereafter conveyed the lands in suit to the grantor of defendant, *held*, that such constituted a collateral attack.

2. EVIDENCE \Leftrightarrow 82—JUDGMENT \Leftrightarrow 472—APPOINTMENT OF GUARDIAN—PRESUMPTION—COLLATERAL ATTACK.

Where the record of the county court in a guardianship proceeding is silent relative to the competency of a person appointed as guardian, it will be presumed that in making the appointment the court, in the proper discharge of its duty, upon inquiry, adjudged that the person designated as guardian possessed all the requisite qualifications; and such judgment, being that of a court of general jurisdiction, is not subject to collateral attack, and may not be impeached by evidence aliunde.

3. INDIANS \Leftrightarrow 18—ALLOTED LANDS—INHERITANCE.

The heirs of a deceased member of the Creek Tribe of Indians, to whom patents have issued for lands allotted in his right, take title to such lands by inheritance.

4. INDIANS \Leftrightarrow 15(1)—ALLOTMENTS—RESTRICTIONS—ACT OF CONGRESS.

"The act of Congress approved May 27, 1908 (35 Stat. 312, c. 199), entitled 'An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes,' is a revising act, and was intended as a substitute for all former acts relating to the subject of such restrictions, and operated to repeal the provisions of an act of Congress approved April 26, 1906 (34 Stat. 137, c. 1876), and previous congressional enactments in conflict therewith on the same subject."

5. INDIANS \Leftrightarrow 15(1)—ALLOTTEES—RESTRICTIONS.

"Under the provisions of section 9 of the act of Congress of May 27, 1908 (35 Stat. L. 312), the death of an allottee of the Five Civilized Tribes operated to remove all restrictions upon the alienation of said allottee's land. The first proviso in said section, 'That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee,' imposed a merely personal restriction on the full-blood Indian heirs. The restriction thus imposed was simply an incapacity to convey without the approval of the proper county court, similar to the disability of a minor to sell his lands."

6. INDIANS \Leftrightarrow 15(1)—ALLOTTEES—INHERITANCE—"RESTRICTED LANDS."

"Lands inherited by full-blood Creek Indian minors from a full-blood Creek allottee are not 'restricted lands' within the purview of the proviso in section 6 of the act of May 27, 1908 (35

Stat. 312), prohibiting the sale or incumbrance of restricted lands of living minors, except by leases authorized by law, by order of the court, or otherwise."

Commissioners' Opinion, Division No. 3. Error from District Court, Okfuskee County; Geo. C. Crump, Judge.

Action by Annie King against W. F. Mitchell and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Lafayette Walker, of Holdenville, for plaintiff in error. C. W. Brewer, of Okemah, for defendants in error.

BLEAKMORE, C. This action was brought by Annie King to recover possession of an undivided one-third interest in certain lands and quiet title thereto. Upon trial to the court judgment was rendered for defendants, and plaintiff has appealed.

The lands in question were allotted in 1900 to one Joseph King, a deceased member of the Creek Tribe of Indians, and patents therefor subsequently issued to his heirs. Plaintiff is a full-blood member of the Creek Tribe, and claims title to the lands in suit as an heir of the allottee. Defendants assert that upon the death of the allottee plaintiff succeeded to only an undivided one-fifth interest in said land, which interest was sold in regular guardianship proceedings in the county court of Okfuskee county, and on November 18, 1908, conveyed by the then guardian of plaintiff to one Shults, who in turn conveyed to defendants.

It is contended by plaintiff that such sale was void for the following reasons: (1) That her guardian falsely represented to the county court in which the guardianship proceedings were pending that she had inherited an interest in said lands; whereas, under the law, she had acquired same by purchase. (2) That by collusive agreement with the purchaser her guardian represented to said county court that she was the owner of only a one-fifth interest in said land, when in truth she owned one-third thereof. (3) That there was no necessity for such sale. (4) That her guardian was not a member of the Creek Tribe of Indians, and therefore, by virtue of section 4 of the Original Creek Agreement (31 Stat. 861), incompetent to act as guardian of plaintiff, a minor full-blood Indian. (5) That the other heirs of the deceased allottee, who are adult full-blood members of the Creek Tribe, had not joined with her guardian in the sale of such land, and that the deeds purporting to convey said lands had not been approved as required by section 22 of the act of Congress of April 26, 1906 (34 Stat. 137). (6) That such sale was in contravention of the proviso of section 6 of the act of May 27, 1908, "that no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court, or otherwise." 35 Stat. 314.

By finding generally for the defendants the trial court necessarily found that upon the death of allottee plaintiff succeeded to a one-fifth, and not a one-third, interest in the lands in suit, thus determining adversely to her the only issue of fact properly presented by the pleadings. In this regard the evidence clearly and convincingly sustains such finding.

[3] The contention that plaintiff, as an heir of the deceased allottee, took title to the land involved by purchase, and not by inheritance, is ill founded. The identical question was before this court in *Chupco et al. v. Chapman et al.*, 170 Pac. 259, No. 7570, not yet officially reported, wherein it was held:

"Katie Chupco, a full-blood Creek Indian woman, died after enrollment, on April 26, 1900. After her death an allotment was selected for her and patented to her heirs. Held, such heirs took the title to the land by inheritance, and not by purchase."

[1, 2] The competency of plaintiff's guardian and the necessity for the sale of her interest in the lands in suit were questions properly and necessarily presented for the consideration of the county court when the guardian was appointed and the sale ordered and confirmed. If the provision of the Original Creek Agreement, that "all guardians or curators appointed for minors and incompetents shall be citizens," was in force and controlling at the time of the appointment of the guardian in the instant case (concerning which we express no opinion), yet, as the record of the county court is silent relative to the citizenship of such guardian, it will be conclusively presumed that, in making the appointment, the court, in the proper discharge of its duty, upon inquiry, adjudged that the person designated as guardian of plaintiff possessed the requisite qualifications; and such judgment, being that of a court of general jurisdiction, is not subject to collateral attack, and may not be impeached by evidence aliunde. *Baker v. Cureton*, 150 Pac. 1090; *Hathaway v. Hoffman*, 153 Pac. 184; *Johnson v. Johnson*, 159 Pac. 1121.

[4-6] The remaining questions presented for our consideration have been determined by this court in *Chupco et al. v. Chapman et al.*, supra, as follows:

"The act of Congress approved May 27, 1908, (35 Stat. 312, c. 199), entitled 'An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes,' is a revising act, and was intended as a substitute for all former acts relating to the subject of such restrictions, and operated to repeal the provisions of an act of Congress approved April 26, 1906 (34 Stat. 137, c. 1876), and previous congressional enactment in conflict therewith on the same subject.

"Under the provisions of section 9 of the act of Congress of May 27, 1908 (35 Stat. 312), the death of an allottee of the Five Civilized Tribes operated to remove all restrictions upon the alienation of said allottee's land. The first proviso in said section, 'That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee,' imposed a merely

personal restriction on the full-blood Indian heirs. The restriction thus imposed was simply an incapacity to convey without the approval of the proper county court similar to the disability of a minor to sell his lands.

"Lands inherited by full-blood Creek Indian minors from a full-blood Creek allottee are not 'restricted lands,' within the purview of the proviso in section 6 of the act of May 27, 1908 (35 Stat. 312), prohibiting the sale or incumbrance of restricted lands of living minors, except by leases authorized by law, by order of the court, or otherwise.

"Amos Chupco and Katie Chupco, full-blood Creek Indian allottees, died in Hughes county, Okl., leaving surviving both adult and minor full-blood Indian heirs. By virtue of the probate jurisdiction conferred by section 6 of the act of Congress of May 27, 1908, the probate court of Hughes county, Okl., was authorized to sell the inherited interest of the full-blood Indian minors in the allotments of the deceased allottees in conformity to the procedure for the sale of the lands of minors under the probate laws of the state, said court being the same court that had jurisdiction of the settlement of the estate of the deceased allottees, and the approval by the court of the guardianship sale, with direction to the guardian to execute a deed to the purchaser, was a substantial compliance with that part of section 9 of the act, providing 'that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.'"

It follows that the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

MIDLAND SAVINGS & LOAN CO. v. EVANS et al. (No. 5815.)

(Supreme Court of Oklahoma. March 12, 1918.)

(Syllabus by the Court.)

BUILDING AND LOAN ASSOCIATIONS ~~§~~ 27, 31 (1)—CONTRACTS ~~§~~ 144—POWERS—LOAN OF MONEY—PREMIUM—STIPULATION AS TO LAW GOVERNING.

Paragraphs 1, 2, and 3 in the case of *Midland Savings & Loan Co. v. Henderson et al.*, 47 Okl. 693, 150 Pac. p. 868, L. R. A. 1916D, 745, are adopted as the syllabus in this case.

Commissioners' Opinion, Division No. 2. Error from District Court, Kay County; W. M. Bowles, Judge.

Action by the Midland Savings & Loan Company against Elias Evans and others. Demurrer to plaintiff's evidence sustained, and it brings error. Reversed and remanded.

A. J. Bryant, of Denver, Colo., and Sam K. Sullivan and H. S. Burke, both of Newkirk, for plaintiff in error. W. K. Moore, of Ponca City, for defendants in error.

POPE, C. This action was commenced on the 28th day of May, 1907, by the plaintiff in error in the district court of Kay county, Okl. The cause was tried to the court, and after the plaintiff had closed its case the defendant interposed a demurrer

to the evidence on the ground that the evidence of plaintiff offered in this cause does not prove, or tend to prove, a cause of action in favor of plaintiff and against the defendant, which motion was by the court sustained. To which ruling of the court the plaintiff in error excepted.

The evidence adduced by the plaintiff at the trial tended to show that the plaintiff in error, the Midland Savings & Loan Company is a building and loan association incorporated under the laws of the state of Colorado, with its home office at Denver, Colo., and that defendant Maggie Evans, on the 1st day of April, 1901, became the owner and purchaser of 30 shares of capital stock of plaintiff corporation, and agreed to pay therefor in 144 monthly payments of \$8.70 each, and thereafter on June 5, 1901, the said Maggie Evans made a written application to the plaintiff company at its home office in Denver for a loan of \$700, and on said date the defendants Elias Evans and Maggie Evans gave to the plaintiff a first mortgage bond or note, whereby they agreed to pay the plaintiff the principal sum of \$700 to be paid in monthly installments of \$15.70, of which sum \$8.70 is the monthly installment or payment on said shares of stock, \$4.37 is the monthly interest on the loan, and the remaining \$2.63 is the monthly premium, and also agreed to pay such fines as may accrue upon said stock, interest, and premium according to the by-laws of the company. On the same day and date Elias Evans and Maggie Evans made and executed a real estate mortgage on certain real estate in Kay county, Okl., and an assignment of said stock to the association to secure the payment of said note, which provided for the payment of \$70 attorney's fee in case suit was brought to foreclose the same.

The testimony further shows that Maggie Evans on the 3d day of September, 1901, became the purchaser of 20 shares of the capital stock of the plaintiff company, to be paid for in a similar manner as the shares above mentioned, and that on said date the defendant made an application to the company in Denver, Colo., for a further loan of \$400, and executed a bond and a second mortgage on the same property as was given to secure the first loan, and containing provisions similar to those set forth in the first mortgage, also further securing the payment of said note by assigning the shares of stock above referred to as collateral security. The evidence further tended to show, at the time of the commencement of the suit on May 28, 1907, there was due and unpaid, including an attorney's fee of \$70, and after allowing the withdrawal value of the stock and all other just credits and set-offs, the sum of \$455.45, with interest from May 1, 1907, at 7½ per cent. per

annum, and there was due on the \$400 note, including the sum of \$50 attorney's fee stipulated for, and after allowing the withdrawal value of the stock and all other just credits, the sum of \$300.58, to draw interest from May 1, 1907, at 7½ per cent. per annum, the total amount due on both notes being \$823.03.

The evidence further tended to show that the defendants had made certain monthly payments, which were credited to the interest premium and to stock account as provided for in said note, and that the defendants had been given due credit for these amounts. Plaintiff pleaded chapter 33, Laws of Colorado 1897, pertaining to the rights and powers of building and loan associations.

It is contended by the defendants that, under the evidence, the contract entered into between the said parties should have been construed by the laws of the state of Oklahoma and not the laws of Colorado; that under section 1490 of the Compiled Laws of 1909, in force at the time in this state, the plaintiff was required to submit its loan to competitive bids of its stockholders, which the plaintiff did not do, and that the loan therefore became and was a straight loan of money from the plaintiff to the defendant; and that the defendant was not bound under the by-laws of the company and laws of the state of Colorado to all the penalties, forfeitures, and payment of stock as is provided for in their by-laws. We deem it unnecessary to discuss this question at length, because this case comes clearly within the rule laid down by this court in the case of Midland Savings & Loan Co. v. Henderson et al., 47 Okl. 693, 150 Pac. 868, L. R. A. 1916D, 745. In that case the court discussed the question very thoroughly, and we deem it unnecessary to restate the rule here.

We are therefore of the opinion that the trial court erred in sustaining the demurrer to plaintiff's evidence.

Reversed and remanded.

PER CURIAM. Adopted in whole.

CITY OF SHAWNEE v. DRAKE. (No. 6643.)
(Supreme Court of Oklahoma. Jan. 29, 1918.
Rehearing Denied March 26, 1918.)

(Syllabus by the Court.)

1. NEGLIGENCE — 32(2)—CONDITION OF PREMISES—INVITATION.

"One who goes upon the premises of another in a common interest or to a mutual advantage is there under the implied invitation of the owner." A., T. & S. F. R. R. Co. v. Cogswell, 23 Okl. 181, 99 Pac. 923, 20 L. R. A. (N. S.) 837.

2. MUNICIPAL CORPORATIONS — 663(1) — PARKS—INVITATION.

Where, according to a general plan for the improvement of a city street, a space left with-

in its bounds between a portion paved for a roadway and the sidewalks is set apart as parking, primarily, at least, for ornamentation rather than travel, the maintenance thereof in a condition attractive and pleasing to the eye may be regarded as of common interest and mutual advantage to the city and abutting property owners; and where the city makes no provision to that end, but for a number of years the property owners mow the grass upon such parking, an invitation so to do will be implied on the part of the city.

3. MUNICIPAL CORPORATIONS — 663(1) — PARKS—INVITATION.

Such invitation, from its nature, cannot, in reason, be considered as restricted to the person of such an owner, but must be held to include his servant employed for the specific purpose.

4. MUNICIPAL CORPORATIONS — 763(1)—PERSONAL INJURY — INVITATION — CARE REQUIRED.

Where a city invites the use of its premises by one for a common interest and mutual advantage, it owes him the duty of exercising ordinary care to prevent his injury by keeping the premises in a condition reasonably safe for such use; and a breach of such duty constitutes actionable negligence.

5. MUNICIPAL CORPORATIONS — 821(3)—PERSONAL INJURY—NEGLIGENCE—QUESTION FOR JURY.

Evidence examined, and held, that the trial court correctly refused to direct a verdict for defendant.

Commissioners' Opinion, Division No. 3. Error from District Court, Pottawatomie County; Chas. B. Wilson, Jr., Judge.

Action by Jordan Drake against the City of Shawnee. Judgment for plaintiff, and defendant brings error. Affirmed.

W. T. Williams, of Shawnee, for plaintiff in error. Blakeney & Maxey, of Tulsa, and Abernathy & Howell, of Shawnee, for defendant in error.

BLEAKMORE, C. This action seeking recovery for personal injuries was commenced in the court below by Jordan Drake against the city of Shawnee. Upon trial to a jury, plaintiff obtained verdict and judgment for \$1,500, and defendant has appealed.

Some years before the occurrences involved the city of Shawnee had caused one of its streets to be improved by paving a portion thereof and the laying of sidewalks, leaving a space of some 15 feet or more between the pavement and the walks for a grass plot or parking. The city also operated and maintained a system of waterworks, and at points in the parking 4 or 5 feet from the outer edge of the sidewalk opposite their property had installed meters for the measuring of water supplied to consumers. These meters were affixed to service pipes situate some 18 inches or 2 feet underground, and were surrounded and protected by a meter box, which consisted of a joint of tiling 18 inches in diameter and about 30 inches in length, extending to the surface of the parking. In the upper end of the tiling was a groove, into which was seated a metallic lid covering the same. It appears that the abutting owners

along the street were accustomed to cut the grass on the parking in front of their lots.

On October 13, 1910, plaintiff was employed by one of such owners to mow the grass on the parking. In performing such service he stepped upon the lid covering a meter box, which was concealed from his sight by the grass, and by reason of the fact that such lid was not properly adjusted and fitted into the groove in the tiling made for that purpose, it turned with his weight and he fell with one foot and limb inside the tiling, and was injured. Within a few hours after his injury his employer examined the meter box and found that grass had grown over the rim of the tiling, and that dirt and dust had accumulated in the groove near the top thereof, into which the metal lid was designed to fit, to such an extent that the lid was thereby lifted or raised out of the groove. A portion of the testimony of this witness is as follows:

"A. I examined the meter to learn what had caused this accident, caused his fall, and found the tendrils or stems of the Bermuda had grown under the lid, so it wouldn't fit down in the flange made to retain it. Q. Now, in the flange you found that the tendrils of the grass had grown under into the place where the lid fit? A. It had either grown under or the lid had been placed down on them, they being long enough to reach under the lid. Q. Now, did you find any other substance in the flange or groove besides the grass? A. Well, dirt that would naturally accumulate from blowing. * * * A. I found the grass had grown under the rim, or the lid had been placed down on the stems. * * * Q. Now, did you notice how deep that flange was that holds the lid from being flush to the top? A. I didn't notice it at the time, but from my general knowledge, I am quite familiar with these, it is about from one-eighth to one-quarter of an inch deep. Q. And the runners of the grass had grown under there until it lifted the lid or raised the lid out of the groove? A. Yes, sir. Q. So it would slip? A. I can't say whether they had grown in there, or whether they were there when the lid was placed on. Q. There was grass enough on there to raise it from its place? A. Yes, sir. Q. You said something about dirt getting in there from the wind. State to the jury what you mean by that. A. We know this is a dusty country; whenever the wind blows, any grooves or exposed places that way will fill up with dust and become solid; that was the case of the rims I examined, mine and the one where Mr. Drake got hurt; they were within 3 feet of each other. Q. The dirt in there was enough to fill the groove in which the lid fit? A. Partially, yes, sir."

It also appears that the water meters were read regularly each month, and that in order to read the same it was necessary to remove the metal cover from the tiling. The last reading of the particular meter located in the box into which plaintiff fell was on September 24, 1910, and the city employé who performed this service testified that after reading such meter he replaced the metal lid so that it fit within the groove. His exact testimony in this regard is as follows:

"Q. I will ask you to tell the jury what was the condition of the groove there at that meter the last time you read it. A. Well, there was

some grass around it. I never paid much attention. Q. When you went there, what did you do with reference to the grass? A. I kind of pulled it back, and some grass grew up over it around the edges a little. Q. Tell the jury what you did with that. A. I pulled the grass up, so I could get at it. Q. Do you mean to pull it up, or pull it out, or break it off? A. Pulled it off; yes, sir. Q. After you pulled it off, what did you do with it? A. Threw it off to one side. Q. I want you to tell the jury whether or not, when you replaced the lid at this time on the 24th day of September, you left grass in the groove there and placed the lid on top of it. A. No, sir. Q. Do you remember anything about the condition of this meter box at that time? A. No; only just like the rest of them. Q. Do you remember anything—you have no recollection or paid no particular attention to any part of it except putting the lid off and replacing it? A. Yes, sir. Q. At the time you read this meter on the 24th day of September, 1910, read this meter there, can you tell the jury what was the height and condition of the grass growing around that meter box? A. No, sir; I can't tell how high it was. Q. You didn't pay any attention? A. No, sir. Q. I will ask you to state whether or not, when you went there, you found any grass or runners of the grass growing between the lid or under the lid next to the rim. A. No, sir; I did not. Q. I will ask you to tell the jury whether or not, at the time you read this meter, you found that meter filled with dirt of any description. A. No, sir."

At the close of the evidence the court refused the request of defendant to direct a verdict in its favor. In the petition it is alleged:

"That the city of Shawnee, through its water department and officers in charge of said department, would at the end of each month read the said meters, which belonged to them, and after they had read the same would, instead of closing the said meter lid, as above described, negligently and carelessly fail to fit the same into the groove, so that it would be solid and stationary," etc.

[1] The principal question presented for our consideration is whether the trial court erred in refusing to direct a verdict for defendant. It is contended that plaintiff was at most a licensee, to whom defendant owed no duty to keep the parking in a reasonably safe condition, but was only required to refrain from willfully or wantonly injuring him. We do not concur in this view, but are of opinion that plaintiff was an invitee rightfully upon the parking at the time of his injury, at the implied invitation of the city. It is unnecessary to consider whether a space within the bounds of a street, between the portion paved for a roadway and the sidewalks, set apart for parking, is a part of the street, for neglect of the reasonably safe condition of which a city may be held liable to one using the same for usual purposes of travel, as that question is not directly presented. In the instant case, however, the very plan of the street in question imports a dedication of the parking, primarily, at least, for ornamentation rather than travel. Indeed, in its brief defendant states:

"The city had withdrawn that part of Broadway street where this meter box was located from public use for ordinary travel, and had

dedicated it to parking purposes, to beautify the street and adjoining premises."

Obviously the maintenance of such parking in a condition attractive and pleasing to the eye must be regarded as of common interest and mutual advantage to the city and abutting property owners. So far as the record discloses, the city made no provision to this end; but some of the lotowners, for a number of years prior to plaintiff's injury, had at least cut the grass on the space in front of their properties, and to this extent, with the knowledge and consent of the city, effectuated the purpose for which the parking was intended. From all the circumstances of the case it may be naturally and reasonably inferred that the city impliedly invited the lotowners along this street to care for the parking, and that it was in response to this implied invitation that plaintiff was employed for such purpose by an abutting owner at the time of his injury.

"One who goes upon the premises of another in a common interest or to a mutual advantage is there under the implied invitation of the owner. The test as to whether there is an implied invitation is stated by Mr. Campbell in his treatise on Negligence in the following language: 'The principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a licensee is inferred where the object is the mere pleasure or benefit of the person using it.' " A., T. & S. F. Ry. Co. v. Cogswell, 23 Okl. 181, 99 Pac. 923, 20 L. R. A. (N. S.) 837.

The rule is also quoted with approval by this court in A., T. & S. F. Ry. Co. v. Jandera, 24 Okl. 106, 104 Pac. 339, 24 L. R. A. (N. S.) 535, 20 Ann. Cas. 316, and English v. Thomas, 48 Okl. 247, 149 Pac. 906, L. R. A. 1916F, 1110.

"The word 'invitation,' used in the rule, covers and includes in it enticement, allurement, and inducement, if the case in judgment holds such features. Also, the invitation may be implied by a dedication, or it may arise from known customary use. Drennan v. Grady, 167 Mass. 415, 45 N. E. 741, and cases, supra. So, too, it is held in all the cases that the invitation may be implied by any state of facts upon which it naturally and reasonably arises." Glaser v. Rothschild, 106 Mo. App. 418, 80 S. W. 332; Id., 221 Mo. 180, 120 S. W. 1, 22 L. R. A. (N. S.) 1045, 17 Ann. Cas. 576.

[2, 3] The implied invitation to the lotowner to go upon the parking in front of his premises for the purpose of cutting the grass thereon, from its very nature, cannot in reason be regarded as restricted to the person of such owner, but under the circumstance must be held to include his servant employed for that particular purpose. The application of this principle under circumstances somewhat analogous is found in English v. Thomas, supra, wherein it was held:

"Where the owner of an office building rents the rooms to numerous tenants, mostly lawyers, a majority of whom were under contract with plaintiff to deliver the Muskogee Daily Phoenix at their offices, and in compliance with such contracts of subscription such papers were by plaintiff delivered, held: (a) That under the circumstances of this case, plaintiff was on the premises at the express invitation of the ten-

ants, and for their common interest and mutual advantage, benefit, and convenience. (b) That, while upon the premises under such invitation, the owner owed the invitee precisely the same duty that he owed to his tenants."

In *Pauckner v. Wakem*, 231 Ill. 276, 83 N. E. 202, 14 L. R. A. (N. S.) 1118, it is held:

"A warehouseman must use reasonable care for the safety of one who goes into the warehouse to get property of his employer stored there, since such a person is more than a mere licensee, being there on the implied invitation of the warehouseman, and about his business."

In the body of the opinion it is said:

"Appellants had the goods of the Chicago Tribune Company stored in the warehouse. It must have been within the contemplation of appellants, when these goods were received into their warehouse, that sooner or later a delivery of them would have to be made to the owner of the goods. The delivery of the goods by appellants and the receipt thereof by the Chicago Tribune Company was a matter of business, which was of mutual interest to the parties. The duty of appellants to the servant of their customer was the same as to the customer himself. When appellee and Carpenter went to appellants' warehouse for the purpose of removing the goods of the Chicago Tribune Company, the appellants owed these servants the same duty that would have been due to the president or general manager of the Chicago Tribune Company, had he called in person for the goods."

In *Samuelson v. Mining Co.*, 49 Mich. 164, 13 N. W. 499, 43 Am. Rep. 456, the following language is used by Judge Cooley:

"If the mine were in an unsafe condition when it was handed over to the contractors, and this was known to the defendant, or by the exercise of proper care ought to have been known, and if in consequence a miner, who was brought there in ignorance of the danger, was killed, the defendant should be held responsible. Every man who, expressly or by implication, invites others to come upon his premises, assumes to all who accept the invitation the duty to warn them of any danger in coming, which he knows of or ought to know of, and of which they are unaware. This is a very just and very familiar principle."

Implied invitation is a part of the law of negligence, by which an obligation to use reasonable care arises from the conduct of the parties. Its essence is that the defendant knew or ought to have known that something that he was doing or permitting to be done might give rise in an ordinarily discerning mind to a natural belief that he intended that to be done which his conduct had led the plaintiff to believe that he intended. It is not enough that the user believed that the use was intended. He must bring his belief home to the owner by pointing to some act or conduct of his that afforded a reasonable basis for such belief.

[4, 5] Defendant, having invited the use of its premises by plaintiff for purposes of common interest and mutual advantage, owed to him the duty of exercising ordinary care to prevent his injury by keeping the premises in a condition reasonably safe for such a use; and a breach of such duty would constitute actionable negligence. Clearly there is some evidence from which the jury might reasona-

bly have inferred that defendant neglected to replace the lid on the meter box in the groove as it was designed to fit, thus rendering it unsafe under the circumstances of the case.

"It is well settled that what is or what is not negligence in a particular case ordinarily is a question for the jury, and not for the court. *Missouri, K. & T. R. Co. v. Shepherd*, 20 Okl. 626, 95 Pac. 243; *Harris v. Missouri, K. & T. R. Co.*, 24 Okl. 341, 103 Pac. 758, 24 L. R. A. (N. S.) 858; *Dewey Portland Cement Co. v. Blunt*, 38 Okl. 182, 132 Pac. 650; *Gulf, C. & S. F. R. Co. v. Ellis*, 54 Fed. 481, 4 C. C. A. 454. When the standard of duty is not fixed, but variable, and shifts with the circumstances of the case, it is in its very nature incapable of being determined as a matter of law, and, where there is sufficient evidence, must be submitted to the jury to determine what it is, and whether it has been complied with. *O'Neil v. East Windsor*, 63 Conn. 150, 27 Atl. 237; *McCully v. Clarke*, 40 Pa. 406, 80 Am. Dec. 584; *Baker v. Westmoreland & C. Nat. Gas Co.*, 157 Pa. 593, 27 Atl. 789." *Littlejohn v. Midland Valley R. Co.*, 47 Okl. 204, 148 Pac. 120.

We are of opinion that the trial court properly submitted the cause to the jury. The petition sufficiently stated a cause of action. The instructions given by the court fairly state the law applicable to the case, and there was no error in refusing those requested by defendant.

An examination of the entire record convinces us that substantial justice has been done between the parties, and the judgment should be affirmed.

PER CURIAM. Adopted in whole.

(67 Okl. 275)

WELCH v. FOCHT et al. (No. 8436.)

(Supreme Court of Oklahoma. Feb. 12, 1918.)

(Syllabus by the Court.)

1. JUDGMENT \S 475—COLLATERAL ATTACK—COURTS OF RECORD—COUNTY COURTS.

The county courts of this state are courts of record and have original general jurisdiction in probate matters. The orders and judgments of such courts, when acting within their jurisdiction, are entitled to the same favorable presumptions and the same immunity from collateral attack as are accorded those of other courts of general jurisdiction.

2. GUARDIAN AND WARD \S 107 — SALE OF LAND—COLLATERAL ATTACK—SCOPE OF INQUIRY.

In a collateral attack on a guardian's deed and the sale proceedings of a county court, the scope of inquiry is confined to the question as to whether the county court had jurisdiction of such proceedings.

3. COURTS \S 1—"JURISDICTION."

"Jurisdiction" is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them. The question is whether, on the case before a court, their action is judicial or extrajudicial, with or without the authority of law to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

4. GUARDIAN AND WARD ~~§~~107 — SALE OF LAND—COLLATERAL ATTACK.

A guardian's petition for the sale of his ward's real estate disclosed that the ward had no personal property or estate, that he owned the real estate described in the petition, and that no income was derived therefrom, alleged that it was necessary to sell said real estate, and prayed for an order of sale, but did not affirmatively allege the statutory grounds for the sale. The order of sale recited that "upon due examination and consideration of said petition, and after a full hearing on the same, and upon due consideration of the proofs offered in said matter, the court finds that the sale of all the real estate belonging to said ward, mentioned in said petition and hereinafter described, is necessary for the purpose of properly maintaining, supporting, and educating said minor; the father of said minor being wholly unable to do so, and for the best interest of said ward." *Held*, that said sale proceedings were not void on collateral attack.

Error from District Court, Creek County; Ernest B. Hughes, Judge.

Action by Jesse James Welch, a minor, by O. L. Clark, his legal guardian, against Adam Focht and others. Demurrers to petition sustained, action dismissed, and plaintiff brings error. Affirmed.

Harry H. Rogers, of Tulsa, and E. C. Hopper, Jr., Kirk B. Turner, and Martin E. Turner, all of Eufaula, for plaintiff in error. James B. Diggs, Rush Greenslade, and William C. Liedtke, all of Tulsa, Burdick & Wilcox, of Stillwater, H. W. Harris, of Chandler, and McGuire & Devereux, Carroll & Mason, and C. H. Rosenstein, all of Tulsa, for defendants in error.

RAINEY, J. The plaintiff in error, Jesse James Welch, a minor, by O. L. Clark, his legal guardian, was plaintiff, and the defendants in error, Adam Focht, Addie Focht, Stroud State Bank, a corporation, Gypsy Oil Company, a corporation, Oklahoma Natural Gas Company, a corporation, George Dollinger, Edward L. Moore, W. H. Wilcox, C. W. Pettigrew, W. A. Thompson, Wilbert Harrington, M. Chamberlain, Fred A. Chapman, Edith Thomas, C. D. Steen, Bertha A. Steen, A. C. Stinson, and J. V. McDonnell were defendants in the trial court, and the parties will hereinafter be referred to as "plaintiff" and "defendants."

The plaintiff's action was instituted to recover the possession of and to quiet the title to a tract of land allotted to him as a newborn freedman. The petition in this action alleged that the title of the several defendants was based upon or deraigned through a certain pretended guardian's deed, purporting to have been executed by one C. O. Potter, as the guardian of the plaintiff, Jesse James Welch, to one Lee Patrick; that the sale proceedings (which are fully set out in the petition) were had in the county court of McIntosh county; and that these proceedings were absolutely null and void on account of various alleged errors and irregularities ap-

pearing on the face thereof. It is not claimed in the petition that there was any fraud practiced in the sale of the land, or that the land did not sell for its actual value. The defendants filed separate demurrers to the plaintiff's petition, which were sustained by the trial court, and from the order so sustaining the demurrers, and dismissing the plaintiff's action, the plaintiff has appealed to this court.

Plaintiff complains of 12 alleged serious defects in the sale proceedings, but of these all except 2 have been abandoned by counsel for plaintiff in his brief, for the reason, as he states, that, since the judgment of the trial court was rendered in this case, this court has, in its decisions, foreclosed the other objections to the sale proceedings made by the plaintiff in the trial court.

The most serious question in the case, and the one most vigorously insisted upon by the plaintiff, is that the petition filed in the county court of McIntosh county for the sale of the land in controversy was insufficient to confer authority or jurisdiction upon the county court of McIntosh county, Okl., to order a sale of the plaintiff's land, in that said petition for the sale of said land failed to disclose the condition of the estate of the ward, and failed to show facts disclosing the necessity or expediency of the sale; and on account of the alleged insufficiency of the petition it is urged that the county court of McIntosh county was without jurisdiction to make the order of sale, and that all the subsequent proceedings are therefore null and void. The petition for the sale of the land, which was properly verified, omitting the verification and indorsements, reads as follows:

"In County Court, State of Oklahoma, McIntosh County—ss.: In the Matter of the Guardianship of Jesse James Welch, a Minor. Comes now C. O. Potter, as the guardian of Jesse James Welch, and shows to the court the condition of the estate of the above named ward, to wit: The personal property of said ward consists of nothing, of the approximate value of \$——. That the annual income therefrom is approximately \$——. That said ward owns the following described real estate, of the approximate value of \$600, to-wit: S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of sec. 9, township 16 N., and range 7 E. That the annual income therefrom is approximately \$——. That said real estate is incumbered to the amount of \$——, with an annual interest charge of \$——. That the annual expense chargeable against the estate of said ward for maintenance and education is approximately \$——. That it is necessary that the hereinafter described portion of said real estate should be sold for the following reasons, to-wit: S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 9, township 16 N., range 7 E. That the next of kin and persons interested in the estate of said ward, together with their respective places of residence are as follows: Willie and Susan Welch, father and mother of said Jesse James Welch, Huttonville, Okl. Wherefore petitioner prays the court that upon a hearing had hereon he be authorized to sell all

of said real estate at public or private sale as shall be deemed most beneficial and for the best interest of said ward.
C. O. Potter."

In the consideration of the question presented, it is important first to determine the character of the attack made upon the sale proceedings. It may be here stated that the petition is very defective, and does not set forth facts showing the necessity or the expediency of the sale, as is provided by section 6565, Rev. Laws of Oklahoma 1910, and we would not hesitate to hold the same insufficient on a direct attack. But plaintiff's action is not a direct, but a collateral, attack upon the sale proceedings of the county court of McIntosh county. *Hathaway et al. v. Hoffman et al.*, 153 Pac. 184; *Continental Gin Co. v. De Bord*, 34 Okl. 66, 123 Pac. 159; *Holmes v. Holmes*, 27 Okl. 140, 111 Pac. 220, 30 L. R. A. (N. S.) 920; *Sockey v. Winstock*, 43 Okl. 758, 144 Pac. 372; *Moffer v. Jones*, 169 Pac. 652.

[1, 2] In the last-named case we held that the scope of inquiry in a collateral attack on the probate proceedings of a county court was confined to the question as to whether the county court had jurisdiction of such proceedings, and that its orders would not be held void for errors or irregularities during the progress of the proceedings. The county court of McIntosh county is a court of record and has original general jurisdiction over probate matters. *Eaves v. Mullen*, 25 Okl. 679, 107 Pac. 433; *Scott et al. v. McGirth*, 41 Okl. 520, 139 Pac. 519.

The prevailing rule is that, where probate courts are courts of general jurisdiction, the orders and judgments of such courts, when acting within their jurisdiction, are entitled to the same favorable presumptions and the same immunity from collateral attack as are accorded those of other courts of general jurisdiction. *Moffer v. Jones*, supra; *Estate of Davis*, 151 Cal. 318, 86 Pac. 183, 90 Pac. 711, 121 Am. St. Rep. 105; *Long v. Burnett*, 13 Iowa, 28, 81 Am. Dec. 420; *Price v. Springfield Real Estate Ass'n*, 101 Mo. 107, 14 S. W. 57, 20 Am. St. Rep. 595; *Sherwood v. Baker*, 105 Mo. 472, 16 S. W. 938, 24 Am. St. Rep. 399; *Robbins v. Boulware*, 190 Mo. 33, 88 S. W. 674, 109 Am. St. Rep. 746; *Crown R. E. Co. v. Rogers Committee*, 132 Ky. 790, 117 S. W. 275, 136 Am. St. Rep. 207.

There is also practical unanimity among the authorities that a judgment of a court of general jurisdiction cannot be collaterally attacked, unless the record affirmatively shows want of jurisdiction, and every fact not negated by the record is presumed in support of the judgment of a court of general jurisdiction, and where the record of the court is silent upon the subject, it must be presumed in support of the proceedings that the court inquired into and found the existence of facts authorizing it to render the judgment which it did. 15 *Ruling Case Law*,

p. 354; *Jones*, *Commentaries on Law of Evidence*, vol. 3, p. 877; *Sodini v. Sodini*, 94 Minn. 301, 102 N. W. 861, 110 Am. St. Rep. 371; *Kalb v. German Sav. Soc.*, 25 Wash. 349, 65 Pac. 559, 87 Am. St. Rep. 757; *Burke v. Interstate Sav. Ass'n*, 25 Mont. 315, 64 Pac. 879, 87 Am. St. Rep. 416; *Gullickson v. Bodkin*, 78 Minn. 33, 80 N. W. 783, 79 Am. St. Rep. 352.

[3, 4] In the instant case the decree or order of sale is very complete and in strict conformity to the statutes. We do not think it is subject to criticism in any particular, and in fact none is made in the brief filed by counsel for plaintiff. This order of sale recites the filing of the petition, the appearance of the petitioner, that notice of the hearing of the petition was waived by all parties interested and the next of kin of the minor, that a hearing was had on said petition, and evidence was adduced and considered at the hearing. As to the necessity of the sale the decree reads:

"And upon due examination and consideration of said petition, and after a full hearing on the same, and upon due consideration of the proofs offered in said matter, the court finds that the sale of all the real estate belonging to said ward, mentioned in said petition and hereinafter described, is necessary for the purpose of properly maintaining, supporting, and educating said minor, the father of said minor being wholly unable to do so, and for the best interest of said ward."

Before we proceed further, it might be well here to call attention to the fact that there is quite a conflict in the authorities on the question as to what constitutes jurisdictional defects in the proceedings for the sale of a ward's real estate. As was observed in *Eaves v. Mullen*, supra, practically all of the courts agree that there are many defects in the sale proceedings of a ward's real estate which will not render the proceedings void. Some courts hold that practically all of the statutory steps are jurisdictional; but we have adopted the other rule, and there are many compelling reasons, unnecessary to be stated at this time, why we should not at this late date depart therefrom. But the filing of a petition praying for a sale of the ward's land is jurisdictional. This is necessary to invoke the jurisdiction of the court and to set the judicial mind in motion.

We come, then, to the question as to whether the fact that the petition for the sale defectively alleges the statutory grounds for a sale, or fails to allege any of the statutory grounds, defeats the jurisdiction of the court on collateral attack. Let us first inquire into the rule obtaining where the judgments of courts of general jurisdiction, other than probate courts, are collaterally assailed. We find the general rule obtaining to be that, where the court is one having power to grant the relief sought and having the parties before it, the fact that the petition defectively states a cause of action, or states it not at all, does not make the judgment void on collateral attack, but, on the contrary, if the

relief demanded by the petitioner can be ascertained from the allegations in the petition, no matter how defective they are, or how many necessary ones are omitted, the judgment is not void on collateral attack. *Chivers v. Board of County Commissioners of Johnston County*, 161 Pac. 822, L. R. A. 1917B, 1296; 15 Ruling Case Law, § 339, p. 964; *Altman v. School Dist. No. 6*, 35 Or. 85, 56 Pac. 291, 76 Am. St. Rep. 468; *Freeman on Judgments*, § 33, pp. 116-118.

Judge Van Fleet is recognized by many courts as the best authority on the subject. In his excellent work on Collateral Attack, he says:

"There is no connection between jurisdiction and sufficient allegations. In other words, in order to 'set the judicial mind in motion,' or to 'challenge the attention of the court,' it is not necessary that any material allegation should be sufficient in law, or that it should even tend to show facts that are sufficient. If that were the rule, the absence of any material allegation would always make the judgment void, because it cannot be said that such a complaint has any tendency to show a cause of action. * * * When the allegations are sufficient to inform the defendant what relief the plaintiff demands, the court having power to grant it in a proper case, jurisdiction exists, and the defendant must defend himself. * * * Allegations immaterial and wholly insufficient in law may be sufficient 'to set the judicial mind in motion,' and to give a wrongful but actual jurisdiction which will shield the proceedings from collateral attack."

And the learned author sums up the whole matter by saying that in his opinion the true and logical rule is that, if there is any petition at all invoking the action of the court, a judgment based thereon cannot be assailed collaterally because of insufficiency in the pleading. This, too, is the rule adhered to by the Supreme Court of the United States. *Ex parte Watkins*, 3 Pet. 193, 7 L. Ed. 650; *Ex parte Parks*, 93 U. S. 18, 23 L. Ed. 787; *In re Coy*, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274-280; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552, 8 Sup. Ct. 217, 31 L. Ed. 202; *Dowell v. Applegate*, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463.

In the case of *Ex parte Watkins*, supra, designated by the Supreme Court of the United States as the leading case, the question arose upon a writ of habeas corpus. The petitioner had been indicted and convicted. He sought to be discharged from prison because the indictment upon its face charged no offense cognizable by courts of the United States. In denying the writ, the Supreme Court held that the Circuit Court for the District of Columbia was a court of record, having general jurisdiction over criminal cases, and that to determine whether the offense charged in the indictment be legally punishable or not was among the most unquestionable of its powers and duties. It said:

"The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case as in the other, and must remain in full force unless reversed regu-

larly by a superior court capable of reversing it."

In the later case of *In re Coy*, supra, the court said:

"In all such cases, when the question of jurisdiction is raised, the point to be decided is whether the court had jurisdiction of that class of offenses. If the statute had invested the court which tried the prisoner with jurisdiction to punish a well-defined class of offenses, as forgery of its bonds or perjury in its courts, its judgment as to what acts were necessary under these statutes to constitute the crime is not reviewable on a writ of habeas corpus."

The distinction between jurisdiction and the exercise of jurisdiction was clearly defined by this court in an opinion by Mr. Chief Justice Sharp in the case of *National Surety Co. et al. v. S. H. Hanson Builders' Supply Co.*, 165 Pac. 1136, wherein the writer quoted with approval the definition given by the Supreme Court of the United States in the case of *Rhode Island v. Massachusetts*, 12 Pet. 718, 9 L. Ed. 1233, as follows:

"Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them. The question is whether on the case before a court their action is judicial or extrajudicial; with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction."

And further observed that the jurisdiction of the court can never depend upon its decision upon the merits of the case brought before it, but upon its right to hear and decide it at all. See *Parmenter v. Ray*, 158 Pac. 1183; *Chivers v. Board of Co. Commissioners*, supra. See, also, cases cited in this opinion. Quite a number of authorities are collated and discussed in an exhaustive note in L. R. A. 1916E to the case of *Jarrell v. Laural Coal & Land Co.*, 75 W. Va. 752, 84 S. E. 933, L. R. A. 1916E, 312. We quote from the note as follows:

"When the general character of a judgment is such that its subject-matter falls within the general jurisdiction of the court that enters it, a collateral attack cannot be made thereon, even though the pleadings may be defective, and it is not subject to collateral attack, even though there was no cause of action stated in the pleadings."

See *Christianson v. King County*, 239 U. S. 356, 36 Sup. Ct. 114, 60 L. Ed. 327; *In re Hughes*, 159 Cal. 360, 113 Pac. 684.

In applying the rule there is a well-recognized distinction made by some of the courts between courts of general jurisdiction and those of limited or special jurisdiction. Thus the Supreme Court of California has held that a superior court of that state, although a court of general jurisdiction, only exercises special and limited jurisdiction in probate matters, and that, before such a court would be authorized to order a sale of a decedent's real estate, a petition must be presented, showing a deficiency of the personal property to meet the liabilities of the estate, and also the necessity of the sale of the

real property, or some portion thereof, for that purpose, as is required by the statute of that state. *Meeks v. Hahn*, 20 Cal. 626. In the later case of *In re Hughes*, supra, in which it was sought to apply this rule to a judgment of one of its superior courts in a matter in which the superior court had general jurisdiction, the Supreme Court stated the distinction in the following language:

"There are cases holding that where a court, even of general jurisdiction, is exercising a limited statutory power, and a statute conferring the power declares that it may be exercised upon the presentation of a petition stating certain facts, the failure to allege such facts is fatal to the jurisdiction of the court and renders its judgment and orders in the proceeding void, even on collateral attack. *Haynes v. Meeks*, 20 Cal. 312, 317; *Meeks v. Hahan*, 20 Cal. 626; *Pryor v. Downey*, 50 Cal. 398, 19 Am. Rep. 656; *Boland's Estate*, 55 Cal. 314. Section 1474 of the Penal Code provides that the petition in habeas corpus must 'state in what the alleged illegality' of the imprisonment consists. Counsel contend that this brings the case within the rule, just stated, that the petition shows on its face that the imprisonment is legal, and that hence it gave the superior court no jurisdiction to act. It is sufficient to say, in answer to this point, that the superior court in habeas corpus proceedings is not acting under a limited statutory authority, but under the general jurisdiction given by the Constitution. The statute may regulate the procedure, but it cannot limit or modify the jurisdiction. Defects in mere procedure, where general jurisdiction exists, are errors of law not fatal to the jurisdiction. This case does not come within the rule invoked by counsel."

Coming now to a consideration of the decrees, orders, and judgments of probate courts, we find that, while this court has never had the exact question herein involved before it, the logical deduction to be drawn from our cases, such as *Hathaway et al. v. Hoffman et al.*, supra, and *Roth v. Union National Bank*, 160 Pac. 504, lead to but one conclusion. These and many other of our adjudicated cases are founded and rest upon the decisions of the Supreme Court of the United States in the cases of *Grignon's Lessees v. Astor*, 2 How. 341, 11 L. Ed. 292, *United States, to the Use of Mattie Hine et al., v. Alexander Porter Morse*, 218 U. S. 493, 31 Sup. Ct. 37, 54 L. Ed. 1123, 21 Ann. Cas. 782, and *McNitt v. Turner*, 16 Wall. 352, 365, 21 L. Ed. 341, 347. These cases have been quoted from at length with approval in quite a number of our decisions, so we will not attempt to incorporate herein the views of that great court as fully as we would otherwise be inclined to; but we do wish to call attention to the fact that in *Grignon's Lessees v. Astor*, supra, the court said:

"The granting of the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken. The rule is the same, whether the law gives an appeal or not. If none is given from the final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence. The court having power to make the decree, it can be impeached only by fraud in the party who obtains it. *United States v. De la Maza*

Arredondo, 6 Pet. 729, 8 L. Ed. 547. A purchaser under it is not bound to look beyond the decree. If there is error in it of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given, but not taken in the time prescribed by law. These principles are settled as to all courts of record which have an original general jurisdiction over any particular subject. They are not courts of special or limited jurisdiction. They are not inferior courts, in the technical sense of the term, because an appeal lies from their decisions."

We come now to a consideration of cases directly in point from sister states. In the case of *Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590, the court had under consideration a statute of the state of Texas which authorized a sale of a ward's land when the ward was not possessed of sufficient means for his proper support and education, or to pay the debts against his estate. The only ground alleged in the petition for the sale of the land was that the sale was necessary by reason of the fact that the ward's property was constantly depreciating in value on account of repeated trespasses by persons cutting and removing timber therefrom. It will be observed the petition failed to allege any statutory ground for the sale, although the court was authorized to grant the relief sought in a proper case. The Supreme Court of Texas upheld the sale, and followed the rule therein announced in the later case of *Taffinder v. Merrell*, 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep. 814. In the last-named case the court said:

"The first objection to the guardian's sale above stated is likewise answered by the opinion of this court in the case of *Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590. Under the rules laid down in that case, the jurisdiction of the county court did not depend upon the showing in the application of one of the statutory causes for such sales. The absence of such a showing, or the statement of a reason which would not authorize a sale, might make the order of sale erroneous; but it does not follow that it was not within the power of the court to make such order. In the language of the opinion referred to, the application for the sale was sufficient to invoke the exercise of the jurisdiction the court possessed over the subject-matter. Those interested must be conclusively presumed to have had notice of the application such as the law prescribes, and the decrees of the probate court in this collateral proceeding must be deemed conclusive of the fact that the sale was made for a lawful purpose and in a lawful manner, in the absence of some evidence in the record showing to the contrary, other than that the application was defective."

In the case of *Read v. Howe*, 39 Iowa, 553, the Supreme Court of Iowa said:

"It may be admitted that upon appeal this petition would be held insufficient to authorize an order for the sale of real estate, but it by no means follows that it is not sufficient to invoke the action of the court in the premises. The subject-matter is within the jurisdiction of the court. That the law confers. This jurisdic-

diction is called into exercise by the filing of a petition and the service of notice. The court of necessity must determine the sufficiency of the petition. An erroneous determination may be reviewed upon an appeal or writ of error, but it cannot be that, for such erroneous determination, sales of real estate may be set aside in collateral proceedings, without regard to the number of innocent parties through whom the title may have passed."

In the case of *Bryan v. Bauder*, 23 Kan. 95, in an opinion by Chief Justice Horton, the Supreme Court of Kansas held that whether the petition for the sale was in proper form, or set forth sufficient facts, were matters for the determination of the probate court in the exercise of its jurisdiction. We quote from the opinion:

"It is well established that, when a court has jurisdiction of the subject-matter and of the parties in an action, the orders and judgment of the court are not void on account of mere defects in the pleadings or irregularities in the subsequent proceedings. In selling the real estate of decedent, complete jurisdiction is acquired by filing the petition praying the court to make an order, which, under the statute, the court is competent to make, and giving the notice of the time and place of the hearing of the petition. The filing of a petition and giving notice to the heirs are jurisdictional acts. The action of the court is upon the petition. All parties interested, after due notice, are required to come in and oppose the application. The statute contemplates a hearing of parties, and an adjudication upon the subject of the petition. Whether the petition is in proper form, or sets forth sufficient facts, are matters for the determination of the court in the exercise of its jurisdiction. Of course, if a mere blank paper is filed as a petition, jurisdiction would not attach, because there would be nothing for the court to act upon; but when a petition contains sufficient matters to challenge the attention of the court as to the merits, and such a case is thereby presented as authorizes the court to deliberate and act, although defective in its allegations, the cause is properly before the court, and jurisdiction is not wanting. This principle underlies all judicial proceedings."

The question was again before the same court in the case of *Watts v. Cook*, 24 Kan. 278, wherein the court observed that, since the probate court of Allen county had the power to hear and determine the matters alleged in the petition, it had the power to decide wrongly as well as rightly. Note the following language in the opinion:

"In the course of its proceedings, it became the duty of that court to decide whether the petition was sufficient for a sale of the premises. The court held it sufficient. As the petition presented a case for judicial determination, if the determination was erroneous, it was reviewable in the appellate court, but not a void or worthless determination. *Bryan v. Bauder*, 23 Kan. 95."

In the later case of *Beachy v. Shomber*, 73 Kan. 62, 84 Pac. 547, the third paragraph of the syllabus reads:

"A guardian's deed will not be held void upon a collateral attack merely because the petition of the guardian for leave to sell his ward's real estate does not affirmatively show the existence of the conditions which under the statute authorize such sale."

The petition for the sale of the ward's land in the last-named case did not affirmatively

show the conditions which would authorize the sale under the statutes, but the court held it sufficient to call into exercise the jurisdiction of the court. To the same effect are the following cases: *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463; *Iverson v. Loberg*, 26 Ill. 179, 79 Am. Dec. 364; *Worthington v. Dunkin*, 41 Ind. 515; *Overton v. Johnson et al.*, 17 Mo. 442; *Adams v. Thomas*, 44 Ark. 267; *Jarrell v. Cole*, 215 Fed. 315, 131 C. C. A. 589, L. R. A. 1916E, 298.

Our investigation also convinces us that, even in those states where the probate courts are courts of limited jurisdiction, there is a growing disposition to disregard defects and irregularities in the petition for the sale of the real estate of minors or decedents, where the decree is attacked in a collateral proceeding. *Cotton v. Holloway*, 96 Ala. 544, 12 South. 172 (overruling *Abernathy v. O'Reilly*, 90 Ala. 495, 7 South. 919, and modifying *Quarles v. Campbell*, 72 Ala. 64). In *Singo v. McGhee*, 160 Ala. 245, 49 South. 290, the court said:

"Upon direct attack, the court should vacate the judgment for noncompliance with the jurisdictional facts in any part of the proceeding; while upon collateral attack the decree will not be vacated, unless void on its face, and not because it would be rendered void by reading it in connection with other parts of the record."

While there are some authorities expressing a different view, we deem it unnecessary to discuss them here, for we are in accord with the principles enunciated in the above cases, and believe that they are not only supported by the weight of authority, but are also sound in principle.

County courts of this state do not have jurisdiction to appoint guardians over minors residing in another county in this state, but in the case of *Hathaway et al. v. Hoffman et al.*, supra, where a collateral attack was made upon the appointment of one Teubner by the county court of Atoka county, as guardian of the estate of the Hathaway minors, on the ground that said minors, at the time of Teubner's appointment, resided in Coal county, we held the appointment of Teubner as guardian of said minors by said court imported jurisdiction in the court so to do, and that it would be inferred from the fact that the appointment was made that the necessary facts had been found to exist before the same was made.

The petition for the sale of the ward's real estate in the instant case discloses that he had no personal property or estate, that he owned the real estate described in the petition, and that no income was derived therefrom. We think the petition was sufficient to inform the court and all parties who would be bound by the record of the relief sought by the petitioner. Inasmuch as the sale of plaintiff's land in this case was within the general class of cases of which the county court of McIntosh county had jurisdiction, although the petition was very defective, and although it did not affirmatively

allege statutory grounds for the sale, we are of the opinion that it was sufficient to invoke the jurisdiction of the court, and to call upon it to decide as to whether the order of sale should be entered. Since the court, after a full hearing, adjudicated the existence of statutory grounds for the sale, as conclusively appears from the decree, reciting as it does that the sale of the real estate mentioned in the petition was "necessary for the purpose of properly maintaining, supporting, and educating the plaintiff, the father of said minors being wholly unable to do so, and that it was for the best interest of said ward," the court in the determination of said matters, and in entering the decree of sale, was acting within the jurisdiction conferred upon it by law, and the subsequent proceedings based on said order are not void in this collateral assault made thereon.

The remaining irregularity complained of is in the appraisal of the land, but as an appraisal was filed, and it is not claimed that the appraisal was fraudulently made, or that the land did not sell for its appraised value, we think the contention is without merit.

The judgment of the trial court is therefore affirmed. All the Justices concur.

THOMAS v. SOPER LUMBER CO. et al.
(No. 8458.)

(Supreme Court of Oklahoma. March 12, 1918.)

(Syllabus by the Court.)

1. MECHANICS' LIENS §59—MATERIALMEN'S LIENS—INTEREST OF PURCHASER.

A materialman who furnishes material to be used in the construction of improvements on premises to a party who is in the peaceable and lawful possession of said premises under and by virtue of an executory contract to purchase the same from the legal owner thereof has a lien upon the equitable interest of the vendee in said contract together with the building in the construction of which the material was used.

2. MECHANICS' LIENS §57(6) — MATERIALMEN'S LIENS—INTEREST OF VENDOR.

The mere fact that the vendor in a contract for the sale of real property repurchases the interests of the vendee in such contract subsequent to the making of the improvements and furnishing of the material for which the lien is claimed does not enlarge the lien, so as to extend it to the legal interest of said vendor.

Commissioners' Opinion, Division No. 3. Error from District Court, Choctaw County; C. E. Dudley, Judge.

Action by the Soper Lumber Company against J. J. Thomas and F. R. Peavey. Judgment of foreclosure, and defendant Thomas brings error. Modified and affirmed.

J. J. Thomas and McDonald & Jones, all of Hugo, for plaintiff in error. E. H. Sherman, of Soper, and R. L. Evans, of Hugo, for defendants in error.

PRYOR, C. This action was commenced on the 15th day of January, 1914, in the dis-

trict court of Choctaw county by the Soper Lumber Company, a corporation, defendant in error, against J. J. Thomas, plaintiff in error, and F. R. Peavey, to foreclose a materialman's lien. The parties will be referred to as they appeared in the trial court.

The cause was submitted to the trial court upon an agreed statement of facts, and the facts in this case, as determined by the trial court in so far as material to the determination of the contentions raised on appeal, are that the defendant J. J. Thomas, on and before the 20th day of December, 1912, was the owner of the northeast quarter (N. E. $\frac{1}{4}$) of section twenty-four (24), in township six (Tp. 6) south, of range fifteen (15) east, in Choctaw county; that on the 20th day of December, 1912, the defendant F. R. Peavey was in the lawful and peaceful possession of said premises, and on that date the said Peavey entered into a contract with the plaintiff, the Soper Lumber Company, for lumber and material with which to construct a dwelling upon said premises; that the said plaintiff delivered said material between the 27th day of December, 1912, and the 1st day of March, 1913, and said material was used by the said Peavey in the construction of the dwelling upon said premises; that the defendant Peavey was in possession of said premises under an executory contract with the defendant Thomas for the purchase of said premises, and at the time of entering into the said contract the said Peavey paid the said Thomas the sum of \$500 as a part of the purchase price, and said Thomas agreed to execute and deliver to the said Peavey a sufficient warranty deed for said premises when all the balance of the purchase price was paid. Said contract was filed for record on the 15th day of January, 1915.

The court found that at the time the plaintiff entered into a contract with the said Peavey to furnish the material for the construction of said building on said premises, that the agent of J. J. Thomas informed the lumber company that there was a contract of sale of said premises between the defendant Peavey and defendant J. J. Thomas, but that the said lumber company had no notice or knowledge of the terms and conditions of said contract; that there was due the plaintiff \$422.60, bearing interest from the 1st day of March, 1913.

On the — day of October, 1913, the defendant Peavey, in consideration of the sum of \$50, relinquished and quitclaimed all of his right, title, and interest in the said premises, together with the improvements thereon, to the said defendant Thomas. The trial court held that by the reconveyance of the equitable interest of the said Peavey to the said J. J. Thomas, that the equitable interest and legal title merged, and that the plaintiff had subsequent to such merger a lien upon the entire equitable and legal es-

tate, and gave judgment ordering said lien be foreclosed and said premises sold in satisfaction of such indebtedness. From this judgment the defendant Thomas appeals.

The question presented by the defendant may be stated generally that the judgment of the trial court is contrary to the evidence and the law. The parties agreed that the facts set out in the pleadings, with some additional agreement as to what the facts were, might be considered by the court as the evidence upon which to base its findings. An examination of the pleadings and the agreed statement of facts clearly shows that the court reached a correct conclusion as to the facts in the case.

[1] In the construction of statutes giving persons who furnish material to be used in the construction of buildings upon premises, all the courts are in harmony and hold that a person who furnishes material to be used in the construction of improvements upon premises to a party who is in the lawful and peaceful possession of said premises under an executory contract to purchase the same from the legal owner thereof is entitled to a lien upon the interest of the vendee of said premises for the amount due on the material so furnished and so used. *Chicago Lbr. Co. v. Fretz*, 51 Kan. 134, 32 Pac. 908; *Badger Lbr. Co. v. Malone*, 8 Kan. App. 121, 54 Pac. 692; *King v. Smith*, 42 Minn. 286, 44 N. W. 65; *Kerrick v. Ruggles*, 78 Wis. 274, 47 N. W. 437; *Forbes v. Mosquito Yacht Co.*, 175 Mass. 432, 56 N. E. 615.

[2] It cannot be controverted that the plaintiff has a lien upon the equitable interest of the defendant Peavey, including the buildings constructed out of the material furnished by the plaintiff. The difficult question is as to what effect the settlement, whereby Peavey reconveyed his interest to Thomas, between the defendant Thomas, the legal owner, and the defendant Peavey had upon the lien. It is very clear that the surrender or reconveyance of the interest from Peavey to Thomas could not operate to defeat the lien of the plaintiff upon the interests of the said Peavey. The trial court held that the said settlement merged the two interests, the legal interest of Thomas and the equitable interest of Peavey, and extended the lien of the plaintiff to the whole estate both equitable and legal.

At the time the plaintiff entered into the contract with Peavey to furnish the material it had knowledge that Thomas was the legal owner of the lands. According to the agreed statement of facts, the plaintiff furnished the material to Peavey, relying on Peavey's possession and verbal contract with Thomas to purchase. There was no authority given Peavey by Thomas to bind his interest, and no such authority can rise by operation of law. Peavey had authority only to bind his interest, and the plaintiff had no reason to

expect the legal interest of Thomas to become liable for the indebtedness when he furnished material, on the failure of Peavey to complete his title by paying the full purchase price, and acquiring conveyance from Thomas. The mere surrender or relinquishment of Peavey of his rights under the executory contract to purchase to Thomas could not operate to enlarge his lien so as to extend it to the legal interest of Thomas. Neither would the re-purchase of vendee's interest. "In actions to foreclose mechanics' liens for work done and for material furnished, under a contract with one who has an executory contract for the purchase of a city lot and is in possession thereof, the lien of the mechanic or materialman must be measured by the extent of the equity of the purchaser under the executory contract." *Getto et al. v. Friend et al.*, 46 Kan. 24, 26 Pac. 473. The trial court erred in decreeing the lien against the legal interest of Thomas.

There is another question raised by the defendant Thomas, that as the contract between him and Peavey provided that the said Peavey should not create any liens on said premises, the said Peavey could not incur the said premises with the lien claimed by the plaintiff. The court found and it was stipulated by the parties that the plaintiff had no notice of this provision of the contract. A contract between the vendor and the vendee of which the person furnishing the material has no notice or knowledge is not binding upon the materialman, and cannot operate to defeat his lien claim. *Cost v. Newport Builders' Supply Co.*, 85 Ark. 407, 108 S. W. 509, 14 Ann. Cas. 142, and extended note.

Therefore the judgment should be modified, giving the plaintiff a lien on the equitable interest of Peavey, which he had under his contract to purchase, at the time the material was furnished, including the building in the construction of which the material was used, and the judgment should be affirmed as modified.

PER CURIAM. Adopted in whole.

(14 Okl. Cr. 395)

DARNEAL v. STATE. (No. A-2866.)

(Criminal Court of Appeals of Oklahoma.
March 30, 1918.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS §146(3)—OFFENSES—RESALE.

Where one person delivers to another certain intoxicating liquors in exchange and consideration for a sum of money then and there paid, the transaction constitutes a sale of intoxicating liquors, and it is immaterial whether the purchaser subsequently delivers a portion of such liquors to other persons who had theretofore contributed to a purse with which such liquors were purchased, where it appears that the person making such a sale was ignorant of the fact that such liquors were to be subsequently de-

livered to parties other than the one producing and paying the money.

2. INTOXICATING LIQUORS — 167—OFFENSES — ACCOMPLICE.

Where D. delivers intoxicating liquors to R. in exchange for a money consideration, and is so charged and convicted of making an unlawful sale to R., and the evidence on the part of the state discloses that prior to said transaction the fund of money with which said liquor was purchased by R. from D. had been contributed to by R. and three other persons without the knowledge of said D., and that it was the intention of R., after obtaining possession of such liquor, to deliver same in part to said other parties who had contributed to the purse, such delivery to be made also without the knowledge of D., held, that under such circumstances R. is not an accomplice of D. *Buchanan v. State*, 4 Okl. Cr. 645, 112 Pac. 32, 36 L. R. A. (N. S.) 83, distinguished.

3. SALES OF INTOXICATING LIQUORS.

Under the facts above stated, the sale of the liquor by D. to R. was independent of any relation theretofore existing between R. and the parties who had contributed to such purse.

Appeal from County Court, Le Flore County; P. C. Bolger, Judge.

Silas (Bud) Darneal was convicted of an unlawful sale of intoxicating liquor, and he appeals. Affirmed.

McCurtain & Neely, of Spiro, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. Plaintiff in error, Silas (Bud) Darneal, was convicted in the county court of Le Flore county at the August term, 1916, of selling intoxicating liquor to one W. H. Rutledge, and his punishment fixed at 30 days' imprisonment in the county jail, and to pay a fine of \$50.

The facts upon which this conviction is based are about as follows: The prosecuting witness, W. H. Rutledge, together with three other parties who were residents of Spiro, Le Flore county, concluded to purchase some intoxicating liquor for their personal use. They boarded the train at Spiro and rode to Sculleyville in the same county, where they got off at the depot in that town, and walked out in the country about a mile and a half to a ravine close to where this plaintiff in error resided. There they all donated \$1 a piece, and Rutledge was selected to approach this plaintiff in error for the purpose of purchasing some alcohol. Rutledge took the \$4 and went to the house of Darneal about one-fourth of a mile away. There he purchased two quarts of alcohol, and paid Darneal the sum of \$4 therefor, and Darneal delivered the alcohol to Rutledge without any knowledge on his part that the \$4 formed a contribution by Rutledge and three other persons, and also without knowledge of the fact that Rutledge was to deliver said alcohol in part to the other three persons who had helped donate the \$4. Harvey Bryant, one of the parties who donated \$1 for the purchase of this liquor, testifies to the same effect as the prosecuting witness, Rutledge, with the

exception that he did not see the liquor purchased from Darneal, but only knows that Rutledge brought two quarts of alcohol back to the ravine after the purse of \$4 had been contributed for that purpose. The defendant denied ever selling any alcohol or other intoxicating liquors whatever to the witness Rutledge, and also introduced a couple of witnesses to show that his general reputation as a law-abiding citizen was good.

[1-3] Counsel for the defendant requested three separate instructions based on the theory that the prosecuting witness, Rutledge, was an accomplice of the defendant, Darneal, in making a sale of intoxicating liquor to all of the four persons who participated in contributing the purse for that purpose, and therefore a conviction, based on the uncorroborated testimony of said Rutledge, must not be permitted to stand. Counsel rely upon the case of *Buchanan v. State*, 4 Okl. Cr. 645, 112 Pac. 32, 36 L. R. A. (N. S.) 83. Said case is not in point. Here Darneal is prosecuted for making a sale to Rutledge direct. In the *Buchanan* Case, Buchanan was prosecuted for making a sale of liquor to one York, and the testimony in that case on the part of York was to the effect that he gave Buchanan some money, and Buchanan went away and brought him some whisky therefor. Buchanan claimed to be a go-between, and the agent of the purchaser, and not the seller in that instance. He occupied the same relation to the parties that Rutledge does in this case. The holding of the court in the *Buchanan* Case was to the effect that Buchanan was guilty as a principal in making a sale to York, irrespective of the fact that he had previously purchased the whisky himself illegally from another party. There is no holding to the effect that the party from whom Buchanan purchased the whisky could not be convicted upon his (Buchanan's) uncorroborated testimony of making a separate sale to Buchanan. In this case, Darneal is charged directly with the sale of intoxicating liquor to Rutledge, who was the go-between. Darneal had no knowledge of the fact that Rutledge intended to deliver a portion of this alcohol to any other party. So far as Darneal is concerned, his relation to Rutledge was that of a seller of the liquor. He was in possession of the liquor, he received his price therefor, and he made a delivery of the liquor to Rutledge in exchange for the sum of \$4 to him then and there in hand paid. All of the necessary elements of a sale were complete, the ownership and possession of the goods in Darneal, and the delivery of the same to Rutledge in exchange for a sum paid. The criminal statutes of this state, as was said in the case of *Buchanan v. State*, supra, must be liberally construed in order to promote justice and obtain the object for which such statutes were enacted. The seller of whisky or other intoxicating liquors, there-

fore, will not be permitted in this court, where he is guilty of a separate and distinct offense, such as the sale of intoxicating liquor, to escape punishment for such illegal act because perchance the party purchasing such liquor may thereafter use same unlawfully without the knowledge or consent or assistance of the person from whom such purchase was made. This court will not impute criminality to the seller of liquor for any and all unlawful acts or uses which may be subsequently made by said purchaser without the knowledge, consent, or assistance of the seller. Therefore, under the facts of this case, it is not necessary to determine whether or not Rutledge is guilty of making a separate and distinct sale to Bryant and the others who delivered money to Rutledge and afterwards received part of this alcohol. The determination of such a question is not essential to a proper solution of this case, because all of the elements of an unlawful sale existed and were concluded between Darneal and Rutledge, and Rutledge's connection with the other parties was absolutely unknown to Darneal. We hold, therefore, that the case of *Buchanan v. State*, relied upon by counsel for plaintiff in error as ground for a reversal of this judgment of conviction, is not in point, nor determinative of the questions involved in this case.

However, it may be advisable to add that any person who receives from another person money, and with that money unlawfully purchases liquor in this state, and thereafter delivers same to the person from whom he received such money, does so at his own peril, and will not be permitted to thus aid and abet in the unlawful traffic in intoxicating liquors, and base his defense solely upon the ground that he received no pecuniary benefit therefrom. For authorities to the effect that all of the facts necessary to constitute an unlawful sale were present in this case, see the following: *Richardson v. Commonwealth*, 11 Ky. Law Rep. 367; *Commonwealth v. Packard*, 71 Mass. (5 Gray) 101; *Loveless v. State*, 40 Tex. Cr. R. 131, 49 S. W. 98; *Wade v. State* (Tex. Cr. App.) 43 S. W. 995; *Cooper v. State*, 37 Ark. 412; *Hatfield v. State*, 9 Ind. App. 296, 36 N. E. 664.

The judgment of conviction is affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

(14 Okl. Cr. 400)

TAYLOR v. STATE. (No. A-2820).*

(Criminal Court of Appeals of Oklahoma.
March 30, 1918.)

(Syllabus by the Court.)

1. RAPE §35(2)—INFORMATION—PROOF.

Where an information charging statutory rape in the first degree alleges the crime to have been committed "on or before September 1, 1915," the state is not required to prove said crime as committed on the date alleged, but may

rely upon any specific act of sexual intercourse committed within three years from the date of the commencement of the action.

2. CRIMINAL LAW §369(8)—EVIDENCE—ADMISSIBILITY.

Where the trial court requires the state to elect to rely for conviction upon a certain specific act of intercourse between prosecutrix and defendant committed some 2 years prior to the commencement of the action, evidence of other acts of illicit intercourse between said parties, continuing from said act up until a short time prior to the commencement of the prosecution, is competent to show the intimate relation and familiarity between the parties and as corroborative of the ultimate fact sought to be proven.

3. RAPE §52(1)—EVIDENCE—SUFFICIENCY.

Evidence examined, and held sufficient to sustain a conviction of statutory rape in the first degree.

Appeal from District Court, Seminole County; Tom D. McKeown, Judge.

Plaintiff in error was convicted of rape in the first degree, and sentenced to serve a term of 18 years in the penitentiary, and appeals. Judgment affirmed.

A. Turner, of Wewoka, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. [1, 2] It is first contended that the verdict is contrary to the law and the evidence, in that the testimony of the prosecuting witness, Lucinda Mitchell, shows "that she was past the age of 14 years at the time the information was filed and the crime alleged to have been committed." The plaintiff in error was convicted and sentenced to serve a term of 18 years in the penitentiary for rape in the first degree; it being the contention of counsel for plaintiff in error that, if he was guilty of any offense at all, it was rape in the second degree, which may only be punished by a maximum imprisonment in the penitentiary for a term of 15 years. The prosecuting witness, Lucinda Mitchell, was an ignorant Indian girl. She had received very little educational training. Her examination shows that she did not know the number of days in a week or month, and that she was uncertain as to her age, testifying that she was told that she was 14 years old, and also that her mother told her that she was 17 years old. This was at the time she appeared as a witness. However, Rebecca Brown, a witness, testified positively that Lucinda Mitchell was 14 years of age in May, 1915. The information alleged that the crime was committed on or before the 1st day of September, 1915. Therefore, if the state was compelled to rely upon the date stated in the information, and limited its proof thereto, the prosecuting witness would have been past 14 years of age at the time of the commission of the alleged crime, and defendant could only have been convicted of rape in the second degree. But time is not the essence of this offense, and it may be proven to have been committed at any time

within the period of 3 years prior to the commencement of the prosecution, and in this instance the trial court required the state to elect to rely upon a particular act of intercourse, and the state elected to rely upon the first act of sexual intercourse between defendant and the prosecuting witness, which occurred in the latter part of the year 1913, or the first of the year 1914, nearly 2 years prior to the date alleged in the information, but within the statute of limitations, and the trial court, in his instructions to the jury, limited its consideration of the question of guilt of this defendant to the particular act relied upon by the state for a conviction. Accordingly, the proof on the part of the state, if believed, showed the commission of rape in the first degree, and the fact that there was proof of a continuous unlawful relation between defendant and prosecuting witness until after she attained the age of 14 years, which culminated in her pregnancy in the late spring or early summer of 1915, although indicating the guilt of defendant of other similar offenses, was competent evidence as was held by this court in *Myers v. State*, 6 Okl. Cr. 389, 119 Pac. 136; *Penn v. State*, 13 Okl. Cr. —, 164 Pac. 992, L. R. A. 1917E, 668; *Morris v. State*, 9 Okl. Cr. 241, 131 Pac. 731. We hold, therefore, that the verdict is not contrary to the evidence or the law.

It is also contended that the court erred in giving a charge to the jury on first degree rape. It necessarily follows from what has been said concerning the first assignment of error that no error was committed by the court in submitting first degree rape to the jury.

It is also contended that the court erred in overruling a demurrer to the evidence because defendant was surprised, it being alleged in the information that the crime was committed on the 1st day of September, 1915, and the state was permitted "to prove the crime to have been committed 2 years prior to that date." It is contended that this operated as a surprise, because plaintiff in error was prepared to defend against a crime alleged to have been committed on September 1, 1915, which would show that he was only guilty, if at all, of rape in the second degree, and therefore he was prejudiced in his substantial rights, and the demurrer to the evidence should have been sustained. We think this contention is without merit, because time is not the essence of the offense, as above stated, and the information plainly charged him with the crime of rape in the first degree both at the preliminary examination and in the district court. He was charged with knowledge, therefore, that the crime committed by him was upon a female under the age of 14 years, and that the state could rely upon any particular act of sexual intercourse of his with the prosecuting witness committed within 3 years from the date of the commencement of the action, and at a time said prosecuting witness was under the age of

14 years of age. He could not claim surprise, therefore, under such circumstances. The information was clearly sufficient to fairly warn him of the nature and circumstances of the crime with which he was charged to be guilty.

[3] It is also contended that the proof of the fact that the prosecuting witness was under the age of 14 years at the time of the commission of this offense is very unsatisfactory and contradictory. The sufficiency of the proof of the crime charged is for the jury. This court will not disturb a verdict on this ground merely because there may be a conflict in the testimony. In this case, however, we see very little conflict. The testimony of the prosecuting witness is to the effect that she was always told she was 14 years old, but that her mother had told her that she was 17. Mrs. Rebecca Brown positively testified that the girl was only a few months past 14 years old at the time she testified. She fixed the child's age by reason of the fact that she had two daughters, one two years older than the prosecuting witness and one one year younger. Mrs. Brown had known the prosecuting witness from the time of her birth, and testified that when the prosecuting witness was one month old, her mother brought the child to Mrs. Brown's house on a visit. The mother of this child was present in court, and in no way contradicted the testimony of Mrs. Brown as to the child's age. Also this prosecuting witness testified that her mother was present in the room where the defendant continuously had access to her for this unlawful purpose. The defendant was her stepfather, and the prosecuting witness testified that the acts perpetrated by him upon her were with her mother's knowledge, consent, and encouragement, and yet this depraved mother sits silently by in the courtroom and does not even contradict the child as to that.

This record discloses a most deplorable state of facts. It is almost impossible to conceive that in this enlightened day and age we can find a mother or stepfather so utterly depraved as to permit or encourage conduct of this kind. That defendant escaped with his life when the jury might have inflicted the death penalty is miraculous under the proof. He was ably defended, and the facts and circumstances disclosed by the evidence in this case clearly indicate his guilt of the crime of rape in the first degree. The assignments of error are purely technical. This court is convinced that his trial was a fair and impartial one, and that the punishment received at the hands of the jury is extremely lenient under the circumstances.

The judgment of conviction is therefore affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

(100 Wash. 699)

PITTOCK & LEADBETTER CO. v. CLARKE COUNTY. (No. 14276.)

(Supreme Court of Washington. April 2, 1918.)

Department 1. Appeal from Superior Court, Clarke County; R. H. Back, Judge.

Proceeding by the Pittock & Leadbetter Company against Clarke County for the reduction of the assessment valuations for taxation of certain of its land. Judgment for defendant, and plaintiff appeals. Affirmed.

Henry Crass, of Vancouver, for appellant. James O'Blair, of Vancouver, for respondent.

PARKER, J. The plaintiff seeks a decree reducing the assessed valuations for taxation purposes placed upon certain of its lands in Clarke county for the year 1915 by the assessing officers of that county, and permitting it to pay taxes thereon computed upon assessed valuations of approximately one-half of those fixed by the assessor and board of equalization of that county. A trial upon the merits in the superior court for Clarke county resulted in judgment in favor of the county, denying the relief prayed for by the plaintiff, from which it has appealed to this court.

It would be quite impossible to review the facts presented in this voluminous record within the reasonable limits of a written opinion, and it would be equally unprofitable to do so. We deem it sufficient to assure counsel for the respective parties that we have painstakingly read all the evidence as presented to us in the necessarily lengthy abstract thereof prepared by counsel for appellant, and have become quite convinced therefrom that we would not be justified in disturbing the judgment of the trial court. There is evidence in the record which may seem to lend strong support to the view that some of appellant's lands have in a measure been assessed at excessive valuations. However, the evidence points to a difference between the lands in question and adjoining lands with which it is sought to compare their assessed valuations, which difference we cannot say does not justify the larger assessment made upon them. The trial court not only heard and saw the witnesses testify, but viewed the lands in question, attended by a representative of each of the parties. There is practically no evidence in this record pointing to arbitrary action on the part of the assessor or the board of equalization in fixing the values complained of, other than the fact that the assessed valuations are too high as compared with the assessed valuations of adjoining lands, in the opinion of certain witnesses. The evidence as a whole, looked at in cold typewriting, as we are compelled to view it, is not of such convincing character in support of appellant's conten-

tions as to enable us to say that the conclusions of the county assessor, the county board of equalization, and the trial court were wrong.

The judgment is affirmed.

ELLIS, C. J., and FULLERTON, MAIN, and WEBSTER, JJ., concur.

(101 Wash. 700)

SCHULLER v. SCHULLER. (No. 14552.)

(Supreme Court of Washington. April 23, 1918.)

Department 1. Appeal from Superior Court, Yakima County; Thos. E. Grady, Judge.

Suit by John J. Schuller against Angela Schuller. From a decree for plaintiff, defendant appeals. Affirmed.

Parker, La Berge & Parker, of North Yakima, for appellant. Roberts & Udell, of North Yakima, for respondent.

PER CURIAM. On November 20, 1911, respondent assigned to appellant a certain mortgage to secure the payment of an indebtedness owing by respondent to appellant, and this action was brought for an accounting of moneys received by virtue of the assignment, which resulted in a decree in favor of respondent for the sum of \$879.63, from which this appeal is prosecuted.

The record presents an unfortunate controversy between mother and son, the transactions involved being numerous and extending over a period of several years. We have carefully examined the evidence, and are convinced that the decree of the lower court, under all the facts and circumstances of the case, is just and equitable. Issues of fact only are presented, and no purpose would be served by descending to a discussion of details.

The decree is correct, and will be affirmed.

(89 Or. 107)

GILE et al. v. LASSELLE.

(Supreme Court of Oregon. May 14, 1918.)

1. EVIDENCE — 472(1) — OPINION OF WITNESS — CONSTRUCTION OF CONTRACT — PROVISIONS OF COURT.

In view of L. O. L. § 136, providing that all questions of law and the construction of statutes and other writings are to be decided by the court, and section 717, providing that for the proper construction of an instrument the circumstances under which it was made, etc., may be shown, so that the judge may be placed in the position of those whose language he is to interpret, permitting a party to a written contract to state what he understood by term "time is of the essence of the contract," and to state whether according to his understanding title passed until certain things were done, was error.

2. APPEAL AND ERROR ¶1052(5) — PERMITTING WITNESS TO CONSTRUER CONTRACT — HARMLESS ERROR.

Where decision was in harmony with true construction of written contract, permitting a witness who was a party to the contract to construe it was harmless.

3. EVIDENCE ¶13 — JUDICIAL KNOWLEDGE — FRUIT SEASON.

The Supreme Court, by putting itself in the position of the parties on June 27, 1916, when contract was made, as it is required to do by L. O. L. § 717, knows by the laws of nature and the fruit season that no present crop of prunes of the season of 1916 was dried and ready for shipment on June 27th.

4. SALES ¶208 — TRANSFER OF TITLE — PROPERTY NOT IN EXISTENCE.

One cannot presently convey title to property which is not in existence.

5. SALES ¶11 — CONTRACT FOR FUTURE DELIVERY — TITLE.

One may make a contract for future delivery, though he has no property of the kind on hand when the contract is made.

6. SALES ¶197 — SALE OF CROP — PASSING OF TITLE.

Provision of contract for sale of year's crop of prunes that it is understood by both parties to constitute an absolute sale, and that seller assumes all risk of loss or damage until delivery, amounts to no more than saying that when the terms of the writing have been fulfilled the result will be an absolute sale.

7. SALES ¶200(1) — EXECUTORY CONTRACTS — PASSING TITLE.

To pass title under an executory contract there must be some further act of the parties amounting to performance of executory feature when property actually comes into existence and possession of seller.

8. SALES ¶202(1) — EXECUTORY CONTRACT — RIGHT OF POSSESSION.

Contract for sale of year's crop of prunes, providing that it constitutes an absolute sale, that seller assumes risk of loss or damage until delivery, that buyers agreed to pay for said crop when delivery is completed, etc., was executory, and buyers were not entitled to possession until they performed concurrent covenant of paying at time of delivery; such covenant not having been waived.

9. EQUITY ¶57 — MAXIMS — MORTGAGE IN ADVANCE OF ACQUISITION.

Where chattels are mortgaged in advance of their acquisition, the court sitting in chancery will construe the mortgage as pledging the property the instant it subsequently comes into the mortgagor's ownership, on the ground that equity will consider that as done which ought to have been done.

10. SALES ¶228 — REMEDY OF BUYER — RECOVERY OF GOODS.

Since a claim under an executory contract for the sale of a year's crop of prunes will not support replevin by the buyers against the seller, replevin will not lie against defendant who purchased prunes after seller got possession and before plaintiff buyers performed concurrent covenant of paying at time of delivery.

11. TRIAL ¶240 — ARGUMENTATIVE INSTRUCTIONS — REFUSAL.

In replevin, where plaintiff claimed the property in its own right and defendant claimed it as bailee for his principal and also sought damages for detention, a requested instruction that the only damages that could be assessed against plaintiff is the sum of 1 cent per pound for the property taken from defendant, as defendant pleads the property right to have been in a named person and defendant's interest in said property to have been only a contract to

process at a stipulated price per pound, held argumentative and misleading under pleadings and evidence and properly refused in view of L. O. L. § 153, making a distinction as to the value of the property and damages for its detention.

12. APPEAL AND ERROR ¶1033(6) — ERROR FAVORABLE TO COMPLAINING PARTY.

In replevin, where plaintiff claimed property in its own right and defendant claimed as bailee for his principal, refusal of plaintiff's requested instruction which would have allowed a recovery of the gross sum of 1 cent per pound as damages without deduction for necessary expenses and labor, held harmless, since if treated as a precept for the measure of damages for detention it would have been harmful to plaintiff.

13. APPEAL AND ERROR ¶1066 — INSTRUCTIONS NOT SUPPORTED BY PLEADINGS OR EVIDENCE — HARMLESS ERROR.

Where the outcome of the case should have been the same regardless of estoppel, error in giving instruction on estoppel is negligible.

Department 1. Appeal from Circuit Court, Linn County; Percy R. Kelly, Judge.

Replevin by H. S. Gile and another, co-partners doing business under the firm name and style of H. S. Gile & Co. against Sanford A. Lasselle. Judgment for defendant, and plaintiffs appeal. Affirmed.

This is an action of replevin in which the plaintiffs seek to recover "about 794 bags of Oregon prunes," containing "about 70,000 pounds" of the value of \$4,500. They allege that the property was in possession of one Percival I. Rust, on storage by them, subject to their order and shipping directions, and that the defendant wrongfully took the prunes from the possession of Rust, caused them to be loaded into a railway car and shipped to Albany where the defendant detains them unlawfully to the plaintiffs' damage in the sum of \$350. They demand judgment for the recovery of possession of the property, or for \$4,500 as its value alternatively, together with \$350 damages. The answer denies the whole complaint and avers that a partnership by the name of John H. Leslie & Co. of Chicago, Ill., employed the defendant, as its agent, to purchase, treat, and pack prunes, in pursuance of which he purchased from Rust 74,661 pounds of prunes of the reasonable value of \$5,200; the same being contained in the 794 bags, and being the identical prunes described in the plaintiffs' complaint. He says, also, that for his services so rendered, he was to receive a commission of 1 cent per pound, and that after the fruit had been properly treated and packed he was required to ship it immediately to Leslie & Co. He avers that he bought the prunes in question with the money of his principal, took it into his own custody, and while he was engaged in treating and packing it the plaintiffs took the same by virtue of a writ of replevin issued in the present case. He states that at the time alleged in the complaint he was, and at all times since then has been, and

still is, entitled to the immediate possession of the prunes and the whole thereof; that Leslie & Co. are the absolute owners of said property; and that this defendant as their agent is entitled to the immediate possession thereof.

Further answering, the defendant sets up a contract entered into on June 27, 1916, between the plaintiffs and Rust, of which the following is a copy:

Buying Contract.

"Roseburg, Oregon, June 27, 1916.

"In consideration of the prices per pound herein specified, Percival I. Rust, the seller, has sold, and H. S. Gile Company, the buyer, has bought, the hereinbefore mentioned 1916 crop of prunes produced during the current year, upon the following described property, the output of his drier at Cottage Grove, guaranteed to not be less than one minimum carload, which crop said seller agrees to properly dry, cure, and deliver in its entirety, unless otherwise agreed to in writing by buyer, and hereby guarantees to be the sole and absolute property of seller, and free from all incumbrances, except as herein specified, and which, with the price per pound, variety, and quantity (estimated by the seller) is as follows: Quantity, 40,000 lbs. or more. Variety, Italians. Price paid per pound for prunes testing between 30-35, $6\frac{1}{4}$ cts; 35-40, 6 cts; 40-45, $5\frac{1}{2}$ cts; 45-50, $5\frac{1}{2}$ cts; 50-55, $5\frac{1}{2}$ cts; 55-60, 5 cts; 60-65, $4\frac{3}{4}$ cts; 65-70, $4\frac{1}{2}$ cts; 70-75, $4\frac{1}{4}$ cts; 75-80, 4 cts; 80-85, $3\frac{3}{4}$ cts; 85-90, $3\frac{1}{2}$ cts; 90-95, $3\frac{1}{4}$ cts; 95-100, 3 cts; 100 over — cts. delivered f. o. b. cars Cottage Grove, sax to be furnished by the buyer. French or Petites same prices as Italians.

"Said buyer agrees to pay for said crop at the price named, when delivery is completed, provided the seller delivers the same thoroughly and properly dried and cured, and free from burned or soft fruit, and in good marketable and merchantable condition. Delivery to be made in bags as soon as buyer requests after drying, but not later than November 15, 1916. Buyer shall be entitled to weigh back and reject any portion of crop delivered not conforming with the terms and conditions of this contract, and such rejection by buyer shall not invalidate this contract or release the seller from any of its obligations. Buyer to accept prunes as to count and grade only after prunes have been put in bags.

"This contract is understood by both parties to constitute an absolute sale, but until delivery has been completed seller agrees to and does assume all risk of loss or damage. Time is of the essence of this contract. No alterations or erasures permitted, save with the written consent of the buyer. In the event of strikes, quarantine, fire, or failure of transportation companies to provide cars, buyer may extend time of delivery under this contract, for a period equal to that so lost, and designate another reasonable point of delivery.

"Percival I. Rust, Seller.
"H. S. Gile & Co., Buyer,
"By R. L. Gile."

He states that at the time this agreement was made Rust was not the owner of any prunes of any kind or nature, nor of any orchard or trees upon which such fruit would grow, nor was he the owner of any contracts for prunes, all of which was known and understood by both him and plaintiffs. The defendant claims that he bought the property in question from Rust about November 23, 1916, in good faith, be-

lieving that Rust was the owner thereof. For another answer the defendant pleads what he claims is an estoppel operating against the plaintiffs and denying them the right to claim property in the fruit in question on the ground that they permitted Rust to retain the possession of it, to employ labor in and about it, and to exercise acts of ownership over it; that finding Rust in possession of the property under such circumstances, and being without any knowledge or intimation that plaintiff had any right to it, the defendant bought the same for his principal, paid Rust the price thereof, and took it into his own possession.

The reply challenges the new matter in the answer in material particulars, avows the making of the contract quoted in the defendant's pleading and states that in pursuance thereof Rust did afterwards produce, procure, and have ready for delivery the prunes here involved and notified the plaintiffs that the same were ready for delivery; that they thereupon shipped to him the necessary sacks to contain them, having thereon the firm name of the plaintiffs, into which defendant Rust put the prunes for the purpose of fulfilling the contract; that the fruit was in those bags at the time the defendant took it, which he did with knowledge that it was the property of the plaintiffs. The jury rendered a verdict to the effect that defendant is entitled to a return of the property described as 74,661 pounds of prunes of the value of \$5,000, together with damages in the sum of \$500. Judgment was rendered upon this verdict in favor of the defendant for the return of the property with \$500 damages, or, in case the property could not be returned, that the defendant have and recover from the plaintiffs \$5,000, together with \$500 damages and costs and disbursements. The plaintiffs appeal.

William H. Trindle, of Salem (Hill & Marks, of Albany, on the brief), for appellants. J. K. Weatherford, of Albany (Weatherford & Weatherford and E. F. Bailey, all of Albany, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). Both parties attempt to deraign title to the property from Rust. This is an action at law and not a suit in equity, and the matter must be adjudicated by legal rules as distinguished from equitable maxims. The crux of the situation is found in the construction to be given to the admitted contract. It is said in section 136, L. O. L.:

"All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court. * * *"

It is also said in section 717:

"For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in

the position of those whose language he is to interpret."

[1] The bill of exceptions discloses that the plaintiffs called Mr. Rust as a witness, and among other things had him identify the contract between himself and the plaintiffs. On cross-examination the defendant's counsel asked him:

"What did you understand by this term of the contract, 'Time is of the essence of the contract'?"

Another question was as follows:

"Now, Mr. Rust, it states in this contract that the 'said buyer agrees to pay for said crop at the price named, when delivery is completed, provided the seller delivers the same thoroughly and properly dried and cured, and free from burned or soft fruit, and in good marketable and merchantable condition.' Now, what was your understanding in reference to whether any title passed to Gile until all this was done, or not?"

To these and similar questions the plaintiffs objected on the ground that they had a tendency to vary the terms of the written instrument which appear clearly upon its face and also that they were not proper on cross-examination. The court overruled this objection. This ruling was manifestly erroneous because it allowed the witness to construe the contract, thus invading the function of the trial judge under the excerpts from the Code above set out.

[2] The view of the contract which we adopt, however, makes this error harmless, because the result reached was in harmony with the true meaning of the instrument, which ought to have been stated by the trial judge without hearing Rust's construction. The theory of the plaintiffs is that the legal effect of the agreement in question was to transfer the title to the property from Rust to them, if not at its date, at least at the moment when he had in his possession as the output of his drier dried prunes which were suitable for filling the contract. The defendant maintains that at best it was an executory agreement which conveyed to the plaintiffs no present title or right of immediate possession without which they cannot maintain replevin.

[3-5] Putting ourselves in the position of the parties on June 27, 1916, when the contract was made, as we are required to do by L. O. L. § 717, we must know by the laws of nature and the fruit season in this country that there was then no present crop of prunes of the season of 1916 dried and ready for shipment, even if the seller had an orchard upon which potential property in such fruit could be predicated. The testimony shows without dispute that at that time Rust had no prunes of any kind and no orchard or contract by means of which he could expect to acquire them. It is common sense that a man cannot presently convey title to property which is not in existence. It is true that he may make a contract for future delivery, although he has no property of the kind on hand when the stipulation is made. The au-

thorities, however, are practically unanimous that such a covenant is executory in its nature, notwithstanding it contains present words of selling and buying.

[6] In the present instance the writing begins with the recital that the seller "has sold" and the buyer "has bought" the 1916 crop of prunes, the output of Rust's drier. It is also said in the body of the instrument:

"This contract is understood by both parties to constitute an absolute sale, but until the delivery has been completed the seller agrees to and does assume all risk of loss or damage."

This language is no stronger than that above mentioned, and adds nothing to its force. It does not amount, in effect, to any more than saying that when the terms of the writing have all been fulfilled the result will be an absolute sale. When we consider the whole instrument together we find that in it there are dependent covenants, the performance of which must be synchronous, and that neither party can put the other in default until he has himself fully performed or tendered performance of what he is to do on his part. This doctrine is illustrated in such cases as *Lewis v. Craft*, 39 Or. 305, 64 Pac. 809; *Longfellow v. Huffman*, 49 Or. 486, 490, 90 Pac. 907. The principle that at law the seller cannot presently pass title to property which is not in existence, either actually or potentially, or which he must hereafter acquire, is enunciated in the cases of *Fonville v. Casey*, 5 N. C. 339, 4 Am. Dec. 559; *Moody v. Wright*, 13 Metc. (Mass.) 17, 46 Am. Dec. 706; and *Dickey v. Waldo*, 97 Mich. 255, 56 N. W. 608, 23 L. R. A. 449 and notes. It is argued by the plaintiffs that, although title did not pass at the date of the contract on account of the property not being then in existence, yet afterwards when the seller did acquire the fruit of the kind and quality prescribed by the agreement, the ownership then automatically passed to the plaintiffs in manner and form sufficient to support replevin.

[7, 8] The rule supported by the authorities quoted, as well as by most other precedents, however, is that in order really to pass the title, as distinguished from rights under an executory contract, when the property has actually come into existence and possession of the seller, there must be some further act of the parties amounting to a performance in that feature of the covenant which hitherto has been executory. The plaintiffs and Rust entered into an agreement the working out of which was designed to pass the title to personal property from the latter to the former. The terms of that process are described in their writing. They expressly say that the "buyer agrees to pay for said crop at the price named when delivery is completed." Without respect to the general property in the prunes, in whomsoever that may be, as against the action for mere possession of them Rust would be entitled to hold the property under this contract until plaintiffs had performed their concurrent covenant of pay-

ing at the time of delivery. This court has several times held that a claim under an executory contract will not support replevin by the buyer from the seller. This is taught in *Hubler v. Gaston*, 9 Or. 66, 42 Am. Rep. 794; *Rosenthal Bros. v. Kahn Bros.*, 19 Or. 571, 573, 24 Pac. 989; *Hamilton v. Gordon*, 22 Or. 557, 558, 30 Pac. 495; *Backhaus v. Buells*, 43 Or. 569, 72 Pac. 976, 73 Pac. 342, and other cases.

[9] The rigor of this rule of law is somewhat tempered under certain circumstances in equity, where chattels are mortgaged in advance of their acquisition. The court sitting in chancery will construe the mortgage as pledging the property the instant it subsequently comes into the mortgagor's ownership, by imputing to him the act necessary to that result, on the ground that equity will consider that as done which ought to have been done. The rule is different at law where the buyer is remitted to his action against the recreant seller for damages for his breach of his executory contract to transfer the title and possession of the goods.

[10] There is no situation disclosed in the testimony which would support replevin by the plaintiffs as against Rust. It is not pretended that they ever performed their covenants. At best they only advanced to him a part of the purchase price, and there is nothing in the testimony or pleadings indicating that Rust waived performance of their concurrent covenant to pay at the time of delivery, so that irrespective of where the general property lies the right to immediate possession has never vested in plaintiffs. They are not in any better plight in respect to the defendant. These conclusions dispose of the assignment of error to the effect that the court was wrong in refusing to direct a verdict for the plaintiffs.

[11] Referring to the statement in the answer that the defendant was entitled to receive from his principal a compensation of 1 cent per pound for his services in buying prunes for their account and preparing them for shipment plaintiffs asked the court to charge the jury thus, and predicate error on the refusal of their request:

"You are further instructed that under the pleadings of this case the only damages you can assess against the plaintiffs in the event you should find for defendant, is the sum of 1 cent per pound for the prunes taken from defendant, as defendant pleads the property right in the prunes to have been in John H. Leslie Company, of Chicago, Ill., and defendant's interest in said prunes to have been only a contract to process them at the stipulated price of 1 cent per pound."

In actions for the recovery of specified personal property, if it has not been delivered to the plaintiff, or the defendant by his answer claims a return thereof, the jury is required to assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof, and

may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property. L. O. L. § 153. A distinction, therefore, must be drawn between the value of the property and the damages for its detention. The instruction as framed is in some degree misleading and argumentative, for the reason that it declares that the only interest the defendant has in the property is the stipulated price of 1 cent per pound. Many cases are cited in support of the plaintiffs' contention to the effect that, when either party claims only a limited estate in the subject of the action, the alternative judgment in his favor must be for the value of the special title. Without exception, however, those cases are between the general owner of the property and the one claiming a special estate therein, as, for instance, between mortgagor and mortgagee, or bailor and bailee, and the like, or their successors in interest. They do not apply to cases like the present, where each is claiming the whole title and between whom there is no privity.

The defendant had the right to show that he would have made 1 cent per pound out of his connection with the property if he had been allowed to proceed, and this for the purpose of proving his damages. The general value of the property is quite another matter. If he was entitled to the possession of the property in its entirety he was also entitled to a judgment for its value in case possession could not be returned to him. That a bailee may maintain replevin against one not entitled to possession and who has no title thereto is taught in *Lewis v. Birdsey*, 19 Or. 164, 26 Pac. 623; *Danielson v. Roberts*, 44 Or. 108, 74 Pac. 913, 65 L. R. A. 526, 102 Am. St. Rep. 627; *Casto v. Murray*, 47 Or. 57, 81 Pac. 388, 383; *Taylor v. Brown*, 49 Or. 423, 90 Pac. 673. This is not in derogation of the doctrine of *McNeff v. Southern Pac. Co.*, 61 Or. 22, 120 Pac. 6, where it was decided that a defendant holding a special property was entitled to an alternative judgment only for the value of his estate in the chattels. That case was between the successors in interest of the general owner of the property on one hand and one claiming a special estate therein in the other. Here, both parties claim the general property in the fruit, the firm in its own right and the other as bailee for a principal who is a stranger to the plaintiffs and not affected by any privity of contract or estate with them. Considered, therefore, as a request to charge the jury that the assessed value of the property, in case the same could not be returned, must be only 1 cent per pound, the instruction was clearly erroneous under the pleadings and evidence.

[12] Considered as a precept for the measure of damages, the giving of this instruction would have been harmful to the plaintiffs themselves, for it would allow a recovery of the gross sum of 1 cent per pound as dam-

ages without any deduction for the necessary expense and labor of treating the prunes and packing them for shipment to Leslie & Co. In that sense, the error of refusal was harmless so far as the plaintiffs are concerned.

[13] The court gave an instruction relating to the estoppel mentioned in the answer. Whatever may be said of the sufficiency of the pleadings or the merits of the instructions in that aspect of the controversy the result would be the same, because it depends upon the construction given to the contract, the legal effect of which was at least to leave possessory rights in Rust and not in the plaintiffs in any event. The outcome of the case would be the same whether the estoppel was pleaded or proved or not. Hence the error, if any, in giving the instruction on that subject is negligible. The most that the plaintiffs have shown is an executory contract on the part of Rust to sell and deliver prunes. For the default of Rust in failing to comply with his contract, if there was such failure, the only remedy the plaintiffs have, if any, is by an action for damages for the breach of the executory contract so far as this record discloses.

These considerations lead to an affirmance of the judgment.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

CLARK v. WHITEUS. (No. 8856.)
(Supreme Court of Oklahoma. April 30, 1918.)

(Syllabus by the Court.)

1. TROVER AND CONVERSION §11—PURCHASE FROM ONE WITHOUT TITLE—NOTICE.

Where one purchases chattels from one in possession, but without title or authority from the owner to sell, and sells them again, he is liable in damages to the owner for conversion, notwithstanding he has no notice or knowledge of the true owner's rights.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conversion.]

2. TROVER AND CONVERSION §9(4)—DEMAND—NECESSITY.

In an action for wrongful conversion, where the defendant by disposing of the property or otherwise has rendered a demand useless, a demand is not a necessary prerequisite to the institution of the action.

Commissioners' Opinion, Division No. 3. Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by C. B. Whiteus against Frank Clark. Judgment for plaintiff, and defendant brings error. Affirmed.

Giddings & Giddings, of Oklahoma City, for plaintiff in error. Twyford & Smith, of Oklahoma City, for defendant in error.

PRYOR, C. This action was commenced in the district court of Oklahoma county, by the defendant in error, C. B. Whiteus, against the plaintiff in error, Frank Clark,

for the recovery of damages for the wrongful conversion of a certain team of mules. The parties will be referred to here as they appeared in the trial court. This case was tried to the judge without the aid of a jury, and there was judgment for the plaintiff for \$313, the reasonable value of the mules at the time of their conversion. The essential facts in this case are undisputed and are that in the first part of the month of November, 1915, the plaintiff was the owner of the mules in controversy; that the mules were stolen from the home of plaintiff near Drumright, Okl., and were by the thief sold to the defendant within a few days after the theft. The defendant paid \$300 for said mules, and, within an hour from the purchase thereof from the thief, sold the same to Davis & Younger. Davis & Younger exported said mules. The defendant had no notice or knowledge that the mules were stolen.

[1] The only question involved is a question of law, as to whether or not the defendant, who purchased the mules in question and sold the same without any knowledge of the plaintiff's ownership, is answerable to the plaintiff in damages for the wrongful conversion of said mules.

"A wrongful sale of the chattels of another, coupled with a delivery of possession, is universally recognized as such an exercise of dominion over the chattels as to constitute a conversion by the seller. In such case it is immaterial that the seller makes the sale under the belief that the property is his own and in ignorance of the true owner's rights, and no demand is necessary before institution of suit." 28 Am. & Eng. Enc. of Law (2d Ed.) 696.

"One who, though acting in good faith, purchases a chattel from a person in possession, but without title or authority or indicia of authority from the true owner to sell, acquires, as against the true owner, no title, and the latter may maintain trover for its conversion; and if a person purchases chattels from one in possession, but without title or authority from the owner to sell, and sells them again, or otherwise actually converts them to his own use, as by refusing to return them to the owner on demand, he is unquestionably liable for conversion, though at the time of the purchase he was unaware of the rights of the true owner." 28 Am. & Eng. Enc. of Law (2d Ed.) 702.

See 38 Cyc. 2023-2024.

In Velsian v. Lewis, 15 Or. 539, 16 Pac. 631, 3 Am. St. Rep. 184, the court said:

"At first blush it may seem strange that one who takes possession of goods or chattels under a contract of purchase, from one who had no right to sell, should be treated as a wrongdoer. but the explanation of the principle lies in the common-law maxim caveat emptor, which applies to the transfer of personal property. It is the buyer's own fault if he is so negligent as not to ascertain the right of the vendee to sell, and he cannot invoke his bona fides to protect himself from liability to the true owner, who can only be divested of his rights or title to his property by his own act, or by the operation of law. Every person is bound at his peril to ascertain in whom the real title to property is vested, and, however much diligence he may exert to that end, he must abide by the consequences of any mistake. * * * Nothing can be plainer than that no one can sell a right when

he himself has none to sell, and that every such wrongful sale, by whomsoever made, whether by thief or bailee, acts in derogation of the rights of the owner and in hostility to his own authority, and consequently can neither acquire themselves, nor confer on the purchaser, any right or title of such owner."

The law seems to be almost universally established against the contention of the defendant that the acts complained of do not constitute wrongful conversion which would make him answerable to the plaintiff in damages, and the judgment of the lower court is not only supported by the great weight of authorities, but seems to be supported by the sound principles of reason and justice.

[2] It is the contention of the defendant that the action of conversion will not lie, for the reason that the plaintiff has not made demand on the defendant for the property before the institution of the action. Where the defendant has, by disposing of the property, or other acts, rendered demand futile and useless, a demand is not an essential prerequisite to the maintenance of an action in conversion. *Courtis v. Cane*, 32 Vt. 232, 76 Am. Dec. 174; *Phelps, Dodge & Palmer Co. v. Halsell & Frazier*, 11 Okl. 1, 65 Pac. 340. The facts in this case are that the defendant, within an hour after the purchase of the mules, had sold the same to another party, and demand for the possession thereof by the plaintiff would have been a useless act.

The judgment of the trial court should therefore be affirmed.

PER CURIAM. Adopted in whole.

(14 Okl. Cr. 468)

THOMAS v. STATE. (No. A-2908.)

(Criminal Court of Appeals of Oklahoma. May 18, 1918.)

(Syllabus by Editorial Staff.)

1. CRIMINAL LAW §1032(7) — ASSIGNMENTS OF ERROR—VARIANCE.

An assignment of error in that there was a fatal variance between allegations of information and proof not urged in the court below, and not a ground for reversal presented in the petition in error, need not be considered.

2. CRIMINAL LAW §1033(1) — APPEAL—JURISDICTION—VARIANCE.

An assignment that there was a fatal variance between the allegations of the information and the proof is not a matter that goes to the court's jurisdiction.

Appeal from County Court, Latimer County; C. R. Hunt, Judge.

J. A. Thomas was convicted of selling intoxicating liquors, and sentenced to pay a fine of \$50, and to serve a term of 30 days' imprisonment in the county jail, and he appeals. Judgment affirmed.

Jones & Lester, of Wilburton, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. Only two alleged errors are urged in this court for a reversal of this

judgment: (1) That the verdict and judgment are contrary to the evidence; (2) that there is a fatal variance between the allegations of the information and the proof.

[1, 2] The second assignment of error was not urged in the court below, and is not one of the grounds for reversal presented in the petition in error. It is unnecessary, therefore, to consider same, except to say that it is not a matter that goes to the jurisdiction of the court, nor do we think same of such merit to require a reversal of this judgment if it had been properly presented.

The evidence is conflicting. This court is not authorized to substitute its judgment on a question of fact for that of the jury. Suffice it to say that there is evidence in the record which, if believed by the jury, is amply sufficient to authorize a conviction of the crime charged.

For the reasons stated, the judgment is affirmed.

(64 Colo. 143)

WALKER et al. v. PEOPLE. (No. 8773.)

(Supreme Court of Colorado. Jan. 7, 1918.

Rehearing Denied April 1, 1918.)

1. TAXATION §867(2)—INHERITANCE TAX—BONDS OF NONRESIDENT.

Unregistered bonds of a Colorado corporation, owned by a New York decedent, and held by him in the state of New York, though secured by mortgage on realty situated in Colorado, Wyoming, and New Mexico, were not taxable by Colorado under the Inheritance Tax Law of 1913 (Laws 1913, p. 539), imposing a tax on the transfer by will or intestate laws of property within the state when decedent was a non-resident at the time of his death.

2. TAXATION §856 — INHERITANCE TAX — SUBJECT OF TAX.

The succession and not the thing inherited is the subject of the inheritance tax.

3. TAXATION §867(2) — INHERITANCE TAX—BONDS OF NONRESIDENT.

The situs of unregistered corporate bonds issued by a corporation of the state is the domicile of a nonresident owner, and they are taxable there, except when the bonds are not in the custody of the nonresident owner, but physically present in the state of issue.

Hill, C. J., and Scott, J., dissenting.

En Banc. Error to District Court, City and County of Denver; William D. Wright, Judge.

Proceeding to fix inheritance tax by the People of the State of Colorado against Donald C. Walker and Augustus N. Hand, executors, and Marion Brookman, executrix of the estate of John U. Brookman, deceased. To review the judgment, the executors and executrix bring error. Reversed, and cause remanded for further proceedings in accordance with the opinion.

William N. Valle, of Denver, for plaintiffs in error. Leslie E. Hubbard, Atty. Gen., and John L. Schweigert, Asst. Atty. Gen., for the People.

BAILEY, J. This is a proceeding to review a judgment of the district court affirming an

order of the county court fixing the amount due the State as inheritance taxes in the estate of John U. Brookman, deceased. Brookman was a resident of the State of New York. Included in his estate were certain unregistered bonds of a Colorado corporation, the payment of which was secured by mortgage on certain real property situated in the States of Colorado, Wyoming and New Mexico. The decedent held these bonds in the State of his residence. Upon the theory that they were property within this State because of the situs of some of the real property mortgaged to secure their payment the Inheritance Tax Appraiser imposed a tax upon their transfer by inheritance. In substance the executors contend that the tax is not authorized by the statute on the ground that the bonds are not property within the State within the meaning of the statute, and that to give the law a construction necessary to include and cover the bonds would be a violation of both the state and federal Constitution.

The Inheritance Tax Law of 1913, Laws 1913, page 539, under which the appraiser assessed the tax, is, so far as applicable, as follows:

"A tax shall be, and is hereby, imposed upon the transfer of any property, real, personal or mixed, or of any interest therein or income therefrom, in trust or otherwise, to any person or persons, institution or corporation, except as hereinafter exempted, in the following cases: * * * When the transfer is by will or intestate laws of property within the State and the decedent was a non-resident of the State at the time of his death."

There is no dispute of the State's right to impose an excise on the bonds passing by inheritance, if they are to be considered as property within the State. As was stated in *Brown v. Elder*, 32 Colo. 527, at page 532, 77 Pac. 853, 855:

"First, an inheritance tax is not one on property, but one on the succession; second, the right to take property by devise or descent is a creature of the law, and not a natural right, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the State may tax privileges, discriminate between relatives and grant exemptions, and is not precluded from this power by the provisions of the respective state Constitutions requiring uniformity of taxation."

[1] Decedent was a resident and citizen of the State of New York. The bonds, drawn to bearer, were payable in New York and were kept by him at his domicile there. Prior to his death they manifestly were beyond the reach of the taxing power of this State, for any purpose. Upon his decease the right of succession was governed by, and subject to, the laws of New York, not of Colorado, and neither the bonds, as the measure of the tax, nor the right to take them by inheritance, which is the thing actually taxed, have any situs in this State. The rule is stated in 37 Cyc. 1562, as follows:

"Shares of stock in a domestic corporation are subject to the tax at the domicile of the corporation on their transfer by will or under the intestate laws, although the decedent was a non-resident, and this is without regard to the place where the certificates may be kept. But a different rule applies to the bonds of a corporation. The bonds of a domestic corporation are not taxable at the domicile of the corporation if kept at the domicile of a non-resident owner, but are subject to the tax if physically present in the State, although belonging to a nonresident decedent."

It is contended by the State that the fact that the payment of the bonds is secured upon property within this State brings them, as evidences of this debt, within its power for the purpose of taxation, on the ground, among others, that creditors are compelled to invoke local laws to enforce the obligation. *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439, is cited and relied upon in support of this contention. The question in that case was whether a debt due an Illinois decedent by a co-partnership in New York, and money deposited by him in a New York Trust company, were taxable under a clause in the New York Inheritance Tax statute, imposing a tax:

"* * * Upon the transfer of any property, real or personal. * * * When the transfer is by will or intestate law, of property within the State, and the decedent was a non-resident of the State at the time of his death." Laws 1896, c. 903, § 220, as amended by Laws 1897, c. 284, § 2.

The court held in substance that this class of indebtedness was taxable in the state where the debtor resides, when the property is actually physically there. It is urged by the State that this case is decisive of the one at bar, and that it in effect overrules the authority relied upon by plaintiffs in error, which is primarily *State Tax on Foreign Held Bonds*, sub nom. *Cleveland P. & A. Co. v. Pennsylvania*, 82 U. S. (15 Wall.) 300, 21 L. Ed. 179, in which case a tax was levied upon bonds of a corporation doing business in Pennsylvania, when the bonds were kept at the domicile of the owner in another state. At page 187 the court said:

"Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations in numerous adjudications, but no number of authorities, and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement.

"The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-

residents of the State, they are property beyond the jurisdiction of the State."

This principle, unless overruled by *Blackstone v. Miller*, supra, clearly precludes the taxation of the Brookman bonds as property within this State. That the court, in *Blackstone v. Miller*, supra, had no intention to overturn its decision in *State Tax on Foreign Held Bonds*, supra, so far as it affected bonds, is clearly evident from the opinion therein, where (188 U. S. 206, 23 Sup. Ct. 279, 47 L. Ed. at page 445) the court says:

"There is no conflict between our views and the point decided in the case reported under the name of *State Tax on Foreign Held Bonds*, 15 Wall. 300 [21 L. Ed. 179] sub nom. *Cleveland P. & A. Co. v. Pennsylvania* [15 Wall. 300] 21 L. Ed. 279 [179]. The taxation in that case was on the interest on bonds held out of the State. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon v. Hooker*, 177 Mass. 335, 337, 58 N. E. 1078 [83 Am. St. Rep. 279]. Therefore, considering only the place of the property, it was held that bonds held out of the State could not be reached. The decision has been cut down to its precise point by later cases. *Savings & L. Soc. v. Multnomah County*, 169 U. S. 421, 42 L. Ed. 803, 805, 18 Sup. Ct. 392; *New Orleans v. Stemple*, 175 U. S. 309, 319, 320, 44 L. Ed. 174, 180, 20 Sup. Ct. 110."

The cases cited by defendant in error are all distinguishable by some vital and controlling fact from the case at bar. Thus, in *Blackstone v. Miller*, supra, ancillary administration was in progress in the courts of the taxing state. This is also true in *In re Rogers' Estate*, 149 Mich. 305, 112 N. W. 931, 11 L. R. A. (N. S.) 1134, 119 Am. St. Rep. 677; *Alvany v. Powell*, 55 N. C. 51; *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82, 3 L. R. A. 372, and in the Massachusetts cases.

[2, 3] It is settled law that it is the succession which is the subject of the tax, and not the thing inherited. In the case at bar there is no ancillary administration here. The decedent, the legatees, and the bonds themselves, now are, and have been at all times, beyond this jurisdiction. So far as the bonds in question be concerned, there is no property, or evidence of indebtedness belonging to the Brookman estate physically within this jurisdiction nor is this State concerned in any manner with the process of succession. In substance it is urged by defendant in error that the State has authority under the statute to tax the right of non-resident legatees to inherit property outside of the State, under the foreign-probated will of a non-resident testator. The bonds being unregistered, pass upon delivery, just like money. They are manifestly transitory and fugitive, and this State is powerless to place its hand upon them, for the purpose of taxation, in the absence of direct, specific legislation to that effect. For taxing purposes the debt which the bonds represent is the property of the bond hold-

er, and not of the debtor. The situs of the bonds is the domicile of the owner, and they are taxable there. This is the rule except when such property is not in the custody of the non-resident owner, but is physically present in the state proposing to levy the tax.

Cases in state courts denying the right to tax evidences of indebtedness secured by local real estate, but held abroad, are the following:

In *re Preston's Estate*, 75 App. Div. 250, 78 N. Y. Supp. 91, the syllabus reads as follows:

"Bonds of a private individual secured by a mortgage on real estate in New York, both bonds and mortgage being kept in good faith outside of the State, are not subject to the taxable transfer acts."

The court, citing *In re Bronson's Estate*, 150 N. Y. 1, 44 N. E. 707, 34 L. R. A. 238, 55 Am. St. Rep. 632, said it was unable to distinguish this case from that "where it was held that the bonds of a domestic corporation, owned and held in a foreign state, could not be reached by the taxable transfer acts," citing, also, *State Tax on Foreign Held Bonds*, supra.

Gilbertson v. Oliver, 129 Iowa, 568, 105 N. W. 1002, 4 L. R. A. (N. S.) 953, was decided under a statute providing that "all property within the jurisdiction * * * and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the statutes of inheritance, of this or any other state, or by deed, grant, sale or gift, * * * in possession or enjoyment after the death of the grantor or donor, to any person in trust or otherwise * * *" (Code, § 1467) is subject to a collateral inheritance tax. Part of the property involved was notes and mortgages owned by residents of Iowa and secured by property situated therein. The court admitting that "there is a conflict in the adjudicated cases as to whether such evidences of indebtedness are taxable at the domicile of the owner, or whether the actual situs of such property * * * determines the liability to taxation," says:

"The great weight of authority, however, supports the holding of our own cases that this species of personal property, which is in a sense intangible and incorporeal, is taxable at the domicile of the owner, and not elsewhere, unless the owner has himself given it a different situs."

The court then quotes *City of Davenport v. M. & M. R. R. Co.*, 12 Iowa, 539, to the following effect:

"It is true that the situs of the property mortgaged is within the jurisdiction of the state but the mortgage itself, being personal property, a chose in action, attaches to the person of the owner."

The court also quotes with approval from *Hunter v. Board of Supervisors*, 33 Iowa, 376, 11 Am. Rep. 132, to the following effect:

"The debt due, of which the notes are the evidence, is property, vested in the owner wherever he may reside. This property in the right—the chose in action—is as absolute a property therein, and he is as well entitled to it as he is to tangible property in possession. And this species of property—debts due—must in the nature of things, follow and be with the owner; except perhaps when he has conferred authority upon some one else as his agent to loan, manage, receive and collect the same for him. * * * The right to the 'money due' being in the appellant, the property in the right must, of necessity, be in the place where he resides, irrespective of the situs of the evidence."

In *Re Fearing's Will*, 200 N. Y. 340, 93 N. E. 956, it is stated in the syllabus:

"Transfer Tax Law (Laws 1892, c. 399), sec. 1, provides that a tax shall be imposed on the transfer by will, or intestate law, of property within the State, where the decedent was a non-resident at the time of his death. Held, that bonds passing under the will of a non-resident pursuant to a power of appointment were not property within the State within such act, and subject to taxation because the bonds were secured by mortgages on lands located in New York."

At page 344 of 200 N. Y., and page 958 of the opinion in 93 N. E., the court said:

"Whether the bonds are secured * * * of corporate property, or, * * * by mortgages of the property of individuals, they represent, equally, debts of their makers, which, as choses in action, under the general rule of law, are inseparable from the personality of the owners."

The contention of defendant in error can prevail only upon the theory laid down in *Blackstone v. Miller*, supra, to the effect that for inheritance tax purposes a debt may be taxed at the domicile of the debtor; but this was declared where the property was physically in the taxing state, and ancillary administration was in progress in its courts, and can not be considered an authority for the imposition of the tax under consideration. In any event, bonds, such as are here involved, are specifically excepted by that opinion from the operation of the special rule therein laid down.

It will be observed that in some of the cases the domicile of the owner has been held to furnish the test of jurisdiction for the purpose of taxation, while in others this test has yielded to the actual situs of the property within the territorial limits of the taxing authority, but in no case has the domicile of the debtor, or the location of the securities, been taken as the situs for the purpose of taxation in the absence of some special circumstance which the court considered gave it an actual situs. No such circumstance exists here. Moreover, whether the test to be applied is the domicile of the owner, or the place where the securities are actually located, since both are in the State of New York, the conclusion must be that the bonds are exempt from taxation in Colorado.

The judgment of the trial court is reversed and the cause remanded for further pro-

ceedings in accordance with the views herein expressed.

HILL, C. J. (dissenting). In *Re Bronson*, Deceased, 150 N. Y. 1, 44 N. E. 707, 34 L. R. A. 238, 55 Am. St. Rep. 632, decided October 6, 1896, it was held that bonds of domestic corporations owned by and in possession of a nonresident decedent at his domicile at the time of his death, and which then passed to nonresidents by will or the law of descent in the state where he lived, were not subject to taxation in New York under that portion of its transfer tax act which reads:

"When the transfer is by will or intestate law, of property within the state, and the decedent was a nonresident at the time of his death." Laws 1892, c. 399, § 1.

In construing this language, the court considered with it and gave emphasis to section 22 of the New York act which defines the word "property" as meaning all property or interest therein over which the state had jurisdiction for the purposes of taxation. A very able dissenting opinion was rendered by Justice Vann, concurred in by Justice O'Brien; the majority opinion was written by Justice Gray.

In *Re Houdayer*, Deceased, 150 N. Y. 37, 44 N. E. 718, 34 L. R. A. 235, 55 Am. St. Rep. 642, the same court held that individual deposits of a nonresident decedent in a trust company in that state were subject to this tax under the same act. The opinion was by Justice Vann and per his reasoning, it was a debt owing by the trust company to the nonresident decedent, yet regardless of this he held it was property within the state so far as the transfer act or inheritance tax law so-called was concerned, it being agreed by all (and is conceded here) that it is not a tax upon property, but rather upon the right to receive it. Justice O'Brien concurred with Justice Vann; Chief Justice Andrews and Justices Bartlett and Martin concurred in the result upon the theory that a deposit of money in a bank, although technically a debt, is still money for all practical purposes and as such was taxable under the transfer act. Justice Gray filed a dissenting opinion, in which Justice Haight concurred, to the effect that the trust company was a mere creditor of the decedent, and for that reason that it did not constitute property within the state, so far as their transfer act was concerned. I am unable to harmonize the two opinions or to gather from them sufficient upon which to hazard a guess as to what the future position of that court will be on similar questions. The former of these cases is the only case cited in 37 Cyc. 1562, to sustain its statement set forth in the opinion of the court here to the effect that the right to inherit these bonds, when held by a nonresident in another state, is not subject to such a tax in the state where issued and where the lands covered by the mortgage to secure them is situate.

In *Blackstone v. Miller*, 188 U. S. 189, 23

Sup. Ct. 277, 47 L. Ed. 439, it was held that a deposit by a citizen of Illinois in a trust company in New York was subject to the transfer tax in New York, notwithstanding that the whole succession had been taxed in Illinois, including this deposit. This opinion was not upon the theory of the three members concurring in the opinion in the New York case last referred to, but to the contrary takes the position of Justices Vann and Gray that the relation was that of debtor and creditor, but disagreed with the latter as to the result which should follow. For instance, the court says:

"What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay."

And again:

"Power over the person of the debtor confers jurisdiction, we repeat. And this being so, we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the state at the time of the death."

In commenting upon *State Tax on Foreign Held Bonds*, 15 Wall. 300, 21 L. Ed. 179, the court distinguished it from this class of cases and, among other things, said:

"The taxation in that case was on the interest on bonds held out of the state. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon v. Hooker*, 177 Mass. 335, 337 [58 N. E. 1078, 83 Am. St. Rep. 279]. Therefore, considering only the place of the property, it was held that bonds held out of the state could not be reached. The decision has been cut down to its precise point by later cases."

For the reason last stated, and the fact that the case referred to was concerning a tax on property, and not a tax upon the right to inherit it, I do not think it applicable here. In *State v. Probate Court*, 128 Minn. 371, 150 N. W. 1094, L. R. A. 1916A, 901, it was held that a promissory note, as well as a book account, of a Minnesota corporation held by a resident of Pennsylvania and who died with the note in his possession in the latter state, was subject to a tax upon the right to succeed to the ownership of said property in Minnesota under the language of their act, which reads:

"When a transfer is by will or intestate law, of property within the state or within its jurisdiction and the decedent was a nonresident of the state at the time of his death." Gen. St. 1913, § 2271.

This case goes into the history of the question in detail, showing that the right to succeed to ownership is taxable by the state having jurisdiction of the debtor, for the law of that state furnishes the means to compel payment, etc. While the Minnesota act has these additional words not contained in our act, viz. "or within its jurisdiction," I cannot see that they add anything to its scope. The words "within this jurisdiction" are used alternately with the words "within the state" and to my mind mean "within the state."

The reasoning of the Minnesota court gives no extra effect to them, but is just as applicable to the paragraph had they been omitted.

In *Re Rogers' Estate*, 149 Mich. 305, 112 N. W. 931, 11 L. R. A. (N. S.) 1134, 119 Am. St. Rep. 677, the court held that notes secured by mortgages on lands in Michigan given by residents of that state, owned, by a nonresident and held by him at his home in New York at the time of his death, were subject to an inheritance tax in Michigan under the provisions of their act which reads:

"When the transfer is by will or intestate law of property within the state, and the decedent was a nonresident of the state at the time of his death." Pub. Acts 1903, No. 195, § 1.

This is the exact language of our act. Theirs was passed in 1903, ours in 1913. Their decision placing a construction thereon was announced July 15, 1907. Hence, long before our Legislature adopted the exact language of the Michigan act, it had before it the construction of the Michigan court thereon holding that it made subject to this tax a note held by a nonresident given by a citizen of their state when secured by a mortgage upon lands within the state.

The holding in *Kinney, Executor, v. Treasurer*, 207 Mass. 368, 93 N. E. 586, 35 L. R. A. (N. S.) 784, Ann. Cas. 1912A, 902, is to the same effect as the Michigan court, under a somewhat similar statute. In commenting, the court said:

"The question before us is whether these securities are property within the jurisdiction of the commonwealth, in reference to taxation upon the succession. * * * The debt belongs with the mortgage, and it must coexist to give the mortgage validity. For that purpose it has a situs within the jurisdiction of the state where the land lies."

The only distinction between the two cases last cited and this is that the bonds under consideration are payable to bearer, but for the purposes of this tax it appears to me that it is a distinction without a material difference. All the authorities that I have been able to find are to the effect that under similar language the right to succeed to ownership of stock of a domestic corporation held by a nonresident is subject to this tax. The Minnesota case applies it to an unsecured note as well as a book account, the Massachusetts and Michigan cases to notes secured by mortgages, the Supreme Court of the United States case to a bank deposit on the theory of simple debtor and creditor. The reasoning in all is to the effect that the situs of the property for the purpose of this tax is at the domicile of the debtor or where the property covered by the mortgage is situate. In such circumstances, when the language of our act is considered as a whole I am of opinion, as said by Mr. Justice Holmes in *Blackstone v. Miller*, supra, concerning the New York act, that it was intended to reach the transfer of this property if it can be reached. The opinion, as I understand it, concedes that it can be reached by ap-

propriate legislation. I am of opinion that it has already been reached by the language used. Whether ancillary administration is in progress or not, in my opinion, makes no difference. The question to be determined is whether our act has attempted to, or whether we can, tax the right or privilege to inherit or succeed to such property. This should be determined by conditions as they exist at the time of the death of the testator. Such being the case, I am unable to appreciate wherein the question of ancillary administration cuts any figure, pertaining to the construction which should be given to our act. It might aid the collection of this tax, but I cannot agree that there should be any difference in the rule to be applied to the same class of property simply because one estate has ancillary administration pending and the other has not. The fact that these bonds can be transferred by delivery in another state, in my opinion, makes no difference; they are not money. A note indorsed in blank can be thus transferred, and if secured by mortgage, per former rulings of this court, such a transfer carries with it the equitable right to have the mortgaged property disposed of in satisfaction of the debt. A bond of the kind under consideration is but a promise to pay, and is in a sense but a promissory note. It is common knowledge that stocks in domestic corporations are quite often indorsed in blank by the person to whom issued and thereafter sold and transferred by delivery through the hands of numerous persons, I can think of no reason why a book account may not be thus assigned to bearer and pass title accordingly. If it is for the reason that the bonds are payable to bearer that they are exempt from this tax, then, in my opinion, it is a reason which sacrifices substance to form.

SCOTT, J., concurs.

(64 Colo. 185)

SCALA v. MINERS' & MERCHANTS' BANK OF OURAY. (No. 8702.)

(Supreme Court of Colorado. Feb. 4, 1918.
Rehearing Denied April 1, 1918.)

1. BANKS AND BANKING §148(1)—PAYMENT OF CHECKS—FORGERIES.

A bank cannot charge against a depositor's account an amount paid by it on a forged indorsement of a check, unless payment is attributable to fault of the depositor, or unless the money has reached the person intended or the drawer himself.

2. APPEAL AND ERROR §882(4) — STIPULATIONS—DEFECT IN PARTIES.

Where an action was brought by one as administrator, by agreement with all interested parties, to determine the liability of each, it cannot be complained on appeal that the action should have been brought by the administrator individually, especially where the money involved was known by all to belong to the estate and was being handled by the administrator in his individual capacity to facilitate a transaction.

3. BANKS AND BANKING §148(1)—PAYMENT OF CHECKS—FORGERIES.

In action by depositor to recover money paid out by a bank on a forged indorsement, that the person who forged the indorsement had previously had the power to indorse paper was immaterial, where the giving of such power was never communicated to defendant.

4. BILLS AND NOTES §32—CHECKS—DESIGNATION OF PAYEE—CERTAINTY.

A check drawn to the "Royal Consulate of Italy" designated the payee with reasonable certainty, and was not payable to bearer, and the bank was liable if it was not indorsed by, and paid to, the proper person.

En Banc. Error to District Court, City and County of Denver; Nell F. Graham, Judge.

Action by Fred Scala, as administrator of the estate of Louis Rodigari, deceased, against the Miners' & Merchants' Bank of Ouray, Colo., a corporation. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions.

George Allan Smith, of Denver, for plaintiff in error. Dines, Dines & Holme, of Denver, for defendant in error.

BAILEY, J. Plaintiff in error seeks to recover \$861.80 from the defendant bank, upon the theory that it is liable to him for that amount, which it paid out on a check bearing a forged indorsement, from funds then held by the bank to his credit. The defendant received judgment in the court below, and that judgment is here for review.

The facts necessary to be considered are that plaintiff had on deposit with defendant certain funds belonging to an estate of which he was administrator. The amount was evidenced by a certificate of deposit to the order of plaintiff as administrator. It became necessary for plaintiff to remit \$861.80 to the Italian Consul, at Denver, and he took the certificate of deposit to the defendant bank to obtain a draft. To save the expense of exchange he deposited the certificate to his personal credit and mailed his personal check to the Italian Consul at Denver, payable to "The Royal Consulate of Italy."

The Consul General was away when the letter arrived, and it fell into the hands of a clerk, who forged the indorsement of the "Royal Consul General of Italy" and the name of the Consul, and followed this with his personal indorsement, and deposited it to his own credit in the Interstate Savings Bank, where he had an account, but where the Consul never had done any business. It was by that bank transferred to the First National Bank, Denver, which in turn presented it to defendant, by whom it was paid, and charged to the account of plaintiff. The clerk also forged the name of the Consul General to a receipt for the money and sent it to the county court of Ouray County, where the estate of Rodigari was in process of settlement.

The peculation of the clerk was not discovered until the return of the Consul General some three months later, when the defendant bank was notified of the forgery. Later a demand was made upon it for payment, and refused, and this action was brought.

[1] The general rule as to liability of a defendant upon a forged indorsement is stated in 7 C. J. 686:

"As a bank is authorized to pay only to the person designated by the depositor, it cannot charge against the depositor's account an amount paid by it on a forged indorsement of the depositor's check, unless such payment is properly attributable to the negligence or other fault of the depositor, or unless the money has actually reached the person whom the drawer intended should receive it, or the drawer himself."

This principle is fully recognized and approved in *Boatsman v. Stockmen's Bank*, 56 Colo. 495, 138 Pac. 764, 50 L. R. A. (N. S.) 107. It follows, therefore, unless some circumstance can be found which prevents the application of the general rule, that defendant must be held liable.

It is urged that there are cogent reasons why the rule should not be applied, and the following facts are set up, among others, as making this case an exception, to wit: That suit was brought by plaintiff as administrator, after he had been discharged as such; that he never had, as administrator, any funds in the defendant bank; that the refusal to pay the check, upon which refusal this suit is based, was refusal to pay a check signed by plaintiff as administrator when he had no account under that designation; that by implication at least the Italian Consul held out his absconding secretary as having power and authority to indorse his name to negotiable instruments; also, that the check bearing the forged indorsement was in reality payable to bearer.

[2] As to whether an action different in form, or with different parties plaintiff or defendant should have been brought may not be considered, for the reason that it conclusively appears from the record, by agreement between the litigants and others in interest, that this action was brought in its present form, as a means of definitely determining the liability of each under the circumstances. Also, when the check signed by plaintiff as administrator was presented for payment, the bank had full knowledge that it was so presented for the purposes of this suit, and made no objection at that time to the form of the signature. It had knowledge that the funds in question were estate funds, and that plaintiff had drawn the first check for the purpose of transferring the money to a trustee. Therefore defendant cannot now be heard to object to mere questions of procedure, which in no way affect the merits of the case.

[3] There is nothing in the record to support the contention that the clerk of the Consul was ever held out to defendant as authorized to sign the name of his employer to

checks or any other papers. While there is testimony to show that the clerk had been, at some time prior to the forgery, empowered to indorse drafts and similar instruments for deposit, the giving of such power was never communicated to defendant.

[4] Neither is there any ground for the contention that the check was payable to bearer. It was drawn to the "Royal Consulate of Italy," and the payee, while not expressly named therein, is manifestly otherwise designated with reasonable certainty. *Esley v. People of Illinois*, 23 Kan. 510; *State of Nevada v. Cleavland*, 6 Nev. 181. This question is discussed in 8 C. J. 171, as follows:

"It has been held that instruments designate the payee with sufficient clearness where payable to the trustees of a particular church, the manager of a particular bank, the treasurer of a certain municipality, the heirs of a named person, the heirs apparent being intended if the person is still alive; the trustees acting under the will of a named person, the trustees to be appointed by a certain convention, the executors or administrators of the estate of a named person; the guardians of a named person; the name of a steamship and 'owners'; 'the estate of' a named person, deceased; or the 'order of the person who shall thereafter indorse' the instrument."

The liability of a bank paying a check upon a forged indorsement was in question in *Goodfellow v. First National Bank*, 71 Wash. 554, 559, 129 Pac. 90, 92, reported in 44 L. R. A. (N. S.) 580, and the court at page 582 held:

"The law imposes upon a bank on which a check is drawn payable to a certain person or order, the duty of ascertaining the identity of the person therein named as payee; and it is only when the bank has been misled by some act of negligence or other fault of the drawer that it will be justified in making payment of the check to any other than the person named therein as payee * * *" (citing numerous authorities).

Among the cases cited by the Washington court, *supra*, is *Western Union Telegraph Co. v. Bi-Metallic Bank*, 17 Colo. App. 229, 233, 68 Pac. 115, 116. In that case the Court of Appeals at page 233 said:

"The contract between the bank and the depositor is that it will pay out his money only upon and in accordance with his express direction. A check drawn in favor of a particular payee or order is payable only to the actual payee or upon his genuine indorsement, and if the bank mistake the identity of the payee, or pay upon a forged indorsement, it is not a payment in pursuance of its authority, and it will be responsible."

After most careful consideration of all the facts connected with the transaction upon which this suit is based, we are unable to find anything to take the case out of the general rule, as set out in the authorities quoted. That plaintiff in error has a clear right of recovery, and that the bank is liable for the amount involved, is beyond peradventure. The judgment of the trial court is manifestly wrong and works a great injustice. It is therefore reversed and the cause remanded,

with directions to enter judgment for plaintiff, according to the prayer of the complaint.

Judgment reversed and cause remanded with directions.

(64 Colo. 172)

GARCIA v. PEOPLE. (No. 9249.)

(Supreme Court of Colorado. Jan. 7, 1918.
Rehearing Denied April 1, 1918.)

1. HOMICIDE — 204 — DYING DECLARATIONS.

Statement of one mortally wounded, who was conscious of impending death and had no hope of recovery, was admissible, although death did not occur until 15 days later.

2. HOMICIDE — 47 — MANSLAUGHTER — ADULTERY.

Knowledge of prior acts of adultery is not sufficient to reduce killing of wife to manslaughter, but in order to render the offense manslaughter, there must be such circumstances as to indicate with reasonable certainty to a rational mind that the wife was just committing, or was about to commit, or had just committed, an adulterous act.

White and Teller, JJ., dissenting.

En Banc. Error to District Court, Conejos County; Jesse C. Wilsy, Judge.

Leofredo Garcia was convicted of murder, and he brings error. Affirmed.

E. S. Counsellor, of Antonito, and James D. Pilcher and Albert L. Moses, both of Alamosa, for plaintiff in error. Leslie E. Hubbard, Atty. Gen., and Charles Roach and Clara Ruth Mozzor, Asst. Attys. Gen., for the People.

SCOTT, J. The plaintiff in error was convicted of the murder of his wife. His crime was fixed at murder in the second degree, and he was sentenced accordingly. There are two assignments of error important to consider. The first is the admission in evidence of the dying statement of the deceased, and the second relates to the refusal by the court to give an instruction tendered.

It appears that at the time of the homicide, the accused and his wife were living separate and apart from each other, and that a suit by the accused for divorce was then pending. The shooting occurred on the evening of April 9, 1916, at about 8 o'clock, and at the home of deceased. Her death occurred as a result of the shooting, on the morning of April 25, 1916.

The dying statement was made the day following the shooting. The record does not disclose that any other person aside from defendant and the deceased wife witnessed the shooting. The dying statement is as follows:

"I, Maximiana Lobato de Garcia, make this, my dying declaration, being on the point of death and not expecting to live: I was at home yesterday afternoon between 7 and 8 in the evening. The children were outside, my two children. Leofredo Garcia came to the door, to the step before the door. The little girl cried, 'There comes my papa now.' I opened the door, and he came in right away. When he was

going in he leaned against the door, and I noticed he had a pistol in his back pocket on the right side. He came to the middle of the room, and he says to the children, speaking to the boy, 'Is that you, Leo?' and he says to the girl, 'Is that you, Adelina?' I was standing inside the room on the right side of the door when I heard him talk that way to the kids. I says, 'What is the matter with you?' When I said that I walked about two or three steps toward him, and he stuck his hand in his pocket, where he had the pistol. Then I took the boy inside the door of the same room and tried to go out, carrying the child in my arms and walking backwards. I went out of the room with the baby in my arms and walking backwards. He went out after me and stood at the door with the pistol in his hand and told me, 'Turn the boy loose.' I went outside, and, walking backwards, went towards the west. He followed me, trying to get behind me—I was facing him all the time. About three feet in front of the electric light pole in front of the door he came up to me in front of me as if trying to take the child away from me. There he threw his right arm over my shoulder and turned me with my face towards the north. He caught hold of me by my shoulder or by the sleeve, I don't remember which, and pushed me. There it was he shot at me the first time, hitting me in the back on the left side. I fell then and dropped the child. I felt wounded, and I took hold of my left hand with my right hand and raised it. I came running all the road, taking hold of my arm. About eight or nine yards from where he gave me the first shot when he shot me on the left leg below the knee near the shoe. Afterwards I heard two more shots, but I do not know where. That is all—I came into Mrs. Dubor's and told them to phone to the doctor and to the marshal. He had threatened to kill me and the children before one time; it was November 9.

"[Signed] Maximiana Lobato de Garcia.

"Witness:

"Henry F. Jordan,
"Amarante Lopez."

The deputy district attorney who took the statement testified:

"Q. Is it your language or the language of the deceased? A. It is the language of the deceased. Q. How did you happen to go there to get this statement? A. I went there for that purpose. Q. You suggested that to her, did you? A. No, sir; I asked her if she wished to make any statement. She looked to me like she was sick, and her words were—I asked her if she desired to make a statement, and she said she did; she said to me that she was going to die and was not going to live; that was not a suggestion on my part. As a matter of fact, she didn't die for 15 days after making the statement, but she told me she was going to die."

The attending physician testified as to the character of the wounds and as to the fatality of the same as follows:

"On the 9th day of April last year I was called to the home of Mrs. Marcus in Antonito, across the tracks, and found Mrs. Garcia standing in the front room with blood streaming down the front of her body and the back, and she was in a very nervous condition. I made an examination of the wounds, and found a gunshot wound, apparently entering below the shoulder blade behind and emerging in front under the collar bone; in the leg, a gunshot wound, entering above the heel about the mid line, and emerging from the outside of the leg, I think somewhat below the media. The first wound passed through the skin, the fat, the muscles of the back and chest, either through the lung, through the pleura in front, either through or

between the ribs in front, through the muscles, fat, and skin. This would cut blood vessels of large size. I continued to attend the deceased until her death, which occurred on the morning of April 25, 1916, at about 7 o'clock."

[1] We think that under this state of facts the court did not err in the admission of the dying statement. This question has been considered many times by this court, and the rule is perhaps more clearly and concisely stated in *Brennan v. People*, 37 Colo. 256, 86 Pac. 79, than in any other, where it was said:

"In order to render a dying declaration admissible in evidence, the declarant must, at the time of making the same, be conscious of impending death, and without hope of recovery. This may be shown, not only by what the injured person said, but by his condition and the nature and extent of his wounds. Whether, from all the circumstances under which the statement was made, it satisfactorily appears that it was made under a sense of impending death is a question exclusively for the court. We think, considering the statement of Mrs. Lowney, that she believed she was in a dying condition and about to die, and from the mortal nature of her injuries, she was aware of the near approach of death, and consequently her statement was made under that sense of impending dissolution that leads to a belief in its truth, and that the court properly admitted it in evidence."

Mrs. Garcia stated in the presence of several witnesses that she was going to die. The wound was quite apparently mortal. There is no suggestion that either deceased, or any other person at the time or afterward, had any hope that she might live.

[2] The instruction tendered by the defendant and refused by that court is as follows:

"You are instructed, gentlemen of the jury, that if a husband discovers his wife in the act of sexual intercourse with another, or discovers them together in such a position, or under such circumstances as to indicate with reasonable certainty to a rational mind that they are just then committing, or are about to commit, or had just committed, an adulterous act, and, enraged and humiliated for the wrong kills in the heat of passion, either the woman or her paramour, the homicide, on account of the grievous nature of the provocation, is manslaughter only."

This court has made no broader statement of the law in this respect than in *Jones v. People*, 23 Colo. 276, 47 Pac. 275, where it was said that:

"The killing of an adulterer, deliberately, and upon revenge, is murder; but where a man finds another in the act of adultery with his wife, and kills him or her in the first transport of passion, he is only guilty of manslaughter"

—and the court so instructed in this case. But if we were to admit the instruction tendered as a correct statement of the law in the abstract, the testimony did not require that it should be given in this case. There was no testimony offered tending to show that the defendant found the wife in the act of adultery, or that he discovered her with another man in such a position or under such circumstances as to indicate with reasonable certainty to a rational mind that they

were just committing, or were about to commit, or had just committed an adulterous act. Sufficient appears from the record to make it probable that theretofore the defendant had information to justify a suspicion, if not a conviction, that his wife had, prior to the time in question, maintained illicit relations with Quintana. But it is well settled that suspicion, or even knowledge of prior acts of adultery, are not sufficient to reduce the offense to one of manslaughter.

The judgment is affirmed.

WHITE and TELLER, JJ., dissent.

(64 Mont. 504)

STATE ex rel. CAMPBELL et al. v. STEWART, Governor, et al. (No. 4202.)

(Supreme Court of Montana. March 27, 1918.)

1. STATUTES \S 119(3) — SUBJECTS AND TITLES.

Laws 1918 (Ex. Sess.) c. 21, entitled "An act appropriating the sum of" \$500,000 to be "expended by the Montana council of defense in aiding and assisting the United States in carrying on and prosecuting the war now existing between the United States and the German and Austrian Empires," designating the purposes for which such appropriation may be expended, authorizing the state board of examiners to issue bonds or warrants in excess of the constitutional limit of indebtedness, to make rules and regulations governing the expenditure and make temporary loans, etc., contains only one subject, clearly expressed in its title, as required by Const. art. 5, § 23.

2. STATUTES \S 107(7) — APPROPRIATION — SEPARATE BILL.

The act is not subject to the objection that it "appropriates money, but such appropriation is not made by a separate bill expressing one subject," as required by Const. art. 5, § 33.

3. STATES \S 119—APPROPRIATION FOR WAR PURPOSES—STATUTE—VALIDITY.

Said act is not in violation of Const. art. 5, § 35, forbidding appropriations for charitable, industrial, educational, or benevolent purposes to any person, corporation, or community not under the absolute control of the state.

4. STATES \S 119—INDEBTEDNESS—PURPOSE.

Laws 1918 (Ex. Sess.) c. 21, §§ 1-14, appropriating money for aiding and assisting the United States in carrying on the present war and authorizing an expenditure of such money for the purpose of encouraging those engaged in agricultural pursuits, does not authorize the state to give or extend its credit or make gifts or donations to individuals, associations, or corporations, in violation of Const. art. 13, § 1, the right to assist the United States in war being expressly recognized as a proper and probable occasion for the use of state funds by article 12, § 12.

5. STATES \S 115—INDEBTEDNESS—PURPOSE.

Laws 1918 (Ex. Sess.) c. 21, §§ 1-14, appropriating money for assisting the United States in war and authorizing the issuance of bonds in excess of the constitutional limit of indebtedness, is not in violation of Const. art. 12, § 12, forbidding expenditures in excess of such amount, except for "appropriations or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war."

6. STATES \S 131 — PUBLIC INDEBTEDNESS — PURPOSE FOR WHICH IT MAY BE INCURRED — "DEBT."

Laws 1918 (Ex. Sess.) c. 21, $\S\S$ 1-14, does not create a "debt" within Const. art. 13, \S 2, forbidding the creation of a debt without providing by irrevocable law for the levy of a tax until the indebtedness therein provided shall have been fully paid or discharged.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Debt.]

7. CONSTITUTIONAL LAW \S 48—DETERMINATION OF VALIDITY—PRESUMPTIONS.

No act of the Legislature will be pronounced unlawful unless its nullity is made manifest beyond a reasonable doubt; doubt alone being insufficient to overturn an act of the Legislature.

Proceedings by the State, on relation of Will A. Campbell and others, against Samuel V. Stewart, Governor, and others, as members of the State Board of Examiners and others. Demurrer to complaint sustained, and decree of dismissal entered.

Gunn, Rasch & Hall, H. S. Hepner, W. T. Pigott, Wm. Scallon, O. W. McConnell, and C. B. Nolan, all of Helena, for relators. Frank Woody, of Missoula, and S. C. Ford, of Helena, for respondents.

SANNER, J. Suit to enjoin the issuance and sale of bonds under the authority of chapter 21, Extra Session Laws of 1918, known as the War Defense Act. The title of the act is as follows:

"An act appropriating the sum of five hundred thousand dollars to be expended by the Montana council of defense in aiding and assisting the United States in the carrying on and prosecuting of the war now existing between the United States and the German and Austrian Empires; designating the purposes for which such appropriation may be expended by the Montana council of defense; authorizing the state board of examiners to issue bonds or warrants in excess of the constitutional limit of indebtedness and to levy a tax upon all property in the state subject to taxation for the purpose of paying the indebtedness so incurred, and the payment of the interest thereon; authorizing the Montana council of defense to make and adopt rules and regulations governing the expenditure of such money and to enter into any and all contracts which the Montana council of defense may deem necessary and proper in connection with the expenditure thereof; and authorizing the state board of examiners to make temporary loans for such sum or sums as may be necessary to meet such appropriation when there is insufficient unappropriated money in the state treasury in the war defense fund for such purpose."

The pertinent provisions of the act are:

"Section 1. The board of examiners of the state of Montana is hereby authorized and empowered to borrow any sum of money in an amount not exceeding five hundred thousand dollars upon the credit of the state of Montana, and there is hereby appropriated five hundred thousand dollars or so much thereof as may be necessary out of the receipts of any such loan or loans so made, under the provisions of this act for the purpose of aiding and assisting the United States in carrying on and prosecuting the war and for repelling invasion and suppressing insurrection.

"Sec. 2. The money hereby appropriated may

be expended by the Montana council of defense, with the approval of the state board of examiners, by loan, for the purpose of encouraging, aiding and assisting those engaged in agricultural pursuits, in procuring seed, in planting, sowing, raising and harvesting crops, and in procuring labor and assistance necessary for such purposes, for the purpose of encouraging, aiding and assisting farmers and stock growers in procuring live stock and feed for the same, and in raising live stock, and in procuring labor and assistance necessary for such purposes, and for the purpose of transporting and aiding and assisting in the transportation and marketing of crops and live stock, to the end that the food supplies of the nation may be sufficient and adequate for the support of its armies, and for all other purposes public exigencies may require for the support, aid and assistance of the United States in carrying on and prosecution of such war."

"Sec. 7. The board of examiners of the state of Montana is hereby empowered and authorized to issue bonds or warrants in a sum not exceeding five hundred thousand dollars at an interest-bearing rate not to exceed six per cent. per annum and upon such other terms and conditions as such board may deem wise, proper and necessary to obtain funds sufficient to meet any loans or expenditures made under the provisions of this act: Provided, however, that the life of any such bonds issued shall not be greater than five years and may be redeemed at any interest-paying period or within thirty days thereafter."

"Sec. 14. This act and all of its provisions is for the purpose of aiding and assisting the United States in carrying on and prosecuting the war now existing between the United States and the German and Austrian Empires and all other enemies and to repel invasion and suppress insurrection, and for no other purpose."

The complaint avers that pursuant to said act the defendants, proceeding as the state board of examiners, have resolved to issue, have advertised that they will offer for sale, and do threaten to issue and sell bonds of the state in the sum of \$500,000, to be dated March 20, 1918, bearing interest at six per cent., interest payable semiannually, said bonds to be due in five years, but redeemable at the option of said board or within 30 days after any interest-bearing period; that the act above mentioned and pursuant to which the defendants are proceeding is void as in contravention of the provisions of sections 23 and 33 of article 5, section 35 of article 5, section 12 of article 12, section 1 of article 13, and section 2 of article 13 of the state Constitution; and that the relators, as taxpayers, will be greatly and irreparably injured and damaged, should said bonds be sold and delivered to the purchasers thereof.

Responsive to an order to show cause, the defendants have appeared, and by general demurrer they join issue upon the question of law now before us, to wit, whether the act is contrary to the Constitution in the respects alleged.

We desire at the outset to express to counsel of record our appreciation of their efforts to aid us in the solution of this problem. We likewise wish to disclaim any view that the Constitution of this state is in abey-

ance because the nation is at war, or that the Constitution is inadequate to serve the state at such a time, or that the exigency justifies or has called forth any canon of construction not applicable in a season of "profoundest peace." Whatever is legally done by any public agency at any time must be done either with the sanction or without the inhibition of the Constitution; for, like the national charter, it "is a law for rulers and people, equally in war and peace, and * * * no doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended" without its authority for any reason. In re McDonald et al., 49 Mont. 454, 143 Pac. 947, L. R. A. 1915B, 988, Ann. Cas. 1916A, 1166; Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281. So premising, we come to the matter in hand.

[1, 2] 1. The respects in which it is alleged that sections 23 and 33 of article 5 have been contravened are:

"That said act contains more than one subject, and each of the subjects is not clearly expressed in the title," and "said act appropriates money, but such appropriation is not made by a separate bill embracing one subject."

Upon argument these objections were abandoned, and we think properly so, because they are groundless. Assuming that the act is one of appropriation, such appropriation is for only one subject, clearly indicated in both the title and the body of the act, namely, "to assist the United States in carrying on and prosecuting the war now existing between the United States and the German and Austrian Empires." This is a particular purpose, defined as well as it can be. The other clauses of the title and the other provisions of the act have to do with ways and means for carrying out such purpose; they are not separate purposes, and thus do not render the act obnoxious to the sections referred to. State ex rel. Hay v. Alderson, 49 Mont. 387, 142 Pac. 210, Ann. Cas. 1916B, 39; Hill v. Rae, 52 Mont. 378, 158 Pac. 826, L. R. A. 1917A, 495, Ann. Cas. 1917E, 210.

[3] 2. Nor, with equal propriety, do the relators place any reliance upon the alleged departure from section 35 of article 5. That section forbids appropriations for "charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state." This is manifestly not such an appropriation, and the mere fact that the moneys may be effective through individuals, associations or corporations in certain ways does not make it so. State ex rel. Cryderman v. Wienrich, 54 Mont. —, 170 Pac. 942.

[4] 3. The same considerations avail to clear the act of any repugnance to section 1 of article 13. This is primarily not an act "to authorize the state to loan, give or extend its credit to or in aid of individuals, associations or corporations," nor "to make

donations or gifts to individuals, associations or corporations," nor "to loan state funds to or in aid of individuals, associations or corporations," nor to authorize the "use of public funds or moneys of the state for private purposes." On the contrary, if it is any of these things, it is so only secondarily or incidentally. The purpose of the act, as apparent on its face and as emphasized in section 14, is the most public one that could well be imagined. City of Lowell v. Oliver, 8 Allen (Mass.) 247; Creeland v. Hastings, 10 Allen (Mass.) 570; Franklin v. Board of Examiners, 23 Cal. 173; People v. Pacheco, 27 Cal. 176. The United States is at war, and to assist the United States in war is expressly recognized by the Constitution as a proper and probable occasion for the use of state funds (Const. § 12, art. 12). Moreover, this state, as one of the United States, is at war. When aiding the United States, this state but defends itself, and thus exercises the highest attribute, as it observes the most solemn duty, of sovereignty. That in pursuing this public purpose the state, through its Legislature, may adopt or prescribe any mode or means reasonably adapted to accomplish such purpose is too well settled for debate. And if it be true that an "army travels on its stomach," then to enlarge the food production, as this act designs, is as essential and important an aid to war as the furnishing of munitions or the equipping of men. The events of the past three years, as of all previous history, bear eloquent testimony to the vast, if not paramount, importance of food production, not only for armies but for the people behind the armies, as a measure of war; and though in the last analysis such production harks back to the "individual, association or corporation," and though, to stimulate such production, either gifts or loans are employed, the outstanding and controlling public purpose is the end that justifies and validates the means. State ex rel. Cryderman v. Wienrich, supra; Daggett v. Colgan, 92 Cal. 53, 28 Pac. 51, 14 L. R. A. 474, 27 Am. St. Rep. 95; Norman v. Kentucky Board, etc., 93 Ky. 537, 20 S. W. 901, 18 L. R. A. 556.

[5] 4. We come then to the provisions of section 12, article 12, and these, so far from being violated by the act before us, are in a sense the warrant for its existence. This section provides:

"No appropriation shall be made or any expenditures authorized by the Legislative Assembly whereby the expenditures of the state during any fiscal year shall exceed the total tax then provided for by law, and applicable to such appropriation or expenditure, unless the Legislative Assembly making such appropriation shall provide for levying a sufficient tax, not exceeding the rate allowed in section 9 of this article, to pay such appropriations or expenditures within such fiscal year. This provision shall not apply to appropriations or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war."

If this very clear language has any meaning, it is that, whereas the legislative power over appropriations and expenditures, unlimited save as restricted by the Constitution, is in fact restricted as above set forth, such restriction does not apply to appropriations or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war; and therefore, for such purposes, the power of the Legislature stands without limit or restriction. *People v. Pacheco*, supra; *In re State Board of Equalization*, 24 Colo. 446, 51 Pac. 493. So, conceding that the act before us does not attempt to meet the restriction above set forth, its validity is unaffected by that fact, because, if it is an act of appropriation, the appropriation is for purposes which take it out of the range of the restriction. Is this, then, an act of appropriation? We think it is both an act of appropriation and an act to authorize expenditures. Its title proclaims it as "an act appropriating the sum of" \$500,000, " * * * designating the purposes for which such appropriation may be expended"; and this proclamation is borne out by the language of section 1, "There is hereby appropriated," and of section 2, "The money hereby appropriated may be expended," etc., and of section 8, "The Montana council of defense shall adopt rules * * * governing * * * the expenditure of the money hereby appropriated," and of section 9, "The money appropriated by this act shall be credited," etc., and of section 11, "Any premiums required * * * may be paid out of the money appropriated by this act," and of section 12, "The Montana council of defense shall keep * * * accounts * * * of the money hereby appropriated," and of section 14, "Upon the termination of such war the power * * * to expend the money hereby appropriated shall cease," etc. Indeed, there is nothing at all to suggest that the act is not an act of appropriation save the absence of funds in hand to meet it, and the first clause of the act, granting authority to the board of examiners to borrow whatever sum, not exceeding the amount of the appropriation, necessary to create a fund to answer to the appropriation. But it is entirely clear that neither of these suffices to characterize the act as other than an appropriation. Its purpose is to defend the state and to assist in the defense of the United States, and by the very language of section 12, article 12, such a purpose may be served by an appropriation which has no funds behind it nor any provision to furnish such a fund through taxation. Obviously the appropriation is made to be used, but not even the state can spend money which it does not possess; and the only way the money not possessed can be gotten is by taxing or borrowing. If, then, the Legislature can, under the Constitution, make an appropriation for war purposes, without a fund and without a tax to furnish

the fund, it must be possible for that body to make an appropriation, authorizing any proper public agency to procure so much of the money as may be required by borrowing it; and this is the office performed by the first clause of the act, elaborated later in section 7 of the act.

[6] 5. This brings us to the last objection, viz. that the act creates a debt without providing by irrepealable law "for the levy of a tax sufficient to pay the interest and to extinguish the principal of such debt, within the time limited by such law for the payment thereof." If this act creates a debt within the meaning of this section, then undoubtedly it is void, for no provision such as this section requires, is made. But to sustain this objection would be to nullify all we have just said; for if the Legislature can make an appropriation for war purposes without funds and without a levy of taxes to meet the appropriation, by authorizing the creation of such fund by borrowing, it cannot be that the very thing not necessary for the appropriation is necessary to create the fund to make the appropriation effective. It should be noticed that the act does not in terms create a debt nor authorize the creation of a liability in a sum certain. It empowers the board of examiners to borrow "any sum not exceeding \$500,000," to "issue bonds or warrants in a sum not exceeding \$500,000 at an interest-bearing rate not to exceed six per cent." upon such terms and conditions "as such board may deem wise, proper and necessary," provided "the life of any such bond issue shall not be greater than five years and may be redeemed at any interest-bearing period or within thirty days thereafter." How, under these provisions, could the Legislature comply with section 2 of article 13. What part of the appropriation would be needed, what amount would be borrowed, what bonds or warrants would be issued, what interest they would bear, what time they would run, were all unknown quantities; yet all quantities requisite to the provision demanded by section 2 of article 13. Must we then conclude that for this very reason the act is void, notwithstanding the power recognized by section 12 of article 12? Or must the answer be that this act does not create a debt within the meaning of section 2 of article 13? The latter, we think, must be the answer, because the very terms of the section imply and contemplate a specific obligation created by the Legislature itself, of such a character that computation will disclose in advance what tax levy is requisite to pay the interest on and to extinguish the debt at its certain maturity. As aptly said by counsel:

"It would be idle to assume that the Legislature should provide for the payment of an indebtedness of \$500,000 when no such indebtedness might come into existence at all. Whether \$500,000 would be expended or a less amount depends entirely upon the action of the council and depends likewise upon the continuance of the war. It is possible that the war may termi-

nate without \$30,000 of this money being invested or expended, and the anomalous situation would be presented that taxes would be collected to pay \$500,000 indebtedness when as a matter of fact only \$30,000 of indebtedness had been contracted."

[7] In reaching our conclusion we need not assert that we are altogether free from doubt; but doubt is not sufficient to overturn an act of the Legislature. In the case of a statute assailed as unconstitutional, we stand committed to the rule that no such enactment will be pronounced invalid unless its nullity is made manifest beyond a reasonable doubt. *Spratt v. Helena Power, etc., Co.*, 37 Mont. 60, 94 Pac. 631; *State ex rel. Hay v. Alderson*, supra. In respect of the act before us we cannot say that this has been done; on the contrary, our views incline us to hold that it is a valid exercise of the legislative power, and that the bonds proposed to be issued pursuant to its provisions will become legal charges against the state.

The demurrer to the complaint is therefore sustained, and, as we are advised that the relators cannot plead to further effect, a decree of dismissal must be entered. So ordered.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(54 Mont. 476)

In re WHITE. (No. 4151.)

(Supreme Court of Montana. March 11, 1918.)

1. ATTORNEY AND CLIENT ⇨11—PRACTICING LAW—WHAT CONSTITUTES.

One who advertised himself as a lawyer and appeared in the district court with the court's permission as an attorney in two cases, was practicing law within Laws 1917, c. 90, § 1, defining "practicing law," and in so doing without having been admitted to practice he was guilty of contempt of court.

2. ATTORNEY AND CLIENT ⇨11—PRACTICING LAW—WHAT CONSTITUTES.

Where one who had not been admitted as a member of the bar received permission of the district judge to appear in cases for a short time pending his admission to the bar and did try cases, he was in contempt, under Rev. Codes, § 6388, since permission may be granted to a nonresident attorney of another state to appear and conduct a particular case, but not to appear generally, under Laws 1911, c. 13, § 1, so that the judge's permission, though in palliation of the offense, is no excuse.

On petition by the Attorney General, H. P. White was cited to show cause why he should not be punished as for a contempt for practicing law without first having been admitted to the bar. Respondent adjudged in contempt.

BRANTLY, O. J. On December 4, 1917, the Attorney General of the state filed with the clerk of this court a petition, reciting that H. P. White, the respondent, a resident of the town of Troy in Lincoln county, "is

holding himself out as an attorney at law by advertisement and otherwise, and practicing the profession of an attorney and counselor at law in said town of Troy and county of Lincoln, without first having been admitted to do so by this court," and asking that a citation issue under the seal of this court, requiring the said White to appear and show cause why he should not be punished as for a contempt. The petition was supported by the affidavits of B. F. Maiden and Graham Fletcher, attorneys and counselors at law residing, respectively, at Libby and Troy in Lincoln county, the former being also the county attorney, and George E. Davis, a justice of the peace residing at Troy. In response to a citation directing him to appear and show cause why he should not be punished, the respondent filed an answer, which denied certain of the material allegations in the affidavits, admitted others, and then pleaded in avoidance that, before he appeared in the district court, he had obtained permission to do so from Hon. T. A. Thompson, the presiding judge. The court thereupon appointed James M. Blackford, Esq., an attorney and counselor at law residing at Libby, to hear the evidence submitted and to report the same with his findings of fact to this court. This has been done, and the matter is now submitted for decision.

The referee found the charges contained in the petition and affidavits fully established by the evidence, and reported: That during the year 1917 the respondent, not having been admitted to practice law in the state of Montana or in any other state, appeared as an attorney of record in the district court of Lincoln county in two causes, numbered, respectively, 400 and 409, by filing papers therein in behalf of defendants; that during the same time he advertised himself as a lawyer in the local newspaper in Troy, on letter heads used by him in his correspondence and by a sign displayed in front of his office which he maintained in the town of Troy; that he appeared in the district court on two different occasions, representing defendants in the causes mentioned, but that, before doing so, he had obtained the permission of the presiding judge; that such permission had been granted by reason of the fact that the presiding judge assumed that the respondent had been regularly admitted to practice law in the state of Idaho, and therefore might by courtesy be granted the privilege to practice until he could be admitted by this court; and that thereafter the respondent also attempted to represent a defendant in a criminal cause entitled, "State of Montana v. Charles Dixon," but that upon objection of county attorney B. F. Maiden, the presiding judge refused to permit him to appear for that purpose, and thereupon he refrained from any further appearance in the

district court of that or any other county. The referee further found that the respondent did not, by any direct misrepresentation, mislead the presiding judge into the assumption that he had been admitted to practice in Idaho.

[1] It cannot be questioned that in engaging in the activities he did respondent was engaged in practicing law in the district court of Lincoln county. Laws 1917, c. 90, § 1; In re Bailey, 50 Mont. 365, 146 Pac. 1101, Ann. Cas. 1917B, 1198. Neither can it be questioned that in thus engaging in the practice he was guilty of contempt of this court. After full and careful consideration of the provisions of the statute on the subject, this was so decided in the Bailey Case, supra. We are entirely satisfied with the conclusion therein reached, and will not enter upon an examination of the subject again.

[2] The respondent assumes that the permission granted him by Judge Thompson to practice until he should be regularly admitted by order of this court ought to absolve him entirely from the charge of contempt, and hence that he should not be subject to punishment. It is sufficient answer to this suggestion to call attention to the fact that a district judge is entirely without authority to grant any one the privilege of appearing in the court over which he presides, to represent a client, unless he is a nonresident of this state, and has been admitted to practice in the highest courts of the state in which he resides, and then only upon motion of a member of the bar of this state. Permission may be granted such an attorney to appear and conduct a particular case, but not to practice generally for any length of time. Laws of 1911, p. 17, § 1. While, therefore, the error into which Judge Thompson fell in granting respondent temporary permission to practice may be taken in palliation of the offense, it cannot be alleged as an excuse. It was respondent's duty to ascertain what his rights were; especially so as he was assuming to act as an officer of the law and thus to possess the qualifications necessary to protect and enforce rights of such persons as would intrust him with them. As the judge had no authority to grant him the permission, respondent cannot justify his violation of the law (Rev. Codes, § 6388) by alleging it as his excuse.

In view of the circumstances, the court is not disposed to inflict a severe punishment upon the respondent, but it cannot acquit him entirely. It is therefore ordered and adjudged that he pay a fine of \$90.75, the amount of the costs of this proceeding, and that, in default of payment, he be committed to the jail of Lincoln county, to be confined therein one day for each \$2 of the fine.

SANNER and HOLLOWAY, JJ., concur.

(88 Or. 150)

ELLIOTT CONTRACTING CO. v. CITY OF PORTLAND.

(Supreme Court of Oregon. March 26, 1918.)

1. EVIDENCE ⇨419(12) — CONTRACT — CONSTRUCTION—CONSIDERATION.

Plaintiff, who agreed to furnish materials and construct pavement, and also to "pay to the city for so much base course stone now in stock piles on the drive as may be incorporated into the pavement" at a stipulated price, could not import into the agreement any additional stipulation of the city to furnish all the rock required on the pretense of inquiring into the consideration; such provision being contractual and not monetary, and the contract being necessarily construed as containing all the terms agreed upon, in view of L. O. L. § 713, as to parol evidence varying writings.

2. MUNICIPAL CORPORATIONS ⇨352 — CONTRACT—CONSTRUCTION.

Such contract bound the city only to furnish such rock as was on the drive, and not to furnish a certain amount.

3. CONTRACTS ⇨108(2) — LEGALITY — PUBLIC POLICY.

It is not contrary to public policy for a city contractor to agree that the determination of the completion of the work and the amount of the materials used shall be left to the city engineer.

4. CONTRACTS ⇨153—CONSTRUCTION.

All of a contract must be taken together as the standard the parties have devised for the control of their relations.

5. CONTRACTS ⇨10(2)—MUTUALITY.

Where contractor agreed to furnish materials and construct pavement, and to pay for stone on the drive which belonged to the city, for which work the city was to pay a certain amount, the contract was not unilateral, but was mutually obligatory.

6. MUNICIPAL CORPORATIONS ⇨358(3) — ACTIONS—PLEADINGS—SUFFICIENCY.

Where a contractor agreed to furnish materials and complete paving, and further agreed that the city engineer should by certificate determine the amount of materials used, and the engineer made such determination, the contractor could not recover a larger sum in the absence of allegations and proof of the engineer's fraudulent conduct or willful disregard of fair computation.

Department 1. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by the Elliott Contracting Company, a corporation, against the City of Portland. Judgment for plaintiff in part, and defendant appeals. Reversed.

By an agreement attached to its complaint and made part thereof the plaintiff, as contractor, covenanted with the city of Portland—

"that the contractor, for the consideration hereinafter named, does hereby agree to furnish all material and perform all of the labor necessary or required for the construction and full completion of the macadam pavement and all necessary trenches for storm water drains on that portion of the Hillside Parkway from Hamilton avenue entrance to Sheridan street, in full compliance with the plans and specifications therefor, which plans and specifications are identified by the signatures of the parties and are hereby made a part of this agreement except where said

specifications are modified by this contract in which case this contract shall prevail and to complete said improvement and all work thereon in a skillful and workmanlike manner, and to the satisfaction of the council of said city, on or before the 1st day of June, 1914, at and for the unit prices following, to wit:

Excavation other than in trenches:

Solid rock\$2.50 per cubic yard
Common40 " " "

Trench excavation:

Solid rock\$2.50 " " "
Common40 " " "

Macadam pavement:

Materials, labor entire..\$.50 " square "

"It is further understood and agreed by the contractor that it will pay to the city out of any money that may become due for the computed work embraced herein, for so much base course stone now in stock piles on the drive as may be incorporated into the pavement at the rate of \$1.00 per cubic yard."

The plans and specifications referred to in the excerpt above set out are not in the record before us. Whether they authorized the city engineer to change the grade or excavation or any other detail is not made to appear. The contract also contained this provision:

"The city engineer of said city shall decide all questions which may arise between the parties hereto relative to the true intent and meaning of any of the provisions or stipulations contained in this contract, or the amount, quantities, character or classification of the work performed by the contractor under this contract, and his decision thereon shall be final and binding upon the contractor, subject only to modification or reversal by the council of said city."

The plaintiff alleges that it purchased from the city 2,906 cubic yards of base course rock at an agreed price of \$1 per yard, but that the city wrongfully overcharged the plaintiff with 3,814 cubic yards, the amount of such overcharge being \$908. It is further stated in the complaint that:

"Defendant city as part of the consideration of said contract agreed to furnish plaintiff rock necessary for the base course of the said roadway at the agreed price of \$1 per cubic yard for the construction thereof, and estimated that it had on hand approximately 5,000 cubic yards of such material; that the defendant city furnished to this plaintiff only 2,906 cubic yards of such base rock, and no more; the said city failed, neglected, and refused to furnish the balance of said base rock to plaintiff."

It is further alleged in substance that the city engineer modified the plans and specifications so that plaintiff was compelled to purchase more base course rock than would otherwise have been required, amounting to an excess of \$1,004.25. The plaintiff also claims for an overplus of second course rock, screenings, sand, and detritus, \$3,330, and extra excavation from ditches \$1,500, all of which, with the item of \$908, amounts to \$6,742.25, for which it demands judgment. The pleading concludes with this allegation:

"That after the completion and performance of the said contract on behalf of plaintiff, the defendant, through the officer designated in said contract, inspected and accepted the work of this plaintiff and pretended to estimate and calculate the amount which plaintiff was entitled to recover therefor, but in the estimate and cal-

culuation the said officer of the defendant refused and neglected to allow plaintiff any of the sums herein specified on any of the items as herein set forth, and that the estimate and calculation of the said officer upon which sum was paid to plaintiff, as herein alleged, was erroneous, incorrect, and untrue in the particulars herein specified, and in that the officer representing the defendant refused to rectify or correct the same. That thereafter the plaintiff attempted to have the said matter rectified by the city council of the city of Portland, but the said city council failed, neglected, and refused, and still fails, neglects, and refuses to allow this plaintiff for any of the items herein specified or to pay the plaintiff therefor."

The defendant's general demurrer to the complaint was overruled. It is unnecessary to recite the text or substance of the answer or reply because the sole contention of the city on this appeal is that the complaint does not state facts sufficient to constitute a cause of action. The case was referred to a referee, who reported findings of fact and conclusions of law to the effect that the plaintiff was entitled to recover \$1,220.10, with costs and disbursements. This conclusion was adopted by the court, and judgment entered accordingly, from which defendant appeals.

L. E. Latourette, of Portland (W. P. La Roche and Stanley Myers, both of Portland, on the briefs), for appellant. J. J. Fitzgerald, of Portland (Logan & Smith, of Portland, on the briefs), for respondent.

BURNETT, J. (after stating the facts as above). [1] The argument against the complaint is that the pleader does not state that the engineer was actuated by fraud, or had excluded items due the plaintiff to such an extent as to indicate bad faith. In the first place we note that not all of the contract is before us in that the terms of the specifications alluded to are not stated. Aside from that the exhibit attached to the complaint embodies the stipulation of the parties. It is said in that pleading that as part of the consideration of the contract the defendant agreed to furnish certain rock at a certain rate. This allegation cannot affect the actual stipulation which speaks for itself and is to be considered as containing all the terms of the contract. L. O. L. § 713. The plaintiff cannot import into the agreement any additional stipulation on the pretense that it is merely inquiring into the consideration. The provision which it would thus add is contractual in its nature and not merely monetary. The rule is thus stated in *Sutherland v. Bloomer*, 50 Or. 398, 93 Pac. 135:

"The consideration specified in the written contract consists of certain acts to be performed, and the authorities are practically unanimous in holding that, where the statement in the written instrument as to the consideration is of a contractual nature, as where the consideration consists of a specific and direct promise by one of the parties to perform certain acts, it cannot be changed or modified by parol or extrinsic evidence."

See, also, *Muir v. Morris*, 80 Or. 378, 154 Pac. 117, 157 Pac. 785.

[2] Referring to the agreement itself, it is plain that the city did not agree to furnish any particular amount of base course stone, but only so much as might be in the stock piles on the drive and should be incorporated into the pavement. At the very beginning of the instrument the plaintiff contracted to furnish all material and perform all the labor necessary, and the agreement of the city to put in whatever was in the pile adjacent to the way was a mere exception to the general duty imposed upon the contractor. As stated, the job was to be paid for on the unit principle, which would require a measuring of the work after its completion. It consisted of excavation and pavement for which the contractor was to be compensated according to certain fixed rates. This involved a determination of the amount, quantity, character, and classification of the work performed by the contractor, as completed. While it might be improvident for the plaintiff to agree that the measurement of its work should be left to the defendant's officer, we are not aware of any law preventing it from making such a stipulation.

[3] It is not contrary to public policy, and if it chose thus to put itself at the mercy, so to speak, of the other contracting party's servant, it had a right to do so. It is analogous to instances where one person agrees to construct a certain piece of work to the satisfaction of the owner. It has been decided many times that in such cases the owner must be satisfied, except that he cannot withhold his satisfaction arbitrarily or fraudulently. The principle is thus stated in 9 Cyc. 620:

"And as there is assuredly no law which prevents a person from making contracts of this kind, if he chooses, the courts should not hesitate to enforce them. The agreement is in short not to make or do a thing which the promisor ought to be satisfied with, but to make or do a thing which he is satisfied with. Such a contract may be one-sided in being dependent upon the caprice of one of the parties; it may be an unwise contract to make; but if it is entered into voluntarily, the promisee is bound, and can have no right to ask a court to alter its terms in his favor."

[4] Some Illinois cases, not of the court of last resort, were cited by the plaintiff in support of its contention that the provision relating to the duty of the engineer in measuring the work lacks mutuality, and hence is void. A clause of the opinion of Mr. Chief Justice Alshie in *Nelson Bennett Co. v. Twin Falls Land & Water Co.*, 14 Idaho, 5, 93 Pac. 789, *arguendo*, is also noted, but in our judgment they are not expressive of the correct rule. The true doctrine is that all the contract must be taken together as the standard the parties have devised for the control of their relations to each other. There being nothing unlawful about it, they have a right to stipulate that either one of them or a third person shall bind the other by his decision.

[5] The contractor voluntarily undertook to work with the condition in question included in the agreement. It is not by the mark to say that the contract is unilateral. Almost every agreement contains terms which are to be performed only by one party, and not by the other. In a sense the covenants of one are not binding upon the other; but the contract is none the less mutually obligatory when considered, as it should be, in all its parts. The city agreed that its officer should decide all questions. It thus constituted that official its agent for that purpose, and hence would be bound by his action under the principle of "*Qui facit per alium, facit per se.*" On the other hand, the plaintiff undertook the performance of the work on that condition, and cannot now be heard to complain in the absence of allegations tending to impeach the award on the ground of fraud or such reckless disregard of fair dealing as would amount to fraud.

[6] The complaint really proceeds on the theory that the condition giving authority to the city engineer is a valid one, and complains of its violation; but it does not pretend to say that the officer did not rightly compute the number of cubic yards of excavation or the number of square yards of pavement in compliance with the stipulation for the payment of unit prices. Neither does it impute to the officer any fraudulent conduct or willful disregard of fair computation. In the absence of such allegations, the parties must be bound by the decision of the tribunal which they themselves have erected. Besides all this, the plain object of the complaint is by means of an action at law to set aside the award of the engineer acting as arbiter. That this cannot be so done was decided in *Fire Association v. Allesina*, 45 Or. 154, 77 Pac. 123, which ruling was approved in *Cohn v. Wemme*, 47 Or. 146, 81 Pac. 981, 8 Ann. Cas. 508, holding that the remedy lies in equity.

That the contract is not unilateral or void is decided in *Boston Store v. Schleuter*, 88 Ark. 213, 114 S. W. 242, and *Young v. Stein*, 152 Mich. 310, 116 N. W. 195, 17 L. R. A. (N. S.) 231, 125 Am. St. Rep. 412. That the decision of the engineer is binding in the absence of fraud is determined in *Dennis v. Willamina*, 80 Or. 486, 157 Pac. 799. The same principle is laid down in *Gerdetz v. Central Oregon Irr. Co.*, 83 Or. 576, 163 Pac. 980. See, also, *Lanier v. Little Rock Cooperage Co.*, 88 Ark. 557, 115 S. W. 401, and *Hatfield Special School District v. Knight*, 112 Ark. 83, 164 S. W. 1137. It being competent for the parties to make a contract of the kind stated, leaving to the engineer the duty of measuring the amount of work done, and there being no allegation in the complaint sufficient to impeach the award thus made, that pleading does not state facts sufficient to constitute a cause of action.

The general demurrer should have been

sustained, for which reason the judgment of the circuit court is reversed.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

(88 Or. 569)

ELMORE et al. v. STEPHENS-RUSSELL CO.*

(Supreme Court of Oregon. March 26, 1918.)

1. ESTOPPEL \Leftrightarrow 118—ESTOPPEL IN PAIS—EVIDENCE—SUFFICIENCY.

In suit for specific performance of contract to purchase land, evidence held insufficient to support plea of estoppel in pais against defendant to refuse performance.

2. SPECIFIC PERFORMANCE \Leftrightarrow 26—RIGHT TO REMEDY.

Where plaintiff's intestate contracted to convey land to defendant, which was chiefly valuable for its timber, which was destroyed by forest fire, no payments having been made on the price and defendant never having had possession, plaintiff, as administrator, could not have specific performance of the contract.

Department 1. Appeal from Circuit Court, Linn County; William Galloway, Judge.

Suit by W. P. Elmore, as administrator of the estate of H. B. Moyer, deceased, and others against the Stephens-Russell Company, a corporation. Decree for plaintiffs, and defendant appeals. Reversed, and suit dismissed.

This is a suit to compel the specific performance of a contract to purchase land. Plaintiffs are the administrator and the heirs at law of H. B. Moyer, deceased. The substance of the complaint is to the effect that on August 9, 1907, H. B. Moyer and the defendant corporation entered into a written contract as follows:

"For and in consideration of the sum of one dollar (\$1.00) to me in hand paid by the Stephens-Russell Company, a corporation, I hereby covenant and agree to sell and convey unto said Stephens-Russell Company all of the S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of section 31 and S. E. $\frac{1}{4}$ of Sec. 32, T. 14 S., R. 1 East, W. M., containing 240 acres, situated in the county of Linn and state of Oregon, for the sum of eight thousand five hundred dollars (\$8,500.00) as soon as the title to said property can be perfected and all liens and incumbrances against same cleared away, and upon same being so cleared away I hereby agree to make, execute, acknowledge and deliver to said Stephens-Russell Company a good and sufficient deed containing general covenants of warranty and convey said property to said Stephens-Russell Company free from incumbrances.

"In witness whereof, I have hereunto set my hand and seal this ninth day of August, A. D. 1907. H. B. Moyer [Seal.]

"The Stephens-Russell Company accepts same upon said terms and conditions.

"Dated Portland, Oregon, August 9, 1907.

"Stephens-Russell Company,

"By C. S. Russell, Agent."

That all the conditions of the contract were fully performed by Moyer prior to his death, which occurred on March 11, 1913, and said Moyer was at all times thereafter and until his death ready, able, and willing to convey said lands by a good and sufficient deed in all respects complying with the contract to

the defendant, and that plaintiff Hazel Moyer was at all times ready, able, and willing to execute the deed as the wife of Moyer. The death of Moyer, the appointment of the administrator, and other formal facts are recited. It is then averred that on March 29, 1915, plaintiff Elmore, as administrator, obtained an order of the probate court, authorizing and directing him to execute a deed and to fully comply with the terms of the contract; that such deed was duly executed by all the plaintiffs and tendered to defendant, accompanied with the requisite revenue stamps, and that defendant refused to accept the same or to perform its part of the contract, and the prayer is for specific performance. Defendant answered with certain admissions and denials, followed by affirmative defenses to the effect that in the interval between the execution of the contract and the death of Moyer no effort was made by Moyer to free the land from incumbrances, nor any steps taken to comply with the contract. It is then alleged that the suit is barred by the statute of limitations; that while a nominal consideration is recited in the contract, none was ever paid; that defendant was not entitled to possession of the premises, and never had possession of any part thereof; that the lands at the time of the execution of the contract were chiefly valuable for the timber growing thereon, and that such timber was the sole inducement for the agreement to purchase; that in the year 1910 a forest fire swept over the land, destroying and fire killing the timber thereon, leaving it of very little value, and that thereby plaintiffs are prevented from complying with the contract; that plaintiffs' title to the land has at all times been insufficient in the following particulars: (a) That the land was a part of a federal grant to the Oregon & California Railroad Company under the terms of an act of Congress which required sales thereof to be limited to actual settlers and not more than 160 acres to any one person, and for a price not to exceed \$2.50 per acre; that in the present instance the land had been purchased by Moyer and another in tracts exceeding 160 acres to the person; and that the conveyance, being in violation of the statute, did not convey a good title; (b) that the conveyance from the Oregon & California Railroad Company to Moyer reserved a strip of land 100 feet wide to be used by the grantor as a right of way and for other purposes, and the right to all waters needed for operating said railroad, reserving therefrom all mineral lands therein other than coal and iron, and requiring the grantee to erect and maintain upon the boundary line between said lands and the aforementioned right of way a substantial fence sufficient to turn stock, and that such covenants and conditions are still in force and effect; (c) that a part of

said land was patented to Louis Campeau; that later there was a mesne conveyance thereof executed by Louis Campeau; that the records contain no conveyance executed in the name of the patentee; and that there is no evidence in the records disclosing the marital status of Louis Campeau. Other minor defects are mentioned, and it is then alleged that plaintiffs and their predecessor in interest never possessed a good and sufficient title to the land, and were at all times unable to comply with their obligations under the contract. After general denials of the affirmative defenses, the reply pleads estoppel in pais as follows: That the forest fire mentioned in the answer occurred in 1910, and that thereafter, at a time when defendant knew all about the fire and its effect upon the property, H. B. Moyer called upon defendant and asked to be relieved from the contract, for the reason that he then had an opportunity to sell the lands at a better price than that specified in the contract, but that defendant refused his request; that Moyer then offered to execute a deed and comply with the terms of the contract, but defendant refused the offer, assigning as its only reason that it was without the necessary funds, but would make payment at a later date; that shortly thereafter Moyer died, and later the plaintiff Elmore demanded a settlement and payment of the purchase price, and received a similar reply, but nothing was said about the fire. It is then alleged that defendant is estopped from urging the reservations in the conveyance from the Oregon & California Railroad Company, for the reason that during the year 1912, H. B. Moyer called upon defendant and asked to be relieved from the contract because he had an opportunity to sell the lands at a better figure than the contract price; but defendant denied the request, making no objection to the title, saying that it was without money to make the payment, but would do so later. It is then alleged that, at the time when this contract was executed and as a part of the same transaction, defendant purchased from H. B. Moyer and paid for other lands which were bought by Moyer from the Oregon & California Railroad Company under like conditions, and the deeds thereto were accepted by defendant without objection. These are substantially the issues. A trial being had, there was a decree for plaintiff, from which defendant appeals.

M. H. Clark, of Portland (T. H. Ward and Clark, Skulason & Clark, all of Portland, on the briefs), for appellant. J. K. Weatherford, of Albany, and A. A. Tussing, of Brownsville (Weatherford & Weatherford, of Albany, on the brief), for respondents.

BENSON, J. (after stating the facts as above). It will be observed that the pleadings involve a number of questions, but we deem it necessary to consider but one, and

that is the plea of estoppel, based upon the allegations that after the destruction of the timber by the forest fire in the year 1910, H. B. Moyer went to the defendant, and asked to be released from the contract, for the reason that he had a purchaser who was ready to pay a better price for the land, and that his request was refused. The evidence upon which plaintiffs rely to sustain this contention consists of the testimony of Mrs. H. B. Moyer, to the effect that shortly after the forest fire in 1910 she with her husband visited defendant's office in Portland; and while there the contract was discussed by Moyer and Russell, and the following question and answer appear in the record:

"Question: The question I started to ask you is this: What did he say about somebody else wanting to take the land? Answer: Well, there was some men up there that wanted to buy it at so much per stumpage, and he thought he could sell it that way, and he wanted to release it on that account."

This was followed by the testimony of two brothers by the name of Sawyer, who testified that shortly after the fire they conceived the plan of buying all of the damaged timber in that vicinity at a low price and manufacturing it into timber at their mill; that in pursuance of this idea they interviewed Moyer, who told them that he had no timber in that vicinity, and referred them to Russell; that they went to Portland and interviewed Russell and the local representative of the Weyerhaeuser Company; that Russell told them that his company had some timber in the burned region which he would sell on a stumpage basis; that when the Weyerhaeuser Company declined to do business with them, they abandoned the scheme; and that the specific tracts in controversy here were not mentioned by them. Russell testified that in the year 1912 there was some talk between him and Moyer in reference to a relinquishment of the contract, and that he expressed his willingness to do so, but that the controlling power in the corporation was Stephens, with whom he advised Moyer to correspond directly or through his attorney, Mr. Weatherford.

[1] The foregoing is substantially all the evidence in support of the plea of estoppel. This showing is altogether too vague and indefinite to establish the plea. It is not shown that Moyer had any buyer in view, or that he was in any way injured by the conduct of the defendant. In 10 R. C. L. p. 697, the established doctrine is quite clearly expressed thus:

"The final element of an equitable estoppel is that the person claiming it must have been misled into such action that he will suffer injury if the estoppel is not declared; that is, the person setting up the estoppel must have been induced to alter his position in such a way that he will be injured if the other person is not held to the representation or attitude on which the estoppel is predicated."

[2] From the evidence it appears that at the time the contract was executed the land

was chiefly valuable for its timber, and that in the year 1910 a forest fire destroyed nearly all the timber on one of the tracts and about half of that on the other. No payments had been made on the purchase price, and defendant had never had possession of the premises. Under these circumstances it has been held by this court that specific performance cannot be had. *Powell v. D., S. & G. R. R. R. Co.*, 12 Or. 488, 8 Pac. 544.

It follows that the decree of the lower court must be reversed and the suit dismissed.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

(38 Or. 436)

ENNEBERG v. STATE INDUSTRIAL ACCIDENT COMMISSION.

(Supreme Court of Oregon. March 28, 1918.)

MASTER AND SERVANT — 417(4½) — WORKMEN'S COMPENSATION—NOTICE OF APPEAL—TIME.

An applicant for compensation for personal injuries under the Workmen's Compensation Act (Laws 1913, c. 112) was awarded a monthly sum for temporary total disabilities each month for a period of seven months. When the last installment was due, a blank form labeled "Final Settlement Voucher" was sent plaintiff, but was returned by him unsigned, and was again sent to him with a request for his signature on the 16th of November, 1915. The voucher, which was signed and subsequently filed with the commission, recited that it was in final settlement that the sum of \$300 had theretofore been paid, and acknowledged the receipt of the further sum of \$50 in full discharge of the obligations of the state. On November 13, 1916, plaintiff's attorney filed a notice of appeal from the decision of the Industrial Board. The statute provides that no appeal shall be entertained unless notice of appeal shall have been served by mail or personally upon some member of the commission within 30 days following the rendition of the decision appealed from, and actual communication thereof to the person affected thereby. *Held*, that the final voucher sent to plaintiff constituted notice to him of the decision of the commission to suspend payment, and the notice of appeal being filed more than 30 days thereafter was too late.

Department 1. Appeal from Circuit Court, Columbia County; J. A. Eakin, Judge.

Proceedings under Workmen's Compensation Act by O. Enneberg to obtain compensation for personal injuries, opposed by the State Industrial Accident Commission. Compensation for temporary disability was awarded in the sum of \$350, further compensation was denied, and on claimant's appeal to the circuit court he obtained judgment on a verdict, and the Commission appeals. Reversed.

See, also, 167 Pac. 810.

O. Enneberg was injured on March 9, 1915, while working for an employer who was subject to the Workmen's Compensation Act (chapter 112, Laws 1913). Enneberg filed a claim for compensation with

the State Industrial Accident Commission on June 14, 1915. An award of \$50 for temporary total disability was made each month by the commission for a period of seven months. The first monthly award was made on April 14, 1915, and the last on October 14, 1915. A blank form, labeled "Final Settlement Voucher" was sent to the plaintiff by the commission. Apparently Enneberg returned the blank form without signing it, for under date of November 6, 1915, the commission addressed a letter to him saying:

"We are again returning to you our final settlement voucher showing the balance of \$50 due you. There is nothing in our findings that would show that you are entitled to any further payments; therefore, if you sign the inclosed voucher and return to us we will be glad to forward to you a warrant for \$50, as final settlement, as soon as possible."

The voucher was signed by Enneberg and returned to the commission, but the latter, under date of November 16, 1915, again sent the instrument to Enneberg so that it could be signed by witnesses. The voucher was signed by two witnesses and finally filed with the commission. The final settlement voucher, as signed, witnessed, and filed, reads as follows:

"Final Settlement Voucher.

"October 18, 1915.

"State of Oregon. To O. Enneberg, Dr. (Post Office Address) Buxton, Oregon. Claim No. 4286. Class A. Firm No. 277.

"Award. Computed on basis of time lost. Seven months working days, being compensation under chapter 112, Laws 1913, as amended by chapter 271; Laws 1915, in full settlement of claim, of above claimant for injury occurring on the 9th day of March, 1915, at Buxton, Oregon, as allowed and approved by the findings and order of the State Industrial Accident Commission on record in the commission's office, \$350.00.

"State of Oregon, County of—ss.:

"....., 191....

"For and in consideration of the sum of \$300.00, heretofore paid to me, and the further sum of \$50.00, receipt of which is hereby acknowledged, I, O. Enneberg, the undersigned, do hereby release and discharge the state of Oregon from any and all further liabilities or obligations for or on account of that certain personal injury by accident arising out of and in the course of my employment, received by me, and heretofore fully reported and described to the State Industrial Accident Commission in my claim for compensation, made in accordance with the provisions of chapter 112, Laws 1913, and chapter 271, Laws 1915.

"[Sign here] O. Enneberg.

"(Write name clearly. Claimants unable to write must make X mark.)

"Witnesses to signature: Minnie Enneberg, Post Office Address, Veronia. Arthur Krum, Post Office Address, Veronia.

"To secure prompt payment of this claim, sign the above blank and forward immediately to the State Industrial Accident Commission, Salem, Oregon.

"This must be signed before warrant for the amount can be drawn."

Under date of October 5, 1916, Milo C. King, as attorney for Enneberg, wrote to

the commission, and on October 11, 1916, the latter addressed a letter to Mr. King saying that Enneberg "was settled with in full and final voucher received. Under the law his right of appeal has expired, and we feel that no injustice can be done by refusing further payment in this case." On November 13, 1916, Milo C. King, as attorney for Enneberg, filed a notice of appeal, dated October 31, 1916, with the county clerk of Columbia county, stating that the plaintiff appeals to the circuit court "from the decision rendered by the State Industrial Accident Commission on the 11th day of October, 1916, in favor of the defendant in said matter and against said plaintiff." The State Industrial Accident Commission moved to dismiss the appeal for the reason that the time allowed for taking an appeal to the circuit court had expired before the plaintiff gave notice of appeal. The motion was denied by the trial court. A trial by jury resulted in a verdict for the plaintiff, and the defendant appealed from the consequent judgment.

J. A. Benjamin, Asst. Atty. Gen. (Geo. M. Brown, Atty. Gen., on the brief), for appellant. Milo C. King, of Gresham, for respondent.

HARRIS, J. A workman may have a decision of the commission reviewed by a proceeding in the nature of an appeal to the circuit court; but the statute also provides that:

"No such appeal shall be entertained unless notice of appeal shall have been served by mail or personally upon some member of the commission within thirty days following the rendition of the decision appealed from and actual communication thereof to the person affected thereby."

In October, 1915, the commission decided to discontinue payments. The letter written by the commission to Enneberg on October 11, 1916, was not a decision; it merely gave the information that final settlement had been made with Enneberg in 1915, and that the right of appeal had expired. The last decision rendered by the commission was made in 1915. The letter of October 11, 1916, merely related what had occurred a year before.

The plaintiff takes the position that the final settlement voucher did not constitute notice of the decision of the commission. The letter written by the commission on November 6, 1915, to Enneberg may be laid out of the case, although it was of itself actual notice of the decision made by the commission. Turning to the voucher, it will be seen that it speaks of an award of \$350 in final settlement of the claim as allowed by the findings and order of the commission on record in its office. Enneberg had already received \$300 and the remaining sum of \$50 was yet to be paid; and the voucher provides that in consideration of the \$300

previously paid and the further sum of \$50 to be paid, Enneberg releases and discharges the state of Oregon from all further liability. The voucher told him in plain language that the commission had already paid him \$300 and had decided to pay him an additional \$50 in full settlement of his claim for compensation. The voucher is not ambiguous; its language is not deceptive; it is plain and understandable; and actual notice of the decision made by the commission is conveyed to any one who reads the voucher.

It is not necessary to fix the exact date when Enneberg signed the final settlement voucher, but it is sufficient to say that he signed it some time before November 16, 1915. The right to appeal is lost unless initiated within the time prescribed by statute. The plaintiff did not appeal within 30 days following the rendition of the decision of the commission and actual communication thereof, and therefore the circuit court was without jurisdiction.

It follows that the judgment must be reversed, with directions to the circuit court to sustain the motion to dismiss the appeal; and it is so ordered.

McBRIDE, C. J., and BENSON and BURNETT, JJ., concur.

(88 Or. 158)

WEST v. HEDGES et al.

(Supreme Court of Oregon. March 26, 1918.)

1. APPEAL AND ERROR \S 928(2)—REVIEW—PRESUMPTIONS—EVIDENCE—INSTRUCTIONS.

In an action by a school-teacher on a contract of employment, where plaintiff made no motion for a directed verdict, nor reserved exceptions to the court's charge, such charge not being contained in the bill of exceptions, the judgment will not be set aside as not being supported by the evidence, since it must be assumed on appeal that the law was correctly declared by the court, and that the verdict was justified by the evidence.

2. JURY \S 89—QUALIFICATION OF JURORS—TAXPAYER—IMPLIED BIAS.

Laws 1915, p. 332, makes the expense of educating pupils residing in one district and attending high school in another district a charge on the county. Section 4 determines the charge for which the county is liable, and requires the county school superintendent to make a report showing the number of high school pupils residing out of the districts in which the high schools are situate. A school-teacher, after his contract of employment had been rescinded by the directors before entering on his duties, brought suit thereon; the contract stipulating that the provisions of the state law regulating the employment of teachers should be a part thereof. *Held* that, if plaintiff recovered, he would recover damages for the wrongful conduct of defendants, and not compensation for services rendered, chargeable to the county, and therefore a taxman who did not own property, nor reside in the school district, was not disqualified to sit on the jury because the verdict might increase his tax rate; the judgment being chargeable to the district only.

3. SCHOOLS AND SCHOOL DISTRICTS \S 141(5)—TEACHERS—VOID CONTRACT.

Where a teacher's contract of employment is void, the directors of the district may sum-

marily so declare it, although the statute entitles a teacher to notice and a hearing before he can be discharged.

**4. SCHOOLS AND SCHOOL DISTRICTS —145—
TEACHERS' CONTRACTS—EVIDENCE.**

In a school-teacher's action on his contract of employment, evidence as to his lack of qualification may be introduced without first showing that he had been duly notified of defendants' contention, and had had an opportunity to present his case to the board; his contract of employment being void if he lacked the statutory qualifications of a teacher.

**5. APPEAL AND ERROR —1050(1)—REVIEW —
HARMLESS ERROR.**

In a school-teacher's action on a contract of employment, admission of parol evidence as to whether he possessed the statutory qualifications of a teacher, if error, held harmless.

Department 2. Appeal from Circuit Court, Clackamas County; J. U. Campbell, Judge.

Action by James West against Joseph E. Hedges and others. Judgment for defendants, and plaintiff appeals. Affirmed.

This is an action brought on a teacher's contract of employment. On May 24, 1915, the individual defendants were the directors of school district No. 62 in Clackamas county. On that day they entered into a contract of employment with plaintiff as instructor in the high school. The contract contained the following clause:

"It is hereby agreed and understood that the provisions of the state law regulating the employment of teachers shall be a part of this contract."

On September 22, 1915, the defendants in their official capacity adopted the following resolution:

"Whereas it appears that James West, heretofore elected to a position as high school science teacher, has failed to qualify and is not properly certificated under the law to teach, now therefore, be it resolved, that the contract heretofore entered into between said James West and school district No. 62 be and the same is hereby revoked and rescinded."

Plaintiff alleges and defendants deny that notwithstanding this action of the board plaintiff presented himself at the high school at the opening of the term and offered to teach. Plaintiff alleges that he was not permitted to teach, and that because the school year had started he was unable to secure other employment as a teacher. He demands judgment for nine months' salary.

There was a verdict for defendants on which judgment was entered, and plaintiff appeals.

Elisha A. Baker, of Portland, for appellant. Gilbert L. Hedges, of Oregon City, for respondents.

MCCAMANT, J. (after stating the facts as above). [1] The parties are agreed that the contract of employment was void, unless plaintiff held a certificate which qualified him to perform the stipulated service. The question of whether plaintiff held such certificate is discussed in the briefs, but we do not find it presented by the record. Plaintiff made no motion for a directed verdict,

nor did he reserve any exceptions to the charge of the court. The court's instructions are not contained in the bill of exceptions. Plaintiff is not entitled on this record to contend that the judgment is without support in the evidence. *Marks v. First National Bank*, 84 Or. 601-603, 165 Pac. 673. We must assume that the law was correctly declared by the court, and that the verdict was justified by the evidence.

There are but four assignments of error, and one of these is expressly waived. The first error assigned is based on the denial of plaintiff's challenges of talesmen for implied bias.

[2, 3] It appears that plaintiff challenged 14 talesmen on the ground that they were taxpayers in Clackamas county, and therefore disqualified to try this cause. Plaintiff exhausted his peremptory challenges, and was obliged to accept 11 of the talesmen so objected to. None of these jurors owned property, or resided, in district 62.

It is settled law that a taxpayer is disqualified as a juror in any case where the verdict may increase his tax rate. *Portland v. Kamm*, 5 Or. 362, 368, 369; *Ford v. Umatilla County*, 15 Or. 313, 323, 16 Pac. 33; *Elliot v. Wallowa County*, 57 Or. 236, 238, 109 Pac. 130, Ann. Cas. 1913A, 117. Plaintiff's contention as to the implied bias of these jurors is based wholly on the law which permits pupils residing in one district to attend high school in another district. The expense of educating these pupils is made a charge on the county. Laws 1915, p. 332. The charge for which the county is liable is determined by the provisions of section 4 of chapter 235 of the Laws of 1915. This section requires the county school superintendent to make a report showing the number of high school pupils residing out of the districts in which the high schools are situated. This report is required to show the cost of educating these pupils, and this cost is determined as follows:

"The cost of educating each high school pupil of any high school district shall be determined by dividing the total amount expended by the high school district for maintaining high school during any school year, by the average daily attendance of pupils enrolled in the high school or high schools of the district for the same year." Laws 1915, p. 332.

The county school superintendent is required to certify to the county court the cost of educating each pupil, multiplied by the number of such pupils, and this total is provided for in the next tax levy.

The only expense which can be charged under the above statute to the taxpayers of Clackamas county is a certain proportion of the "amount expended by the high school district for maintaining high school during any school year." This language has been twice construed by this court. *School District v. Smith*, 82 Or. 443, 161 Pac. 706, and *School District v. Smith*, 84 Or. 50, 53, 164

Pac. 375. Money paid in liquidating any judgment which plaintiff might recover in this cause would not be "expended by the high school district for maintaining high school." Plaintiff did not teach during the school year 1915-1916. If he were to recover in this cause he would secure damages for the wrongful conduct of defendants, not compensation for services rendered. Plaintiff's judgment, if any, would be paid by a tax levied on the property located in district No. 62. Laws 1915, c. 159, § 8. This charge could not be transferred in whole or in part to Clackamas county. It follows that the court did not err in denying plaintiff's challenges on the ground of implied bias.

[4] Plaintiff's next assignment of error is based on the admission of evidence touching plaintiff's lack of qualification to teach without first showing that plaintiff had been duly notified of the contentions of defendants, and had had opportunity to present his case to the board. The case of *Richards v. School Board*, 78 Or. 635, 153 Pac. 482, L. R. A. 1916C, 789, Ann. Cas. 1917D, 266, on which plaintiff relies, involved the construction of a statute applicable only to school districts with a population of 20,000. This decision is not in point in the case at bar. In districts whose population is less than 20,000 the teacher is not in every case entitled to a hearing before dismissal. It is squarely held in *Foreman v. School District*, 81 Or. 587, 159 Pac. 1155, 1168, that the board of directors may summarily dismiss a teacher for breach of the contract of teaching. The right to a hearing must in any event be based on a valid contract of employment. Assuming, as we must on this record, that plaintiff lacked the statutory qualifications of a teacher, his contract was void, and it was competent for the board so to declare it. *School Directors v. Jennings*,

10 Ill. App. 643, 645; *School Directors v. Newman*, 47 Ill. App. 364; *Jackson Township v. Farlow*, 75 Ind. 118; *Hosmer v. Sheldon District*, 4 N. D. 197, 59 N. W. 1035, 25 L. R. A. 383, 50 Am. St. Rep. 639, 641.

[5] The only remaining assignment of error is as follows:

"That the court erred in admitting any evidence of any verbal or oral statements made at the time of signing the contract or prior thereto which tended to vary, add to, or in any wise change the terms of the written contract signed by the parties."

It is well settled that it is not competent to vary the terms of a writing by a separate parol agreement made at the time or prior thereto. *Looney v. Rankin*, 15 Or. 617, 621, 16 Pac. 660; *Portland Bank v. Scott*, 20 Or. 421, 424, 26 Pac. 276; *Edgar v. Golden*, 38 Or. 448, 451, 48 Pac. 1118, 60 Pac. 2; *Sund v. Standiffer*, 86 Or. 289, 168 Pac. 300. The only testimony in the bill of exceptions to which this assignment of error can possibly be applicable is the following:

"Q. Now, about the time this document was signed was it, or was it not, understood between you folks, the board of directors and Mr. West, that the certificate that he then possessed was not a proper one? A. I cannot say now. As I tried to recall what I think was—before this vote was had just whether I knew anything about his certificate or not. I do not know that it was accepted by me, and the board, that he was proficient to teach the subjects he had been teaching in the school, or something similar. We did have then—I think he can tell better than I—an incipient agricultural course, to be sure, hardly born yet."

This testimony is so noncommittal and so utterly lacking in probative value that it cannot have prejudiced plaintiff. The error, if any, in permitting the foregoing question to be answered was harmless.

It follows that the judgment is affirmed.

MOORE, BEAN, and HARRIS, JJ., concur.

(102 Kan. 104, 619)

POSTLETHWAITE v. EDSON et al.
(No. 21131.)

(Supreme Court of Kansas. Dec. 8, 1917.
On Rehearing, March 9, 1918. Further
Rehearing Denied April 12, 1918.)

(Syllabus by the Court.)

1. FORMER OPINION ADHERED TO.

The former opinion (Postlethwaite v. Edson, 98 Kan. 444, 155 Pac. 802) remains as the deliberate holding of this court.

2. HOMESTEAD §153 — HOMESTEAD CHARACTER—LIABILITY TO JUDGMENT.

A husband and wife mutually willed their property, including a homestead, to their survivor for life with power of disposal, remainder to their children. It was occupied by the devisees, and by the surviving wife until her decease, the children then having homes elsewhere and not occupying the land devised. A judgment obtained against the father was kept alive as to his estate by revivor against his administratrix. *Held*, that the children took the land freed from its homestead character, and it could by this suit be subjected to the payment of the judgment.

3. HOMESTEAD §1—HOMESTEAD CHARACTER.

The homestead character of real estate depends on family occupancy—not on the source of title.

4. JUDGMENT §780(1) — LIEN — INTEREST OF JUDGMENT DEBTOR—PAYMENT OF DEBT.

Only the interest of the judgment debtor could be appropriated, and it was error to sustain a demurrer to that part of the amended answer setting up that the homestead was acquired by the joint efforts and money of the husband and wife, and held by them as tenants in common.

5. WILLS §488—INTENTION OF TESTATOR—EXPLANATION.

The will not being ambiguous, the trial court correctly refused evidence explanatory of the testator's intentions, and properly struck from the answer allegations of what such intentions were.

6. HOMESTEAD §136—ALIENATION—WILL.

The will was not an alienation or conveyance of the homestead.

On Rehearing.

7. HOMESTEAD §136—WILL—"CONVEYANCE"—"ALIENATION."

Rule followed that a will is not a conveyance or an alienation of the real estate described therein.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Alienation; Conveyance.]

8. HOMESTEAD §136 — DEVISE — RIGHTS OF "CREDITORS."

"Creditors," as the expression is used in section 11752 of the General Statutes of 1915 concerning wills, means and includes general creditors.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Creditor.] Johnston, C. J., and Porter and Burch, JJ., dissenting.

Appeal from District Court, Shawnee County.

Action by Robert C. Postlethwaite, administrator of the estate of John C. Postlethwaite, deceased, against Frank P. Edson and Jessie L. McCabe. Judgment for plaintiff, and defendants appeal. Modified and remanded.

Eugene S. Quinton, of Topeka, for appellants. Garver & Garver, of Topeka, for appellee.

WEST, J. [1] When this case was here before it was stated in the brief of the plaintiff, page 10:

"Defendants do not claim any homestead rights."

In the defendants' brief were the following statements:

"The appellants claim that the instrument is a joint will by which Mary Edson took a life estate with a remainder to Frank P. Edson and Jessie L. McCabe, and if so the property is subject to be taken in this action." Page 6.

"It is admitted that Frank P. Edson and Jessie L. McCabe * * * had never resided upon or occupied this property as a homestead for a long time prior to all matters herein presented." Page 9.

"If the absolute fee-simple title and homestead right did pass, under this mutual will, upon the death of Willis Edson to Mary Edson, the survivor, then it must follow that Frank P. Edson and Jessie L. McCabe inherited that legal title and the property, directly and fully and completely, from Mary Edson, against whom there were no claims or debts. From the death of Willis Edson to the death of Mary Edson, this property, as a homestead, remained clear and free from the claims of any creditors of either of them. If so, then the legal title to this homestead having vested upon the death of Willis Edson in Mary Edson, that, too, must have remained clear and free, with the homestead right, from the claims of creditors; there being no claims or debts of Mary Edson at her death. The same unincumbered title and property must of necessity have passed unincumbered to the heirs, Frank P. Edson and Jessie L. McCabe. This conclusion is inevitable, if, as a matter of law, the legal title to this homestead, by virtue of this mutual will, passed unincumbered to Mary Edson." Page 12.

"So, in this case, under the mutual will, the homestead and legal title thereto vested in the survivor clear and free from the debts of the deceased husband. Having once, then, vested free from debts in an innocent party or purchaser, it could not be divested." Page 17.

These quotations are made to demonstrate that the controversy when first here centered on the question whether the survivor took a fee or a life estate with power of disposal, remainder to the children, and that it was then insisted that if the former, the homestead character of the land remained even when inherited by the children who did not claim to occupy it as a homestead. Hence in the opinion (Postlethwaite v. Edson, 98 Kan. 444, 155 Pac. 802) it was said:

"Mary Edson survived her husband, remaining in possession of the homestead during her life. She left the defendants as her sole heirs who claim no homestead rights. The plaintiff takes the position that the will devised a life estate to Mary Edson with full power of disposition, remainder to the defendant, and if this be the proper construction it is conceded that the property is subject to be taken in this action." 98 Kan. 445, 155 Pac. 802.

In the elaborate petition for a rehearing there was no complaint of this statement. Near the close of the opinion it was said:

"It is fairly clear that the intention was that the survivor should have complete dominion

over the estate during her life, including the full power of disposition, but that as she would be likely to retain the estate or a portion thereof, such portion was to vest personally in the children, to take effect at her death; that is, the present estate in such portion was to vest in her for life with the power of disposition, remainder to the children."

This conclusion, reached after a painstaking examination and consideration, we are satisfied with, and it must remain as the deliberate holding of this court. The case was first here on appeal from an order overruling a demurrer to the answer. When it reached the lower court the defendants amended their answer, parts of which were stricken out on motion of the plaintiff, and a demurrer to the remainder was sustained, from which orders this appeal is taken. Hence the question now before us is the claimed error in such rulings. The parts stricken out amounted to an allegation that the Edsons talked over the making of the will, and expressed their intentions and desires, counseled with an experienced lawyer who drew the instrument, and suggested a certain addition, with which the testators were pleased. In other words, the trial court refused to permit the defendants to go into the conversations and intentions of the makers of the will on the theory, doubtless, that it is plain on its face, and needs no extrinsic aid for its proper construction. The remainder of the amended answer pleaded the homestead character of the land devised while occupied by the parents or their survivor, the separate homes elsewhere occupied by the defendants, that the homestead was procured by the joint efforts of the devisors and held by them as tenants in common.

Error is assigned on sustaining a demurrer to all of the remaining answer except the general denial, because the judgment of the plaintiff was never a lien on this property; because the judgment was not against Mary Edson, the joint owner with her husband of the homestead; because the will is ambiguous and susceptible to explanation of the intention of its makers, and because it carried a fee to their survivor. The last reason is disposed of by the former decision. The first may be conceded; this suit being brought for the very purpose of subjecting the land to the payment of the plaintiff's judgment which would be idle if it were already a lien thereon. This leaves only the second and third for consideration—the effect of the alleged one-half or joint ownership by Mrs. Edson, and the claimed ambiguity of the will.

A "partial transcript" before us contains the following:

"Counsel for Plaintiff: It is admitted that the title of record to the lots described in the petition was in Willis Edson at the time of his death, and that at that time and some time previous said premises had been occupied by Willis Edson and his wife as their residence and homestead.

"Counsel for Defendants: That is all right.

"Mr. G.: It is further admitted Mary Edson elected to take under the will as probated, and

thereafter, in April, 1914, died without having made any other disposition of said property.

"Mr. Q.: That last statement in there I want taken out, 'without having made any other disposition of her property.'

"Mr. G.: I offer in evidence the original answer filed in this case by the defendants, which states some of these facts.

"I offer the inventory filed in the probate court by Mary Edson as administratrix of the estate of Willis Edson, deceased.

"Mr. Q.: I object to it as incompetent, irrelevant, and immaterial and not the best evidence.

"The Court: Overruled. * * *

"The inventory in question is in substance as follows, to wit: 'I, Mary Edson, residing at Topeka, Kansas, administrator of the estate of Willis Edson, deceased, do hereby made and return upon oath the following inventory of all the moneys of the deceased which are by law to be administered and which has come into my possession or knowledge and also of all the real estate of the deceased. I further declare upon oath that the estate of said deceased consists only of the property herein scheduled and listed, to-wit: Except household goods exempt under the law. * * * Lots 246 and 248 Eighth avenue, Topeka, Shawnee county, Kansas, \$3,750.'"

[2, 3] But aside from all this and conceding for the moment only that the property was acquired and owned by the parents as alleged, it was still the subject of their testamentary direction, and, as already construed, their mutual will gave to the survivor a life estate with power of disposal, remainder to the children. True, while the homestead of the devisors or their survivor it was property towards which the eye of their creditors could be turned in vain, but had it ceased to be such homestead by abandonment it would thereby have become like any other property they may have owned, subject to their debts. While they could not have defrauded their creditors by selling to a stranger, this is because while still occupied by them it was exempt. Again, had the survivor died leaving the children in possession as part of her family, it would still have been exempt not only from the debts of the devisors, but from the debts of the children so long as they might rightfully continue to occupy the property as their homestead. The theory of homestead exemption is the setting apart of real estate free from the claims of creditors, not the giving to any family or heirs the right to have a homestead and claim also as exempt other real estate because inherited from, or devised by, those whose homestead it was.

It has been held that when a husband with his own money purchases land in his wife's name for the purpose of placing it beyond the reach of his creditors, and then makes improvements thereon and occupies it with his family as a homestead, such transactions are not fraudulent as to subsequent creditors of the husband. And that in such case it makes no difference whether the husband or wife owned the money, or in whose name (of the two) the title was taken. *Hixon v. George*, 18 Kan. 253. In *Ashton v. Ingle*, 20 Kan. 670, 27 Am. Rep. 197, it was decided

that a judgment against an owner of nonexempt real estate attaches thereto, although at the time of the levy, it may be occupied as the homestead of the owner. In *Dayton v. Donart*, 22 Kan. 256, an owner of a homestead died intestate, leaving many debts and no personal property with which to pay them, and no other real estate. It was held that the title descended to the widow and children just the same as if it were not occupied as a homestead, "except that it descends to them subject to a certain homestead interest vested in the widow and such of the children as occupy the homestead at the time of the intestate's death. Syl. 1. That if the property be sold while still occupied as a homestead by the widow and one or more of the children, the title passes to the purchaser free from debts, although the property may afterwards be abandoned as a homestead by the widow and children. In the opinion it was said:

"But evidently from the statutes they hold the property as their absolute property, free from debts and division only, while some of them occupy the same as their homestead. If they all abandon the property as a homestead, it then becomes subject to debts and division the same as though it never was a homestead. This homestead right is probably just like any other homestead exemption right, except that it is held by the occupants (prior to the widow's marriage, and prior to all the children's reaching their majority) free from division or partition, as well as free from debts; and when it is abandoned as a homestead (if not previously sold) it becomes liable for the intestate's debts." 22 Kan. 270.

Stratton, Adm'r, v. McCandliss, 32 Kan. 512, 4 Pac. 1018, was to the effect that a homestead left by the husband and occupied by the widow as a homestead until her decease was thereupon subject to sale for the payment of the owner's debts. In another case the homestead owner died leaving a widow and several children, all of whom had reached majority. He had devised one-half to the widow and one-quarter to the son who resided upon the homestead until partition, by which the widow was allotted one-half the homestead, the son one-quarter, and the remaining one-quarter was set off to the other heirs. The widow sold her portion and abandoned the homestead. The heirs to whom the one-quarter was awarded never resided upon the homestead, and after the abandonment by the widow their one-quarter was unsold and unoccupied. The personal property left by the deceased was insufficient to pay the debts of the estate, and it was held that the one-quarter last mentioned was subject to sale for the payment of debts and cost of administration. *Barbe v. Hyatt*, 50 Kan. 86, 31 Pac. 694. In the opinion it was said:

"It has been settled that the death of the owner of the homestead does not transfer the title absolutely and unconditionally to the widow and children. It descends to them the same as other real estate owned by the deceased, except that it is subject to the homestead interests. So long as it retains its homestead character it cannot be sold to pay ordinary debts,

nor can there be a compulsory division and distribution. While it is so occupied it may be conveyed by the persons in whom the homestead interests vest, and the title to the property or any interest therein will pass free from any liability for the ordinary debts of the estate. Abandonment by them, however, will destroy the homestead interest, and when it is abandoned it becomes subject to the debts of the estate, the same as other lands which were never impressed with the homestead character." 50 Kan. 89, 31 Pac. 694.

In *Allen v. Holtzman*, 63 Kan. 40, 64 Pac. 966, the husband died leaving a will devising the property to the wife, who elected to take thereunder, and mortgaged the land, while occupying it with her children, to secure a personal debt, and it was held that such mortgage was a valid incumbrance. It was said in the opinion:

"After the husband's death and the election of the wife to take under the will, she took the whole estate. The children got none. Their homestead rights in the land were no greater after the death of their father than before." 63 Kan. 41, 64 Pac. 967.

In *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560, the widow who continued to occupy the homestead after the death of her husband was held to be entitled to so occupy the land free from forced sale for the payment of the husband's debts, and to so do after electing to take under his will, devising the homestead to her. When a wife, after the death of her husband, occupies the homestead alone, it is exempt as to her own creditors as well as those of her husband's estate, regardless of which spouse held the legal title. *Weaver v. Bank*, 76 Kan. 540, 94 Pac. 273, 16 L. R. A. (N. S.) 110, 123 Am. St. Rep. 155.

It is insisted that the land cannot be appropriated to the payment of the judgment because the latter has not been revived against the defendants. It was revived against Mary Edson as administratrix July 8, 1912. She died April 4, 1914, and this suit was begun May 4, 1914. Whatever estate Willis Edson left was, unless exempt, subject to appropriation for the payment of his debts. Mary Edson, by his will, took the property devised to her thus burdened, unless exempt, and thus subject when such exemption should cease. By the same mutual will the property passed to the children, and would have continued exempt from the debts of Willis Edson had it been and continued to be the children's homestead. But as they did not occupy it, they took it subject to the debts of their father; the judgment against his estate having been kept alive. The judgment, if not a lien on the land, could be made one, because the homestead shield had been lowered by the cessation of homestead occupancy. Had they by the will taken other land on which no claim of homestead could have been made, they would of course have taken it burdened with liability to appropriation for the payment of his debts. Having taken this land to which no homestead claim

could longer be made, they took it also thus burdened.

[4] But it is urged that this could at most be true only as to such interest as Willis Edson actually owned, and that if he owned but a half interest this is all that could be appropriated, hence the importance of permitting the defendants to show such half ownership only. It is true that only the actual interest owned by the judgment debtor could be reached. *Hixon v. George*, 18 Kan. 253; *Holden v. Garrett*, 23 Kan. 98; *McCalla v. Knight*, 77 Kan. 770, 94 Pac. 126, 14 L. R. A. (N. S.) 1258; *Emery v. Bank*, 97 Kan. 231, Syl. 3, 155 Pac. 34. While it is vigorously asserted and as vehemently denied that evidence as to ownership was received under the general denial, the supplemental abstract contains the statement that none was introduced. The defendants had a right to show if they could that their father owned only one-half the land, for in that event their loss by its appropriation to the payment of his debt would be cut in two. It was error, therefore, to sustain the demurrer to this part of the amended answer.

[5, 6] But it is insisted that Willis Edson could have deeded the property, freed from its homestead character, and by his will he accomplished the same thing, and, therefore, vested the title in his wife freed from the claims of his creditors; and that the children also took the property thus freed. As counsel says in his brief:

"If the fee title passed to the children and a life estate only to the wife, it still was a 'disposition' of the property while occupied as a homestead, that transferred the fee to the same free from debts of creditors."

In his reply brief, he asserts that:

"The homestead may be transferred to the children by a will, free from debt, the same as it may be made a gift to a stranger."

In *Dayton v. Donart*, 22 Kan. 256, it was said:

"They say that the first moment of bona fide occupancy by the widow and children so fixed the title in the occupants that no subsequent abandonment by them would have the effect to expose the property to liability for the payment of Church's debts. Now, if mere occupancy alone for any period of time, long or short, could have the effect to so free the land from liability for Church's debts that no subsequent abandonment of the premises would expose them to such liability, we should think that under the statutes a moment's time would be just as good as any longer period of time. But in our opinion no period of time, however long, is sufficient to give absolute title, free from debts, if the debts remain unpaid and not barred by the statute of limitations." Page 268.

In *Comstock v. Adams*, 23 Kan. 513, 33 Am. Rep. 191, the court had under consideration section 8 of the Descents and Distribution Act, providing that one-half in value of the husband's estate of which the wife had made no conveyance shall be set apart, etc. It was argued that the term "conveyance" should be given its broad and general sense, so as to include the conveyance of the property by will; but the court said:

"The word 'conveyance,' as used in the proviso of said section 8, clearly does not include a will. A will is never a conveyance. A conveyance operates in the lifetime of the grantor, while a will does not operate until after the death of the maker. Of course, death transfers all property, and a will says where it shall go; but this does not render a will 'a conveyance,' which the husband has made." 23 Kan. 524, 33 Am. Rep. 191.

In *Martindale v. Smith*, 31 Kan. 270, 1 Pac. 569, it was held that a husband could make a valid will giving a homestead to his wife, and that as against an heir, who did not occupy the property as a homestead, it would take effect immediately after the death of the testator and after the probate of the will, although the will stated that the testator devised the property to his wife, after paying all his legal debts. In the opinion it is said:

"When death occurs, the title to the property of the person dying must be transferred to some person. It cannot remain in the deceased; and the will simply designates where the title shall go." 31 Kan. 273, 1 Pac. 571.

The claim of counsel that the will could not take effect until the payment of the debts was thus disposed of:

"As against George Waybright, the heir and his grantees, we think the will took effect immediately after the death of the testator and the probate of the will, and such death and will immediately transferred the title to the property to the testator's wife, subject possibly to the payment of the debts of deceased, and subject possibly to his wife's homestead interests."

The language last quoted leaves the question now before us quite open.

In *Vining v. Willis*, 40 Kan. 609, 20 Pac. 232, a husband and wife occupied the homestead owned by her, the title being in her name, she having no children, and it was held that she could by will, without her husband's consent, devise a one-half interest to a third person, so that after her death such third person could take such interest. It was argued that the will amounted to an alienation of the estate which could only be accomplished by the joint consent of the husband and wife.

"We think these views are utterly untenable. A will never divests the owner of his property or of any interest therein. No interest passes by the will to the intended devisee; nothing that he can sell, or transfer, or incur; nothing that will pass from him to heirs or that he can devise or bequeath; and the will may be revoked by the testator immediately after its execution or at any time afterward and before his death. A person might execute 1,000 wills for the same property, yet no one of such wills would transfer anything; but when the testator should die the devisee mentioned in the last will executed would, under and by virtue of the statutes, take the property. It would not be the will, however, but death that would take the property from the testator; and it would be death, the statutes, and the will, all operating together, that would confer the property upon the devisee." 40 Kan. 611, 20 Pac. 233.

Section 8262 of the General Statutes of 1915 (Code Cr. Proc. § 337) provides that in case any person be imprisoned for life, his estate shall be disposed of as if he were nat-

urally dead. In *Smith v. Becker*, 62 Kan. 541, 64 Pac. 70, 53 L. R. A. 141, the meaning of the words "disposed of" were construed, and it was said:

"The words 'disposed of' are not in our judgment broad and comprehensive enough to reach to and embrace that act of the law which vests the ownership of property in an heir by inheritance. * * * It is an inapt expression to say that when an estate is cast by descent on the heir by the death of the owner, it has been disposed of."

A California decision was cited to the effect that a statute giving the husband absolute power to dispose of community property ought not be extended to a disposition by devise. The fourth section of the syllabus in *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560, reads as follows:

"Upon the death of her husband a wife may elect to take title under his will to their homestead, which she continues to occupy, without subjecting it to the payment of his debts." 68 Kan. 496, 75 Pac. 559 (64 L. R. A. 560).

It was argued that taking under the will necessarily implied taking subject to the debts of the testator in view of the statute authorizing one to devise his lands subject to the rights of creditors, but it was held that while by the will, the title itself was devised, and she elected to take thereunder, there was no hiatus in her occupancy of the premises as a residence, and the homestead privilege (arising out of occupancy) was not disturbed, any more than it would have been had her husband deeded the lots to her in his lifetime, while she was occupying them as a homestead.

"And since the lots in question were continually impressed with the homestead interest of Sue S. Cross in the lifetime of her husband, at the date of his death and during the following years until her own demise, creditors enjoyed no rights to which such lots were subject or to which the making of a will of them was subject."

In *Compton v. Gas Co.*, 75 Kan. 572, 89 Pac. 1039, 10 L. R. A. (N. S.) 787, holding that the widow owning an undivided half of the homestead may lease her interest subject to the rights of those occupying the premises as a homestead, it was said:

"As was held in *Gatton v. Tolley*, 22 Kan. 678, such sale or alienation is always subject to the right of the heirs to continue to occupy the premises as a homestead until the widow marries, the youngest child becomes of age, or the homestead is abandoned." 75 Kan. 575, 89 Pac. 1040 (10 L. R. A. [N. S.] 787).

In a note to this decision found in 10 L. R. A. (N. S.) 787, may be found numerous authorities more or less in point, but, like other decisions from other states, they are so dependent on local statutes as to be of little, if any, assistance. See *Weaver v. Bank*, 76 Kan. 540, 94 Pac. 273, 16 L. R. A. (N. S.) 110, 123 Am. St. Rep. 155, already referred to. From these citations, it is manifest that there is evolved the settled rule that a will is not a conveyance, and does not effect an alienation of real estate, and is not a disposal of it in the ordinary sense of the term. When,

therefore, the widow took under the will, she took subject to the husband's debts, in case they should be kept alive, and occupancy as a homestead should cease. When the children took by virtue of the same will, their title was not expanded, increased, or enlarged over that which the widow acquired on the death of her husband. While if they had been in occupancy as a homestead, it would have continued free from their father's debts, it was only free while such occupancy should continue, and no longer.

As to the claim of ambiguity and the consequent propriety of showing the real intent of the devisors, it must be observed that while, as stated in the former opinion, support could be found for a different legal conclusion touching the meaning of the will as drawn, the document is not ambiguous, but clearly within the rule of construction already announced, and hence there was no call and no room for evidence explanatory of intention. *Smith v. Holden*, 58 Kan. 535, 50 Pac. 447; *Holmes v. Campbell College*, 87 Kan. 597, 125 Pac. 25, 41 L. R. A. (N. S.) 1126, Ann. Cas. 1914A, 475; *Morse v. Henlon*, 97 Kan. 399, 155 Pac. 800.

The judgment is modified as to the sustaining of the demurrer, and the cause is remanded for further proceedings in accordance herewith. All the Justices concurring.

On Rehearing.

A rehearing was granted on the homestead question only, and for the third time this controversy has received somewhat unusual attention. *Postlethwaite v. Edson*, 98 Kan. 444, 155 Pac. 802; 102 Kan. 104, 171 Pac. 769. The right to will away real estate is not inherent, but is purely a creature of legislation. The Legislature may give and the Legislature may take away.

"The Legislature has plenary power to withhold or grant the right, and, if it grants it, may make its exercise subject to such regulations and requirements as it pleases." 40 Cyc. 997.

When this matter was attended to in this state it was enacted that one may give and devise property by will, "subject, nevertheless to the rights of creditors and to the provisions of this act." Gen. Stat. 1915, § 11752. This is all the power that has ever been given. The Legislature has not added and the courts cannot add thereto.

[7] Section 9 of article 15 of the Constitution sets apart certain property as a homestead which "shall not be alienated without the joint consent of the husband and wife, when that relation exists. * * *" Section 8 of the Descents and Distributions Act (Gen. Stat. 1915, § 3831) sets apart one-half in value of the husband's estate of which the wife has made "no conveyance." In *Comstock v. Adams*, 23 Kan. 513, 33 Am. Rep. 191, the sole question for consideration as expressly stated in the opinion was whether a will is a conveyance under the section last referred to, and after painstaking consideration the court

unanimously held that it is not. In *Vining v. Willis*, 40 Kan. 609, 20 Pac. 232, the point was whether a will is an alienation under the section of the Constitution referred to, and after a still more elaborate discussion it was unanimously held that it is not, and *Comstock v. Adams* was followed with approval. In *Barbe v. Hyatt*, 50 Kan. 86, 31 Pac. 694, these two decisions were referred to and reaffirmed. The first of these was rendered in 1880, the second in 1889, and the third in 1892, and in all these years neither the people, the Legislature, nor the courts have sought to change the rule of property thus embedded in the judicial system of this state. While loose expressions touching wills may be found, in no instance has this court decided anything to impair the force of this rule. In *Martindale v. Smith*, 31 Kan. 270, page 273, 1 Pac. 569, it was said that when death occurs the title to the property of the person dying must be transferred to some person, that it cannot remain in the deceased, and the will simply designates where the title shall go.

In *Vining v. Willis*, 40 Kan. 609, 20 Pac. 232, it was said that a will never divests the owner of his property; that when the testator dies the devise mentioned in the will takes the property by virtue of the statutes.

"It would not be the will, however, but death that would take the property from the testator; and it would be death, the statutes, and the will, all operating together, that would confer the property upon the devisee." 40 Kan. 611, 20 Pac. 233.

Also:

"It is not the will alone, however, that determines where the title shall go, for the will operating alone would be powerless. It is the will, and death, and the statutes, operating together, that determine where the property shall go. Indeed, it is the statutes which give force and efficacy to all." 40 Kan. 612, 20 Pac. 233.

After going over the matter again at length it was said:

"We think it appears from the statutes and from the decisions of the Supreme Court that the Legislature, the Governor, and the Supreme Court have always been of the opinion that the aforesaid constitutional provision has nothing to do with the question as to where the title to real estate, occupied as a homestead, shall go after the death of the owner of such real estate. It is evident that it has always been their opinion that the word 'alienated,' as used in said provision, means only a passing of some estate, title or interest in the homestead from the owner during his lifetime, and that it has no reference whatever to where his title or interest shall go after his death. These statutes and decisions have all the force and effect of a contemporaneous exposition of the true intent and meaning of this constitutional provision." 40 Kan. 620, 20 Pac. 238.

A homestead always contemplates a place for the residence of a family, and its character, as exempt property, is derived only from the fact of such occupancy. In *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560, the doctrine of family was expanded and applied to the case of a widow occupying

the homestead after the death of her husband. This was carried still further in *Weaver v. Bank*, 76 Kan. 540, 94 Pac. 273, 16 L. R. A. (N. S.) 110, 123 Am. St. Rep. 155, holding that the homestead right may persist in the survivor without regard to which held the legal title or the time when the indebtedness to pay which it was sought to be sold was incurred. Another modification was made in *Towle v. Towle*, 81 Kan. 675, 107 Pac. 228, 27 L. R. A. (N. S.) 550, two members of the court dissenting, wherein it was decided that a sale in partition is not a forced sale, and that distribution of the homestead may be had by the adult children while it is still occupied by the widow.

[8] It is now argued that another enlargement should be made, and that the property in this case not claimed to have been occupied by the present owners as a homestead should be deemed exempt from the debt sought to be enforced against it. Of course this means a reversal of the decisions referred to and the establishment of the contrary rule. It is argued that creditors should be construed to mean those holding claims which could in the lifetime of the testator be enforced against the property. In other words, that the power to devise given by the Legislature does not mean subject to the rights of creditors generally, or general creditors, which would be its natural meaning, but subject only to the rights of what might be called actual or potential lienholders, such as materialmen, or those holding claims for the purchase price. But the same Legislature which thus restricted the making of wills enacted that the homestead should not be exempt from sale for taxes, improvements, purchase price, or liens given by consent of both husband and wife. Hence creditors other than these must have been meant when using the phrase "subject * * * to the rights of creditors." Of course the phrase does not mean creditors whose eyes could not be turned toward the homestead for all understand a homestead to be exempt from the claims of general creditors. The phrase "subject * * * to the rights of creditors" must, according to the act on statutory construction, be construed according to the context "and the approved usage of the language." Section 10973, subd. 2, Gen. Stat. 1915. If only actual or potential lienholders were intended, there was no occasion to use this language at all because they were already protected by the Constitution and the statute as above shown. Hence the argument that only creditors who could have looked to the homestead in the life of the intestate were intended falls to the ground. In *Monroe v. May, Weil & Co.*, 9 Kan. 466, Mr. Justice Brewer, in speaking of the homestead right, said:

"A man may sell his homestead, and give good title, no matter how many judgments may be standing against him." 9 Kan. *475.

Again:

"Nor is there anything in the transaction of which creditors can complain, or upon which they can base any equity. * * * If placing the title in the wife's name had removed so much property from the reach of their claims, it might give them some pretense for insisting that no more property should be thus removed. But where the homestead is alike exempt, whether in the husband's or wife's name, we fail to see why placing it in the wife's name gives the creditors a right to call that a gift which the parties made a payment." 9 Kan. *476.

It is quite manifest that in this discussion general creditors were the ones referred to. In *Colby v. Crocker*, 17 Kan. 527, the plaintiff, who had loaned the owner \$800, for which he had no security, sought to require a mortgagee to first exhaust the homestead property. It was said:

"The homestead exemption laws provide in effect that the homestead shall be exempt from all debts except for purchase money, taxes, improvements, and liens given by the consent of both husband and wife. Now the plaintiff's claim does not fall within any of these exceptions." 17 Kan. 531.

He therefore must have been a general creditor like the plaintiff in the case before us. In *La Rue v. Gilbert*, 18 Kan. 220, a judgment was obtained against a homestead owner whose family continued to occupy after his death. The holder sought to require the mortgagee of the homestead and other real estate to exhaust the homestead property first. This was refused. Mr. Justice Brewer said:

"In giving a mortgage on the homestead, the debtor waives this homestead right, but only to the mortgagee, and does not thereby open the door to other creditors, or increase their equities." 18 Kan. 222.

In *Hixon v. George*, 18 Kan. 253, in discussing the claims of creditors who questioned the right of a husband to purchase land with his own money and put it in his wife's name and hold it as a homestead, it was declared that:

"It would have made no difference if the title to the property had been taken in George's name, and not in his wife's name. In either case, the property would have been exempt from the claims of any general creditor of either George or his wife." 18 Kan. 253.

In *Sproul v. Atchison Nat. Bank*, 22 Kan. 336, the court held:

"It is not illegal or fraudulent to hold property in a homestead exempt from the claims of general creditors; and the right of the homestead occupants to so hold such property is paramount to any right of any general creditor." Syl. 2.

In *Long Bros. v. Murphy*, 27 Kan. 375, it was held that an insolvent debtor having creditors pressing for the payment of their claims could not take goods purchased upon credit, and exchange them for real estate, and hold it as a homestead against such existing creditors. *Henderson v. Stetter*, 31 Kan. 56, 2 Pac. 849; *Stratton v. McCandliss*, 32 Kan. 512, 4 Pac. 1018; *Frick Co. v. Ketels*, 42 Kan. 527, 22 Pac. 580, 16 Am. St. Rep. 507; *Loan Association v. Watson*, 45

Kan. 132, 25 Pac. 586; *Wilson v. Taylor*, 49 Kan. 774, 31 Pac. 697; *Batley v. Barker*, 62 Kan. 517, 64 Pac. 79, 56 L. R. A. 33; *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560; *Hopper v. Arnold*, 74 Kan. 250, 86 Pac. 469; *Sawin v. Osborn*, 87 Kan. 828, 126 Pac. 1074, Ann. Cas. 1914A, 647; *Rose v. Bank*, 95 Kan. 331, 148 Pac. 745; *King v. Wilson*, 95 Kan. 390, 148 Pac. 752; *Milberger v. Veselsky*, 97 Kan. 433, 155 Pac. 957; *Scott v. Rogers*, 97 Kan. 438, 155 Pac. 961; *Fredenhagen v. Nichols & Shepard Co.*, 99 Kan. 113, 160 Pac. 997; *Walz v. Keller*, 102 Kan. 124, 169 Pac. 196—all involved controversies between homestead claimants and general creditors, and no distinction can be found between those which did and those which did not involve wills. In *King v. Wilson*, 95 Kan. 390, 148 Pac. 752, this is found: "Was it necessary for the plaintiff to allege that the former judgment was not for an obligation contracted for the purchase of the premises, or for the erection of any improvements thereon? In suits for the protection of the homestead right it is not necessary to allege that the debt sought to be enforced against the property is not embraced within any of the exceptions." 95 Kan. 393, 148 Pac. 753.

In *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560, the following is found:

"And since the lots in question were continually impressed with the homestead interest of Sue S. Cross in the lifetime of her husband, at the date of his death and during the following years until her own demise, creditors enjoyed no rights to which such lots were subject or to which the making of a will of them was subject." 68 Kan. 506, 75 Pac. 563 (64 L. R. A. 56).

There can be no question that in this expression general creditors were meant. The trouble is that we have no homestead in this case—simply some real estate which ceased to be a homestead when it ceased to be occupied as such.

"The homestead interest is not an estate in land. * * * It is an exemption of land under stated conditions. If the conditions do not exist, or having once existed are at an end, the exemption ceases." *Ellinger v. Thomas*, 64 Kan. 180, 185, 67 Pac. 529, 530.

If the homestead had at any time been abandoned by the widow of the judgment debtor while such judgment was kept alive it would at once have become subject to proper process for its payment. Had the makers of the will died intestate, leaving no family in possession, the property would likewise have become subject to the rights of the judgment holder. The fact that the will designated to whom it should go is now sought to be exaggerated into a continued exemption in the hands of the devisees. There is no potentiality in the oft used and frequently abused expression that the eye of the creditor need never be turned towards the homestead to justify a holding that property continues to be a homestead after it ceases to be one.

But it is argued that the will and the death and the statute together vested the ti-

tle in the defendants. It certainly cannot be said that the death conveyed any property to any one; it simply removed the present owner from this life. Indeed, counsel himself says in his brief that "death transfers nothing." It was long since settled law that the will did not and could not convey or alienate the land. The statute directed that it should go according to the desire expressed in the will, but only after probate (Gen. Stat. 1915, § 11784), and while these three insufficient causes may when combined produce the effect of a conveyance, which neither could do alone, there is nothing in the situation to give the will a potency not accorded to it by the statute. While the eye of the creditor need never be turned toward the homestead of the debtor, this situation continues only so long as it is a homestead. The only reason possible to be advanced for having a homestead provision is the protection of the family, and when, under our recent decisions, no member of the family continues to occupy it, the homestead character ipso facto ceases. When the survivor in this case departed this life, no one was left in possession claiming or who could claim any sort of homestead rights. The devisees took by force of the statute, which compelled them to take subject to the rights of creditors, who, having kept their judgment alive, had a right to look at this property as soon as it ceased to be a homestead, which it did upon the death of the survivor. While the testators might, during their occupancy of the homestead, have conveyed it away by deed, and while the creditors might not be able to show that they were in any wise defrauded thereby, this was not done. It could have been done regardless of this will or any other will that might have been drawn, but it was not done. Instead of conveying the property away the owners and occupiers chose to exercise their rights to designate where and how it should go at their death—only this and nothing more.

It is said that death is not an abandonment. Very well, but suppose the devisors had died simultaneously while in possession, whose homestead would it have been? It is not claimed to be the homestead of any one now, and it is not. The theory is advanced that by some sort of inherent efficacy the will carried over the exemption or the exempt quality of the land to the devisees. Why? Because a deed would have done so, forsooth. But a deed would have evidenced a present and complete divestiture and investiture of title. A will is powerless to do this. Being a mere creature of statute it can at the utmost result in designating the beneficiary subject to the rights of the creditors of the devisor. Had this will expressly provided that it was made subject to the rights of the devisor's creditors, it would simply have contained what the statute writes into every will as effectually as if inserted by the maker himself.

"Legatees succeed to the estate of the testator as beneficiaries and objects of his bounty, and have no rights or equities whatever as against creditors whose debts existed in the testator's lifetime, and this applies even to a legacy based on a valuable consideration. It has even been considered that the creditors have a lien on property which the testator has specifically devised or bequeathed by his will." 40 Cyc. 2060.

The statute has not said that the owner of a homestead may not convey it away by deed. This he may do, and unless he thereby works a fraud upon his creditors, this right is in no wise impaired, but the statute has in effect said that he may not will his homestead away without preserving the rights of his creditors. There is no possible reason in justice or equity why one should prefer a relative or a stranger who already has a homestead and who owes him nothing, to a creditor who may have furnished him the very means of subsistence for years without return.

The answer to the contention that if a deed cannot defraud creditors a will cannot is that the one is an inherently free act and the other a matter restricted and limited by law whose limits cannot be passed without violating the law itself. The point in *Cross v. Benson*, supra, was that, although the widow took under the will subject to the rights of creditors, she could not be ousted of her occupancy so long as it continued, because such occupancy was paramount to her rights as devisee.

When the Constitution was framed and adopted the country was new and land was of small value, but 160 acres of land and the improvements thereon in many cases now amount to a fortune of many thousands of dollars. If one owning such a homestead now can, by being the beneficiary in the will of another homestead, hold such other property free from the debts of the testator, then it would seem indeed that the effect, if not the object, of the exemption law is not to protect the family, but to defeat debts.

The former decision and opinion are adhered to.

MASON, MARSHALL, and DAWSON, JJ., concurring.

PORTER, J. (dissenting). A rehearing was granted on the homestead question only, and the sole question is whether under the will the property occupied by the testators in their lifetime as a homestead passed to the devisees free from the debts of Willis Edson. The question now under consideration has never been squarely before this court, and we are confronted at the outset with the established proposition of law that the owner may sell and convey the homestead—may even make a transfer of the same, with the avowed purpose of defeating his creditors, and such sale, conveyance, or transfer will not render the property liable for his debts. In other words, it is absolute-

ly exempt. The constitutional provision reads:

"A homestead * * * shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of the husband and wife, when that relation exists. * * *" Article 15, § 9.

In *Monroe v. May, Well & Co.*, 9 Kan. *466, it was said:

"The homestead is something towards which the eye of the creditor need never be turned. It is an element which may never enter into his calculations in his efforts to collect his debt. He may as well ignore that, as he does now (except in cases of fraud) the body of the debtor." 9 Kan. *476.

First, it is insisted the main question involved is no longer an open one in this state, for the reason that in a number of well-considered cases it has been held that a will is neither a "conveyance," as referred to in the statute, nor an "alienation," within the meaning of that word as used in the homestead clause of the Constitution. Second, it is insisted that under the statute of wills, the devisees in any will take the property "subject, nevertheless, to the rights of creditors." Gen. Stat. 1915, § 11752.

In support of the first of these contentions the cases of *Comstock v. Adams*, 23 Kan. 513, 33 Am. Rep. 191, and *Vining v. Willis*, 40 Kan. 609, 20 Pac. 232, and other cases following and approving them, are relied upon. There was, however, no principle of law actually involved in the *Comstock* Case, the decision of which settled the question to be determined here. The statute there considered was the statute of descents and distributions (Gen. Stat. 1915, § 3831), giving the wife an inchoate interest to the extent of one-half of the husband's real estate owned by him at any time during the marriage, and particularly that portion of the section which reads:

"That the wife shall not be entitled to any interest, under the provisions of this section, in any land to which the husband has made a conveyance, when the wife, at the time of the conveyance, is not or never has been a resident of this state."

The point decided was that the will was not a "conveyance" within the meaning of the statute. To understand the force and effect of the decision it is necessary to recall the purpose and intent of the statute which the court was then construing. It was an early-day statute, enacted to meet peculiar conditions then existing when the state was new and was rapidly being settled by men who came from distant communities. It was not uncommon then for a person to represent himself and to pass as single and unmarried, when, in fact, he had a wife living in some other state; sometimes the separation resulted from her refusal to reside in Kansas, sometimes from other reasons. The purpose of the statute was to facilitate the conveyance of land titles, and to protect those purchasing land by ordinary deeds of conveyance executed by one resid-

ing here and claiming to be single and unmarried, but who possibly had a wife living somewhere else. At the time it was enacted the means of communication with Eastern settlements and distant states was slow and uncertain. There cannot be the slightest doubt as to the intention of the Legislature; it was to relieve the purchaser from the difficulty of establishing a negative fact; that is, that the grantor had not a wife living elsewhere, instead of at the home of the husband where a wife is usually found residing. To have held that the word "conveyance" was intended to embrace all kinds of conveyances and to include a will would have been manifestly contrary to the spirit and purpose of the statute. It could not have been the intention to protect the rights of devisees under a will, because they need no such protection, since the wife is not a necessary party to the husband's will. It is manifest that the word "conveyance" was employed in the same sense as though the statute had been made to read "deed or covenant of conveyance," because the Legislature was enacting this particular clause for the sole purpose of dispensing with the necessity of the absent wife joining in the instrument. All that was necessary in the decision was to determine whether the statute so intended, or, on the other hand, should be construed as giving the husband power to exclude by will (to which she had not assented) the rights given her in other statutes to receive after his death one-half of his property. While the decision was placed mainly upon a consideration of the different manner in which title passes by will and by deed, and a narrow instead of a broad construction of the word "conveyance," nevertheless the court readily determined, and in part rested its decision upon a consideration of the statute in connection with the provisions in the same and other statutes intended to protect the wife's rights in the husband's property, and held that the particular statute there involved did not give to the husband the power "to exclude by will, against the consent of his wife, her rights to receive after his death one-half of his property, real and personal, although she may never have been a resident of Kansas." Syl. par. 3. The entire opinion, so far as it bears upon the particular statute, reads:

"We do not think that *Ira Comstock* had the power to exclude by will, and against the consent of his wife, *Avis F. Comstock*, her right, after his death, to one-half of his property, real and personal, although she may never have been a resident of Kansas; and we think the statutes conclusively settle this question. Sections 8, 17, 31, and 32 of the act relating to descents and distributions (Comp. Laws 1879, pp. 379, 380), sections 1 and 35 of the act relating to wills (Comp. Laws 1879, pp. 1001, 1004). The word 'conveyance,' as used in the proviso of said section 8, clearly does not include a will. A will is never a conveyance. A conveyance operates in the lifetime of the grantor, while a will does not operate until after the death of the maker. Of course, death trans-

fers all property, and a will says where it shall go; but this does not render a will 'a conveyance,' 'which the husband has made.' It is the death that transfers the property. Besides, if we should hold that the will and death taken together constitute 'a conveyance,' 'which the husband has made,' under said section 8, we would overturn other provisions of the statutes contained in said sections 17 and 35. This we cannot do." 23 Kan. *524, 33 Am. Rep. 191.

Section 17 of the statute of descents and distributions, to which the writer of the opinion referred, reads:

"The widow's portion cannot be affected by any will of her husband, if she objects thereto." * * * Gen. Stat. 1915, § 3840.

And section 39 of the act relating to wills, to which he referred, reads:

"No man while married shall bequeath away from his wife more than one-half of his property." Gen. Stat. 1915, § 11790.

By way of comment, and by what may perhaps be called a refinement of reasoning, the writer of the opinion drew a distinction between a will and a conveyance generally, based upon the difference in the manner by which wills and deeds operate to convey property. The same process of reasoning might lead to confusion according to the sense in which the word "deed" is used, by which we sometimes mean the written instrument itself, duly executed, but not yet delivered; without which it is not in one sense a deed, and yet in one sense it is. The register of deeds, for example may be compelled at the instance of a third party to record it as a deed. He has no means of determining, nor any duty to determine, whether it has been delivered. When we speak of a deed as conveying property we assume that the instrument was not only executed, but was delivered. We might, but seldom do, go further, and consider that the deed would not constitute a conveyance except by force of law authorizing property to be thus transferred; and that we have a "statute of conveyances," which regulates what estate is conveyed by different kinds of deeds. The statute not only provides what a deed shall contain, but declares what interest in real estate "passes" or is "conveyed" thereby (using these expressions interchangeably, as does the statute of wills). Nor would accuracy of statement require us to say that the deed alone does not convey, but that the instrument, together with delivery, and the law, operating together, constitute it a conveyance. After having been fully executed, it may or may not be delivered. That rests upon a contingency. So, whether a will duly executed shall remain unrevoked is an uncertainty, which generally cannot be known or determined until the death of the testator; but it requires a refinement of reasoning, which leads nowhere, to say that it is the death of the testator that conveys the property, or that it is death and the law which operate as a conveyance. Of course, there must be a law, statutory or otherwise, to enable the testator to dispose of his prop-

erty by will, just as it required a law to enable him to own it and manifest dominion over it in the first place. The will cannot and was not intended to take effect until the death of the person who executed it. His death was certain; the time when it should occur was uncertain. When death occurred the will operated as a conveyance of the property to the devisee. In abstracts of title, as well as in common parlance, and in judicial decisions, it is said that property passed by the will, not by any statute, not by death, but by the will; and its terms are often pondered and considered by the legal profession and by the courts in an effort to discover what the testator intended to convey.

The court considered all parts of the particular statute in connection with other statutes and construed them in *pari materia*, in order to give all of them force and effect, if possible. *State v. Young*, 17 Kan. 414; *In re Hall*; *Petitioner*, 38 Kan. 670, 17 Pac. 649; *Wenger v. Taylor*, 39 Kan. 754, 18 Pac. 911; *Gilbert v. Craddock*, 67 Kan. 346, 72 Pac. 869. Another rule of construction which if followed would have lead the court to the same result is, that the meaning of a statute is to be derived from its general terms and manifest purpose (*Gleason v. Sedgwick County*, 92 Kan. 632, 635, 141 Pac. 584), and another rule equally applicable is that a thing which is within the letter but not within the manifest spirit of the act is not in contemplation of the law. Indeed, the second ground upon which the decision was rested is itself conclusive, and in my opinion more in accord with sound reasoning than the first. The statement in the opinion that "a will is never a conveyance" was not necessary to the opinion, nor was it an accurate statement of the law. That the word "conveyance" was given in the opinion a technical and restricted meaning is quite clear because of the express language employed by the Legislature in the statute of wills, and the language used by the court in numerous decisions in which it has been declared that a will does "convey" property and is a "conveyance." For instance:

The first section of the statute of wills authorizes the owner of real estate to "give and devise the same to any person by last will and testament." Gen. Stat. 1915, § 11752. Section 33 provides that the will is not "effectual to pass real or personal estate" (Gen. Stat. 1915, § 11784), unless admitted to probate or recorded. In section 57 of the statute the Legislature expressly construes a will to be a "conveyance." The section reads:

"When lands, tenements or hereditaments are given by will to any person for his life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall be construed to vest an estate for life only in such part taken, and a remainder in fee simple in his heirs." Gen. Stat. 1915, § 11808.

Section 59 reads:

"Every devise of real property in any will shall be construed to convey all the estate of the testator therein which he could lawfully devise, unless it shall clearly appear by the will that the testator intended to convey a less estate." Gen. Stat. 1915, § 11810.

In *Bennett v. Hutchinson*, 11 Kan. *398, Mr. Justice Brewer, after quoting the foregoing provision of the statute, said:

"It provides simply a rule of construction. It is like the clause in section 2 of the act concerning conveyances. * * * Its purpose, as all lawyers know, was to avoid the frequent controversies at the common law as to whether a devise passed only the life estate or a fee simple." 11 Kan. *411.

In numerous other sections (35, 54, 58) of the statute of wills, the will itself is spoken of as passing the title. In *Niquette v. Green*, 81 Kan. 569, 584, 106 Pac. 270, it was held that section 33 of the statute of wills "refers to wills generally which themselves pass title." In *Holt v. Wilson*, 82 Kan. 268, 108 Pac. 87, it was said:

"Where property is given in clear language sufficient to convey an absolute fee, the interest thus given shall not be taken away, cut down or diminished by any subsequent vague and general expressions." 82 Kan. 273, 108 Pac. 88.

In *Breen v. Davies*, 94 Kan. 474, 146 Pac. 1147, it was held that:

"The word 'devise' is used in its popular sense, and relates to the disposal of personality as well as real estate." Syl. 1.

There is not much force in the suggestion that the *Comstock Case* adopted a rule of construction which must be regarded as binding because the Legislature has all these years permitted it to remain unchanged. The legislative declaration that "a will is a conveyance, and does convey," has also remained unchanged, and, as already noted, has often received the sanction of this court.

The opinion in the case of *Vining v. Willis*, 40 Kan. 600, 20 Pac. 232, was also written by Justice Valentine, and he quoted with approval much of the comment of the former in respect to the manner in which a will operates, by force of death and the statutes, to dispose of property. The only question involved, however, was the construction of the word "alienation," as used in the homestead provision of the Constitution, which declares that the "homestead * * * shall not be alienated without the joint consent of husband and wife." The title to the homestead in that case was in Mrs. Vining. The land was occupied by herself and husband as their homestead. She died leaving no children, and left a will devising one-half of the land to the defendants. The husband sued to recover the property, claiming the will was void because it amounted to an "alienation" of the homestead without his joint consent. The syllabus, after stating the facts, declares the law to be that she could by will and without the consent of her husband devise a one-half or any less interest in the land to a

third person, so that such a third person takes the interest thus devised. This was all that was decided, and it was only necessary to give a restricted in place of a broad, general meaning of the word "alienation," as used in the Constitution. Of course, the owner of the land comprising a homestead may dispose of it by will the same as any other property he owns, and it would be absurd to contend that he cannot. The statute of wills gave Mrs. Vining the power to bequeath away from her husband one-half of her property.

The Supreme Court of Illinois had occasion to consider the same question, and readily disposed of the contention by holding it to be "preposterous" to say that the word "alienation" in a homestead exemption law was intended to be used in its broadest sense and to include a disposition by will. In the opinion it was said:

"It [alienation] must mean a transfer or conveyance; such a one as the signature and acknowledgment of a party are proper to effect, as the law requires those acts as conditions to the alienation of the homestead. If the homestead exemption applies to the case of the descent of property, then it may be released in the mode provided by the statute, as an act contemplates that it may be released. But it would be preposterous to suppose the Legislature intended any such thing as that the 'signature and acknowledgment of the wife' should apply to the case of the operation of the law of descent." *Turner v. Bennett*, 70 Ill. 263, 267.

In the *Vining Case* the court, after referring to the statute of wills and construing it in connection with the homestead provision, very properly gave a restricted meaning to the word "alienation." The opinion expressly states that the word sometimes is used in a broader sense so as to "include the transfer of property by will and death and the statutes; and perhaps this use of the word in such a case is not inaccurate." 40 Kan. 614, 20 Pac. 234. The courts differ upon the question whether the word "alienation" properly includes a transfer by will or devise. In *Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 44, 48, 28 Am. Dec. 150, it was said:

"The word 'alien' or 'alienate' extends not only to alienations of land in deed, but also to alienations in law. A transfer of title by devise * * * would be as technically an alienation as a transfer by deed."

To the same effect, see *Burbank v. Rockingham Mut. Fire Ins. Co.*, 24 N. H. 550, 57 Am. Dec. 300. The correct rule of construction, and the one upon which the decision in *Vining v. Willis*, supra, was, in part, rested, may be stated substantially as follows: The word "alienable" may be broad enough to include dispositions by will, when not otherwise restrained by the context. But, where used in the same connection with respect to the joint consent of husband and wife, it cannot be said that it was intended to embrace testamentary dispositions. See *Bouvier's Law Dict.* and cases cited.

We are not concerned in the present case, however, with the definition of the word

"alienation," and what I have said with respect to the case of *Vining v. Willis*, supra, is merely to demonstrate that although it has been relied upon as an authority, and although it approved and followed some of the dictum in the *Comstock* Case, the decision itself determined nothing involved in the question now under consideration. It is said that we have no homestead question here because the defendants neither occupy the premises nor claim a homestead right in themselves. However, we have a most important question to determine for the first time, which affects the character and extent of the homestead right under the Constitution, and in determining it we must not lose sight of the long-settled policy of this court that the homestead law must be liberally construed for the purpose of carrying into effect its beneficent provisions. Has the owner the right freely to dispose of it released from the claims of general creditors, or is his right to dispose of it free from the claims of general creditors restricted to a conveyance by deed, which must take effect in his lifetime and be accompanied by a surrender of possession and an abandonment of the premises as a homestead? It is conceded that he has the right to dispose of it in any manner he may see fit during his occupancy; that he may sell or give it away; that he may do this with the avowed purpose to prevent his general creditors from ever obtaining any liens upon it; and that a deed of conveyance will have that effect.

The Constitution itself places no restriction upon the owner's right to dispose by will of the property held as a homestead. Indeed, the Constitution does not in express terms declare that he may sell and convey it free from the liens of general creditors, but that is the construction the court has always given to the Constitution. The provision is, that the joint consent of the husband and wife is necessary to alienate or convey the homestead when that relation exists. There is no question here of alienation without joint consent, because the will under which the defendants acquired the property was a joint and mutual will executed by the husband and wife. There being no restriction in the Constitution as to the method by which a homestead may be conveyed or disposed of, how should the Constitution be construed in determining whether the homestead guaranty includes the right to dispose of the property occupied as a homestead by will or devise? I think this can be readily answered by reference to a few fundamental rules of construction which the authorities agree may properly be applied in order to interpret the meaning of constitutional provisions.

"It is a fundamental canon of construction that a Constitution should receive a liberal interpretation, especially with respect to those provisions which were designed to safeguard the liberty and security of the citizen." 6 R. C. L.

§ 44, citing *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. Ed. 1060, and other cases.

"A constitutional guaranty of the enjoyment of life, liberty and property carries with it all that effectuates and renders complete the unrestrained enjoyment of that guaranty." 6 R. C. L. § 243.

"Another important canon of construction of a similar nature which is frequently applied to Constitutions is that the limitations of a power furnish a strong argument in favor of the existence of that power," citing *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23. 6 R. C. L. § 43.

In the same section it is said that:

"An exception of any particular case presupposes that all those which are not included in such exception are embraced within the terms of a general grant or prohibition. The rule is likewise well established that where no exception is made in terms, none will be made by mere implication or construction."

Applying these general rules of construction, it is plain that in one respect alone does the Constitution limit the power of the owner of the homestead as to its disposition. The express exception relates to one particular matter. The owner may not alienate the property without the joint consent of the husband and wife while that relation exists. All the other powers and rights which the owner has in the homestead and which "are not included in such exception" the owner still possesses, including the valuable right to dispose of it in any of the recognized methods by which the owner can convey or dispose of his real estate.

Since the Constitution places no restriction upon the right to convey, and contains no limitation as to the method by which the land may be disposed of, the Legislature is powerless to create such restriction or limitation. Because the statute of wills declares that the owner of property shall have the right to give or devise the same to any person, "subject, nevertheless, to the rights of creditors," it is argued that the power thus to convey is created coupled with a limitation or restriction, which applies to the right an owner of land comprising a homestead has to convey it by a will. But, if we were to give the construction contended for to the language "subject, nevertheless, to the rights of creditors," still if there was included in the homestead guaranty the right of the owner to dispose of it by any of the recognized methods by which the owner may dispose of real estate, then the Legislature may not restrict the right. As said in *Cross v. Benson*, 68 Kan. 495, 506, 75 Pac. 558, 64 L. R. A. 560, "it can only be replied that the Constitution is the paramount law, and its mandates must be obeyed." In the opinion in that case it was said in reference to the power of the Legislature to restrict the homestead right by the provisions of the statute of descents and distributions, or by the statute of wills:

"It is further claimed that the taking of title under the will of a homestead owner necessarily abrogates the homestead right because a person must devise his lands 'subject, nevertheless, to the rights of creditors.' Gen. Stat. 1901, §

7937. This proposition ignores the persistence of the exemption from forced sale, independent of changes in the title already illustrated in the case of descent. In this case Sue S. Cross occupied the lots in question as a residence and as the family of the owner, H. C. Cross. By the will of the owner the title was devised to her and she elected to take under the will. But there was no hiatus in her occupation of the premises as a residence and as the family of H. C. Cross. The homestead privilege was no more disturbed than it would have been had H. C. Cross deeded the lots to his wife in his lifetime and while she was occupying them as a homestead. * * * And since the lots in question were continually impressed with the homestead interest of Sue S. Cross in the lifetime of her husband, at the date of his death and during the following years until her own demise, creditors enjoyed no rights to which such lots were subject or to which the making of a will of them was subject." 68 Kan. 506, 75 Pac. 562 (64 L. R. A. 560).

The opinion in *Cross v. Benson*, written by Mr. Justice Burch, has received recognition by other courts, text-writers, and annotators as a leading case. It is reported in 64 L. R. A. 560, and is cited in 21 Ann. Cas. 248, in a note on "The right to make testamentary disposition of homestead," wherein it is said:

"The power of the owner of a homestead to dispose of the same by his will depends in most instances on the statutes of the particular state creating the homestead, since those statutes usually contain either an express prohibition against such testamentary disposition, or other provisions which are held to exclude the exercise of such power. In the absence of a provision of this nature either in the Constitution or statutes of the state, it is generally held that an owner may make a testamentary disposition of his homestead."

It is cited in 13 R. C. L. 647, in support of the rule that the use of merely formal phrases "will not make a devise of a homestead subject to the payment of the testator's debts. To do this, the language employed must be unequivocal and imperative." The Supreme Court of Minnesota cites *Cross v. Benson*, in *Larson v. Curran*, 121 Minn. 104, 140 N. W. 337, 44 L. R. A. (N. S.) 1177. There it was held that where a decedent, leaving no surviving spouse, child, or issue of deceased child, disposes of his homestead by his last will, the devisee takes it free from claims of creditors of the decedent, unless the testator clearly indicates an intention that the homestead shall be liable to the payment of his debts; and a general direction by the testator in the will to pay all his just debts out of his estate, followed by the devise of the residue, is not sufficient to indicate such intention. The Minnesota court had previously in *Eckstein v. Radl*, 72 Minn. 96, 75 N. W. 112, held that:

"A testamentary disposition of the statutory homestead, assented to in writing by a surviving husband or wife, will not render the property liable to the satisfaction of the debts of the testator."

In that case the court said:

"We quite agree with the trial court that the devise of a homestead does not render it subject to any liability for the payment of a deviser's debts. When living, the owner may sell and convey the homestead, or he may make a fraud-

ulent transfer of the same, and such sale, conveyance or transfer does not render the property liable for his debts. It is absolutely exempt." 72 Minn. 96, 75 N. W. 113.

At the time the *Eckstein* Case was decided, the first section of the Minnesota statute of wills was broader than ours. It read:

"Any person of full age and sound mind may dispose by will of all or any part of his property subject to the payment of his debts. * * * Gen. Stat. (Minn.) 1894, § 4423.

Ours reads, "subject, nevertheless, to the rights of the creditors." In the later case of *Larson v. Curran*, supra, it was said:

"That the homestead of the decedent is not, after his death, occupied as a homestead by a member of his family entitled to occupy it as such, does not affect its character as being exempt from liability for the decedent's debts." Syl. 5.

It was further said in the opinion:

"As stated by appellant, the only question on this appeal is whether, under the will of decedent, the property occupied by him in his lifetime as a homestead passed to respondent free from the debts of decedent. This is a question of the intention of the testator as expressed in his will. That he had the right to give up his homestead to his creditors, there can be no doubt. But he had the right to devise the homestead, and the devisee would take it free from the claims of his creditors. * * * *Eckstein v. Radl*, 72 Minn. 95 [75 N. W. 112]."

"It is probably correct that an intention to devise the homestead will not be presumed when the law forbids a disposition thereof to which the surviving spouse has not assented in writing, or when there are children to whom it would descend in the absence of a devise. But when there is no surviving spouse, and no surviving children, or issue of deceased children, there is no reason to adopt a strained construction of the will in order to arrive at a conclusion that the homestead is not devised." 121 Minn. 106, 107, 140 N. W. 338 (44 L. R. A. [N. S.] 1177).

The advancing policy of modern courts in construing the rights of the owner of a homestead was thus referred to in the opinion:

"The history of the constitutional and statutory provisions in this state in regard to the extent and character of the homestead exemption shows a steadily advancing policy in favor of the debtor, his family, and his grantee or devisee. * * * The whole trend of legislation on the subject of the descent of the homestead free from debts is indicative of a policy that creditors of the deceased shall have no recourse to the homestead, unless the debtor leaves no spouse or children, and either makes no devise thereof, or clearly indicates an intention to make a devise thereof subject to the claims of his creditors. The general rule is that only property of the decedent that was unexempt in his lifetime is after his death subject to his debts, * * * whether it precedes or follows in the will a devise of the exempt property, does not have the effect of charging the homestead with the payment of debts. * * * The case of *Cross v. Benson*, previously cited, is strongly in point, and not distinguishable from the case at bar. * * * The fact that in *Cross v. Benson* there was a wife and children to whom the homestead would have descended in the absence of a will is not sufficient to distinguish that case from this in principle, or to detract from its authority." 121 Minn. 109, 110, 140 N. W. 338 (44 L. R. A. [N. S.] 1177).

In Wisconsin the homestead may be devised. *Johnson v. Harrison*, Adm'r, 41 Wis.

381; *Albright v. Albright*, 70 Wis. 528, 36 N. W. 254; *Whitmore et al. v. Hay*, 85 Wis. 240, 55 N. W. 708, 89 Am. St. Rep. 838. In *Myers' Guardian v. Myers' Adm'r*, 89 Ky. 442, 12 S. W. 933, it was held that a testator may will his homestead and invest the devisee, though such devisee may be his wife or child, with the title the same as he could do by deed, and that the property would not be subject to his debts. This was followed and approved in *Pendergest, etc., v. Heekin, etc.*, 94 Ky. 384, 22 S. W. 605. The Court of Appeals of Kentucky in *Schonbachler v. Schonbachler*, 22 Ky. Law Rep. 314, 317, 57 S. W. 232, 234, an opinion following the other cases, said:

"And we see no reason why he may not do practically the same thing by will, because his creditors are prejudiced in one state of case no more than in the other."

Cross v. Benson has been cited and approved in more than a dozen instances in our own decisions; and it furnished the basis for the decision in *Weaver v. Bank*, 76 Kan. 540, 94 Pac. 273, 16 L. R. A. (N. S.) 110, 123 Am. St. Rep. 155, in which the case of *Ellinger v. Thomas*, 64 Kan. 180, 67 Pac. 529, was overruled. In that case Mrs. Weaver elected to take under the will of her husband devising a life interest in the homestead to her, and it was held, following the doctrine of *Cross v. Benson*, that she held the property exempt against her own creditors as well as against the creditors of her husband's estate, and in the opinion it was said:

"Where the property is sought to be taken to satisfy her debt, she must be deemed to be herself the owner."

The opinion commented upon the fact that the Constitution does not in terms declare that the homestead exemption shall survive the dissolution of the family, but it was held that the policy of the homestead law justified the court in giving that construction to the constitutional provision. Our homestead law has been construed as giving to the owner the right to deal with it as exempt property, something to which the eye of the creditor, that is, the general creditor, "need never turn." The owner may sell and dispose of the homestead; he may make a gift of it to another and the one to whom the title is given, or who becomes the purchaser, takes it free from the claims of the general creditors. The Constitution does not in express terms give the owner the right to sell and convey it free from the claims of general creditors; neither does it in terms declare that the exemption shall survive the dissolution of the family, but by the aid of a liberal interpretation we have held that these rights are as firmly imbedded in the provision as though they had been expressly declared. Moreover, why should it be held that the proviso in section 1 of the statute of wills authorizing an owner of real estate to devise it to another "subject, nevertheless, to the rights of cred-

itors," was intended to restrict the right of the owner of a homestead in devising it, and to save the rights of general creditors? It is certainly as fair an inference from the language used that the intention was to make merely a general proviso, saving whatever rights creditors might have to look to the homestead. The Constitution had already put creditors into two classes with respect to the homestead, and declared that only those having mortgage liens or liens for purchase money or improvements have the right to look to the homestead, and had made no provision that the general creditor could do so, and the court has declared that they need never look in that direction. When the statute of wills was enacted the question as to just what the rights of general creditors in respect to the homestead are was something quite uncertain and as yet undetermined. It has required numerous decisions, and we are still endeavoring to determine the extent of their rights. It seems obvious that it requires no strained construction of the language of the statute to say that it was not the intention to give to the creditor something denied him by the Constitution. As already observed, the expression is not as broad in effect as the language used in the Minnesota statute of wills, which read, "subject to the payment of his debts," and yet the Supreme Court of Minnesota held, upon the authority of their own decisions and the doctrine of *Cross v. Benson, supra*, that the devisee takes the property free from the claims of creditors.

The situation of the plaintiff and other general creditors in the present case is in no respect different from what it would have been if the owners of this real estate a few minutes before their death occurred had made a deed conveying the property to the devisees. Their creditors are prejudiced in one situation no more than in the other; in fact, they are not wronged in either, because they never had any right to look to this property for the payment of their debts.

One of the anomalous effects of the decision in the present case appears from a consideration of our decisions holding deeds under certain conditions not testamentary in character. Under these decisions *Willis Edson* and his wife might have conveyed the homestead to their children, with a condition that the deed should not take effect until the death of both grantors; and had their occupancy of the homestead continued until their death, the property would have passed to the grantees free from claims of the creditors. All that would have been necessary was for the grantors to hand the deed to a third party, with instructions to deliver it at their death to the grantees. *Nolan v. Otney*, 75 Kan. 311, 89 Pac. 690, 9 L. R. A. (N. S.) 317. And this would be true, even though the grantees were not aware that the deed had been executed. *Gideon v. Gideon*, 99 Kan. 332, 161 Pac. 595. Does it not seem like giving force to a mere quibble of words and losing

sight of the substance of things to say that we are bound by the comment in the Comstock Case respecting the different manner in which title to real estate passes under a will and under a deed, language which we have seen was not necessary to the decision?

There was no hiatus, no space of time, of which courts or the law can take any cognizance, and during which the lien of the judgment of the plaintiff could attach to the property. It was occupied as a homestead until the death of the last of the two testators. The moment the breath left her body the title passed by the will to the devisees. Occupancy as a homestead warded off the lien until death occurred, and then the title had passed. As said in the opinion in *Martindale v. Smith*, 31 Kan. 270, 1 Pac. 569:

"At the death of the owner of real estate the title must go somewhere, and we know of no law which prevents the owner from saying by will, where it shall go." 31 Kan. 273, 1 Pac. 571.

In that case the only question was whether a husband can devise by will the other half interest in his homestead. It was held that he could. This court has established the precedent that in construing the homestead law the policy of giving it a liberal construction is of paramount importance to the doctrine of stare decisis. In *Weaver v. Bank*, supra, Mr. Justice Mason, speaking for the court, used this language:

"The court is of course always reluctant to treat as still open a question which it has once definitely passed upon. But in matters involving the interpretation of the Constitution it is usual and proper to give less force to the doctrine of stare decisis than in other cases." 78 Kan. 544, 94 Pac. 274 (16 L. R. A. [N. S.] 110, 123 Am. St. Rep. 155).

The majority opinion, employing what seems to me a narrow rather than a liberal interpretation, gives to the homestead provision a meaning which deprives the homestead owner of a valuable privilege which has been declared is included within the general constitutional guaranty of the right of property, which "carries with it all that effectuates and renders complete the unrestrained enjoyment of that guaranty." 6 R. C. L. § 243, and cases cited.

The saying that "Constitutions march," like the statement that the sun moves, is incorrect. Speaking in strictness, a Constitution, until amended as provided by its terms, remains what it was originally. The understanding of the full scope and effect of its general provisions is often a matter of growth and development, and it is the conception of what its true meaning is that may be said to march. The Constitution speaks in general language, and avoids detail; it is merely the general framework upon which rest all the rights and all the privileges it guarantees, as well as all the duties and all the obligations imposed by it. In ascertaining the scope and effect of the Constitution the court may call to its aid its knowledge of modern

social conditions, and is not restricted to the tallow candle in use at the time the instrument was adopted. Until repealed or amended by the Legislature, statutes stand immovable; Constitutions march, aided by judicial interpretation necessarily employed to give full force and effect to the rights and privileges guaranteed by their general terms. Take as a concrete example the constitutional provision for establishing the district court (article 3, § 5), which provides that in each judicial district "there shall be elected * * * a district judge." It never occurred to the framers of the Constitution that the time might come when the population of a district or of a single county would increase to such an extent as to require more than one judge of the court to transact the business. A literal and strict construction of the language of the Constitution (insisted upon by many able members of the legal profession) would have made a constitutional amendment necessary to meet the changed conditions and necessities. But, giving a liberal and broad construction to the Constitution in order to carry into effect its general purpose, the court had no difficulty in deciding that the Legislature might provide for a district court in a single county which should consist of a number of divisions, each presided over by a district judge, and that each of the several judges should be "a judge of the district court." *State v. Hutchings*, 79 Kan. 191, 98 Pac. 797. A still better concrete example may be found in the broad and liberal construction given by the Supreme Court of the United States to what is known as the "Commerce clause" of the federal Constitution. No one would have the hardihood to contend for a moment that when they gave to Congress the power "to regulate commerce between the states," the framers of the Constitution had the most remote conception of the vast extent of power granted by the language as construed in hundreds of decisions of the federal Supreme Court.

In adopting the homestead provision, the framers of our Constitution never got beyond the idea of preserving to the head of the family a refuge from the assaults of general creditors while the family occupied the premises with him. In interpreting the homestead provision the court, however, has given it a broad and liberal construction in order to carry into effect the general purpose of the framers, and has extended the right to the widow and to the members of the family after the death of the owner. The right has thus been extended by a gradual process which has been brought about as the net result of judicial interpretation in cases involving many different situations and conditions. In *Shirack v. Shirack*, 44 Kan. 653, 24 Pac. 1107, it was held that a minor child who was the only heir of his widower father, and living with him on a homestead, was entitled to claim the benefit of the homestead

after the father's death, although living elsewhere with his guardian. The progress or march of the Constitution halted at times. In *Batley v. Barker*, 62 Kan. 517, 64 Pac. 79, 56 L. R. A. 33, the court gave a narrow construction to the homestead clause, and held that the homestead right would not persist for the benefit of an unmarried daughter of adult years who resided on a homestead with her father until his death, he dying intestate and leaving her his sole heir, and she continuing to occupy the premises as her home. The land was held subject to sale for the debts of the father. The uncertainty as to the extent of the homestead right prevailing at the time the decision was written is apparent in the following statement of Mr. Justice W. R. Smith in the opinion:

"We are not called upon to decide, nor do we find that the question has been passed upon by this court, that where the head of a family residing on a homestead loses his wife and children, the right one fixed by law to hold the homestead as against creditors is divested by such circumstance." 62 Kan. 521, 64 Pac. 80 (56 L. R. A. 33).

The court was called upon in *Cross v. Benson* to consider the homestead guaranty as affecting a situation to some extent unique, and the decision cast additional light upon the meaning of the Constitution. It marks another stage in the progress of the Constitution, or rather in the conception of what the homestead provision means. Later, because the court was satisfied with the decision, it was made the basis for an express declaration in *Weaver v. Bank*, supra, overruling *Ellinger v. Thomas*, and in my opinion, it went far beyond the decision in *Batley v. Barker*, supra, and in effect has overruled the doctrine of that case.

It requires the exercise of but a modicum of the liberality employed by the highest court in the land in the interpretation of the commerce clause of the federal Constitution for this court to hold that the valuable right of the owner of a homestead to dispose of it in any of the recognized methods of conveying real estate was included in the constitutional provision, since the only exception to his right to convey does not include a prohibition against disposing of it by will; and, following the logic of *Cross v. Benson*, and the force and effect given to it by the Minnesota court, to say that since the right to dispose of the homestead by devise or will was not taken from the owner by the Constitution, the Legislature has no power to do so, if that were held to be the intention of the provision of section 1 of the statute of wills.

As regards the intention of the Legislature. I think the majority opinion not only places too much emphasis upon the proviso in section 1 of our statute of wills, but assumes that it was intended specially to limit the transfer of the homestead by will, although the homestead is not specifically mentioned.

Only 18 states of the Union have in their statute of wills a provision declaring that property devised by will shall be subject in some manner to the debts of the testator. Among the 30 states which have no such provision are those comprising the 13 original colonies and the states created from their territory. Notwithstanding the absence of such a provision in 30 states, it cannot be doubted that the law is the same in all the 48 states, and that in all of them property devised by will is subject generally to the rights of creditors. It amounts to this: The law is the same whether the statute of wills contains such a provision or not. Things that are equal to the same thing are equal to each other. The language of the proviso in our statute of wills adds nothing to the force or effect of the statute nor to the rights of creditors. Without such a provision in the statute the owner of property conveyed it by will subject, generally, to his debts; the statute makes no reference to a homestead, and it seems obvious that the language was not intended and should not be construed to deprive the owner of a homestead of the right to convey or dispose of it by will just as he could have conveyed it by deed. In the words of the Supreme Court of Kentucky in *Myers' Guardian v. Myers' Adm'r*, supra:

"And it would, therefore, seem no more injury to creditors, nor in contravention of the purpose and reason of the homestead law, for the debtor to pass the title by will than by deed; for if, as has been held, he can, by deed, and for merely love and affection, convey the remainder interest to his children, reserving a life estate to himself, we see no reason why he may not do practically the same thing by will, because his creditors are prejudiced in one state of case no more than the other."

After the fullest consideration of the importance of the question involved, I have reached the conclusion that the devisees under the will take the land free from the claims of the general creditors.

I am authorized to say that Mr. Chief Justice JOHNSTON and Mr. Justice BURCH join in this dissent.

(54 Mont. 472)

STATE ex rel. HUBBERT v. DISTRICT COURT OF EIGHTEENTH JUDICIAL DIST. IN AND FOR HILL COUNTY et al. (No. 4190.)

(Supreme Court of Montana. March 7, 1918.)

MANDAMUS ~~and~~ (3) — REMEDY BY APPEAL — APPOINTMENT OF RECEIVER.

Writ of supervisory control will not be granted where the court appoints a receiver of the property in controversy; the remedy by appeal from the order granted by Rev. Codes, § 7099, being adequate and speedy.

Appeal from District Court, Hill County; W. B. Rhoades, Judge.

Application by the State, on the relation of E. J. Hubbert, for writ of supervisory control to the District Court of the Eighteenth Judi-

cial District in and for the County of Hill, and W. H. Rhoades, Judge thereon. Denied and dismissed.

Donnelly & Carleton, of Havre, for relator. Thos. D. Long, of Havre, for respondents.

HOLLOWAY, J. In the case of Masterson et al. v. Hubbert, pending in the district court of Hill county, the trial court, at the instance of the plaintiffs and without notice to defendant, appointed a receiver to take charge of the property in controversy. The defendant moved the court to annul or abrogate the order appointing the receiver, and, the motion being denied, applied to this court for a writ of supervisory control.

The remedy sought is an extraordinary one. The writ never issues as a matter of course. It is authorized by the Constitution, out of abundance of caution, to prevent a failure of justice by supplying a means for the correction of manifest error committed by the trial court within jurisdiction where there is no other adequate remedy and gross injustice is threatened. *State ex rel. Carroll v. District Court*, 50 Mont. 428, 147 Pac. 612. If the statute provides a remedy which will afford the same or equivalent relief, it must be pursued.

The motion to abrogate the order appointing the receiver was made upon the records and files in the case. The only records in the case at that time were the complaint and order of appointment. By section 7099, Revised Codes, the order appointing the receiver is appealable, and an appeal would present for consideration the entire record upon which the motion to abrogate was made, and therefore every question raised before the lower court or which may be raised on this application could be raised on the appeal. If the order should be reversed on appeal, the effect would be to blot out the receivership as from the beginning. In other words, the appeal would accomplish the same result as would have been accomplished if the trial court had sustained defendant's motion and the same result as would now be accomplished if on this application we should direct the lower court to annul its order. The fact that a motion to annul the order of appointment was made and denied does not affect the right to appeal from the original order, and the time within which an appeal from such order may be taken has not expired. It follows that in this instance the statutory remedy is adequate. It is also speedy; for under the rules of this court such appeal is entitled to advancement as of right.

For these reasons, this application is denied, and these proceedings are dismissed.

Dismissed.

BRANTLY, C. J., and SANNER, J., concur.

(24 N. M. 348)

STATE v. LUCERO. (No. 2095.)

(Supreme Court of New Mexico. March 12, 1918.)

(Syllabus by the Court.)

1. CRIMINAL LAW §841—TRIAL—INSTRUCTIONS—OBJECTION.

Errors in instructions must be called to the attention of the trial court by proper objections or exceptions before the instructions are given to the jury.

2. SUFFICIENCY OF EVIDENCE—LARCENY.

Evidence held to sustain verdict.

(Additional Syllabus by Editorial Staff.)

3. CRIMINAL LAW §1064(5)—APPEAL—SUFFICIENCY OF EVIDENCE—OBJECTION.

Where the motion for a new trial did not call the trial court's attention to the alleged insufficiency of the evidence as to venue to sustain a conviction, the question was not reviewable on appeal.

Appeal from District Court, San Miguel County; Leahy, Judge.

Juan V. Lucero was convicted of the larceny of one head of neat cattle, and he appeals. Affirmed.

O. A. Larrazolo, of Las Vegas, for appellant. George C. Taylor, Asst. Atty. Gen., for the State.

ROBERTS, J. Appellant was tried and convicted in the district court of San Miguel county under an indictment charging him with the larceny of one head of neat cattle, the property of Florencio Garcia. The venue was laid in the county of San Miguel.

[1] Two points are relied upon here for reversal: First, that the trial court erred in giving instruction No. 10 relative to where the trial of an offense may be had, where it is committed within 500 yards of a boundary line between two counties. This instruction, however, is not subject to review here because the alleged vice in it was not called to the attention of the trial court by objection or exception prior to the giving of the instruction. Errors in instructions must be called to the attention of the trial court by proper objections or exceptions before the instructions are given to the jury. *Territory v. Pettine*, 16 N. M. 40, 113 Pac. 843; *State v. Eaker*, 17 N. M. 479, 131 Pac. 489; *State v. Alva*, 18 N. M. 143, 134 Pac. 209, 211; *State v. Padilla*, 18 N. M. 573, 139 Pac. 143; *U. S. v. Cook*, 15 N. M. 124, 103 Pac. 305; *State v. Graves*, 21 N. M. 556, 157 Pac. 160; *State v. Johnson*, 21 N. M. 432, 155 Pac. 721.

[2, 3] The second point urged is that the verdict was not sustained by the evidence, in that there was no evidence to show commission of the crime in San Miguel county. An examination of the transcript, however, does not sustain appellant's contention. There was evidence from which the jury might reasonably conclude that the animal was stolen within San Miguel county; nor is this question here for review, because not

properly called to the attention of the trial court in the motion for a new trial. In such motion the attention of the court was not directed to the fact that appellant claimed there was insufficient evidence to establish venue.

For the reasons stated, the judgment of the trial court will be affirmed; and it is so ordered.

(24 N. M. 346)

STEAN v. OCCIDENTAL LIFE INS. CO.
(No. 2141.)

(Supreme Court of New Mexico. March 12, 1918.)

(Syllabus by the Court.)

1. INSURANCE §400—LIFE INSURANCE—"INCONTESTABLE."

The word "incontestable," as used in life insurance policies providing that the policy shall be incontestable, means indisputable and amounts to a guaranty that no objection shall be taken to defeat the policy on the death of the person whose life is insured.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incontestable.]

2. INSURANCE §517—LIFE INSURANCE—INCONTESTABLE POLICY—DEFENSE OF SUICIDE.

An incontestable clause in a policy of insurance does not preclude the defense of suicide, where the suicide clause in the policy is a part of the contract to pay, providing how much shall be due and payable in the event of death by self-destruction.

Appeal from District Court, Bernalillo County; Mechem, Judge.

Suit by Gussie I. Stean against the Occidental Life Insurance Company. Judgment for plaintiff, and she appeals. Affirmed.

Heacock & Cornell, of Albuquerque, for appellant. A. B. McMillen, of Albuquerque, for appellee.

ROBERTS, J. This suit was instituted in the court below by appellant to recover from appellee the sum of \$2,000, alleged to be due appellant as beneficiary under a policy of insurance of \$2,000 on the life of her husband, Earl R. Stean, issued by appellee. Appellee answered and admitted the execution of the policy and alleged that there was due thereon the sum of \$76.80, which was tendered to appellant. The case was submitted to the court on stipulation of facts, substantially as follows:

The policy of insurance was issued on the 19th day of June, 1915, and, in consideration of an annual premium of \$38.40 to be paid on the 18th day of June of each year, the company agreed to pay \$2,000 to the beneficiary upon receipt of due proofs of the death of the insured should such death occur within ten years from the date of the policy and while the policy was in force. The policy contained two provisions which are involved in this case, which are as follows:

"1. This policy is incontestable after one year from date of issue except for nonpayment of

premiums and is absolutely free from all conditions as to residence, occupation, travel or place of death. * * *

"7. Death by self-destruction, sane or insane, within two years of the date of the issue hereof, shall limit the amount payable by the company to the total premiums paid by the insured, and no more. This policy is issued on the non-participating plan. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties."

The insured had paid two annual premiums of \$38.40 each, and on the 7th day of March, 1917, while the policy was in full force, the said Earl R. Stean died by self-destruction. The insured having died more than one year after the issuance of the policy but within less than two years from such time, the trial court found that under said paragraph 7 the beneficiary was entitled to only the annual premiums paid by the insured and entered judgment accordingly. To review this judgment this appeal is prosecuted.

[1, 2] The sole question presented under the pleadings and stipulation of facts in this case is the proper construction of the policy and the amount to be recovered thereunder. That it was competent for the company to limit its liability in case of self-destruction by the insured is not questioned, and that it had such right is well settled. 25 Cyc. 878; Bigelow v. Berkshire Life Ins. Co., 93 U. S. 284, 23 L. Ed. 918. The provision in case of self-destruction within two years of the date of the issue of the policy, and its effect, is clear, and there can be no question as to its meaning; but appellant relies upon the incontestable clause of the policy to defeat the clause relative to self-destruction. Appellant contends that appellee has contested the policy, and her argument and the authorities cited are directed to this theory of the case. Of course, if it is true that the construction which appellee claims should be placed upon the policy amounts to a contest, clearly appellant would be right in her contention. It is beyond question that in the interpretation of a policy of insurance it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity which in making the insurance it was his object to secure, and when the words used by the insured are, without violence susceptible of two interpretations, that which will sustain his claim and cover the loss must in preference be adopted. May on Insurance, § 175; Elliott on Contracts, vol. 2, § 1528, and cases cited.

We are unable to see how the assertion by the insurance company that its liability is limited to the return to the beneficiary of the premiums paid by the insured under the suicide clause amounts to a contest of the policy. The insurance company admits that the policy is in full force and effect and that it is liable thereunder, but insists that its liability is limited to the return of the premiums paid because of the fact that the insured commit-

ted suicide within two years. The provision that its liability in such case shall be limited to a return of the premiums is clear, and there can be no question as to its meaning. The incontestable clause in the policy is in substance that the validity of the policy will not be questioned after the expiration of one year, but the suicide clause is not one which enters into the original validity of the contract, but one which limits the right of recovery after the full existence of the contract is established. A very good definition as to the meaning of "incontestable" is found in *Simpson v. Life Ins. Co. of Virginia*, 115 N. C. 393, 20 S. E. 517, which is as follows:

"That a promise that all assurances shall be unquestionable means indisputable, and amounts to an absolute guaranty that no objection shall be taken to defeat the policy on the death of the person whose life is insured."

In construing life insurance policies as in the construction of other contracts, the entire contract is to be construed together for the purpose of giving force and effect to each clause. 25 Cyc. 740. In the policy under consideration, the clause limiting the liability in the case of self-destruction does not conflict with the incontestable clause. The amount payable in case of death by self-destruction is just as much a part of the contract as is the amount payable in case of death from natural causes. Neither the one nor the other can be determined without examining the terms of the contract. Neither amount will be payable unless the policy is valid and in force. The right to the amount payable in case of self-destruction depends upon exactly the same prerequisites as the amount payable in case of death from natural causes. In this case there is no fact in controversy. There is no contest upon the facts. The sole question presented is the application of the law to the facts; that is, when the appellee asked the court to construe the policy according to the plain language embraced therein, did that amount to a contest under the incontestable clause? It must be clear that every resistance by the insurer against the demand of the beneficiary is in one sense a contest, but it is not a contest of the policy; that is, not a contest against the terms of the policy but a contest for or in favor of the terms of the policy. In other words, there are two classes of contests; one to enforce the policy, the other to destroy it. Undoubtedly the term "incontestable" as used in a life insurance policy means a contest, the purpose of which is to destroy the validity of the policy, and not a contest the purpose of which is to demand its enforcement. Here, the appellant and the appellee are demanding exactly the same thing, namely, the enforcement of the terms of the policy. The dispute is as to those terms, and seeking the construction by the court of the terms of the policy and the application of the terms when ascertained is not a contest of the policy. In the case of *Childress v. Fraternal Union*

of America, 113 Tenn. 252, 82 S. W. 832, 3 Ann. Cas. 236, the same point was involved, and the court held that the assertion by the insurance company of its limited liability under the suicide clause was not a contest of the policy. This case was cited with approval by the Appellate Court of Indiana in the case of *Court of Honor v. Hutchens*, 79 N. E. 409. The same rule was announced in the case of *North America Union v. Trenner*, 138 Ill. App. 586. In 14 R. C. L. 1233, it is said:

"It would seem that a provision for reduced liability in the case of death by suicide is not affected by the incontestable clause."

We are of the opinion, that, while the policy in this case became incontestable after one year except upon the grounds stated, that it was in force according to its terms and those terms being plain and explicit to the effect that the beneficiary in case of suicide of the insured should be entitled only to recover the premiums paid, the amount for which judgment was rendered in the court below and which was tendered into court, the judgment of the court must be affirmed, and it is so ordered.

HANNA, C. J., and PARKER, J., concur.

(24 N. M. 351)

STATE v. ROMERO. (No. 2145.)

(Supreme Court of New Mexico. March 12, 1918.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1159(2)—APPEAL—VERDICT—REVIEW.

Where there is substantial evidence to support the verdict of the jury, the same will not be disturbed on appeal.

2. CRIMINAL LAW §404(4) — EVIDENCE — CLOTHING WORN BY DECEASED.

Under circumstances of this case, it was not error to permit the state to introduce in evidence clothing worn by deceased at time of killing.

Appeal from District Court, San Miguel County; Leahy, Judge.

Julian Romero was convicted of murder in the first degree, and he appeals. Affirmed.

William J. Lucas and William G. Haydon, both of East Las Vegas, for appellant. Milton J. Helmick, Asst. Atty. Gen., for the State.

PARKER, J. The appellant, Julian Romero, was convicted of murder in the first degree, in the district court for the county of San Miguel.

The undisputed evidence shows that the appellant killed Maria Varela de Jaure, at the time alleged in the indictment, by shooting her. Nor is there any dispute of the fact that appellant and deceased had been on friendly terms shortly prior to the time of the killing. Appellant claims, however, that he was exceedingly drunk at the time he fired the fatal shot, and that he had no recol-

lection of his conduct in this respect. It is argued that the verdict of murder in the first degree cannot be sustained, because of prejudice existing in the minds of the jury, due to the admission and exhibition of the clothing of the deceased in evidence. Counsel for the appellant consequently argue that the verdict of the jury would not have been murder in the first degree, had the court excluded consideration of the clothing of deceased.

[1] 1. There is evidence in the record tending to show that appellant was not drunk at the time he fired the fatal shot; his conduct at and prior to this time indicating that he possessed his faculties, whereas the evidence introduced on behalf of appellant would indicate that he was drunk and did not possess his faculties. There is substantial evidence, however, to support the verdict of the jury, and the verdict will not, therefore, be set aside on appeal.

[2] 2. The crucial question is whether the court erred in admitting in evidence the clothing of the deceased. Counsel for the appellant contend that the admission and exhibition of the blood-stained clothing of the deceased served no legitimate purpose in the case, and that it tended to inflame the minds of the jurors and prejudice them against the appellant. It is contended that the killing was admitted, as was the location of the wound on deceased and the relative position of the parties at the time the fatal shot was fired. In the oral argument of the case, counsel for appellant stated that the location of the wound could have been proved by the state by evidence other than the clothing.

We fully discussed the law with reference to the admissibility of such evidence, in the case of *State v. McKnight*, 21 N. M. 14, 35, 153 Pac. 76. We held in that case that such demonstrative evidence was admissible, but that it should not be admitted, unless it serves to identify the deceased or honestly explain the transaction. Where there is no issue or contest as to facts which such evidence would legitimately tend to prove, there is no justification for its admission. Thus, in *Gillespie v. State* (Tex.) 190 S. W. 146, the defendant stated that there would be no issue on the question as to the location and character of the wounds. It was held that the court erred in admitting in evidence the bloody clothing of the deceased, because all that such evidence would prove was conceded by the appellant. In *McKinney v. State* (Tex.) 187 S. W. 960, 963, the testimony of two state witnesses was not in complete harmony as to the location of the wounds on the body of the deceased, and it was held that the clothing was therefore properly admitted. See, also, *Cole v. State*, 45 Tex. Cr. R. 225, 75 S. W. 527, 530; *Lucas v. State*, 50 Tex. Cr. R. 219, 95 S. W. 1055.

In the case at bar the indictment charged murder in the first degree, and an issue was

made thereon by appellant's plea of not guilty. At the trial it thereupon became incumbent on the state to prove the material allegations of the indictment beyond a reasonable doubt. The clothing was an item of evidence tending to prove, in part, those allegations. The appellant not only did not admit all relevant matter which the clothing might tend to prove, but from an examination of the record it appears that his counsel questioned the evidence of the state as to the number of shots which were fired by appellant at the deceased. We are satisfied that the circumstances of this case were such as permit the introduction of the clothing in evidence.

The judgment of the trial court is therefore affirmed; and it is so ordered.

HANNA, C. J., and ROBERTS, J., concur.

(24 N. M. 339)

TRUJILLO et al. v. TUCKER.

ARNWINE et al. v. SAME;

(Nos. 2079, 2080.)

(Supreme Court of New Mexico. March 12, 1918.)

(Syllabus by the Court.)

1. REPLEVIN §30—AFFIDAVIT—SUFFICIENCY—VALUE OF PROPERTY.

An affidavit in replevin in substantial compliance with the statute is sufficient, and where the form prescribed does not state the value of the property, and the statute does not require the value to be stated, an affidavit is not defective because it fails to set forth the value of the property described.

2. REPLEVIN §59—COMPLAINT—VALUE OF PROPERTY.

The value of the property sought to be replevined need not be stated in the complaint, where suit is filed in a court of general jurisdiction, and the statute does not require the complaint to state the value.

3. APPEAL AND ERROR §719(1)—ASSIGNMENTS OF ERROR—REVIEW.

Questions not raised by the assignments of error will not be considered.

4. PROPERTY §9—OWNERSHIP AND POSSESSION—EVIDENCE.

Any competent evidence may be introduced to establish the fact of ownership and right of possession of personal property.

Appeal from District Court, Lincoln County; Medler, Judge.

Suit in replevin by Francisco Trujillo and another against Thomas H. Tucker, and suit in replevin by Allan Arnwine and another against the same defendant. Demurrer to complaint overruled and judgment for plaintiffs in each case, and defendant appeals. Judgment in each case affirmed.

George B. Barber, of Carrizozo, for appellant. George W. Prichard, of Santa Fé, for appellees.

ROBERTS, J. The above cases were tried together and upon the same evidence in the

district court, by agreement; and, as the same identical questions are involved in both appeals, they will be considered together here. In each case the appellees here, plaintiffs below, filed a suit in replevin in the district court. The action in each case was commenced by the filing of a complaint and affidavit in replevin by the appellees in the office of the clerk of the district court for Lincoln county. The affidavits in replevin filed were in the exact words of the form prescribed by section 4355, Code 1915. Appellant appeared in each case and filed a plea in abatement in which he set forth that the affidavits in replevin failed to allege any value to the property sought to be recovered and asked that the actions be dismissed because not based upon a lawful affidavit as required by the statute. The pleas in abatement were stricken from the files upon motion by counsel for appellees. Appellant then demurred to the complaints upon the ground that the complaint in each case was defective in that it failed to state the value of the property described and sought to be replevied. The demurrer was overruled and appellant answered. The case being at issue was tried by the court without a jury.

The possession of 19 head of calves was involved in the Arnwine Case and 8 head of calves in the Trujillo Case. In the Arnwine Case the court decreed that appellees in that case were entitled to the possession of 19 head of calves; that appellant should return said calves, in default of which he should pay to appellees \$665, and judgment for this sum was entered against the sureties on the forthcoming bond. A similar judgment was entered in the other case for the return of 8 head of calves or the sum of \$280. To review these judgments these appeals are prosecuted.

[1, 2] The first point made by appellant in each case is that the court erred in sustaining appellees' motion to strike from the files appellant's plea in abatement and in not quashing the writ of replevin and in not sustaining appellant's demurrers to the complaints. The affidavit in replevin was in exact compliance with the form prescribed by section 4355, Code 1915, and was clearly sufficient. Neither the statute nor the form prescribed requires any statement in the affidavit as to the value of the property. An affidavit in replevin in substantial compliance with the statute is sufficient. 18 Ency. P. & P. 513.

The suit having been filed in the district court which had jurisdiction of the action regardless of the amount involved, it was not necessary to allege in the complaint the value of the goods. Where such a suit is filed before a justice of the peace where the jurisdiction of such officer is limited by section

3252, Code 1915, such allegation would be essential. The statute does not require the value of the goods to be stated in the complaint, and even though the value had been alleged in the complaint it would have served no useful purpose as neither party would, upon the trial, be bound by such stated value, nor would the officer taking the bond be warranted in acting upon the value so alleged. There are cases which hold that it is essential that the complaint should state the value of the goods, but these cases evidently arose under statutes which so require. The following cases and authorities hold that the value need not be alleged in the complaint. *Blake v. Darling*, 116 Mass. 300; *Litchman v. Potter*, 116 Mass. 371; *Pomeroy v. Trimmer*, 8 Allen (Mass.) 398, 85 Am. Dec. 714; *Root v. Woodruff*, 6 Hill (N. Y.) 418; *Britton v. Morss*, 6 Blackf. (Ind.) 469.

[3] It is next urged by appellant that "the record proof fails to establish the market value of the calves in controversy." This question is not raised by the assignments of error, hence is not here for consideration.

[4] The third and fourth propositions will be considered together. The third is that "the court erred in admitting oral testimony to prove up the right of possession and ownership of the branded calves involved in the suit by colors," and the fourth is that "the court erred in admitting in evidence plaintiffs' bills of sale." Appellees testified that they were the owners of the calves in question; that they had purchased the same from named individuals. The calves purchased were described by colors and brand marks, and bills of sale for the calves were introduced in evidence. If appellant were right in his contention that a party could not prove ownership by either parol evidence or written bills of sale, we fail to understand how it would be possible for the owner of property to establish his right to its possession. The propositions advanced are so palpably unsound that no discussion other than the mere statement of the same is necessary. In the case of *Gale & Farr v. Salas*, 11 N. M. 211, 66 Pac. 520, it was held that, in a civil action wherein sheep are replevied, bills of sale or a certified copy of recorded brand is competent evidence of ownership or right of possession; but that any other competent evidence may be introduced to establish the same facts or the identity of the animals.

It is lastly urged that the judgment entered is contrary to the law and the evidence. The evidence fully supports the judgment of the court and was warranted by the law.

The judgment in each case will therefore be affirmed, and it is so ordered.

HANNA, C. J., and PARKER, J., concur.

(24 N. M. 344)

STATE v. HILL. (No. 2122.)
(Supreme Court of New Mexico. March 12, 1918.)

(Syllabus by the Court.)

INDICTMENT AND INFORMATION §75(1) —
VERBAL INACCURACIES—EFFECT.

Where the sense of an indictment is clear, nice or technical exceptions are not to be favorably regarded; therefore verbal inaccuracies, or clerical errors which are explained and corrected by necessary intentment from other parts of the indictment are not fatal.

Appeal from District Court, Doña Ana County; Medler, Judge.

Fred Lehman Hill was convicted of embezzlement, and he appeals. Affirmed.

Wade & Taylor, of Las Cruces, for appellant. C. A. Hatch, Asst. Atty. Gen., for the State.

ROBERTS, J. Appellant was convicted of the crime of embezzlement, and appeals. The first ground relied upon for a reversal is that the court erred in not sustaining his motion in arrest of judgment. This motion challenged the sufficiency of the indictment. The indictment was drawn under section 1544, Code 1915, which makes it larceny for any officer, agent, clerk, or servant of any incorporated company, etc., except apprentices and other persons under the age of 16 years, to embezzle or fraudulently convert to his own use any money or property of another which shall have come into his possession or shall be under his care by virtue of such employment. The point made against the indictment is that it does not charge that the property embezzled came into the possession of appellant by virtue of his employment. The language in this respect is as follows:

"Did then and there by virtue of his said employment as such clerk * * * have in his possession and under his care, custody, and control of the property and moneys of."

The alleged defect is occasioned by the use of the word "of" before the words "the property," but this does not destroy the sense of the indictment, and does not render it defective. Where the sense of an indictment is clear, nice or technical exceptions are not to be favorably regarded; therefore verbal inaccuracies, or clerical errors which are explained and corrected by necessary intentment from other parts of the indictment, are not fatal. 22 Cyc. 291. The indictment here, read as a whole, clearly shows that the appellant was charged to have had the property in question under his care, custody, and control.

Another objection to the indictment is that the pleader used the words "by reason of" his said employment, instead of "by virtue of." What has been said disposes of this objection.

The remaining points upon which appel-

lant relied for a reversal all go to the question of the sufficiency of the evidence to sustain the verdict. We have read the transcript, and have considered all the objections stated, and find that there is no merit in any of them.

For the reasons stated, the judgment will be affirmed; and it is so ordered.

HANNA, C. J., and PARKER, J., concur.

(24 N. M. 333)

STATE ex rel. SEDILLO v. SARGENT,
State Auditor. (No. 2136.)

(Supreme Court of New Mexico. March 5, 1918.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW §48 — **CONSTITUTIONALITY OF STATUTE—CONSTRUCTION.**

Where the validity of a statute is questioned on the ground that it is unconstitutional, it is the duty of the court to uphold the statute when the conflict between it and the Constitution is not clear, and the implication always exists that no violation of the Constitution has been intended by the Legislature.

2. STATUTES §211 — **CONSTRUCTION—TITLE.**

In construing statutes, if the meaning thereof is doubtful, the title, if expressive, may have the effect to resolve the doubts by extension of the purview or by restraining it, or to correct an obvious error.

3. STATES §131 — **APPROPRIATION OF MONEY — CONSTITUTIONAL PROVISIONS.**

Section 27, art. 4, of the state Constitution does not prevent the Legislature from appropriating money to pay for services rendered the state by a servant or contractor outside the scope of his previous employment. Where the Legislature of 1915 (Laws 1915, c. 86, § 1) appropriated the sum of \$2,000 to pay a named individual for translating from English into Spanish the Code adopted at that session, which Code so adopted did not include the prefatory matter, nor index, accompanying the English publication, and such party voluntarily translated such additional matter and read proof and corrected the same on the Spanish publication, and incurred expenses not contemplated by the original appropriation, a succeeding Legislature could constitutionally appropriate money to pay for such extra services.

4. STATES §131 — **LEGISLATIVE POWER—APPROPRIATIONS — CONSTITUTIONAL PROVISIONS.**

Section 1, c. 28, Laws 1917, construed. Held, that such section does not appropriate money, as extra compensation contrary to section 27 of article 4 of the Constitution.

Hanna, C. J., dissenting.

Appeal from District Court, Santa Fé County; Holloman, Judge.

Mandamus by the State of New Mexico, on relation of A. A. Sedillo, against William G. Sargent, State Auditor. Judgment for relator, and defendant appeals. Affirmed.

H. L. Patton, Atty. Gen., for appellant. F. W. Clancy, of Santa Fé, for appellee.

ROBERTS, J. A. A. Sedillo, applied to William G. Sargent, state auditor of New Mexico, for a warrant for the sum of \$1,500 authorized to be paid to the said Sedillo un-

der the provisions of chapter 28 of the Laws of 1917. The auditor refused to issue such warrant on the ground that the said chapter was an unconstitutional enactment. Sedillo thereupon applied to the district court of Santa Fé county for a writ of mandamus to compel the auditor to draw the warrant. The auditor made a return to Sedillo's application, setting up the invalidity of the act. The trial court sustained the application of Sedillo, and, in a final judgment, ordered that a peremptory writ issue unto the auditor. From such judgment the state auditor appeals.

The Attorney General contends that section 1 of chapter 28 of the Laws of 1917 violates section 27 of article 4 of the state Constitution. This section, so far as pertinent, reads as follows:

"No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made."

The Legislature of 1915 adopted the present Code, which, as adopted, embraced sections 1 to 5901, inclusive. The same Legislature, in the general appropriation bill (section 1, c. 86, Laws 1915) provided:

"For translating into Spanish, under the supervision of A. A. Sedillo, of the codification of the laws of New Mexico adopted at this session, \$2,000."

Thereafter Hon. S. B. Davis, Jr., and Judge M. C. Mechem, who compiled the Code, annotated the same and prepared an exhaustive and thorough index. They likewise prefaced the Code with the Constitution of the United States of America and amendments thereto, the treaty of peace between the United States and Mexico at the city of Guadalupe Hidalgo, February 2, 1848, the Gadsen Treaty between the United States and Mexico, the Organic Act establishing the territory of New Mexico, the Enabling Act for the state, and the Constitution adopted January 21, 1911, which was also annotated.

Both the Spanish and English languages being spoken and used in the state, and a portion of the population not being able to understand both languages, it has been the uniform practice to publish all laws in both Spanish and English; and in all revisions and compilations of statutes heretofore published the volume in either language has been the exact counterpart of the other, including prefatory matter, indexes, and annotations. After the compilers of the present Code had prepared the same for publication, as stated, Mr. Sedillo, appellee, in order to make the Spanish edition as full and complete as the English edition voluntarily translated all the prefatory matter, annotations, and index. Both editions of the Code were printed by a firm in Chicago, and the printers were unfamiliar with the Spanish language, and it was necessary, or at least Mr. Sedillo so assumed, that some one familiar with the Spanish language should read proof on the Spanish

edition. This task he undertook and performed, and in and about this work made three or four trips to Chicago at his own expense.

The Legislature in 1917 enacted chapter 28, the title to which act reads as follows:

"An act appropriating the sum of one thousand five hundred (\$1,500.00) dollars to pay A. A. Sedillo for expenses sustained and extra work done and services performed in connection with the translation into Spanish of the 1915 codification of the laws of New Mexico, and other printed matter contained in the Spanish edition of the New Mexico Statutes Annotated, codification of 1915, including the prefatory matter, annotations, code and indexes, in said volume contained and other than the 1915 Session Laws."

Section 1 of the act reads as follows:

"There is hereby appropriated the sum of one thousand five hundred (\$1,500.00) dollars to be paid to A. A. Sedillo on account of expenses sustained and extra work done and services performed by him in connection with the translation and preparation for publication of the Spanish edition of the 1915 codification of the laws of New Mexico; and the state auditor is directed to draw his warrant therefor, payable out of any funds in the treasury not otherwise appropriated."

Appellant concedes the power of the Legislature, under the constitutional provision quoted, to appropriate money to pay for the work performed by Mr. Sedillo not within the contemplation of section 1 of chapter 86, Laws 1915; but he contends that the appropriation made by section 1 was, in part at least, for services performed by Mr. Sedillo in connection with the translation of the Code proper, as adopted in 1915. Some of the State Constitutions have provisions which forbid the appropriation of money for services already rendered, but our constitution contains no such inhibition. It only prevents the giving of any extra compensation to a contractor, public officer, etc., after the services are rendered or the contract made, and necessarily refers to extra compensation for that which is contracted to be performed or for which the services are required. It does not prevent the Legislature from recognizing a moral obligation nor from paying for work performed outside the requirements of a contract.

[1] It is well settled that it is the duty of the court to uphold the statute when the conflict between it and the Constitution is not clear, and the implication always exists that no violation of the Constitution has been intended by the Legislature. Further, whenever an act of the Legislature can be so considered and applied as to avoid a conflict with the Constitution and give to it the force of law, such construction should be adopted by the court; and all doubts which may exist as to whether the statute is or is not constitutional should be resolved in favor of the constitutionality of the same.

[2-4] In construing statutes, if the meaning thereof is doubtful, the title, if expressive, may have the effect to resolve the doubts by extension of the purview or by restraining it,

or to correct an obvious error. Sutherland's Stat. Const. vol. 2, § 339; 38 Cyc. 1133. The title of the act in question is very comprehensive and shows clearly that it was the intention of the Legislature only to compensate Mr. Sedillo for the extra work performed by him in and about the translation and preparation, of the prefatory and supplementary matter to the Code for publication in Spanish. The body of the act says that the appropriation is made "on account of expenses sustained and extra work done and services performed by him in connection with the translation," etc. It clearly appears from the language used that the Legislature was attempting to compensate him for extra work and extra services performed and rendered outside the scope of his original employment. The title of the act plainly shows the legislative intent, and, reading the act in connection with the title, it is clearly apparent that the Legislature did not give appellee extra compensation for services rendered. The title set forth the work done by him, and in the act says he shall be compensated for work done "in connection with the translation." The language was not apt, it is true, as it suggests a doubt as to whether the services rendered were a part of the translation for which the previous appropriation was made, but this doubt is removed by a reference to the title of the act. The services performed by Mr. Sedillo are substantially in the same status as though the secretary of state, being required to publish a codification of the laws in Spanish without any provision for payment for the necessary translation, had employed Mr. Sedillo or any other competent person to do the work, and the Legislature had then made an appropriation to pay for the services rendered.

Appellant cites in support of his contention that the statute is unconstitutional. *Robinson v. Dunn*, 77 Cal. 473, 19 Pac. 878, 11 Am. St. Rep. 297; *State v. Williams*, 34 Ohio St. 218; *People v. Spruance*, 8 Colo. 307, 6 Pac. 831; *Carpenter v. State*, 39 Wis. 271. A reading of these cases, however, will show that they are not in point, the majority of them having to do with attempts on the part of the Legislature to give extra compensation to officers or employees of the Legislature for performing services which it was their duty to perform under their employment.

For the reasons stated, the judgment of the court below will be affirmed; and it is so ordered.

PARKER, J., concurs.

HANNA, C. J. (dissenting). I dissent from the majority opinion, not for the reason that I disagree with the legal principles announced, but because I do not believe that these principles should be applied to the facts of

this case. It is apparent that the constitutional provision under consideration is violated if we are to compare the acts of 1915 and 1917 without reference to the title of the later act. The majority opinion points out that in construing statutes, if the meaning thereof is doubtful, the title if expressive may have the effect to resolve the doubts by extension of the purview, or by restraining it, or to correct obvious error. 38 Cyc. at page 1134, after announcing the rule in substantially the language of this opinion, goes further, and states that:

"Ordinarily, where the body of the statute is free from ambiguity, the meaning expressed therein must be given effect, without resort to the title; and in no event should the language of the title be permitted to control expressions in the enacting clause in conflict therewith."

It is my opinion that this qualification of the rule announced in the majority opinion is violated, and that the act of 1917 is free from ambiguity, and clearly in conflict with the act of 1915, and that resort to the title, which is here had, has the effect of violating or making ineffective the language of the 1917 act, which clearly appropriates money for "services performed by him in connection with the translation and preparation for publication of the 1915 codification of the laws of New Mexico," which was the same thing for which the appropriation in the act of 1915 was made, thereby doing violence to section 27 of article 4 of the state Constitution.

For the reasons stated, I dissent.

(24 N. M. 354)

MORGAN v. PIERCE. (No. 2147.)

(Supreme Court of New Mexico. March 12, 1918.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 14(1)—WRIT OF ERROR—SUPERSEDEAS.

Where a party appeals from a judgment against him in the district court, and gives a supersedeas bond, he cannot abandon such appeal and sue out a writ of error without supersedeas.

Error to District Court, Otero County; Medler, Judge.

Action by R. H. Pierce against Julia F. Morgan. Judgment for plaintiff, and after filing a supersedeas bond and without perfecting an appeal, defendant obtained a writ of error. Motion to dismiss writ of error sustained.

W. H. H. Llewellyn and J. F. Bonham, both of Las Cruces, for plaintiff in error. J. Lee Lawson, of Alamogordo, for defendant in error.

ROBERTS, J. A money judgment was rendered against the plaintiff in error in the district court of Otero county on the 10th day of May, 1917. From this judgment an appeal was granted by the district court on

the 16th day of June, 1917, upon application of plaintiff in error, and on the 2d day of July, 1917, she filed a supersedeas bond, which was on said date approved by the clerk of the district court. After filing the supersedeas bond, plaintiff in error took no further steps toward perfecting the appeal, and on the 8th day of October, 1917, applied to this court for a writ of error, which was granted. Upon the writ of error being granted, she executed a cost bond and served citation upon the defendant in error. Defendant in error has filed a motion to dismiss the writ of error upon the ground that the appeal having been taken and supersedeas bond given, plaintiff in error cannot prosecute a writ of error to review such judgment.

Plaintiff in error relies upon the case of *Dailey v. Foster*, 17 N. M. 377, 128 Pac. 71, in support of her right to prosecute the writ of error. In that case plaintiff in error had taken an appeal and executed a cost bond only. The cost bond was not filed within the 30 days required by statute, and, fearing that advantage would be taken of the default, plaintiff in error sued out the writ of error. We held that the suing out of the writ of error was an abandonment of the appeal, and refused to dismiss the writ of error. Defendant in error was not prejudiced in any way in that case because no supersedeas bond had been given staying the enforcement of the judgment. Here, however, under the appeal, by the giving of the supersedeas bond, defendant in error was deprived of his right to have the judgment enforced, and the case is governed by a different rule.

When the appeal was taken in this case the plaintiff in error executed a supersedeas bond, as authorized by section 17, c. 43, Laws 1917. By section 41, c. 43, Laws 1917, it is provided that if the judgment of the appellate court be against the appellant or plaintiff in error, the Supreme Court shall either render judgment against him and his sureties in the appeal or supersedeas bond, or remand the cause, with instructions to the district court to enter such a judgment. This provision of the statute would be rendered ineffectual if a party could take an appeal and give a supersedeas bond, and then sue out a writ of error without supersedeas in the same case, and such practice should not receive the approval of this court. Whether the decision in the *Dailey-Foster* Case was correct or not need not be determined. The majority of the courts do not permit the suing out of a writ of error where an appeal has been taken and not prosecuted further.

In the case of *Perez v. Garza*, 52 Tex. 571, it was held that the person who had perfected an appeal under a supersedeas bond could not abandon his appeal and sue out a writ of error with a like bond returnable to a term subsequent to that to which the appeal was returnable, and thus defeat the

right of appellee to affirmance of the judgment on certificate. The Supreme Court of Arkansas makes a distinction between those cases where the appeal does not operate as a supersedeas, and those, on the other hand, where, by operation of law or act of the suit or by entering into a recognizance, the execution is stayed upon the granting of the appeal. Where the successful party in the court below is not hindered by the appeal from having execution, the appellant is permitted to dismiss his appeal, and may later sue out a writ of error, but this he cannot do where a supersedeas bond has been given in the first appeal. *Yell v. Outlaw*, 14 Ark. 413; *Kinner & Butler v. Dodds*, 35 Ark. 29.

For the reasons stated, the motion to dismiss the writ of error will be sustained; and it is so ordered.

HANNA, C. J., and PARKER, J., concur.

(24 N. M. 256)

FIRST SAV. BANK & TRUST CO. v.
FLOURNOY. (No. 2026.)

(Supreme Court of New Mexico. Dec. 31, 1917.)

(Syllabus by the Court.)

1. **BILLS AND NOTES** — 49 — **PARTIES** — 51(4) — **ACCOMMODATION MAKER — BRINGING IN NEW PARTIES — "PRIMARILY LIABLE."**

Under the uniform negotiable instrument statute the maker of a promissory note is "primarily liable" thereon, though he signs only for accommodation. Hence, where the accommodation maker is sued on a note, he is not entitled to have the party for whose benefit he signed the note, such party not having signed the same, made a party to the action. (Quoting Words and Phrases, *Primarily Liable*.)

2. **LIABILITY OF PARTIES TO NOTE.**

Under such statute (section 612, Code 1915) no person is liable on the instrument whose signature does not appear thereon, except as in such statute provided.

3. **HUSBAND AND WIFE** — 85(1), 87(5) — **BILLS AND NOTES — "ENGAGEMENT RESPECTING PROPERTY" — MARRIED WOMAN'S ACCOMMODATION INDORSEMENT — LIABILITY.**

Under section 2750, Code 1915, a married woman may enter into any engagement or transaction respecting property which she might if unmarried. A promissory note is an engagement respecting property which a married woman may make, although it can be enforced only against her separate property; hence, where a married woman signs a note for her husband, as an accommodation maker, she is liable thereon, regardless of the fact that the note may have been executed for a community debt.

Appeal from District Court, Bernalillo County; Leahy, Judge.

Action by the First Savings Bank & Trust Company of Albuquerque against Jeanette W. Flournoy. From an order denying plaintiff's motion to strike part of defendant's evidence, and from an order requiring plaintiff to bring in another party defendant within a certain time, and otherwise dismissing the action, plaintiff appeals. Reversed and remanded, with instructions.

Lawrence F. Lee, of Albuquerque, for appellant. Barth & Mabry, of Albuquerque, for appellee.

ROBERTS, J. April 21, 1915, Jeanette W. Flournoy, the appellee, made, executed, and delivered to the First Savings Bank & Trust Company of Albuquerque, N. M., her negotiable promissory note for the sum of \$1,872.87. Said note was due and payable one day after date, and provided for interest at the rate of 8 per centum per annum. At the time the note in question was executed, M. W. Flournoy was the president of the appellant bank and the husband of appellee, and as such official of the bank he secured the execution of the note. From time to time thereafter Mr. Flournoy made certain payments on the note, amounting in the aggregate to something more than \$400. Mr. Flournoy died in September, 1915, and his daughter, Nell E. Flournoy Andros, was appointed executrix of his last will and testament, and duly qualified as such. On the 11th day of February, 1916, the appellant filed suit against appellee to recover the balance due on said note. The complaint was in the ordinary form. Appellee answered the complaint, and admitted the execution of such a note as described in plaintiff's complaint, but alleged that it was wholly without consideration; that said note was given by defendant herein upon the request and solicitation of plaintiff herein and one M. W. Flournoy, plaintiff bank and trust company's vice president and agent, in charge of said plaintiff bank; that said indebtedness was a debt of the marriage community of M. W. Flournoy and the defendant; that there is sufficient property to pay said debt or all such indebtedness; that the said M. W. Flournoy died at Albuquerque, N. M., in September, 1915; and that Nell E. Flournoy Andros is the duly qualified and acting executrix of the estate of the said M. W. Flournoy, deceased, and is a necessary party to a complete and equitable determination of the merits of this suit, and respectfully prays that the said executrix be summoned to appear and answer, and made a party defendant herein. Plaintiff bank in its amended reply denied all of said allegations, except so much thereof as admits the execution of said note, and that Nell E. Flournoy Andros is the duly qualified executrix of the estate of M. W. Flournoy, deceased. Upon the trial of the issues thus formed plaintiff offered the note in evidence and rested. Defendant offered evidence in an attempt to prove the allegations contained in her answer. Plaintiff objected to the admission of any evidence tending to show the disposition made of the proceeds of the note. Plaintiff's objection was overruled, and evidence tending to show that defendant was an accommodation maker was introduced by defendant. Upon the close of the testimony offered by defendant, plaintiff moved to strike out all of the tes-

timony introduced on behalf of the defendant as regards the Flournoy estate or as to what this money was spent for, that was advanced upon account of the note sued upon or what disposition was made of it and who received the benefit, for the following reasons: First, because it is irrelevant, immaterial, and incompetent, and does not constitute a defense to plaintiff's suit; second, because the question as to whether the property purchased with the proceeds of the note in question is wholly irrelevant and immaterial. Plaintiff's motion to strike was overruled, and the defendant then moved for judgment on the pleadings and evidence, which motion was overruled. At the close of the trial the court made the following findings of fact, conclusions of law, and judgment:

"Findings of Fact.

"I. That the defendant executed and delivered to plaintiff on the 21st day of April, 1915, the promissory note set out in plaintiff's complaint, and that said note was given by the defendant herein upon the request of M. W. Flournoy, who was the husband of defendant, and who was president of the plaintiff corporation in charge of said bank, and that said note was executed to take the place of a note previously executed by the said M. W. Flournoy to plaintiff, and to which note said M. W. Flournoy had, without the knowledge of defendant, but with the knowledge of the plaintiff, signed defendant's name, and that the said plaintiff, through its president, had knowledge that such note was used to purchase household furniture and to do repair work for the said M. W. Flournoy and the defendant herein, they then being husband and wife living together in the city of Albuquerque, N. M.; that the defendant herein received no consideration whatever for said note, except such benefit as she enjoyed as a member of the household of the said M. W. Flournoy; that the proceeds of the money obtained from said note were expended for the benefit of the marriage community, and that this matter was known to plaintiff, and plaintiff had notice thereof through its president, and that the defendant did not receive any part of the proceeds derived from said note to her individual and separate use, and that the debt incurred by said note was a community debt of the said M. W. Flournoy and the defendant, Jeanette W. Flournoy."

"II. That the said M. W. Flournoy, deceased, died in the month of September, 1915, and Nell E. Flournoy Andros is the duly qualified and acting executrix of the estate of M. W. Flournoy, deceased."

From the foregoing findings of fact the court reaches the following:

"Conclusions of Law.

"That the Nell E. Flournoy Andros, executrix of the estate of the said M. W. Flournoy, deceased, is a necessary party to a complete and equitable determination of the merits of this suit in order that substantial justice may be obtained. Wherefore, it is ordered that the said Nell E. Flournoy Andros, executrix of the estate of M. W. Flournoy, deceased, be made a party defendant in this action, and that plaintiff cause such executrix to be summoned to appear and answer herein within 20 days from the date hereof. It is further ordered that in the event of the failure of the plaintiff to summon the aforesaid executrix within the said 20 days, then said action shall stand dismissed at plaintiff's costs. To all of which findings and

order plaintiff then and there by its counsel accepted."

[1] From this order appellant prosecutes this appeal, and relies upon two propositions for a reversal, which are stated as follows: First, can the sole maker of a promissory note avoid liability thereon, to a holder for value, by setting up the fact that he was an accommodation maker? Second, can a person whose name does not appear upon a promissory note be charged with liability thereon? Both these questions are settled by our negotiable instrument statute, of March 21, 1907 (section 623, Code 1915), which provides:

"Sec. 35. An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of making the instrument knew him to be only an accommodation party."

Crawford's Annotated Negotiable Instruments Law in Revised Uniform Edition, p. 118, § 60, says:

"The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse. * * * Under the statute the maker of a promissory note is 'primarily liable' thereon, though he signs only for accommodation." *Vanderford v. Farmers', etc., Nat. Bank*, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129; *Richards v. Market Exchange Bank*, 81 Ohio St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99; *First State Bank v. Williams*, 164 Ky. 143, 175 S. W. 10; *Fritts v. Kirchdorfer*, 136 Ky. 643, 124 S. W. 882; *Murphy v. Panter*, 62 Or. 522, 125 Pac. 292; *Hunter v. Harris*, 63 Or. 505, 127 Pac. 786; *Cellers v. Meachem*, 49 Or. 186, 89 Pac. 426, 10 L. R. A. (N. S.) 133, 13 Ann. Cas. 997; *Wolstenholme v. Smith*, 34 Utah, 300, 97 Pac. 329; *Bradley Engineering, etc., Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170, 134 Am. St. Rep. 1127; *First Nat. Bank v. Meyer*, 30 N. D. 388, 152 N. W. 657; note to section 120, Crawford's Annotated Negotiable Instruments Law.

Words and Phrases, in volume 6, at p. 5550, says:

"A person primarily liable on an instrument is the person whom by the terms of the instrument is absolutely required to pay the same."

In the case of *Murphy v. Panter*, 62 Or. 522, 125 Pac. 292, the court said:

"The negotiable instruments law defines what constitutes an accommodation maker, and specifies how negotiable instruments may be discharged. * * * It is settled that, under the Negotiable Instruments Law, the accommodation maker is primarily liable as a principal debtor, notwithstanding an indulgence given to the indorser or drawer for whose benefit he became a party to the instrument." Sections 5952, 5953, 6023, L. O. L.; *Lumbermen's Nat. Bank of Portland v. Campbell*, 61 Or. 123, 121 Pac. 427; *Cellers v. Meachem*, 49 Or. 186, 89 Pac. 426, 10 L. R. A. (N. S.) 133, 13 Ann. Cas. 997, and cases there cited.

The Supreme Court of Utah, in the case of *Wolstenholme v. Smith*, 34 Utah, 300, 97 Pac. 329, said:

"The same question raised here was considered in the case of *Cellers v. Meachem* [49 Or.

186] 89 Pac. 426, 10 L. R. A. (N. S.) 133 [13 Ann. Cas. 997], and the conclusion was there reached that, under the new law, an accommodation maker was primarily liable, notwithstanding any knowledge the holder of the instrument might have had as to his relationship with the principal." *National Citizens' Bank v. Toplitz*, 81 App. Div. 593, 81 N. Y. Supp. 422.

Other cases of the same import are *Vanderford v. Farmers' & Mechanics' Nat. Bank*, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129, and *Hunter v. Harris*, 63 Or. 505, 127 Pac. 786.

It is clear, from the authorities as well as from the necessities of the case, that the mere grounds that a maker of a promissory note is an accommodation maker is no defense to that note against a holder for value. In the case at bar the defendant has set up no defense whatever. The defendant does not seem to pretend that the fact that she was an accommodation maker is an absolute defense to the note, but alleges that she is entitled to have the executrix of the estate of M. W. Flourney joined as a party defendant in this action upon a promissory note upon which neither the name of the decedent nor the executrix appears. Then it is very evident that the answer does not set up any defense to the note, but is an attempt to shift the responsibility of the note onto a person who is not a party to the note. From the facts and authorities stated above the district court should have rendered judgment upon the pleadings of the plaintiff, as no defense to the note was offered. This disposes of the first question raised in this appeal.

[2] The second question, as stated above, raises the point as to whether or not the district court had authority to make the order compelling plaintiff to join the executrix of the estate of M. W. Flournoy as a party defendant, when neither the name of the executrix nor that of the decedent appeared on the note. In examining the authorities we find that no person is liable on a negotiable instrument whose signature does not appear thereon. Section 612, Code 1915, provides:

"No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he signed in his own name."

This statute merely confirms the law merchant. This has been a settled principle of law ever since negotiable paper has been used. An old case, which is one of the leading cases on this point, is *Briggs et al. v. Partridge et al.*, 64 N. Y. 357, 363, 21 Am. Rep. 617, where the court says:

"Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent." *Barker v. Mechanics' Ins. Co.*, 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; *De Witt v. Walton*, 9 N. Y. 571.

Crawford's Annotated Negotiable Instruments Law, at p. 51, states:

"Necessity for Signature.—Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent." *Manufacturers', etc., Bank v. Love*, 13 App. Div. 561, 43 N. Y. Supp. 812; *Briggs v. Partridge*, 64 N. Y. 363, 21 Am. Rep. 617.

"Under" this section, "a firm upon whom a draft is drawn by its commercial traveler is not liable thereon before acceptance by reason of any custom in previous years to honor such drafts." *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064.

[3] In summing up we find the situation to be: A suit by plaintiff against defendant on a promissory note, upon which note the defendant's is the only name that appears as a signer or indorser. The defendant for a defense alleges that the note was made for the joint benefit of her and her husband, so that she was only an accommodation maker, and prays that her husband's executrix be made a party defendant because the husband received benefit from the proceeds obtained upon the promissory note in question. This is clearly no defense in law upon a promissory note. If it were, it would do away with the very purpose of negotiable instruments.

Appellee does not take issue with the propositions of law advanced by appellant, and followed by this court, but says they are not applicable to the case at bar, for the following reasons:

First, "that the note was a community debt of M. W. Flournoy and the appellee"; and second, "that the executrix of the estate of M. W. Flournoy was a necessary party to the complete determination of the issues made by the pleadings, and that the court had authority to order the executrix made a party defendant."

As to the first proposition appellee says: "The presumption is, that all debts contracted during marriage are community debts"—citing in support thereof *Ballinger on Community Property*, §§ 119, 149, 150, *Strong v. Eakin*, 11 N. M. 107, 66 Pac. 539, and *Brown v. Lockhart*, 12 N. M. 10, 71 Pac. 1088.

As to the second proposition she says:

"The executrix of the estate of M. W. Flournoy was a necessary party because appellee was a married woman under coverture at the time that she executed the note for her husband for the benefit of the community. She had no power to bind the community or to create a community debt except in so far as she was acting for her husband, who alone could bind the community. She was under all disability of coverture under the common law, except that she could, without the consent of her husband, convey her separate property or enter into any engagement or transaction with him or others, respecting her separate property, which she might have done if unmarried."

The obligation was the community debt of Flournoy, and there was enough community property to pay all the debts against the said estate, including that debt. And had Flournoy been living, he would have been a necessary party to the action, and, he being dead, and the community estate being a primary fund for the payment of the debts of the com-

munity, the executrix of the estate of M. W. Flournoy is a necessary party for the payment of this community debt.

This argument is not sound, because of section 4, c. 37, Laws 1907 (section 2750, Code 1915) which reads as follows:

"Either husband or wife may enter into any engagement or transaction with the other, or with any other person respecting property, which either might, if unmarried; subject, in transactions between themselves, to the general rules of common law which control the actions of persons occupying confidential relations with each other."

This section was either copied from California, or from some other state which had copied the California statute. The courts, in all the states having this statute, or one substantially like it, have uniformly held that under it a married woman may enter into any engagement or transaction respecting property which she might if unmarried, and that a promissory note is an engagement respecting property which a married woman may make, although it can be enforced only against her separate property. In the case of *Good v. Moulton*, 67 Cal. 536, 8 Pac. 63, the court, ~~discussed~~ the following instruction given to the jury:

"If the jury believe from the evidence that the note sued on, and introduced in evidence, was executed by Mrs. Lina Moulton for the accommodation of D. L. Moulton merely, and without consideration, and that at the time she was a married woman, and that the plaintiff knew such facts, then he cannot recover"

—and said:

"The instruction in effect told the jury that, if Mrs. Moulton was a married woman, and without consideration executed the note for the accommodation of D. L. Moulton, and the plaintiff knew these facts, then their verdict must be for the defendants. This was error. In this state a married woman may enter into any engagement or transaction respecting property which she might if unmarried. Section 158, Civil Code. A promissory note is an engagement respecting property which a married woman may make, though it can be enforced only as against her separate property. *Marlow v. Barlew*, 53 Cal. 456; *Alexander v. Bouton*, 55 Cal. 15. If Mrs. Moulton had been unmarried, she could have made a promissory note for the accommodation of her father without receiving any consideration for so doing, and the note so made, in the hands of one who received it for value, would, beyond question, have been valid and binding upon her, though the holder knew how and why it was made. But the fact that she was married does not at all change the rule or limit her power in this respect."

In the case of *Cooper v. Bank of Indian Territory*, 4 Okl. 632, 46 Pac. 475, the court dealt with a similar question, under the same statute copied from California, and said:

"The California construction placed upon this statute is followed, and the case of *Good v. Moulton* quoted from and approved in the state of North Dakota in the case of *Mortgage Co. v. Stevens* [3 N. D. 265] 55 N. W. 579. In this case the court said: 'This statute is very broad in its language. It is true that the contract must be one respecting property, but we cannot assent to the view that it must relate to the married woman's separate property. It would have been easy to have said so in express terms, had such been the purpose of the lawmaking

power. When the Legislature has established the single and simple test that the contract must be one respecting property generally, we have no right to amend the law, and thereby inject into the act a further limitation which will exclude many contracts respecting property. To add another limitation by interpretation would ignore the drift of legislation on the subject of the rights and liabilities of married women.' The state of South Dakota has also given to this statute the same construction as is given to it in the states of California and North Dakota. See *Mortgage Co. v. Bradley* [4 S. D. 158] 55 N. W. 1108; *Granger v. Roll* [6 S. D. 611] 62 N. W. 970. These several constructions of this statute of these three states are clear, positive, and uniform, and we are cited to the decisions of no state which, if it has the same statute, has given it a different construction; and, as these constructions harmonize, and give to the statute the obvious intention of the Legislature, we can see no reason why the courts of this territory should depart from it. It would be an idle waste of time for us to review in this opinion the cases cited by counsel for plaintiff in error from the Supreme Courts of Michigan, Indiana, and Arkansas, in their attempt to show that a different construction from that to which we hold should be placed upon the statute in question. The very first reading of the statutes on which those decisions are based shows that they are not, in language, point or purpose, even similar to our statute. This statute, which the plaintiff in error asks us to construe against the right of Alma L. Cooper to bind herself by her contract, has substantially placed the wife on an equality with the husband in making property contracts. She can make them to the same extent, and with the same force and validity, that the husband can. And of course this carries with it the same duty and the same obligation to carry out and perform these contracts. For us to say that she cannot be required to perform these contracts would, for all future cases, at least, be to say that she has not the power to make them, for no sane person would enter into a contract with one whom the courts would say could not be required to perform it. Contracts are effectual only as they create binding obligations, and obligations are binding only where they can be enforced. We would be taking away a substantial right of the married women of this territory if we gave to this statute the construction asked for."

The above quotation shows that both North and South Dakota courts have given the statute the same construction; and, our Legislature having adopted this statute from one of these states, it is our duty to follow the construction placed upon it by the courts of the parent state, unless some good reason exists for the contrary view. This being true, under the foregoing decisions, the wife stands, in regard to this note, in the same position she would occupy were she unmarried. This being so, the fact the note was executed for a community debt becomes of no importance, and the argument advanced by appellee to sustain the order of the trial court is unsound. For the foregoing reasons it follows that the trial court erred in ordering appellant to make the executrix of the M. W. Flournoy Estate a party defendant, and in default of so doing the action should stand dismissed.

The cause will therefore be reversed and remanded to the district court, with instruc-

tions to vacate the order and overrule the motion, and to enter judgment for appellant; and it is so ordered.

HANNA, C. J., concurs. PARKER, J., being absent, did not participate.

(177 Cal. 715)

WILLIAMSON v. INDUSTRIAL ACCIDENT COMMISSION. (S. F. 8471.)

(Supreme Court of California. March 12, 1918.)

MASTER AND SERVANT §375(1)—WORKMEN'S COMPENSATION—ACTS BEYOND SCOPE OF EMPLOYMENT.

Where a woman employed as chambermaid and assistant in rooming hotel, when the janitor was sick, and without her employer's knowledge or consent, went into a light well to clean it, fell, and was killed, her kin were entitled to no compensation, since she acted beyond the scope of her employment, in attempting duties which only a young and active man could perform.

In Bank. Proceeding by Martha M. Landis and W. S. Prosser, as guardian ad litem of Rachel Love Prosser, for compensation for the death of Harriet Anne Prosser, opposed by Mary E. Williamson, employer. To review award of compensation, the employer petitions for writ of review. Award annulled.

Eugene F. Conlin, of San Francisco, for petitioner. Chris M. Bradley, of San Francisco, for respondent.

PER CURIAM. Application for a writ of review. The petitioner was the proprietress of a rooming house known as Hotel Merritt, in Oakland, Cal., and had in her employ as a chambermaid Mrs. Harriet Anne Prosser, on and prior to October 3, 1916. Mrs. Prosser was married, but had been in the employ of the petitioner for about three months prior to the above date, occupying one of the rooms on the premises; her husband in the meantime being away in Oregon looking for work. The hotel was small and was kept in order by the proprietress, Mrs. Prosser, and a janitor. The general duties of Mrs. Prosser were to make the beds, sweep, dust, and keep tidy the bedrooms. At times she answered the telephone, and occasionally assisted the clerk. The janitor's duties were to take care of the halls, general toilets, and bathrooms, and generally to keep in order the exterior parts of the premises. There was a light well attached to the premises upon which the windows of some of the hotel rooms opened, and which also furnished light to other tenants of the building. The janitor of the hotel was accustomed to keep the light well in order and clear of litter, although there was no provision in the lease requiring this to be done by the lessee. For some time prior to the accident which cost Mrs. Prosser her life, the janitor had been ill and unable to fully attend to his duties in this regard. Litter had gathered in the light well, which the janitor had been instructed to clear away, but which he had been unable to do because of

his illness. One day shortly before the accident, the owner of the building, being there in the absence of the proprietress of the hotel, noticed the litter in the light well, and suggested to Mrs. Prosser that it would look better cleaned up, and she promised him that she would clean it. Two or three days later, in the absence of the proprietress, and without any knowledge or sanction on her part, Mrs. Prosser told the clerk she was going to clean the light well. He told her that it was not her work and advised her not to do it. She, however, persisted, saying that she had promised the owner, and climbed out of one of the windows for that purpose, when she fell a distance of about nine feet to the bottom of the light well, receiving injuries from which she died.

The application for compensation before the commission was made by Mrs. Martha M. Landis, a sister of Mrs. Prosser, and by W. S. Prosser, the husband of the deceased, as guardian ad litem of Rachel Love Prosser, a minor child. Rachel Love Prosser was not related to the decedent or her husband, but was an illegitimate child of one who had been a friend and inmate of the home of the Prossers when they lived in Pittsburgh, Pa., some five years previously. The child had been taken by the Prossers at its birth, had been given their name and nurture from that time forth as fully as though it was their own child, although they had not gone through the form of adoption. It had lived in their home while they had a home, but at the time of the injury and death of Mrs. Prosser, and for some time prior thereto had been cared for in the home of Mrs. Prosser's sister, Mrs. Martha M. Landis, in Sutter county, Cal., who was being paid by Mrs. Prosser from \$10 to \$15 per month for her temporary care of the child. The husband of Mrs. Prosser also contributed some small amounts irregularly for the same purpose. The parents of the child were known, but did not live in California, and never in any way assisted in the care of the child. Upon the showing of the foregoing facts, the commission made an award in favor of the applicant, whereby Mrs. Martha M. Landis was given the sum of \$52 to repay her for the funeral expenses of the deceased, and was further awarded a total sum of \$1,589.45, as trustee for Rachel Love Prosser, payable in weekly installments until the whole of said sum should be paid. Upon petition for a rehearing the commission affirmed this award, whereupon the petitioner herein applied to this court for a writ of review.

The first question presented for our consideration is as to whether the injury and death of Mrs. Prosser was by accident arising out of and in the course of her employment. The immediate act which she was attempting to do at the time of her fall and injury was not one which the emergencies of

the situation required to be done at once. On the other hand, it was, as the record, and especially the exhibits, abundantly show, a dangerous act and one which ordinarily a woman would not be expected to undertake at all, even if the doing of it lay within the range of her general duties, nor could it be expected that an employer would reasonably command or contemplate the doing of such an act by a woman employed in the capacity of a chambermaid. It is conceded by the respondent herein that in attempting to do said act the decedent did step aside from the sphere of her specific employment and was thus beyond its scope, but it is contended that since the act which she was undertaking to do was undertaken out of loyalty to the interests of her employer and for the latter's benefit, the statute should be construed so liberally as to allow compensation for the injury sustained in attempting to perform it. We think, however, it would be an unwarranted extension of the statute to give it application to acts done without the knowledge or consent of the employer, which, however commendable from the viewpoint of loyalty to one's employer, are not only outside of the employé's specific employment and duty, but which are in themselves of such a hazardous character as that the employé ought not to be reasonably expected or required to do them, except as a matter of immediate necessity or emergency, even though they might be within the scope of the employment.

This is such an identical case. Even if the deceased had been the janitress in charge of the building generally she could not reasonably be expected to do the thing she was essaying to do, for it was peculiarly the work of a man, and it might even be said of a young and active man, to climb out of a window, find a precarious footing upon a narrow ledge between three or four feet below it, and thence descend by a lean-to step-ladder to the bottom of a light well nearly nine feet below the point of exit from the window. We think the attempted doing of this act by the deceased, admittedly outside the range of her designated duties, was also so clearly beyond the scope of her employment as to require no further discussion. We are cited to cases which it is insisted support both sides of the foregoing contention. A review of these would be unprofitable, since none of them present an approximately parallel situation, and since also, in proceedings of this character, each case as a rule, at least in the formative period of the law relating to industrial accident cases, must be decided upon its own peculiar state of facts. The foregoing views render unnecessary a consideration of the other questions presented upon this proceeding.

It is ordered that the petition be upheld, and the award of the commission be, and the same is hereby, annulled.

(177 Cal. 710)

L. E. WHITE LUMBER CO. v. MENDOCINO COUNTY. (S. F. 7875.)

(Supreme Court of California. March 12, 1918.)

1. PLEADING ¶8(11)—ILLEGALITY OF TAXES —ALLEGATION—SUFFICIENCY.

In suit for recovery of taxes paid by mistake, complaint held radically defective in failing to allege sufficiently that the assessments were illegal, the mere conclusion that plaintiff has no interest, and that the United States has complete title to the land, being insufficient to contradict the allegations showing an assessable interest.

2. TAXATION ¶62—TAXABLE PROPERTY AND LAND.

Taxable property in land is not limited to the title in fee, but may include any usufructuary interest, or even a mere right of possession, it not being necessary that an assessable interest be a complete equitable title.

3. TAXATION ¶57 — PROPERTY TAXABLE — TITLE IN DISPUTE.

That title to land is in dispute does not exempt the land or interests therein from taxation.

Department 2. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by the L. E. White Lumber Company against the County of Mendocino. Judgment for defendant, and plaintiff appeals. Affirmed.

M. H. Iversen and Preston & Preston, all of Ukiah, for appellant. Hale McCowen, Jr., Dist. Atty., of Ukiah, for respondent.

MELVIN, J. Judgment was given against plaintiff after the court had sustained the demurrer to its second amended complaint without leave to amend.

The suit was one for the return of taxes paid during a number of years by plaintiff to the proper authorities of the county of Mendocino. By the plaintiff's pleading it appears that F. A. Hyde and F. A. Hyde & Co., prior to May 8, 1903, selected certain enumerated lands in Mendocino county with forest lien base under the act of Congress of June 3, 1897, and proper certificates for the lands so selected were issued by the government of the United States; that the claim of F. A. Hyde and F. A. Hyde & Co. to a portion of said land was canceled by order of the Commissioner of the General Land Office of the United States, and homestead entries were allowed on said portion by persons other than the original selectors and the plaintiff; that the parts of the lands included in the original selection, certificates to which were not canceled by the Commissioner's order, have been involved in litigation ever since the original selection was made; that plaintiff acquired, and since the 8th of May, 1903, has held, an undivided two-thirds interest in all of the title of every sort acquired by the original selectors; and that from and including the year 1904 to and including the year 1910 plaintiff was assessed for and paid taxes on an undivided two-thirds interest in

the lands. These payments, as it is averred further, were made "under the erroneous and mistaken belief that the said certificates so issued by the United States for the said lands conveyed the equitable title to the plaintiff, and that such lands were then and there taxable to the plaintiff." Plaintiff also denied actual or constructive possession of the lands or any part of them at any time. The pleading further recites that on February 1, 1912, plaintiff filed with the clerk of the supervisors of Mendocino county a verified claim for the refunding of said taxes paid for the fiscal years 1904 to 1910, amounting to \$2,062.21; that of this amount the sum of \$1,022.36 was paid within three years prior to the filing of plaintiff's claim, and that the board of supervisors of Mendocino county allowed on plaintiff's claim only \$209.57 for taxes for the fiscal years 1908, 1909, and 1910 on the lands as to which certificates of selection had been canceled by the Commissioner. By averment of a second cause of action plaintiff set up a payment of \$244.40 for the first installment of taxes for the fiscal year 1911; a similar demand for repayment; and an allowance by the board of supervisors for \$38.80 for the same reason which caused the other allowance. Both causes of action set out the fact that plaintiff had applied to the proper authorities of the United States for acceptance and approval of the selections excepting the lands regarding which the certificate had been annulled but (to quote directly from the pleading) "the said United States has refused and now refuses to approve the said selections on any of said lands or to issue patents therefor, on the ground that the said selections are in litigation, and it cannot be determined by the said authorities whether or not they will finally approve said selections or cancel the same."

[1] The demurrer of defendant pleaded insufficiency of facts averred and the bar of section 3804 of the Political Code. Undoubtedly the bar of the statute was effective against all except the taxes paid within three years of the filing of the verified claim with the board of supervisors. Section 3804, Pol. Code. But we need not discuss the effect of this limitation because the complaint is radically defective in its failure to allege sufficiently that the assessments were illegal. It is true that the pleading set forth a statement that plaintiff has never been in the actual or constructive possession of the lands, and that the property belongs to the United States of America. It also contains averments that the land is in litigation, and that the proper authorities refused to approve the selections or to issue patents for any of the lands. But this is not equivalent to a statement of facts showing that plaintiff is without assessable interest in the property.

[2] Undoubtedly the lands of the govern-

ment are exempt from the burdens of taxation, and while it is true that the pleading before us contains an averment of a conclusion that the general government owns the property it also sets forth the issuance by the government of "proper certificates" for the selected lands to plaintiff's predecessors. The sort of property in land which is taxable under our laws is not limited to the title in fee. It may include any usufructuary interest or even a mere right of possession. *State of California v. Moore*, 12 Cal. 56. An assessable interest need not be a complete equitable title. By the act of June 4, 1897, under which the selections were made by plaintiff's predecessors the United States government made a continuing offer to exchange lands outside of a forest reservation for those held by settlers within a reservation. The exchange could be initiated by the surrender to the land office on the part of the settler of his patent or deed to the base land and the selection of realty in lieu of that relinquished. *Roughton v. Knight*, 156 Cal. 123, 103 Pac. 844. Respondent's theory is that in all of the selections made by appellant in which it met the terms of the offer to trade it acquired an equitable interest subject to assessment. In this behalf respondent quotes as follows from *Witherspoon v. Duncan*, 71 U. S. (4 Wall.) 210-218, 18 L. Ed. 339:

"The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title."

We quite agree with respondent that under this authority appellant has pleaded an assessable interest, and has failed to contradict such allegation by the mere conclusion set forth in the complaint that it has no interest, and that the United States has complete title to the assessed property.

The case of *Witherspoon v. Duncan*, cited above, is in many of its aspects similar to the one at bar. In that case the Supreme Court of the United States was considering an effort made to set aside a tax title arising from a failure to pay taxes levied by the state of Arkansas after a certificate of entry had been issued by the Land Office, but before a patent had been obtained. The Supreme Court held that after a certificate of entry had been obtained the lands could in no just sense be regarded as public because if they were subject to sale the government had no power to revoke the entry and withhold the patent. In the opinion of the court delivered by Mr. Justice Davis the following language was used:

"As the patent emanates directly from the President, it necessarily happens that years elapse, before, in the regular course of business in the General Land Office, it can issue; and if the right to tax was in abeyance during this

time, it would work a great hardship to the state; for the purchaser, as soon as he gets his certificate of entry, is protected in his proprietary interest, can take possession, and make valuable and lasting improvements, which it would be difficult to separate from the freehold for the purpose of taxation. If it was the purpose of the acts of Congress, by which the new states were admitted into the Union, to prohibit taxation until the patent was granted, the national authority would never have suffered, without questioning it, the universal exercise of the power to tax on the basis of the original entry."

Summing up, the learned justice said:

"The power to tax exists as soon as the ownership is changed, and this is effected when the entry is made on the terms and in the modes allowed by law."

[3] The complaint contains the allegation that the lands are and ever since the selections of its predecessors have been in litigation, but there is no allegation regarding the details nor the merits of the controversy or controversies involved. The mere fact that the title is in dispute does not exempt the land from taxation. *Herrick v. Sargent*, 140 Iowa, 590, 117 N. W. 751, 132 Am. St. Rep. 281; *Northern Pacific Railroad Co. v. Patterson*, 154 U. S. 130-133, 14 Sup. Ct. 977, 978 (38 L. Ed. 934). In the latter case the rule was thus stated by Mr. Chief Justice Fuller, who delivered the court's opinion:

"If the legal or equitable title to the lands or any of them was in the plaintiff, then it was liable for the taxes on all or some of them, and the mere fact that the title might be in controversy would not appear in itself to furnish sufficient reason why plaintiff should not determine whether the lands or some of them were worth paying taxes on or not."

These authorities sufficiently support the ruling of the court in sustaining the demurrer. It is true that according to the authority of *Durham v. Hussman*, 88 Iowa, 29, 55 N. W. 11, which on appeal is reported in 165 U. S., at page 144, 17 Sup. Ct. 253, 41 L. Ed. 664, an intending purchaser from the government does not acquire an equitable interest in property until he has done all that is required of him. But in the present case there is no pleading to the effect that the holder of the certificate issued by the Land Office has not complied with all the legal requirements entitling it to a patent. In *Durham v. Hussman* it appeared that the Commissioner of the Land Office had actually suspended all proceedings under the entry, and had canceled the bounty land warrant under which the location had been made before the levy of the state tax upon which the unsuccessful litigant sought to found his alleged tax title.

Appellant cites *Allen v. Pedro*, 136 Cal. 1, 68 Pac. 99, *Roberts v. Gebhart*, 104 Cal. 67, 37 Pac. 782, and *Slade v. County of Butte*, 14 Cal. App. 453, 112 Pac. 485, to support the contention that until the Secretary of the Interior approves the selection, the legal and equitable title are both in the United States and are not taxable. But it is to be remembered

that in each of these cases the certificates of purchase were issued by the state of California for lands which belonged to the United States, but which had never been confirmed to the state. In the case at bar the certificates had been issued by the representative of the general government, the holder of the fee.

The case of *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 23 Sup. Ct. 692, 47 L. Ed. 1064, is not in point to establish the asserted principle that no taxable title nor equity arises until the application of the selector of lieu lands has been confirmed by the Secretary of the Interior. It was merely held in that case that the complainant did not have a complete equitable title which would entitle it to maintain an action enjoining another from interfering with its possession of the land involved.

Our conclusion, based upon the foregoing discussion, renders unnecessary any analysis of the other questions raised in the briefs. The judgment is affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 719)

SPOTTON v. SUPERIOR COURT et al.
(S. F. 8674.)

(Supreme Court of California. March 13, 1918.)

1. APPEAL AND ERROR \S 345(1)—MANDAMUS \S 10—MANDATE TO COMPEL SETTLEMENT OF BILL OF EXCEPTIONS.

Where judgment was entered December 16th and order denying defendant's motion for a new trial entered February 10th following, an appeal, taken March 13th, from final judgment came too late, in view of Code Civ. Proc. \S 939, requiring appeal within 30 days after entry of order denying a motion for new trial, and mandate will not issue to compel settlement of bill of exceptions to be used on such appeal, as such writ will not issue to enforce a mere abstract right which would be of no benefit to applicant.

2. APPEAL AND ERROR \S 346(1)—EXTENSION OF TIME FOR APPEAL—PENDENCY OF MOTION.

The pendency of a motion under Code Civ. Proc. \S 663, 663a, for setting aside judgment and entering another and different judgment on findings of fact would not extend the time for appeal from judgment.

In Bank. Application for writ of mandate by E. K. Spotton against the Superior Court, etc., to compel settlement of a bill of exceptions to be used on appeal from final judgment. Denied.

C. R. Baender, of San Francisco, for petitioner.

PER CURIAM. [1, 2] This is an application for a writ of mandate to compel the settlement of a bill of exceptions to be used on appeal from final judgment. Unless there is an appeal on which the bill of exceptions can be used, mandate will not issue, for such

a writ will not issue where it would be of no benefit to the applicant, or to enforce a mere abstract right, unattended by any substantial benefit to the petitioner. *Gay v. Torrance*, 145 Cal. 147, 78 Pac. 540. The only appeal as to which it is suggested that the bill of exceptions could be used is an alleged appeal from a final judgment. The learned judge of the trial court concluded that this attempted appeal was not taken within the time allowed by law, and we are satisfied that he was right in so concluding. The final judgment was entered December 16, 1916. An order denying petitioner's motion for a new trial was entered February 10, 1917. The time for appeal from the judgment was limited to 30 days after entry in the trial court of such order of denial. Section 939, Code Civ. Proc. The appeal was not taken until March 13, 1917, which was one day too late. Petitioner's claim is that the time was further extended by the pendency of a motion made under sections 663 and 663a of the Code of Civil Procedure for the setting aside of the judgment and the entry of another and different judgment on the findings of fact. This motion was not decided until some time in March, 1917. Such a motion is not a proceeding on motion for new trial, and the pendency of such a motion is altogether immaterial in determining the time within which an appeal must be taken. That question is determined in clear and unambiguous terms by the provisions of section 939 of the Code of Civil Procedure, and the proceeding on motion for new trial therein referred to is the proceeding covered by sections 656 to 660 of the Code of Civil Procedure. Our law gives a separate appeal from an order made by the court on the motion referred to in sections 663 and 663a of the Code of Civil Procedure.

The application for a writ of mandate is denied.

(177 Cal. 721)

Ex parte HERR. (Cr. 2148.)

(Supreme Court of California. March 14, 1918.)

1. CRIMINAL LAW \S 1011—HABEAS CORPUS \S 30(1)—CERTIORARI—GROUNDS—ERRORS.

Any error in refusing transfer to another department of the court for bias and prejudice of the judge is not a matter going to the court's jurisdiction, so as to allow its consideration on application for writ of habeas corpus or certiorari.

2. CRIMINAL LAW \S 1011—HABEAS CORPUS \S 25(1) — CERTIORARI — GROUNDS — INSUFFICIENT EVIDENCE.

That evidence was insufficient to prove the charge is not available on application for writ of habeas corpus or certiorari.

In Bank. Application by Alexander Herr for writs of habeas corpus and certiorari. Denied.

Charlotte F. Jones, of Seattle, Wash., for petitioner.

PER CURIAM. In our opinion the petition does not show any good ground for the issuance of either a writ of habeas corpus or a writ of certiorari. To our minds the ordinance of the city and county of San Francisco here involved is not violative of any provision of either state or federal Constitution and is a valid enactment.

[1,2] The complaint in the police court stated facts sufficiently showing a public offense in view of the provisions of said ordinance. The claim that the police court erred in refusing to grant a transfer to another department of that court because of the alleged bias and prejudice of the police judge is not a matter going to the jurisdiction of the court and cannot be considered on this application. The claim that the evidence given on the trial was not sufficient to prove the charge is also a matter not available to petitioner on such an application as this, and the same appears to be true as to all other claims made in support of the application.

The application is denied.

(177 Cal. 697)

VEREIN et ux. v. FREY. (L. A. 4174.)

(Supreme Court of California. March 12, 1918.)

1. PRINCIPAL AND AGENT ¶23(1)—**EVIDENCE OF RELATION—SUFFICIENCY.**

In action to cancel contract for loan, evidence held to support finding that person negotiating it was agent of plaintiffs, and not defendant.

2. TRIAL ¶395(1)—**FINDINGS—RESPONSE TO ISSUES.**

In action to cancel contract for loan procured through an agent, a finding that he was plaintiff's agent was equivalent to finding that he was not defendant's agent.

Department 2. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by A. Verein and wife against Charles Frey. From a judgment for defendant, and order denying new trial, plaintiffs appeal. Affirmed.

Bischoff & Thompson, of Escondido, for appellants. Theron Stevens and J. R. Gilliland, both of San Diego, for respondent.

MELVIN, J. Plaintiffs appeal from a judgment and from an order denying their motion for a new trial.

There is very little difference between the parties to the litigation regarding the facts. Plaintiffs applied to one Engelman, a loan agent, for money to erect a house on their land. The application was in writing and contained, among other things, the following language:

"You are hereby authorized to procure this loan from any person or company and apply so much of the proceeds of said loan as is needed to remove any existing incumbrances, and to pay for the certificate of title, recording fees, insurance, or any necessary expenses in closing the loan."

Thereafter Engelman arranged with Charles Frey to advance \$1,200 on a note for \$1,250, supported by a mortgage. Such a note and mortgage were executed by plaintiffs, delivered to Engelman and by him transmitted to Frey, and pursuant to agreement \$600 was then paid to Engelman. Subsequently the balance of the \$1,200, in various sums as Engelman reported the need for funds to pay bills due on the house under construction on the premises, was paid. Plaintiffs asserted that they had received only \$500, which they offered to restore, and they asked for a cancellation of their contract with defendant. The court decided that the payment by the defendant of the several sums which aggregate \$1,200 to P. J. Engelman constituted a payment to the plaintiffs of the full consideration for the execution of the note and mortgage.

[1] Plaintiffs attack the finding that in all matters relating to the loan and receiving payment thereon Engelman acted as the duly authorized agent of plaintiffs. There can be no doubt of the correctness of this finding. In addition to the writing quoted above, there was testimony on the part of the plaintiff A. Verein that he never saw defendant during the progress of the building and that he knew Engelman was handling the money. True, he says, he objected to that arrangement, yet confessedly the \$500, for repayment of which he admits himself bound, was paid by Engelman in settling bills of those who had performed labor and furnished materials for the building on the land of plaintiffs. Not only the writing, but the entire course of conduct on the part of Verein supported the court's finding and conclusion regarding Engelman's agency.

[2] Complaint is made by appellants that there was no finding by the court responsive to the evidence tending to show that Engelman was the agent of Frey. No such issue was raised by the pleading, but, if it had been raised, no finding on that matter would have been necessary, because the court found on evidence duly supporting such finding that Engelman was the agent of plaintiffs—an equivalent to a finding that he was not Frey's agent.

The judgment and order are affirmed.

We concur: **WILBUR, J.;** **VICTOR E. SHAW,** Judge pro tem.

(36 Cal. App. 44)

PANTER v. NATIONAL SURETY CO.
(Civ. 2111.)

(District Court of Appeal, First District, California. Jan. 25, 1918. Rehearing Denied by Supreme Court March 25, 1918.)

1. PLEADING \S 129(2)—ADMISSION — FAILURE TO DENY.

In an action on a surety company's bond executed to protect plaintiff against the damages resulting from an injunction which had been issued in a prior action against him, defendant's failure to deny the allegation that the bond was such an undertaking was an admission that it was given in consideration of a pre-existing injunction, and such fact need not be further proved or found.

2. PLEADING \S 310—MATTERS OF SUBSTANCE — NECESSITY TO ALLEGE—EXHIBIT.

Recital of the consideration in the bond in suit, though the bond was attached to and made part of the complaint, did not, as matter of pleading, control the specific allegations of the complaint as to the actual consideration for the bond, since matters of substance must be alleged directly, not by way of recital or reference, much less by exhibits merely attached to the pleading.

3. PLEADING \S 406(7) — ESSENTIAL ALLEGATIONS—RECITALS OF EXHIBIT.

In the absence of a special demurrer for uncertainty, direct and essential allegations in a complaint will not be modified, controlled, or defeated by the recitals of an instrument attached to the complaint.

4. INJUNCTION \S 252(4) — INTEREST—EXPENSES IN SUIT—STATUTE.

Under Civ. Code, \S 3287, providing that every person entitled to recover damages certain or capable of being made certain by calculation, etc., is entitled to recover interest from the day the right to recover is vested in him, in an action on a bond to secure plaintiff against damages resulting from an injunction issued in a prior action against him, judgment for plaintiff properly provided for interest on allowances for counsel fees and expenses incidental and necessary to plaintiff's successful endeavor to secure dissolution of the injunction; the several items of expense not being uncertain or incapable of being made certain by calculation.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Frank Panter against the National Surety Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Metson, Drew & McKenzie and R. G. Hudson, all of San Francisco, for appellant. Morrison, Dunne & Brobeck, of San Francisco (R. L. McWilliams, of Burlingame, of counsel), for respondent.

LENNON, P. J. This is an appeal from a judgment in favor of plaintiff in an action to recover damages upon a bond given by the defendant National Surety Company.

The facts of the case briefly stated are these: On December 21, 1910, a prior action was instituted in the superior court of Mendocino county by one Jacobs against Frank Panter, the plaintiff here, and others, in which action, on the said 21st day of December, 1910, the court issued an order of injunction, restraining the defendants there from

the commission of certain acts, and prohibiting the Crocker National Bank from paying or crediting to the account of Frank Panter, the plaintiff here, any moneys or stock then in its hands or thereafter to be received by virtue of a certain contract. Thereafter, on January 11, 1911, the defendant National Surety Company executed its undertaking in the sum of \$2,500, which purported to be obligated to protect the plaintiff here from any damages resulting to him by reason of the issuance of an injunction in that action. After the service of the injunction on the bank, Panter demanded of it payment to him of the sum of \$35,544.57, the amount which it had in its possession credited to his account. In compliance with the writ the bank refused payment. The cause was transferred to the superior court of Shasta county, and the injunction of December 21, 1910, was there dissolved on April 4, 1911.

In the present action upon the bond, judgment was rendered and entered for plaintiff Frank Panter in the sum of \$1,576.05, being \$750 paid to counsel for securing a dissolution of the injunction, \$252.43 interest on that sum from date of its payment to January 27, 1916, at 7 per cent., \$36.20 expenses of Panter for two trips necessary and incidental to the securing of the dissolution of the writ, and \$12.19 interest thereon, and the sum of \$525.23 as the reasonable value of the use of the sum of \$32,544.57 from January 12, 1911, to April 4, 1911.

The principal point presented upon this appeal is that the bond in suit was without consideration. This contention is based on recitals in the bond, which was attached to and made a part of the plaintiff's amended complaint. The recitals referred to are that:

"Whereas the above-named plaintiff had commenced or is about to commence an action * * * against the above-named defendants, and is about to apply for an injunction in said action against said defendants: * * * Now, therefore, the undersigned, National Surety Company, a corporation, * * * in consideration of the premises, and of the issuing of said injunction, does hereby undertake in the sum of \$2,500 and promise to the effect that in case said injunction shall issue, the said plaintiff will pay to the said parties enjoined, such damages, not exceeding the sum of \$2,500 as such parties may sustain by reason of said injunction. * * *"

The bond was approved and filed on the 11th day of January, 1911, three weeks after the issuance of the injunction out of which the alleged damages arose. It is contended that the undertaking, having been given after the issuance of the writ, could not, in the face of the recitals above quoted, be considered as having been given in consideration of the issuance of the writ, and that, inasmuch as the record does not show that any writ was subsequently issued, it must be held that the undertaking was executed without consideration.

[1] This contention is answered by the

pleadings in the case. The defendant neither denied, nor attempted to deny, the allegations of the plaintiff's amended complaint, to the effect that the bond in suit was an undertaking executed by the corporation defendant to protect the plaintiff herein against the damages resulting from an injunction which had been issued in the prior action. The failure to deny that allegation was an admission that the bond in suit was given in consideration of a pre-existing injunction. And it is the rule that a fact admitted by the pleadings need not be further proved or found.

[2] The recital of the consideration in the bond, even though the bond was attached to and made a part of the complaint, did not as a matter of pleading control and prevail over the specific allegations of the complaint as to what was the actual consideration for the bond. This is so because it is the rule that:

"Matters of substance must be alleged in direct terms, and not by way of recital or reference, much less by exhibits merely attached to the pleading. Whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint." *Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151; *Mayor v. Signoret*, 50 Cal. 298; *Hibernia Savings & Loan Society v. Thornton*, 117 Cal. 481, 49 Pac. 573; *Ahlens v. Smiley*, 11 Cal. App. 343, 104 Pac. 997.

[3] The converse of this rule must be that, in the absence of a special demurrer for uncertainty, direct and essential allegations in a complaint will not be modified, controlled, or defeated by the recitals of an instrument attached to the complaint. *Hibernia Savings & Loan Soc. v. Thornton*, supra; *Blasingame v. Home Ins. Co.*, 75 Cal. 633, 17 Pac. 925; *San Francisco Sulphur Co. v. Aetna Indemnity Co.*, 11 Cal. App. 695, 106 Pac. 111. No demurrer was interposed to the amended complaint in the present action.

[4] It is contended that the judgment is erroneous in so far as it provides for interest on the allowances for counsel fees and expenses incidental and necessary to the plaintiff's successful endeavor to secure the dissolution of the writ of injunction. The sufficiency of the evidence to support the trial court's finding of plaintiff's expenditures in this behalf is not assailed nor is it contended that the several items of expense referred to were not properly assessed as damages, nor that the amounts so found to have been expended by the plaintiff were uncertain or incapable of being made certain by calculation. It is the rule that:

"Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is

prevented by law, or by the act of the creditor, from paying the debt." Civ. Code, § 3287.

The judgment appealed from is affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

PER CURIAM. The foregoing affirmance of the judgment after a consideration of the case upon its merits disposes of the necessity of discussing and deciding the motion to dismiss the appeal.

(36 Cal. App. 120)

HOUGH et al. v. FERGUSON et ux.
(Civ. 2306.)

(District Court of Appeal, First District, California. Feb. 2, 1918. Rehearing Denied March 4, 1918. Denied by Supreme Court April 1, 1918.)

1. APPEAL AND ERROR ⇨1071(3)—HARMLESS ERROR—FINDINGS AGAINST EVIDENCE.

Where appellant could not have had judgment had a finding been the other way, the fact that such finding was against the weight of evidence was no ground for reversal, since it was not prejudicial.

2. VENDOR AND PURCHASER ⇨44—FRAUD—RIGHTS OF PARTIES—EVIDENCE.

In suit to foreclose purchase-money mortgage, where defendants set up fraud inducing purchase, evidence held to sustain judgment for plaintiffs.

3. VENDOR AND PURCHASER ⇨43(1)—FRAUD—RIGHTS OF PARTIES.

Where purchasers, after obtaining notice and knowledge of alleged fraudulent representations, applied for extension of time to make payments, they were thereby precluded from raising question of fraud.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Suit by W. W. Hough and others against George A. Ferguson and wife, wherein defendants filed a cross-complaint. Decree for plaintiffs, and defendants appeal. Affirmed.

Henry Hawson, of Fresno, and John A. Wall, of Mariposa, for appellants. Barnard & Watters and Harris & Hayhurst, all of Fresno, for respondents.

BEASLY, Judge pro tem. [1] This is an action to foreclose a mortgage. In April, 1912, the plaintiffs were the owners of the 893 acres of land in Fresno county on which they seek to foreclose. They exchanged this land with defendants for land in San Bernardino county, and as a part of the transaction took from the defendants this mortgage. This action was begun over 18 months after the mortgage was given. The defendants filed a cross-complaint, in which they allege that they were defrauded by the plaintiffs in said exchange of lands. The trial court found against the defendants on all of the issues made by the cross-complaint, and these findings are attacked on the ground that they are not sustained by the evidence. Conceding that this criticism is just as to

some of the findings, still, as was said in *McCreery v. Wells*, 94 Cal. 485, 29 Pac. 877:

"A finding against evidence is not always ground for reversal. Thus it is not prejudicial error to make a finding against evidence in a case where the appellant could not have recovered judgment even if the finding had been the other way."

We think the principle there announced is to be given application to this case. Examining the record with this rule in mind, the following circumstances are disclosed thereby:

[2, 3] The fraudulent misrepresentations by which the defendants claim they were induced to make the exchange of properties consisted of statements as to the productivity of the soil of the Fresno county tract, and in particular a statement that a certain designated part of it was subirrigated by seepage from the San Joaquin river which forms one of its boundaries. The court found that Hough, who was charged with making these misrepresentations, did not do so; and it cannot be said that the evidence taken as a whole is not susceptible of this construction; in fact, it seems to us that the trial court was fully justified in so finding. There is other evidence to which the court could hardly have given any other meaning than that embodied in the findings which support the judgment. For example, the court found that both defendants examined this property at length and with great care before the trade was made, and that they were not hindered in any way while doing so. The court also found that the defendants lived on the property for many months, and, being in default in their payments on the mortgage, applied to plaintiffs for and received extensions of time on such payments. By so doing, after they had been put upon notice of the alleged fraudulent character of the representations which induced them to enter into the transaction, they were precluded from later raising the question of fraud. Bearing on this point is the fact that among the misrepresentations charged were those as to the fertility and character of the land received by the defendants in the exchange. Their testimony shows that immediately upon taking possession of the property, and within less than one month after the deal was closed, they began plowing the land, and discovered that it was dry, porous, sandy, and of poor quality; indeed, that it was so devoid of moisture that they could not plow. This fact alone should have put them upon inquiry as to the truth of the main misrepresentation upon which they claim to have relied, namely, that the lands were subirrigated from the waters of San Joaquin river. There seems, indeed, to have been no excuse for not instituting their inquiry at this time. The only one which they attempt to offer is that Hough, upon his attention being called to this condition of the

land, informed them that it was a very dry year and that they must wait for subirrigation until a dry creek, known as Sand creek, running through the property, should flow. So flimsy an excuse for so important a condition would have caused any reasonable person, situated as the defendants claim they were, to make an immediate investigation as to the truth of the matter; and this is still more apparent when we consider that the defendants (who it should be mentioned were husband and wife) emphatically testified that their sole purpose in leaving San Bernardino county to come to Fresno county was to secure land which would need no irrigation whatever. There was much other evidence, a portion of which was that one of the sons of the defendants was employed in the office of the real estate agent with whom Hough had listed his property and who showed the property to the defendants; that another son looked the property over carefully before the exchange was made; that during the negotiations the defendants discussed with Hough the possibility of securing water from the well of a neighbor for irrigation; that Mrs. Ferguson made independent inquiries and received independent advice from other people than Hough before she closed the deal. Of course, much of this evidence was contradicted; but it seems to us not only that the judgment is sustained by this evidence, but that the trial court could hardly have reached any other conclusion in the case.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(36 Cal. App. 119)

WINKLER et al. v. SIERRA PARK CO. et al.
(Civ. 2134.)

(District Court of Appeal, Second District, California. Feb. 2, 1918.)

COSTS \$260(1)—FRIVOLOUS APPEAL—DAMAGES.

Where the appeal is frivolous and without merit, damages, in addition to their costs, will be adjudged to respondents.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Max Louis Winkler and Susie Winkler against the Sierra Park Company, a corporation, the Janss Investment Company, a corporation, and the Janss Company, a corporation. From a judgment for plaintiffs, and an order denying motion for new trial, defendants appeal. Affirmed.

John W. Luter and Randall & Bartlett, all of Los Angeles, for appellants. Porter & Sutton, of Los Angeles, for respondents.

PER CURIAM. The appeal in this case purports to have been taken from the judgment entered in favor of the plaintiffs and from an order denying the motion of defend-

ants for a new trial. The transcript of the record was filed in this court on July 3, 1916. Thereafter the appeal, on motion duly made, was dismissed as to the Janss Company. No brief has been filed on behalf of appellants and no appearance was made by the appealing parties at the time set for oral argument. We are of the opinion that the appeal taken herein is frivolous and without merit.

The judgment and order are affirmed. In addition to the costs incurred by them, the respondents shall have and recover from appellants the sum of \$75 as damages.

(36 Cal. App. 48) -

CITY OF REDDING v. SHASTA COUNTY.
(Civ. 1790.)

(District Court of Appeal, Third District, California. Jan. 25, 1918. Rehearing Denied March 25, 1918.)

BRIDGES — § 10(1) — CONSTRUCTION — RIGHTS OF CITY — LIABILITY OF COUNTY.

In view of Pol. Code, § 2713, requiring counties whose lines are crossed by bridges to pay costs of construction in the proportions previously agreed upon, the succeeding section 2714, which requires bridges located in two road districts to be repaired by aid of both districts, and authorizes bridges crossing line between cities and road districts to be constructed at joint expense, does not require a county, wherein a road connects with a bridge built by a city in an adjoining county, to pay half or any part of the cost, when its supervisors expressly refused to participate in building the bridge, since such refusal was a determination against its necessity as to the county, and the city's determination of necessity as to the city did not conclude the county.

Appeal from Superior Court, Shasta County; Wm. M. Finch, Judge.

Action by the City of Redding against the County of Shasta. Judgment for defendant after plaintiff refused to amend, demurrers to the complaint having been sustained, and plaintiff appeals. Affirmed.

Braynard & Kimball, of Redding, for appellant. O. M. Chenowith, of Redding, and A. M. McCoy, of Red Bluff, for respondent.

CHIPMAN, P. J. In the first cause of action it is alleged:

That defendant is indebted to plaintiff in the sum of \$28,235.53 "for money paid out and expended by said plaintiff for the use and benefit of said defendant in the construction of a concrete bridge over and across the Sacramento river at Reid's ferry and in said city of Redding and in said county of Shasta, and which said bridge crosses the line between said city of Redding and road district No. 4 of said county of Shasta, and which said bridge connects and is a part of the public highway leading from and within said city of Redding on the south bank of said Sacramento river to the public highway in road district No. 4 of said county of Shasta, leading from the north bank of said Sacramento river to the towns of Kennett, Buckeye, Baird, in said Shasta county, and to other parts of said Shasta county, for the purpose of transportation of persons and property and as a means of communication and for promoting the convenience of the public; that the building and construc-

tion of said bridge as a part of and so connecting said public highway was necessary and essential for the use and convenience of the inhabitants of said city of Redding and of the inhabitants of said county of Shasta and of the public in general."

It is then alleged by proper averments that plaintiff duly presented its said claim to defendant for allowance, and the same was rejected.

For a second cause of action it is alleged that on June 9, 1913, plaintiff duly and regularly determined that the public interest and the public necessity of the plaintiff and its inhabitants for the purpose of transportation of persons and property and as a means of communication and for promoting the convenience of the public demanded the acquisition and construction of a certain municipal improvement and public utility, namely, "a public free bridge over and across the Sacramento river at Reid's ferry in said city of Redding and in said county of Shasta, by resolution duly passed and adopted by said board of trustees at a regular adjourned meeting thereof held in said city of Redding on said 9th day of June, 1913, a copy of which said resolution is hereunto attached, marked Exhibit B, and made a part of this complaint." It was stated in said resolution:

"That the board of trustees of said city of Redding hereby determines that the public interest and the public necessity of said city of Redding, and the inhabitants thereof, for the purpose of transportation of persons and property, and as a means of communication, and promoting the convenience of the public, demand the acquisition and construction of a certain municipal improvement and public utility," to wit, the public free bridge hereinbefore referred to; "the total cost of said improvement and public utility being hereby estimated at the sum of \$60,000."

It was further determined that the cost of said improvement "will be too great to be paid out of the ordinary annual income and revenue of said municipality," and the ordinance provided for the calling of a special election to submit the question of incurring said indebtedness to the electors of the said city of Redding. It is then alleged:

That prior to the passage of said resolution, to wit, on January 8, 1913, plaintiff, by its board of trustees, "conferred with said defendant, by and through its board of supervisors, at the chambers of said supervisors in said city of Redding, for the purpose and object of determining the proportion of the cost of constructing said bridge to be paid by said plaintiff and said defendant, and that it was impossible by conference or otherwise to determine the same for the reason that said defendant by and through its said board of supervisors then and there refused to participate in the erection or construction of said bridge or to contribute or agree to contribute any part of the cost of erecting or constructing the said bridge."

It further appears from the complaint:

That said proposed bridge and the said bridge as constructed crosses the line between the said city of Redding and road district No. 4 of said county of Shasta, "and connects and is a part

of the public highway leading from and within said city of Redding on the south bank of said Sacramento river to the public highway in road district No. 4 of said county of Shasta, leading from the north bank of said Sacramento river to the town of Kennett, Buckeye, and Baird, in said Shasta county, and to other parts of said Shasta county, for the purpose of transportation of persons and property and as a means of communication and for promoting the convenience of the public."

It is then alleged that in April, 1914, plaintiff duly adopted plans and specifications for the building of said bridge, and thereafter, and on June 6th, duly and regularly entered into a contract in writing with the Chico Construction Company for the building of said bridge, which said bridge was fully completed on April 5, 1915, and was thrown open to the public for use on August 15, 1915, and ever since has been and now is used by the public as a public free bridge across the Sacramento river at Reid's ferry "as a means of communication and for promoting the convenience of the public, and ever since said last-mentioned time the said county of Shasta and the inhabitants thereof have enjoyed and now enjoy all of the benefits of said bridge"; that the construction of said bridge "as a part of and so connecting said public highway was necessary and essential for the use and convenience of the inhabitants" of said city and county, and the public in general; that the cost of the construction of said bridge was the sum of \$56,471.06, "which has been fully paid by plaintiff, and the proportionate share of said defendant of said costs of the construction of said bridge was and is the sum of \$28,235.53"; that on September 7, 1915, plaintiff by its board of trustees and by resolution duly passed, determined the indebtedness due from defendant to plaintiff for the construction of said bridge to be the said sum of \$28,235.53.

Averments follow showing that the plaintiff duly prepared its demand for the allowance of said claim and presented the same to defendant for payment at a regular session of the said board of supervisors, and that the said board, by vote duly made and entered, rejected and disallowed the said claim and the whole thereof, and the same is owing and unpaid from said defendant to plaintiff.

A general and special demurrer to the complaint was sustained, granting plaintiff ten days to amend. Plaintiff declined to amend the complaint, and thereupon judgment was entered in favor of the defendant that plaintiff take nothing by its action, and that defendant have judgment for its costs. Plaintiff appeals from the judgment.

We find embodied in respondent's brief the written opinion of his honor Judge Wm. Finch, who presided at the trial. In support of his findings the learned judge discusses at considerable length the questions arising under the second cause of action. He disposes of the first count by the following brief statement:

"The first-asserted cause of action is attempted to be alleged in the form of the common counts for the sum of \$28,235.53, averred to have been paid out and expended by the plaintiff for the use and benefit of the defendant. This alleged cause of action is defective in that it is not averred that the alleged moneys were paid out at the request of the defendant, and the demurrer thereto should be sustained.

"It is generally necessary, except in the count for money had and received and the count upon an account stated to allege that the consideration of the debt was performed at the defendant's request." 2 Ency. Pl. & Pr. 1004. "In order to enable one who has paid money to the use of another to maintain the count for money paid, the money paid must be alleged and shown to have been paid upon the request, express or implied, of the defendant." 2 Ency. Pl. & Pr. 1012. "In a declaration upon a promise on a consideration which is past, it is necessary to allege that the act performed or sum paid was performed or paid at the request of defendant, unless where a beneficial consideration and a request are necessarily implied from the moral obligation under which defendant was placed." 5 C. J. 1397.

"Since it is alleged that the supervisors 'refused to participate in the erection or construction of said bridge or to contribute or agree to contribute any part of the cost of erecting or constructing the said bridge'; it would seem that the plaintiff will be unable to so amend its complaint as to state a cause of action, but a court cannot assume that the facts may not be different from those alleged, and therefore the plaintiff will be given ten days within which to amend its complaint if so advised."

As before stated, plaintiff declined to amend its complaint, and judgment followed for defendant. Plaintiff's counsel argue with apparent confidence that a cause of action was stated in the first count whatever may be said of the second cause of action, and hence it was error to sustain the demurrer on both counts. Their position as stated in their reply brief is that, "regardless of any statute on the subject, the county of Shasta is liable to the city of Redding upon quasi contract for one-half of the cost of the construction of the bridge," relying upon the cases of *Hunt v. City of San Francisco*, 11 Cal. 250, and *Brown v. Board of Education*, 103 Cal. 531, 37 Pac. 503. Special reliance is placed upon *City of Clinton v. Hickman County*, 160 Ky. 687, 170 S. W. 11, a case decided by the Kentucky Court of Appeals. More fully stated, the contention of plaintiff is as follows:

"Having been furnished by the city with a full opportunity to join in the erection of this boundary bridge in order to discharge the joint duty of the county and the city to keep this public highway open across the Sacramento river for the use of the public, and the allegation that such bridge was a public necessity and necessary for the convenience of the public being admitted on this demurrer, the county is estopped from claiming that the bridge was not built by the joint action of the county and the city. Thus, on this demurrer, the facts are that the bridge was a public necessity in order to keep open a public highway across a boundary stream, and that the county refused to participate in its erection. By refusing to participate in the erection of the bridge, the county waived any right to insist upon the bridge being jointly constructed, and cannot now evade its just liability by claiming that the bridge was not joint-

ly constructed. Under these circumstances a beneficial consideration and a request are necessarily implied from the moral obligation under which the county was placed when the bridge was completed and thrown open to the public by the city."

When and under what circumstances an implied liability of one municipality to another municipality will arise opens a field of discussion which we do not think it necessary to explore. The facts in the case, we assume, are as fully shown in the second cause of action as they can be. Unless plaintiff can recover under the facts there shown and admitted by the demurrer, plaintiff cannot recover at all. Hence we deem it unnecessary to further consider the sufficiency of the first count. Plaintiff's case must stand or fall upon the facts alleged in its second cause of action.

We find ourselves in accord with the views expressed by the learned trial judge upon the second cause of action, and will take the liberty of quoting them:

"This is an action brought by the city of Redding to recover from Shasta county the sum of \$28,235.53 alleged to be due as the county's proportionate share of the cost of a bridge across the Sacramento river. The river forms the boundary line between the city and road district No. 4.

"Some three years ago the city trustees duly determined that the public interest and necessity of the city demanded the construction of a free bridge across the river. The trustees thereupon conferred with the supervisors of the county with the object of securing the co-operation of the latter in the construction of a bridge by the city and county jointly. The supervisors refused to participate in the construction of the bridge or to contribute towards the cost thereof. The trustees then proceeded to construct the bridge at the expense of the city, and have brought this action to recover from the county one-half of such expense.

"The plaintiff claims the right to enforce contribution under the provisions of section 2714 of the Political Code, which reads as follows: 'If the road overseer of one district, after five days' notice from the overseer of an adjoining district to aid in the repair of a bridge in which each are interested, fails so to aid, the one giving notice may make the necessary repairs and must be allowed a pro rata compensation therefor by the board of supervisors out of the road fund of the defaulting district. Bridges crossing the line or lines between cities or towns and road districts, or between cities or towns, may be constructed and maintained by the cities or towns and from the road fund of the road district or by the cities or towns into which such bridges extend. Any such bridge may be constructed by contract let as provided by law by either city or town or by the county into which such bridge extends or wherein such bridge is located, and any such city, town or county may contribute toward the cost and expense of the construction or maintenance of such bridge by the appropriation for such purpose of any funds in the treasury of such city, town or county not otherwise appropriated, upon such terms and conditions as may be prescribed by ordinance or resolution of the governing body of such city, town or county, aiding in the construction or maintenance of such bridge: Provided, that if the proportion to be paid by any such city, town or county cannot be otherwise determined, the cost of construction or maintenance of any such bridge shall be borne equally by the city or town and from the road fund of the road dis-

trict or by the cities or towns into which such bridge extends. The proceeds of any bonds heretofore or hereafter authorized by the voters of any such city, town or county for the acquisition, construction or completion of any such bridge, or any portion thereof, may be expended or contributed as herein provided.'

"Counsel for the plaintiff contend that the terms of the statute must be construed as mandatory, invoking the familiar rule that, where a public body or officer has been empowered to do an act which concerns the public interest, it becomes the duty of the public body or officer to do it. There is no doubt as to the correctness of the rule, but there is just as little doubt that the rule is not of universal application. Permissive language authorizing official action is often held to be mandatory, but, on the other hand, mandatory language is sometimes held to be permissive only. No hard and fast rule is to be applied in such cases, but the court must look to the nature of the power conferred and to the general rules applicable to the construction of statutes. Generally if the act authorized is legislative in character, the power is construed as discretionary; if executive, it is usually held to be mandatory.

"The Legislature has conferred upon the governing boards of the various political divisions of the state authority to determine whether a proposed local improvement is a public convenience or necessity. The determination of such question by the governing board is a legislative act, not subject to review by the courts. 'The act of the board of supervisors in determining whether a street shall be opened or closed, or widened or contracted, or otherwise improved, is a legislative act performed in the exercise of the power which has been conferred upon the municipality by the Legislature to enable it to provide for the welfare of its citizens.' *Brown v. Board of Supervisors*, 124 Cal. 277, 57 Pac. 82. 'The Legislature having conferred upon the board of supervisors the power to open and close streets "whenever the public interest or convenience may require," the determination by that board of the question whether the public interest and convenience require that streets be closed, is conclusive, and not open to review by the courts.' *Symons v. San Francisco*, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453.

"It will probably be conceded that the determination of the question whether the public interest and convenience require that a bridge be constructed across a river is as fully a legislative question as that of opening or closing a street. A county or city cannot be compelled by the courts to bridge every water course crossed by its roads or streets, or any of them. 'In deciding to erect a bridge a public corporation is exercising discretionary power. Action or non-action in that regard can lead to no liability.' *Coffey v. City of Berkeley*, 170 Cal. 258, 149 Pac. 559.

"If the territory on both banks of the river to be crossed were wholly within the city of Redding, the determination of the trustees as to the necessity of a bridge would undoubtedly be conclusive; so that of the supervisors if the location were wholly outside the city. Is the rule different where the two boards are authorized to act jointly?

"If both boards had determined that public convenience required the construction of the bridge, no one would contend that such determination was not conclusive. On the other hand, if both boards had determined that the public interest did not require the bridge, that determination would have been equally conclusive.

"The city trustees, in their legislative capacity, determined that the bridge was a public necessity. The supervisors in their equal legislative capacity, determined that no such necessity existed in behalf of the county.

"Why are not the legislative determinations

of such boards conclusive as to their respective jurisdictions, and by what authority is the determination of one board to be held superior to that of the other?

"In considering the question we must not confuse the authority conferred upon a board to construct a bridge with the duty of the board to keep the bridge in repair after its construction. Having, in the exercise of their discretion, constructed and opened a bridge, thereby inviting the public to travel over it, the duty of the officers to keep it in good repair is mandatory. Having assumed the burden of maintaining the structure, that obligation must not be discharged in a negligent manner.

"Again, the question of the construction by two boards jointly of a new bridge must be distinguished from the obligation of each to maintain a bridge which they had by their voluntary agreement constructed jointly. The joint agreement to build implies an agreement for joint maintenance.

"Most of the cases cited by counsel for the plaintiff had to do with the repair or reconstruction of bridges rather than with the construction of new ones; besides, they are based upon statutes essentially different from ours.

"Thus the Nebraska statute [Comp. St. 1909, c. 78, § 88] provided that, if either county charged with the joint maintenance of a bridge should refuse to join with the other in making needful repairs, 'it shall be lawful for the other of said counties to enter into such contract for all needful repairs, and recover by suit from the county so in default such proportion of the costs of making such repairs as it ought to pay.'

"The law of Kansas [Gen. St. 1909, § 7309] provides that, where a road is located on a county line, 'all expenses * * * arising from the improvement of any portion of such road shall be borne jointly by the counties * * * contiguous thereto.' It was held that one county could recover from the adjoining county for one-half the cost of making necessary repairs to a bridge on such a road. *County of Brown v. County of Keya Paha*, 88 Neb. 117, 129 N. W. 250, Ann. Cas. 1912D, 790; *Dodge County v. Saunders County*, 77 Neb. 787, 110 N. W. 756; *Buffalo County v. Kearney County*, 83 Neb. 550, 120 N. W. 171; *Oass County v. Sarpy County*, 72 Neb. 93, 100 N. W. 197; *Cloud County v. Mitchell County*, 75 Kan. 750, 90 Pac. 286.

"Under a New York statute [Laws 1890, c. 568, § 130] providing that, when the whole expense of constructing a bridge in 'any one town * * * shall exceed one-sixth of one per centum on the assessed valuation of the taxable property of the town, * * * the county in which such town is located, shall then pay not less than one-third part of such excess,' it was naturally held that the county was liable for such one-third. *People v. Board of Supervisors*, 146 N. Y. 107, 40 N. E. 738.

"Section 256 of the Highway Law of New York [Consol. Laws, c. 25] provides that, 'where two towns are liable to make or maintain * * * a bridge, and one of them refuses or neglects to join therein, application may be made to the court to compel the delinquent to act.' The intention of the Legislature in this statute is too plain to admit of doubt, and it was held that the court could compel the delinquent town to act. *In re Town of Saratoga*, 160 App. Div. 60, 145 N. Y. S. 468.

"Section 250 of the same law provides that, when bridges are constructed over streams forming the boundary line of towns, either in the same or adjoining counties, such towns shall be liable jointly to pay such expense, and that each county shall be liable to pay not less than one-sixth part of such expense. Here again the language of the statute is so plain that there can be no doubt of its meaning. *People v. Warren County*, 170 App. Div. 144, 155 N. Y. S. 642.

"In the Illinois cases cited the statute [Starr & C. Ann. St. 1885, c. 121, par. 19] provided: 'When it is necessary to construct or repair any bridge over a stream, or any * * * approaches thereto, * * * and the cost of which shall be more than twenty cents on the one hundred dollars on the last assessment roll, and the levy of the road and the bridge tax for that year, * * * was for the full amount of sixty cents on each hundred dollars allowed by law for the commissioners to raise, the major part of which is needed for the ordinary repair of roads and bridges, the commissioners may petition the county board for aid; and, if the foregoing facts shall appear, the county board shall appropriate from the county treasury a sum sufficient to meet one-half of the expenses of said bridge or other work. * * *

The plain provisions of the statute requiring the appropriation were held to be mandatory. *Stark County v. People*, 118 Ill. 459, 9 N. E. 192; *Macon County v. People*, 121 Ill. 616, 13 N. E. 220.

"The Wisconsin Statute [Laws 1899, c. 284] provided that 'bridges across navigable streams * * * shall be built, maintained and repaired by the town and village jointly, the expenses to be borne by each in proportion to their equalized valuation as fixed by the county board.' It was held that the town was liable for its proportion of the necessary expense incurred by the village of building a new bridge to replace an old one. *Village of Bloomer v. Town of Bloomer*, 128 Wis. 297, 107 N. W. 974.

"In the Kentucky cases cited, with one exception, the questions under consideration had relation to the repair of bridges or the rebuilding of bridges which had been destroyed.

"In the one exception, *City of Clinton v. Hickman County*, 160 Ky. 687, 170 S. W. 11, it appears from the decision that the bridges in controversy were original constructions, but it does not clearly appear what the terms of the statute were under which contribution by the county was enforced. An examination of the Kentucky decisions leads to the inference that the conclusion reached in the *Clinton Case* was the result of judicial legislation. This view is strengthened by the closing sentence of the dissenting opinion of three out of the seven justices in the case of *Flemingsburg v. Fleming County*, 127 Ky. 120, 105 S. W. 133, where it is said, referring to the confusion which the courts had arrived at upon the question of constructing and maintaining joint bridges: 'This confusion, which is further extended by the opinion in this case, is the result, in my judgment, of an attempt on the part of the court to relieve a situation which calls for some remedy, but which has not been provided for by legislation.'

"Whatever may be said as to the correctness of the Kentucky decisions, they are out of harmony with the decisions of this state respecting the finality of the determination by governing boards of questions committed to their discretion.

"It appears very clearly that, whatever natural right to contribution the city of Redding may have against the county of Shasta, the Legislature has not attempted to impose any legal liability upon the county in a case of the character involved."

[1] It is said that the conclusion of the judge was based principally upon the statement that the board of supervisors had, in their legislative capacity, determined that the bridge was not a public necessity, whereas what occurred was not such a determination, but was merely a refusal to participate in the erection of the bridge or to contribute or agree to contribute any part of its cost. This action by the board of supervisors was

taken in its official capacity at its place of conducting business, and was in response to plaintiff's request then and there made. The board was not required to declare by formal ordinance or resolution that in its opinion there was no necessity for the bridge. It is a fair inference from their refusal to participate in or pay any part of its construction that they determined this question in the negative. In any view taken of this action it was a very plain notice to plaintiff that it must not look to defendant for contribution.

In the discussion of the questions involved the briefs take a wide range and are very elaborate. But, after all is said, the liability of defendant, if it be liable at all, depends upon the construction to be given section 2714 of the Political Code, and it is upon that section plaintiff relies.

Turning to the section, it seems to us that its true interpretation or meaning is not far to seek. It first provides for "the repair of a bridge." The overseer of one district may give five days' notice to an overseer of an adjoining district to aid in the repair of a bridge in which each is interested, and the one giving the notice may make the necessary repairs, "and must be allowed a pro rata compensation therefor by the board of supervisors out of the road fund of the defaulting district." Plainly this provision refers only to the repair of existing bridges. We do not think plaintiff's contention, made at the argument, can be maintained, that the bridge in its original construction can be treated as a repair within the meaning of the statute. The provision as to repairs stands out apart from the provisions relating to the construction of new bridges.

The section then provides that bridges crossing the boundary line between cities or towns and road districts, or between cities or towns, may be constructed and maintained by the cities or towns and the road district, or by the cities and towns into which such bridges extend. We can discover no mandate here that compels such construction of bridges. The statute is permissive, and authorizes the construction of bridges across lines between cities and towns and road districts. The section next provides that such bridge may be constructed by contract let as provided by law by either the town, city, or county into which such bridges extend, and any such town, city, or county may contribute toward the cost or maintenance of such bridge by appropriating for such purpose any funds in the treasury of such town, city or county not otherwise appropriated, "upon such terms and conditions as may be prescribed by ordinance or resolution of the governing body of such city, town, or county aiding in the construction or maintenance of such bridge." Clearly, it seems to us, no liability attaches to an interested city, town, or county until the governing body of such city,

town, or county has by ordinance or resolution prescribed the terms and conditions upon which such contribution shall be made. Just what is meant by "terms and conditions" which must first be prescribed by ordinance or resolution is not explained. It is not unreasonable to assume that this would require the governing body to determine whether or not there was a necessity for a bridge as well as the kind and character of bridge required and its cost. But, whatever may have been the intention of the Legislature in thus expressing its meaning, by no course of reasoning can it be said that a town, city, or road district may, independently of the wish of the adjoining town, city, or district, and particularly in the face of a refusal to participate or pay any part of the cost of the proposed bridge, proceed to erect the bridge and hold the nonconsenting town, city, or county liable for one-half the cost. This section of the Code provides for compulsory contribution for the repair of existing bridges by the interested adjoining districts, but it makes no similar provision as to the original construction of bridges. To illustrate our meaning: The boundary line between the city of Sacramento and the county of Yolo is the Sacramento river. There are now two free bridges connecting said city with said county erected by the joint action and at the joint cost, in an agreed proportion, by the city and county, one at the foot of M street, and one at the foot of H street. We do not think that the governing authorities of the city of Sacramento could erect another bridge across the river—we may say at the foot of K street—however much it may be desired by or of benefit to the city, and hold the county of Yolo liable for a part of its cost unless the governing authorities of Yolo county had in some manner duly and legally authorized the erection of the bridge. For still greater reasons would this be true had Yolo county, in the supposed case, not only failed to take favorable action, but had given notice that it would not participate in the erection of such bridge or contribute to its cost. The building of public roads and bridges is made the subject of statutory regulation, and for the authority to build roads and bridges we must look alone to the statute. By what we regard as a strained and unwarranted construction, appellant would read into section 2714 substantially the same authority to build bridges and enforce compulsory contribution as is provided by the section for repairs of bridges.

"In the absence of statute or agreement one territorial subdivision of the state cannot compel another to assist it in erecting bridges over their common boundaries. It is therefore a just and equitable exercise of legislative discretion to provide that, when the necessity or convenience of travel renders advisable the erection of bridges over the boundaries between counties or townships, each must contribute to the expense thereof. Such statutes must be clear and ex-

plait, and must be strictly complied with to enable one county or town to build a bridge at its own expense and recover a pro rata from the other." 5 Cyc. p. 1062.

The courts have held in numerous cases that counties, towns, and cities in the matter of building bridges over a stream dividing one county or town from another have only such powers as are conferred upon them by statute, and that, where one county has determined that such a bridge is necessary, and has so notified an adjoining county and requested the co-operation of the latter, no liability is cast upon the latter through its neglect or refusal to join with the former. In dealing with this question it was said, among other things, in *Commissioners of Highways of Dimmick v. Commissioners of Highways of the Town of Waltham*, 100 Ill. 636:

"If the commissioners of one town have the power to compel the commissioners of another town to contribute one-half of the cost of erecting a bridge over a stream on the line of two towns, without a prior contract or agreement, by merely serving notice, there are many cases where a densely populated township might bankrupt and bring ruin upon an adjoining township containing but few inhabitants and a small amount of taxable property. * * * We cannot believe such a result was ever within the contemplation of the Legislature, and yet, should the construction of the statute contended for by appellant prevail, such results would necessarily follow."

That there must be concert of action and agreement between the parties concerned seems to be the principle running through the cases generally. *Harlow v. Board of Commissioners*, 33 Okl. 353, 125 Pac. 449; *Washer v. Bullitt County*, 110 U. S. 558, 4 Sup. Ct. 249, 28 L. Ed. 249; *Brown v. Merrick County*, 18 Neb. 355, 25 N. W. 356; *Jefferson County v. St. Louis County*, 113 Mo. 619, 21 S. W. 217; *Pickens County v. Greene County*, 171 Ala. 377, 54 South. 998; *McPeeters et al. v. Blankenship*, 123 N. C. 651, 31 S. E. 876; *Board of Commissioners of Fountain County v. Board of Commissioners of Warren County*, 128 Ind. 295, 27 N. E. 133. In *Pickens County v. Greene County*, supra, dealing with the contention that the commissioners of one county may impose their will upon the commissioners of another county, under the statute in question, the court said:

"But that construction of the statute would lead to some surprising results—results so at variance with the spirit of our institutions that it may well be doubted that the Legislature had the power, if it had the purpose, to bring them about. Certainly nothing short of an unequivocal legislative declaration could induce us to believe that the Legislature intended to permit the commissioners of one county to control the revenue of another on the judgment of one that the interests of both will be subserved."

In *Fountain County v. Warren County*, supra, the court said:

"If the construction [of the statute] contended for by the appellant is to be adopted, we have the anomalous case of a tribunal in one county serving summons in another county, beyond its

ordinary jurisdiction, upon another tribunal of equal dignity and jurisdiction, and entering judgment and making orders against the tribunal so served, as upon a default. Certainly a construction so much at variance with our general system of laws, and followed by such unusual consequences, should not be adopted unless the language used is such as is not susceptible of any other reasonable construction."

The concluding paragraphs of section 2714 confer no authority, but merely provide that, when the matter of building the bridge is determined by the towns, cities, and counties interested, as the statute requires, the expense shall be borne equally if they do not agree as to the proportion each is to pay. The provision as to the proceeds of bonds authorized to meet the bridge building expense presupposes that the erection of the bridge has been authorized under the provisions of the statute. Section 2713 of the Political Code, which immediately precedes section 2714, is not without significance. Among other things is the following provision:

"Bridges crossing the line between counties must be constructed by the counties into which such bridges reach, and each of the counties into which any such bridge reaches shall pay such portion of the cost of such bridge as shall have been previously agreed upon by the boards of supervisors of said counties."

Here the necessity for joint action is clearly manifested. And we think the same principle of joint and concurrent action pervades section 2714.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(36 Cal. App. 199)

STEPHENS v. ANDERSON et al.
(Civ. 2107.)

(District Court of Appeal, Second District, California. Feb. 7, 1918.)

1. BROKERS \S 86(4)—SALES OF LAND—SUFFICIENCY OF EVIDENCE.

Evidence held insufficient to show that plaintiff furnished a buyer for land, or that he was entitled to a commission.

2. BROKERS \S 54—COMMISSION—BURDEN OF PROOF.

Before an agent may be said to have earned a commission for a sale of land, he must show that he produced to the vendor a purchaser ready, able, and willing to buy for the price and terms proposed by the vendor in the agency contract.

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by Richard B. Stephens, as executor, substituted for C. M. Stephens, deceased, against Nathalie Anderson and Charles Anderson. Judgment for defendants, and plaintiff appeals. Affirmed.

Kendrick & Ardis, of Los Angeles, for appellant. Frank C. Scherrer, of Independence, and J. H. Ryckman, of Los Angeles, for respondents.

JAMES, J. This action was brought to recover a sum of money alleged to have been earned by the plaintiff in negotiating a sale of certain real property owned by the defendants. Subsequent to the commencement of the action C. M. Stephens died and his executor was substituted as party plaintiff. At the trial, after evidence had been introduced on behalf of the plaintiff, the trial judge, agreeable to motion made by the defendants, ordered judgment of nonsuit, which was thereafter entered, and from which this appeal is taken.

It is claimed on behalf of the appellant that there was evidence to sustain the allegations of the plaintiff's complaint. It appears from the bill of exceptions that C. M. Stephens was the general attorney of defendants, particularly of Nathalie Anderson, and that in the year 1911 defendants gave a written statement to said Stephens, wherein they particularly described certain real property, and further stated:

"Our price for the above two tracts is \$25,000 cash, or half cash balance secured by mortgage payable at one year at 6 per cent. net. Will pay C. M. Stephens 5 per cent. commission on sale."

One Leonis testified that while acting as agent for a corporation, which latter desired to purchase the Anderson property, he called upon C. M. Stephens, knowing that the latter had the property for sale, and agreed orally with said Stephens to take the property at the price of \$25,000. He stated that he gave Stephens a check for \$100 to bind the bargain, and was later told by Stephens, who returned him the check, that the owner would not accept the offer. Further, that Stephens told him that he would have to go to Mrs. Anderson and buy the property direct from her. It appeared in testimony that subsequent to this time other agents of the corporation which desired to purchase the property, acting upon the report of Leonis that he was unable to get it through Stephens, took up negotiations with Mrs. Anderson and, after considerable talk was had backward and forward and much discussion over the price, the corporation purchased the property for the sum of \$35,000. It was nowhere shown in the testimony that Mrs. Anderson, at the time she dealt with the agents of the company to whom she sold her property, knew that the purchaser was a purchaser who had been found or produced by Stephens.

[1, 2] There was no evidence that Stephens communicated to her any offer to purchase the property, and in these particulars we think there was a failure of proof necessary to sustain the plaintiff's case. We think the rule is fundamental and well understood that before an agent may be said to have earned a commission he is required to show that he produced to the vendor a purchaser ready, able, and willing to buy for the price and upon the terms proposed by the vendor in the agency contract. The alleged agency was

in no wise an exclusive agency, and under the conditions shown, Mrs. Anderson had the right to deal independently with any one who desired to purchase directly from her. While it is true that she did secure a price in excess of \$25,000, the negotiations which led to a consummation of the deal were all carried on directly with her, and the price and terms of purchase were thus arrived at. We are of the opinion that the trial judge was right in ordering the judgment of nonsuit.

The judgment is affirmed.

We concur: **CONREY, P. J.; WORKS,**
Judge pro tem.

(36 Cal. App. 123)

ANDERSON v. RECORDER'S COURT et al.
(Civ. 2421.)

(District Court of Appeal, Second District, California. Feb. 4, 1918. Rehearing Denied by Supreme Court April 4, 1918.)

APPEAL AND ERROR \S 757(1)—**BRIEFS—SUFFICIENCY.**

Where the only record on appeal is in the form of a typewritten transcript, and no part of it is printed in the brief, as prescribed by Code Civ. Proc. \S 953c, the judgment below must be affirmed.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Certiorari by Fred N. Anderson, directed to the Recorder's Court, etc. Judgment for defendants, and plaintiff appeals. Affirmed.

William Sea, Jr., of Calexico, for appellant.
D. L. Ault, of Calexico, for respondent.

PER CURIAM. This is an appeal from a judgment rendered on writ of certiorari. The only record on file is in the form of a typewritten transcript. Appellant has not complied with section 953c of the Code of Civil Procedure, which provides that upon such a record the parties must "print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." The brief for appellant is absolutely deficient in that no part of the record has been printed therein.

On the authority of *Stewart v. Andrews*, 169 Pac. 397, *Jones v. American Potash Co.*, 169 Pac. 397 (decided October 25, 1917), *Heppler v. Wright*, 170 Pac. 667 (decided December 13, 1917), and other cases cited in those decisions, the judgment is affirmed.

(36 Cal. App. 175)

FONTAINE et al. v. LACASSIE et al.
(Civ. 2180.)

(District Court of Appeal, First District, California. Feb. 6, 1918.)

1. MONEY RECEIVED \S 18(3) — **SUFFICIENCY OF EVIDENCE.**

Judgment for money had and received is sustained by the facts that plaintiff furnished

defendant money to be used by her to provide a home for plaintiff, and shortly thereafter defendant ejected plaintiff from the house.

2. CONTRACTS §260—RESCISSION—PARTIAL FAILURE OF CONSIDERATION.

Contract, whereby plaintiff furnished money for defendant to build a house to be occupied by plaintiff for life, is entire, authorizing rescission under Civ. Code, § 1689, and recovery of the entire amount, for partial failure of consideration; defendant having soon ejected plaintiff.

3. MONEY RECEIVED §17(1)—COMPLAINT.

Complaint for money received need not set forth the entire contract, from breach of which the right arises.

4. PROPERTY §4—REALTY OR PERSONALTY—AGREEMENT—HOUSES.

House built by defendant on her land with money furnished by plaintiff under agreement that plaintiff might occupy it for life, unless it was sold, in which case plaintiff should be repaid the money, is not personal property, removable by plaintiff on ejection by defendant.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Emile Fontaine and another against Simeon Lacassie and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

W. S. Tinning and A. B. Tinning, both of Martinez, for appellants. George C. Thrasher, of San Francisco, for respondents.

BEASLY, Judge pro tem. Catherine Fontaine, one of the above-named plaintiffs, is the mother of the defendant Simeon Lacassie, and the latter's codefendant is his wife, who owns a piece of land at Walnut Creek in Contra Costa county. In the month of December, 1914, Mrs. Fontaine, who was then unmarried, furnished to Mrs. Lacassie the sum of \$439.50 with which to build a house on said property, as the trial court found, under an agreement between them that Catherine Fontaine might occupy the said house during her life, with the proviso that if the land was sold before her death by Mrs. Lacassie she would repay to her mother-in-law the money furnished by her for the building of the house. It is further found that Mrs. Lacassie was to attend to expending the money in erecting the house, and that she did so, paying the bills with the money so furnished by Mrs. Fontaine. The building was complete on January 1, 1915, and the plaintiffs occupied it thence until the month of December following, when the defendants ordered them off the premises with threatening and violent language, and, as the evidence discloses, had Mrs. Fontaine arrested and removed from the property on a charge of insanity. She never returned to the house thereafter. The court also found that the object of the agreement to build the house was to furnish a home for Mrs. Fontaine. The defendants on this appeal insist that this finding has no support in the evidence, but the whole tenor of the testimony supports it; and it also specifically appears

that when the money was advanced to Mrs. Lacassie by her mother-in-law the latter had become too infirm to work in the laundry where she had been employed, that the defendants were to charge her no rent, and were to furnish her with wood, water, and milk free of charge. From this—and indeed from the entire evidence—it may be fairly inferred that the agreement itself under which the money was furnished was that Mrs. Fontaine should occupy the house as long as she should live, unless the property should in the meantime be sold. This evidence certainly supports the finding attacked.

[1] The defendants also rely for a reversal upon a question of pleading, claiming that the facts above set forth will not support a judgment for "money had and received." The language of the pleading material to this question, to be exact, is as follows:

"That * * * the defendant received the sum of \$439.50 from the plaintiff for the use and benefit of plaintiff."

It is plain from these facts that the money was furnished by Mrs. Fontaine to Mrs. Lacassie to be used by the latter for Mrs. Fontaine's benefit, namely, to provide a home for her in her old age, and that she was, within a comparatively short time after having furnished the money, deprived of its benefit and use by being ejected from the house. The view of the trial court was that this evidence sustains the judgment. With this view we are constrained to agree.

[2] The contract here was entire within the rule announced in the leading case of *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734, 736, upon the construction of entire and divisible contracts, a rule approved by our own Supreme Court in *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305. In the latter case it was also held that where a contract is entire there is a right of rescission thereof for partial failure of consideration under section 1689 of the Civil Code. This proposition is illustrated in this state also by *Howlin v. Castro*, 136 Cal. 605, 69 Pac. 432, a case of somewhat different nature, where the facts were that Castro undertook to take care of Howlin during the remainder of the latter's life in consideration of receiving Howlin's property at his death. Howlin delivered a deed to one Rowling as security for the performance on his part of this agreement, and Castro, after performing the agreement on his part for a year, discontinued doing so. The Supreme Court held that, the contract being executory and having been broken, the plaintiff was not confined to a remedy for damages, but might have the deed delivered up and canceled in an action for that purpose, thus receiving back all the consideration which he had promised for the performance of Castro's agreement to care for him. The ancient rule of the Court of King's Bench, the fountain of common-law

pleading, was that, where there is an entire contract, and by defendant's default plaintiff could not perform what he had undertaken to do, he had a right to put an end to the whole contract and recover back money which he had paid thereunder. *Giles v. Edwards*, 7 Term, 181.

Lord Mansfield, in *Moses v. MacFerlan*, 2 Burr, 1005, adapted the count for money had and received to an action of the character of the case of *Mrs. Fontaine*. Previous to the decision of that case a debt proved in support of this action had always been a debt arising under the operation of purely legal principles. In that case there was clearly no debt. Indeed, the only possible ground of recovery was that it would have been inequitable under the circumstances to permit MacFerlan to retain the money. The real question, therefore, was whether a debt sufficient for the purposes of an action in *debitatus assumpsit* might arise from the operation of purely equitable principles. The court unanimously answered the question in the affirmative, Lord Mansfield stating the scope of the obligation as follows:

"If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract. * * * This kind of equitable action, to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex æquo et bono*, the defendant ought to refund. * * * In one word the gist of the action is that the defendant upon the circumstances of the case is obliged by the ties of natural justice and equity to refund the money."

"From the use of such expressions as 'obliged by the ties of natural justice and equity' it must not be inferred that the right of recovery in a particular case is a problem of moral philosophy. Recovery does not depend upon the trial judge's idea of justice in the particular case, nor yet upon the jury's notion of what is right between man and man. Here, as elsewhere, the courts must be guided by principles and rules fairly capable of uniform administration. These must be sought in the reports of decided cases." 7 *Modern American Law*, p. 372.

Here, as we have seen, the courts of our own state have held that an agreement such as that made by the parties to this action may, under circumstances such as the trial court found to exist here, namely, where the contract is entire and the consideration has partially failed by reason of the default of one of the parties, be rescinded by the other party, who may then recover the money which he has paid thereunder.

[3] From this discussion we think it fairly deducible that in an action such as this the plaintiff need not set forth the entire contract, but may sue quasi *ex contractu* for money had and received.

[4] It is argued that the house was personal property and could have been removed by *Mrs. Fontaine*. The terms of the agreement under which it was built negative this

contention, for the intent of the parties evidently was that it should remain permanently on the land; and the trial court found that *M. E. Lacassie* retained the house for her own use and benefit.

This disposes of the points urged in support of the appeal. The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(36 Cal. App. 153)

MASSIE et ux. v. ELDORADO GOLD STAR MINING CO. (Civ. 2035.)

(District Court of Appeal, Second District, California. Feb. 5, 1918.)

1. CORPORATIONS ⇐432(12)—AUTHORITY OF PRESIDENT—SIGNING NOTES—SUFFICIENCY OF EVIDENCE.

In an action on notes against a corporation, evidence held insufficient to show authority in the former president of the company, who signed, to bind the company by the execution of promissory notes.

2. CORPORATIONS ⇐426(4)—ACT OF PRESIDENT—RATIFICATION.

The determination of a mining company's board of directors that, in the event the mine became productive and no change of mind was had upon the matter, they might take care of notes given to lenders to the company by its former president, unauthorized to borrow and execute notes, was not a ratification of the president's act, nor the making of a new contract.

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Action by John Massie and Lou Massie, husband and wife, against the Eldorado Gold Star Mining Company, a corporation. From judgment for plaintiffs, and an order denying motion for new trial, defendant appeals. Reversed.

G. W. Wickliffe, of Los Angeles, for appellant. Randall & Bartlett, of Los Angeles, for respondents.

JAMES, J. This appeal was taken by defendant from the judgment and from an order denying defendant's motion for a new trial. On the evidence as shown by the bill of exceptions, we are of the opinion that the judgment cannot be sustained; and it will be unnecessary to notice particularly errors assigned by appellant which do not refer to the question of the insufficiency of the evidence to justify the decision of the court.

[1] Plaintiffs sued upon two promissory notes alleged to have been executed by the defendant, each for the sum of \$500; the first alleged to be of date May 15, 1910, and the second of June 15, 1910, each payable one year after date, with interest at the rate of 7 per cent. per annum. It was alleged that plaintiffs were not in possession of the promissory notes at the time suit was brought, but that they were informed and believed that the same were in possession of the defendant. The

defendant by answer specifically denied the making of the promissory notes and denied that it had possession of any notes. It appeared that at the time the notes were alleged to have been made one Sims was president of the defendant company. Plaintiff Lou Massie testified that Sims borrowed the money from her and her husband, the coplaintiff. When asked by whom the first note was signed, she answered that it was signed by "Sims." As to the second note, the following interrogatory was put to her: "And this second note, the one dated June 15, 1910, or thereabouts, was signed the same as the other note, or signed as president of the Eldorado Gold Star Mining Company?" to which the witness answered, "Yes, sir." Sims testified as a witness, and stated that he borrowed the money and signed the notes with his own name, adding thereto the words: "President of Eldorado Gold Star Mining Company." He gave no testimony as to any alleged particular authority given him by the company to borrow money. Later in his testimony he added that the notes had also been signed by the secretary of the company. When asked what was done with the money, he said:

"The first money, there was a writing desk, typewriter, carpet, some little fixtures we had there, went down to the mine twice, carried down parties twice to investigate, to take out stock with the company, and of course that cost money. Q. Do you know how the second \$500 was used? A. Pretty much the same way. We were trying to get started, and the money did not last very long."

Plaintiff John Massie testified that he at one time demanded payment of the full amount of the notes from one Folke, secretary of the company, and that Folke gave him a note which was in form a statement reading as follows:

September 25, 1911.

Eldorado Gold Star Mining Company to John Massie, Dr.

Sept. 25. To 2 notes.....	\$1,000.00
" cash & inst.....	319.00
	<hr/> \$1,319.00

The foregoing statement constitutes the substance of all the material testimony introduced on behalf of the plaintiffs. From that testimony it is very clear indeed that no authority was shown in Sims, as president of defendant corporation, to bind the corporation by the execution of promissory notes. *Black v. Harrison Home Co.*, 155 Cal. 121, 99 Pac. 494.

[2] The claim that the act of Sims was ratified must rest wholly upon the transaction which resulted in the giving of the alleged statement of account as above quoted. The secretary of the defendant was sworn as a witness on the latter's behalf. This witness, without objection, testified that he had examined the minutes of the corporation, which contained a full, true, and correct report of the meetings of the board of directors, and had found no record of any action taken

on behalf of the board authorizing the making of the promissory notes here sued upon. The secretary testified positively that the board "had never authorized any loan of that character." He testified that, at one of the meetings subsequent to the date of the maturity of the notes, a Mr. Shields, by request of the plaintiffs, made a statement to the board of directors regarding the borrowing by Sims of the plaintiffs' money, and the witness then stated:

"The board had considered the matter, they said. Well, we are not entitled to pay it, because we didn't borrow it and did not use it; but as you are old people, and you let him have the money individually, when the mine gets on a productive basis we will try and take care of it. We will have our secretary make an entry, so when we get on a productive basis we can look after you if we so choose."

It was upon this authority that the secretary made the statement of account which has before been referred to. Plainly the determination of the board of directors that they might, in the event the mine became productive and no change of mind was had upon the matter, "take care" of the notes, in no sense amounted to a ratification of the act of Sims, nor the making of a new contract. There was no claim made by plaintiffs that any express authority had been granted to Sims to borrow money on behalf of the corporation. The testimony given by the secretary was in no wise disputed or contradicted. Upon the record, we think the decision of the court is without sufficient evidence to support it.

The judgment and order are reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(36 Cal. App. 173)

SMITH v. MEADE. (Civ. 2085.)

(District Court of Appeal, Second District, California. Feb. 6, 1918. Rehearing Denied March 8, 1918. Denied by Supreme Court April 1, 1918.)

1. APPEAL AND ERROR \S 671(1)—REVIEW—APPEAL ON JUDGMENT ROLL — QUESTIONS PRESENTED.

Where the findings of fact made by the court are sufficient to support the judgment, no further point is presented which can be determined on appeal on the judgment roll and brief bill of exceptions.

2. APPEAL AND ERROR \S 719(6)—RECORD—ASSIGNMENTS OF ERROR—NECESSITY.

Where the bill of exceptions contains no assignment of error, no point as to the sufficiency of the evidence to sustain the decision can be considered in view of Code Civ. Proc. \S 648, providing that when the exception is to the verdict or decision upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by W. C. Smith against A. J. Meade. Judgment for defendant, and plaintiff appeals. Affirmed.

Bicksler, Smith & Parke, of Los Angeles, for appellant. Avery & French, of Los Angeles, for respondent.

JAMES, J. [1] This appeal is one taken from a judgment entered in favor of the defendant. It is presented on the judgment roll and a brief bill of exceptions. The action was upon a promissory note executed by a corporation of which the defendant was treasurer, the payment of which note was guaranteed in writing by the defendant. Recovery was sought against the defendant by reason of his contract of guaranty. In the complaint it was alleged that subsequent to the maturity of the promissory note referred to, a note and draft were received by plaintiff's assignor, the payee of the first note, which last note and the draft, it is alleged in the complaint, "were forwarded to plaintiff's assignor to satisfy and liquidate the note sued upon herein." A further allegation followed, showing that attempts had been made to collect the second note and draft, which attempts were unsuccessful; and it was alleged that the second note and draft were valueless, and that the corporation maker was insolvent. The answer admitted all of the facts alleged, except it contained a denial of nonpayment of the note sued upon, and alleged affirmatively that the same had been wholly paid and satisfied. The court made its findings sustaining the defense of payment. The findings were sufficient in form and substance to support the judgment which followed. The bill of exceptions contains a copy of an affidavit made by a representative of the payee corporation. It appears to have been stipulated that this affidavit might be used as evidence in the case. The affidavit contains a narrative of the transactions had regarding the making of the several instruments referred to. There appears to have been no other evidence offered on behalf of either party at the trial. As the findings of fact made by the court were sufficient to support the judgment, no further point is presented which can be determined by an examination of the judgment roll.

[2] The chief contention of appellant refers to the matter of the insufficiency of the evidence to sustain the findings. The bill of exceptions contains no assignment of error, either in general or particular terms. Upon this state of the record, counsel for respondent insist that no point as to the sufficiency of the evidence to sustain the decision can be here considered, and with this contention we must agree. Section 648, Code of Civil Procedure, provides that:

"When the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. * * *

In *Swift v. Occidental Mining, etc., Co.*, 141 Cal. 161, 74 Pac. 700, it is said:

"The substance of all these decisions is that the object of the rule requiring these specifications is first to shorten the statement of the evidence by excluding everything irrelevant to the specified fact; and, second, to notify the opposing party of the particular finding called in question, in order that he may see that the statement fairly and fully presents the evidence bearing upon that particular matter."

It has been repeatedly held that in the absence of any specification pointing out where in the evidence is insufficient to sustain the decision, no review can be had on appeal of that particular matter. *Hawley v. Harrington*, 152 Cal. 188, 92 Pac. 177; *Meek v. Southern California Ry. Co.*, 7 Cal. App. 606, 95 Pac. 166; *Millar v. Millar et al.*, 167 Pac. 394.

For lack of error shown by the record, it follows that the judgment should be affirmed. The judgment is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(36 Cal. App. 137)

BISSIG v. JOHNSTON ORGAN & PIANO MFG. CO. (Civ. 2109.)

(District Court of Appeal, Second District, California. Feb. 4, 1918. Rehearing Denied by Supreme Court April 4, 1918.)

PLEADING § 258(5)—AMENDMENT—LEAVE.

Defendant's answer in an action on a note denying the alleged consideration, but insufficiently denying the execution, his motion for leave to amend, accompanied by sufficient amended answer, made pending motion for judgment on the pleadings, should have been allowed.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Vincent Bissig against the Johnston Organ & Piano Manufacturing Company. Judgment for plaintiff, and defendant appeals. Reversed, and rehearing denied.

Frank Bryant, of Los Angeles, for appellant. Carter, Kirby & Henderson, of Los Angeles, for respondent.

CONREY, P. J. The defendant appeals from a judgment which was rendered pursuant to an order granting a motion for judgment on the pleadings. The complaint, which was verified, alleged that on the 17th day of September, 1913, defendant was indebted to plaintiff in the sum of \$1,000, and that as evidence of said indebtedness defendant executed and delivered to plaintiff on that day the described note. The answer contains an evasive and insufficient denial of the execution of the note, and we will assume that the note was executed and delivered as alleged. But the answer does specifically and in sufficient terms deny that on September 17, 1913, or at any time, the defendant was indebted to the plaintiff in the sum of \$1,000 or at all.

If the complaint had alleged the execution of the note without specifying the fact of pre-existing indebtedness and without

stating that the note was given as evidence of such indebtedness, we think that defendant's denial that it was indebted to the plaintiff would have raised no issue, for it would have been merely a denial of a conclusion of law, and would not have been equivalent to an assertion that the note was given without consideration. But the allegations of the complaint relied upon such pre-existing indebtedness as constituting the sole consideration for the execution of the note. The defendant was entitled to meet the case as alleged. By denying the existence of the indebtedness and by denying that the note was executed as evidence of such indebtedness, the issue tendered by the plaintiff was accepted. In this condition of the pleadings the plaintiff was not entitled to judgment without proof that the only claimed consideration for the note did in fact exist.

While the motion for judgment on the pleadings was pending, the defendant moved for leave to file an amended answer, which, as offered, was undoubtedly sufficient to raise issues upon which a trial would have been necessary. Under the circumstances this amendment should have been permitted.

The judgment is reversed.

We concur: JAMES, J.; WORKS, Judge pro tem.

Opinion of Supreme Court Denying Rehearing.

PER CURIAM. In denying the application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District we deem it proper to say that we do so on the ground last stated in the opinion, viz.: That the trial court erred in refusing to allow an amended answer to be filed. This being a case within the appellate jurisdiction of the District Court of Appeal, as declared by the Constitution, the rules expressed by us in such cases as *Rauer's Law, etc., Co. v. Berthlaume*, 21 Cal. App. 675, 132 Pac. 833, govern.

(36 Cal. App. 152)

SOLOMON v. JUSTICES' COURT OF LOS ANGELES TP., LOS ANGELES COUNTY, et al. (Civ. 2473.)

(District Court of Appeal, Second District, California. Feb. 5, 1918.)

1. APPEAL AND ERROR § 757(1)—BURDEN TO SHOW ERROR—ABSENCE OF POINTS.

As it is incumbent on an appellant to make an affirmative showing that the trial court has committed error before he can be relieved from the effects of the judgment, judgment will be affirmed where there is on file only a typewritten clerk's transcript setting forth the judgment roll in the action, and no points and authorities in support of the appeal have ever been filed.

2. COSTS § 280(1) — FRIVOLOUS APPEAL—DAMAGES.

Where the appeal is frivolous, respondents, in addition to any costs recoverable by them, may recover damages.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Irl Solomon against the Justices' Court of Los Angeles Township, Los Angeles County, State of California, Harlan G. Palmer, Justice of the Peace of such court, and Giacchino Giangregorio. From judgment for defendants, plaintiff appeals. Affirmed.

Irl Solomon, of Los Angeles, in pro. per. Carter & Torchia, of Los Angeles, for respondents.

PER CURIAM. [1,2] This is an appeal from a judgment entered after the sustaining of a demurrer to a complaint without leave to amend. There is on file a typewritten clerk's transcript setting forth the judgment roll in the action, but no points and authorities in support of the appeal have ever been filed. As it is incumbent upon an appellant in any case to make an affirmative showing that the trial court has committed error in the case, before he can be relieved from the effects of the judgment appealed from, the judgment is affirmed. As it appears to us that the appeal is frivolous, the respondents, in addition to any costs recoverable by them because of the affirmance of the judgment, shall have and recover from the appellant the sum of \$50 as damages.

(36 Cal. App. 208)

CURRAN v. WILSON. (Civ. 2120.)

(District Court of Appeal, Second District, California. Feb. 7, 1918. Rehearing Denied March 8, 1918. Denied by Supreme Court April 4, 1918.)

1. **BILLS AND NOTES § 496(3)—ACTION BY INDORSEE—INDORSEMENT BY PAYEE—PROOF.**
In an action on a note by plaintiff, alleged indorsee, for value before maturity, where indorsements were denied, it was essential for plaintiff to prove the indorsement.

2. **EVIDENCE § 370(3)—DOCUMENTARY—IDENTIFICATION—AUTHORITY OF INDORSEMENT BY PAYEE—CORPORATE AGENT.**

A written instrument, purported to have been executed by payee corporation, and purporting to authorize S. to receive notes and indorse and discount the same, was inadmissible to establish the authenticity of indorsement by S. for the corporation, where neither the instrument nor the signatures attached thereto were identified by any witness.

3. **DEPOSITIONS § 90—USE IN CIVIL CASES—PRESENCE OF WITNESS.**

In an action on note by plaintiff, alleged indorsee, for value before maturity, the deposition of one not a party, but to whom note had been indorsed by original payee, was inadmissible in the absence of a showing as to the existence of conditions set forth in Code Civ. Proc. § 2021, providing for use of depositions only where attendance of witnesses cannot be procured, etc.

4. **BILLS AND NOTES § 497(1)—HOLDER IN DUE COURSE—PRESUMPTION.**

While the effect of a blank indorsement is to make a negotiable note payable to bearer, the presumption cannot be invoked in favor of plaintiff indorsee that by such indorsement he acquired the note free from equities.

5. BILLS AND NOTES §497(3)—BONA FIDE PURCHASER—PROOF.

Before the defense of fraud could be cut off, it was incumbent on plaintiff indorsee to show that he acquired the note for value before maturity.

Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Action by William M. Curran against Mrs. Lydia A. Wilson. Judgment for plaintiff, and defendant appeals. Reversed.

Anderson & Anderson and Victor T. Watkins, all of Los Angeles, for appellant. Hocker, Morris & Austin and Hocker & Austin, all of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered against the defendant. The action was upon a promissory note, the text of which is set out in the complaint as follows: "\$500.00. Pomona, Cal., March 1st, 1915.

"Sixty days after date, (without grace) I promise to pay to the order of Silent Engine Co. five hundred dollars for value received with interest at 7 per cent. per annum from Mch. 1st, 1915, until paid both principal and interest payable only in United States gold coin.

"Payable at First National Bank, Pomona, Cal. Mrs. Lydia A. Wilson.

"No. Due"

Indorsements on back:

"Silent Engine Co., Bradford Stein, Gen. Mgr. T. Carter Doremus."

It was further alleged in the complaint that before maturity, for a valuable consideration, the note was indorsed and delivered to Doremus, who thereafter, before maturity and for a valuable consideration, indorsed the same to the National Surety Company. It was then alleged "that thereafter said note was transferred and delivered by said National Surety Company to the plaintiff herein." A sufficient allegation of nonpayment appears in the complaint. In the answer the defendant made denial of the allegations as to the indorsements made on the note and the transfer thereof in the following form:

"Alleges that she has no information or belief sufficient to answer the allegations of the second paragraph thereof and for want of such information and belief, or either, and upon that ground denies that before maturity or for a valuable consideration, or at all, said note was indorsed, or at all delivered to T. Carter Doremus, or that thereafter or before maturity, or for a valuable consideration, or at all, said note was indorsed or delivered by said T. Carter Doremus to the National Surety Company, or that thereafter or at all said note was transferred or delivered by said National Surety Company to the plaintiff herein."

A special defense was set up by the defendant showing fraud in the obtaining of the note by the payee, and praying that judgment be denied to the plaintiff. Plaintiff offered the note, with the indorsements made thereon, in evidence, to which objection was made and overruled. Without calling a witness, a written document was then offered and received by the court, which purported to have

been executed by the corporation payee of the note by its president and secretary, with corporate seal attached. Objection was made to the reception of this document, and this objection was also overruled. The plaintiff thereupon offered in evidence the deposition of Doremus, wherein Doremus gave testimony showing that he sold to the payee of the note, 15 days after its date, an automobile, and took as part payment the note in suit. He further testified that he assigned the note later to the National Surety Company in payment of a debt owing to the corporation by his mother. Objection was made to the introduction of the deposition and to particular parts thereof. The general objection was first made that the deposition was not admissible for the reason that it was not shown that the attendance of Doremus as a witness at the trial could not be secured. This objection was overruled. Plaintiff having rested his case, defendant was called to the witness stand, and counsel sought to elicit from her the details of the transaction in which the note was given as sustaining the special defense made by the answer. This testimony was objected to on the ground that it had been shown that Doremus had obtained the note before maturity for value and without knowledge of the transaction involved in the making of the note. The objection was sustained. The court thereupon ordered judgment in favor of the plaintiff.

[1, 2] It will be noted that there was no testimony showing any indorsement to have been made by the National Surety Company to the plaintiff herein, and that the allegation of the complaint was merely that the note had been transferred and delivered by that surety company to the plaintiff herein. In our opinion, it was first essential for the plaintiff to prove the indorsement of the payee. The indorsement appeared in the terms set out above, and the first evidence tending to establish the authenticity of that indorsement was the written document referred to hereinbefore purporting to have been executed by the Silent Engine Company, and which purported to authorize Stein to "receive moneys, notes, checks and indorse and discount same; to take subscriptions for stock, make contracts and issue evidences of indebtedness." This document was not, nor were the signatures attached thereto, identified in any way by the testimony of any witness and, under the objection made by the defendant, we think was inadmissible. The case of *Burnett v. Lyford*, 93 Cal. 114, 28 Pac. 855, shows a case different on the facts; the court there declaring only that where no objection was made, the seal of the corporation affixed with the signatures would prima facie be proof of the regularity of the execution of the document. Neither was there evidence showing that Stein was the general manager of the payee of the note.

[3, 4] But it is said that in the testimony given by deposition Doremus furnished evidence showing the regularity of the transfer by the payee of the note to him. Doremus was not a party to the action. His deposition was not admissible, unless some showing was made as to the existence of conditions set forth in section 2021, Code of Civil Procedure.

The witness in his answers showed that at the time of making the note he was a resident of Los Angeles, and gave no testimony showing that any change of residence had been made afterward. As we have noted, there was no testimony showing facts regarding the transfer of the note from the National Surety Company to this plaintiff, and no indorsement made by the Surety Company appeared upon the note. If we were to assume, without proof, that the indorsements of the payee corporation and Doremus were regularly made, it might perhaps be further presumed that by the production of the note from the hands of the plaintiff, ownership would be implied. Plaintiff, however, assumed, and we think rightly, that it was essential to his case to show the indorsement of the note by the payee; but he failed to furnish the court with competent evidence to establish the fact.

[5] We may add further that, while it has been held that the effect of an indorsement in blank is to make the note payable, not as an indorsee strictly, but as to bearer (*Eames v. Crosier*, 101 Cal. 260, 35 Pac. 873), we do not believe that the presumption can be invoked in favor of this plaintiff that he acquired the note in such a manner as to free it from equities existing in favor of the defendant. We are of the opinion that it was incumbent upon the plaintiff to show that he acquired the note for value before maturity, before the right of the defendant to urge her special defense of fraud would be cut off.

The judgment is reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(36 Cal. App. 129)

FICKES et al. v. BAKER et al. (Civ. 1788.)

(District Court of Appeal, Third District, California. Feb. 4, 1918.)

1. REFORMATION OF INSTRUMENTS—VOLUNTARY CONVEYANCES.

A voluntary conveyance will not be reformed so as to include land not referred to therein, unless all parties interested in the land consent.

2. JUDGMENT—REFORMATION OF INSTRUMENTS—VOLUNTARY CONVEYANCES—DEATH OF GRANTOR.

A voluntary conveyance reformed after the death of the grantor in a suit against the grantor's executors, to include land not referred to therein, is not binding on an heir under Code Civ. Proc. § 1664, prescribing method for ascertainment of heirship.

3. REFORMATION OF INSTRUMENTS—VOLUNTARY CONVEYANCES—DEATH OF GRANTOR.

Assuming that a voluntary conveyance can be reformed after death of the grantor without heirs to include land not referred to therein, the state, under Civ. Code, § 1386, is a party with a contingent interest in the estate of one dying intestate whose consent would be necessary.

4. EXECUTORS AND ADMINISTRATORS—REFORMATION OF CONVEYANCES.

Executors and administrators have no authority to consent to the reformation of a voluntary conveyance by the deceased to include land not referred to therein.

Appeal from Superior Court, Yolo County; Malcolm C. Glenn, Judge.

Action to reform a deed by Mary Fickes and others against W. S. Baker and another, executors of the last will and testament of John Cradwick, deceased. Judgment for defendants, and plaintiffs appeal. Affirmed.

F. E. Gaddis, of Woodland, and L. Ernest Phillips, of Oakland, for appellants. A. G. Bailey, of Woodland, for respondents.

BURNETT, J. The action was brought for the reformation of a deed executed by the testator in his lifetime. It was found by the court that at the time of his death the deceased was the owner and in the possession of property described as lot No. 6 in block No. 10, in the town of Winters, county of Yolo; that he made no disposition of it by his will; that on the 31st day of July, 1912, said Cradwick executed a certain deed of conveyance to the plaintiffs, granting a certain lot of land contiguous to the parcel here in controversy; that "said deed was by its express terms made, executed, and delivered by the grantor therein, John Cradwick, for and in consideration of the love and affection which he had and bore unto the grantees therein named, and also for the better maintenance, support, protection, and livelihood of the grantees therein named, and said consideration was the sole consideration for the execution of said deed"; that said grantees were not blood relatives of deceased, "and, so far as known, at the date of trial said deceased had no heirs at law; that prior to the time said deed was drafted said John Cradwick directed the scrivener to include in the said deed the said lot No. 6, in block 10, but said scrivener failed and neglected to do so; that at the time said deed to said lot No. 7 and a portion of said lot 8 was executed and delivered nothing was said by any of said parties or by said scrivener in reference to the omission of said lot 6 from said deed." It is further found "that W. S. Baker and W. P. Womack, executors of the last will and testament of said John Cradwick, deceased, in open court at the trial of the issues involved in this proceeding consented to the granting of a decree directing them to amend and reform the deed hereinbefore described, so as to include lot 6 in block 10, in said town of Winters." The court concluded from

the foregoing facts that the plaintiffs were not entitled to a reformation of said deed, and therefore directed judgment in favor of defendants for their costs. The appeal is from such judgment. It is to be observed that there is no express finding that at the time of the execution of said deed the grantor intended to convey said lot, but the cause has been treated here by both parties as though such intention existed, and we shall so consider it.

[1] It is quite apparent that the judgment of the lower court must be affirmed. This follows from the rule recognized by all the authorities that a voluntary conveyance will not be reformed so as to include land not referred to or conveyed therein, unless all the parties interested in said land consent thereto. The rule and the reason underlying it are clearly stated in *Enos v. Stewart*, 138 Cal. 112, 70 Pac. 1005, from which we quote:

"A court of equity interferes to correct a mistake in a written instrument only in furtherance of justice, and to prevent fraud or some injustice. In this case, by refusing to correct the deed no fraud nor injustice is done to appellant. She has lost nothing because she paid no consideration for the deed. She has been deprived of nothing the law would otherwise give her. It is true the intention of the grantor is not carried out, but it would have been equally true if an attempt had been made to make a will and it had been defective in a vital part. The court could not reform a will, nor make it so that it would comply with the law. In this case the deceased intended to convey the property, but she did not do so."

In *Smith v. Smith*, 80 Ark. 458, 97 S. W. 439, 10 Ann. Cas. 522, it was held that the deed was not sufficient to convey the 82½ acres of land defectively described, that it was a voluntary conveyance without a valuable consideration to support it, and that equity would not reform said deed, citing a long number of authorities. This case was affirmed in *Johnson v. Austen*, 86 Ark. 446, 111 S. W. 455, wherein it was held:

"In the absence of evidence of fraud or undue influence, a deed of gift from a wife to her husband cannot be reformed without the consent of all parties."

By the Supreme Court of Michigan, in *Tuthill v. Katz*, 174 Mich. 217, 140 N. W. 519, it was declared to be "a well-established rule that a court of equity will refuse its aid to rectify a mistake in a conveyance that is voluntary and without consideration unless all the parties consent." In *Willey v. Hodge*, 104 Wis. 81, 80 N. W. 75, 76 Am. St. Rep. 852, it was declared:

"There can be no doubt of the intention of the father to convey this tract of land to the plaintiff. His deed, however, fails to describe it. The rule is quite familiar that a defective deed may be treated in equity as an agreement to convey, and performance enforced. But the rule is equally well understood that when it appears that the deed was voluntary, equity will not carry it into effect or reform it."

But we forbear further citation, as we are referred to no contrary decisions.

[2] It seems to be contended, however, that equity will withhold relief after the death of

the grantor only where there is an heir to succeed to the property and it is claimed that the converse of the proposition, namely, that where there are no heirs the court should correct the mistake at the instance of the grantees, is a sound principle of equity. As to this contention, we may observe that there is no express finding that there was no heir, and it is quite apparent that if there be any heir to an estate he would not be precluded by such finding in this case from asserting and maintaining his heirship by the method pointed out in section 1664 of the Code of Civil Procedure.

[3] But waiving the foregoing considerations and admitting for the sake of argument that if all parties in interest consent such deed may be reformed after the death of the grantor, it is quite apparent that there are other parties in interest besides the heir or heirs and the grantees. Whoever would succeed to the property under the laws of the state stands in the same relation to the grantor as far as reformation is concerned and to what he has failed to convey as would an heir. In fact, the heir—so called—is a party in interest only by virtue of the statute and the same section of the Code which provides for the succession by a relative to the decedent determines that the state has a contingent interest in the estate of one dying intestate. For said section 1386 of the Civil Code reads:

"When any person having title to any estate not otherwise limited by marriage contract dies without disposing thereof by will, it is succeeded to and must be distributed * * * in the following manner: * * * 9—If the decedent leaves no husband, wife, or kindred, and there are no heirs to take his estate or any portion thereof, under subdivision eight of this section, the same escheats to the state for the support of the common schools."

In other words, the legal title to said lot No. 6 on the death of John Cradwick vested according to the order prescribed by said section 1386, and the interest of the one entitled to the same is not affected by the class or category to which he may belong. The matter cannot be made plainer by argument, and it will not be disputed that the state has not consented to the reformation of said deed. It may be said also that the creditors, if any—and it does not appear that there was none—probably have such an interest that equity would not be justified in reforming said deed without their consent, but as to that we need not express any definite opinion.

[4] There is some pretense that the executors represented the interested parties in expressing their willingness to have the deed reformed. Such position, however, cannot be maintained. We need not consider at length the duties and responsibilities of executors, as those matters have been often discussed in the decisions, and the provisions of the Code of Civil Procedure on the subject scarcely need elucidation. It is sufficient to say that they have no power to consent to such

a decree, and if they attempt to do so it cannot affect the legal title to the property. They may compound with a creditor as provided by section 1588 of the Code of Civil Procedure, but that must be "with the approbation of the court or a judge thereof." They may also be required to complete contracts for sale of real or personal property made by the decedent in his lifetime (section 1597, Code Civ. Proc.), but this must be by direction of the court, and, of course, it must be in cases wherein the grantor if living could be compelled to execute the conveyance.

No one would contend that in a case like this where the conveyance was voluntary the grantor could be compelled to convey the land in controversy. Manifestly the executors stand in a relation no more favorable to the grantees.

We think there is no merit in the appeal, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(36 Cal. App. 171)

KARALES v. LOS ANGELES CREAMERY CO. (Civ. 2036.)

(District Court of Appeal, Second District, California. Feb. 6, 1918.)

1. SALES — 62 — INDIVISIBLE CONTRACT.

A contract to sell and deliver to defendant all milk produced by plaintiff for a period of three months was indivisible, notwithstanding the milk was to be paid for monthly.

2. SALES — 342 — BREACH OF CONTRACT — RECOVERY.

Where plaintiff stopped delivery, before termination of contract to deliver a certain amount of milk from a certain number of cows, because of the sale of his cows, he could not recover in an action on the contract for milk delivered, as one who himself breaches a contract cannot recover in an action thereon for breach of the other party.

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by Steve Karales against the Los Angeles Creamery Company. Judgment for plaintiff, and defendant appeals. Reversed.

Lloyd, Cheney & Gelbel and Ovilla N. Normandin, all of Los Angeles, for appellant. Chas. S. McKelvey, of Los Angeles, for respondent.

WORKS, Judge pro tem. [1, 2] The amended complaint in this action asks for judgment for the contract price of milk delivered during the months of January and February, 1915, at the special instance and request of the defendant. The answer alleges that the milk was delivered pursuant to the terms of a written contract between the parties, and that none was delivered after February 10, 1915. A copy of the contract is attached to the answer as an exhibit. By it Karales agreed, under date of December 1, 1914, to sell and deliver daily, and the creamery com-

pany agreed to buy, all the milk produced by Karales, being not less than 400 pounds per day from not less than 35 cows, for a three-month period from December 1, 1914, to March 1, 1915, at an agreed price per pound of butter fat content of the milk, payment to be made before the 15th of each month for deliveries during the preceding month. The contract also bound Karales to furnish the milk from healthy, well-fed cows, to keep his dairy in a clean and sanitary condition, and to protect the milk with a proper canvas covering while it was in transit to the company. It also provided that if the delivery of milk should be interfered with by strikes, or other specified untoward occurrences, then the contract should be suspended only during such interference. The trial court found the facts as alleged in the answer, with the further finding, in effect, that Karales had stopped the delivery of milk on February 10th because he had sold his cows, but rendered judgment in his favor. The appeal is from the judgment.

Notwithstanding the fact that the milk was to be paid for monthly, the contract was indivisible and entire, and the plaintiff committed a breach of its provisions by ceasing delivery on February 10th. *McConnell v. Corona City Water Co.*, 149 Cal. 60, 85 Pac. 929, 8 L. R. A. (N. S.) 1171; *Wood, Curtis & Co. v. Seurich*, 5 Cal. App. 252, 90 Pac. 151; *Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 Pac. 55. And one who himself breaches a contract, without excuse, cannot recover in an action upon the contract for a breach of its terms by the other party. *Wood, Curtis & Co. v. Seurich*, supra; *Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co.*, supra; *California Sugar Agency v. Penoyar*, 167 Cal. 274, 139 Pac. 671; *Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co.*, 168 Cal. 140, 142 Pac. 46. The fact that Karales sold his cows and went out of the dairy business was plainly no excuse or justification for his breach of the contract.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(36 Cal. App. 156)

GLOBE GRAIN & MILLING CO. v. DRENTH, Constable. (Civ. 2185.)

(District Court of Appeal, First District, California. Feb. 5, 1918. Rehearing Denied by Supreme Court April 4, 1918.)

1. SALES — 88 — EXECUTED OR EXECUTORY CONTRACT — QUESTION FOR JURY.

Even if a contract, otherwise showing an actual sale of barley, might be construed to be executory, because of the expression "as per your samp. No. 1 Fen," though there was testimony that no sample was given, yet the positive testimony of the parties that the transaction was an absolute sale, raised a conflict of evidence for the jury, against motion for nonsuit.

2. TRIAL \S 165 — MOTION FOR NONSUIT—VIEW OF EVIDENCE.

On motion for nonsuit, the evidence being fairly susceptible of two constructions, the court must take the view most favorable to plaintiff.

3. FRAUDULENT CONVEYANCES \S 137(4)—CHANGE OF POSSESSION—GROWING CROPS—“IN THE POSSESSION OR UNDER THE CONTROL OF.”

Growing crops are not in the possession or under the control of the seller thereof within Civ. Code, \S 3440, so as to require immediate delivery and continued change of possession, which could only be by abandonment of the premises, to save the sale from being a fraudulent conveyance.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Globe Grain & Milling Company against Ben Drenth, constable. From an adverse judgment, plaintiff appeals. Reversed.

Short & Sutherland, of Fresno (Carl E. Lindsay, of Fresno, of counsel), for appellant. Barnard & Watters and S. L. Strother, all of Fresno, for respondent.

KERRIGAN, J. This action was brought by plaintiff for the alleged conversion of certain grain. The trial was had before a jury, and at the conclusion of the plaintiff's case a motion of nonsuit was made, and the court took the case from the jury and granted the motion, and this is an appeal from the judgment of nonsuit.

There are two points relied upon for a reversal: First, that no proper motion for a nonsuit was made; and second, that there was sufficient evidence to make out a prima facie case for the jury.

The first objection is based upon the assertion that no formal motion for nonsuit was ever made, and, if made, the grounds of the motion were not specified.

The record clearly discloses the fact that, not only was the motion made, but that it was based and granted upon the grounds that there had been no sufficient change of possession of the property under a sale thereof to satisfy the requirements of section 3440 of the Civil Code, and, further, that it was not shown that there was ever any sale of the property. There is therefore no merit in either of the contentions contained in the first objection.

In support of the second objection, it is argued that plaintiff presented substantial evidence tending to prove all the facts in issue constituting his case, and was therefore entitled to have the case go to the jury for a verdict on its merits.

[1] There is no conflict as to the facts. It appeared in evidence that two parties, S. C. Robertson and Geo. R. Harrison, were engaged in farming barley upon certain lands which they had leased, situated in Fresno county. In the month of June, 1916, and before the barley was harvested, they undertook to sell to plaintiff some 1,350 sacks of

the crop, and agreed to deliver the same at San Joaquin, their nearest railroad station, as soon as the grain was harvested. The sale was made in two different lots. During the course of the harvest, but before completion thereof, it was taken by defendant into his possession as constable under a writ of attachment, and finally sold by him under execution. It was admitted by defendant that plaintiff at the time of the attachment served upon him a duly verified claim of ownership, and it is not denied that the defendant refused to deliver the barley to plaintiff notwithstanding the claim so made, but, on the contrary, sold the same under execution as above stated. The barley so sold constituted the entire interest of Robertson and Harrison in the crop, which amounted in all to about 1,100 sacks. The testimony of the vendors Robertson and Harrison, who sold the barley, and plaintiff's officers, who conducted the purchase, was positive and direct that an actual sale had been made. The terms of the contract itself show an actual sale unless the expression contained therein “as per your samp. No. 1 Fen” can be construed as having the effect to make the contract merely executory. Testimony was introduced to show that no sample of the barley was ever given, and from this evidence it might be inferred that the expression used was one of description only. Assuming, however, that the contract might be construed to be executory in character, the positive testimony of the parties to it was to the effect that the transaction was an absolute sale, and a conflict in the evidence was thus presented.

[2] A motion for nonsuit should be denied where there is any evidence to sustain plaintiff's case. On such motion, if the evidence is fairly susceptible of two constructions, the court must take the view most favorable to the plaintiff. *Mitchell v. Brown*, 18 Cal. App. 117, 122 Pac. 426.

[3] This being so, the only remaining question to be discussed is as to the sufficiency of the transfer of the property to satisfy section 3440 of the Civil Code.

The property was not in existence when the sale of the grain was made, and, of course, was not and could not then be in the possession of the transferor. For like reasons there could be no actual or continued change of possession of this nonexistent property. *Fissel v. Monroe*, 33 Cal. App. 756, 166 Pac. 607.

Growing crops are chattels not susceptible of manual delivery until harvested, and are not “in the possession or under the control of the vendor” within the meaning of the statute requiring an immediate delivery and continued change of possession. *O'Brien v. Ballou*, 116 Cal. 318, 48 Pac. 130. To so construe the statute would make it an imperative duty on the part of the grower to abandon the possession of his farm to the vendee at the time

of the sale, a proceeding the statute certainly does not contemplate. *Davis v. McFarlane*, 37 Cal. 634, 99 Am. Dec. 340.

In the state of the evidence we think it clear, in view of these authorities, that it was error to grant the defendant's motion for nonsuit. The judgment is therefore reversed.

We concur: LENNON, P. J.; BEASLY. Judge pro tem.

(36 Cal. App. 159)

TRELOAR v. KEIL & HANNON et al.
(Civ. 1555.)

(District Court of Appeal, Third District, California. Feb. 6, 1918. On Rehearing, March 8, 1918.)

1. INSURANCE ⇨514—LIABILITY—INDEMNITY INSURANCE—INJURY TO THIRD PERSON—"DEFEND."

Under contract of P. insuring K., not against liability that may be incurred by K., but against loss and expenses arising from claims on K. on account of bodily injuries accidentally suffered, or alleged to have been suffered by any person, and caused by K.'s horses or vehicles, and providing that no action shall lie against P. for any loss or expense except such as has actually been sustained and paid by reason of a final judgment, P. is not liable to one so injured, so as to authorize action against it and K., and this notwithstanding provision of contract that, if action is brought on account of an accident, K. shall notify P., and P. will settle or defend the action; "defend" not meaning to successfully defend.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Defend.]

2. INSURANCE ⇨514—INDEMNITY INSURANCE—LIABILITY OF INSURER—STATUTES.

Liability of the insurer on a policy, insuring against loss and expenses actually sustained and paid by reason of a final judgment by insured on account of a claim for injury to another from insured's horses or vehicles, is not intended to be changed by Civ. Code, § 2777, providing that one who indemnifies another against an act to be done by the latter is liable to every person injured by such act; section 2778, subd. 2, providing that, on an indemnity against claims, demands, damages, or costs, the person indemnified is not entitled to recover without payment thereof.

3. APPEAL AND ERROR ⇨1073(3)—HARMLESS ERROR—JUDGMENT AGAINST FIRM AND PARTNERS.

Judgment having been properly rendered against the individual members of a firm, it is a matter of no moment to them whether the partnership, against which judgment was also rendered, was dissolved pending the action.

On Rehearing.

4. INSURANCE ⇨146(3)—POLICY—CONSTRUCTION.

Policy of insurance will not be construed against insurer, where this will require the doing of violence to its plain terms.

5. CONSTITUTIONAL LAW ⇨113—OBLIGATION OF CONTRACTS.

Where parties have entered into a lawful contract and clearly expressed their intention, the Legislature cannot provide a different contract for them.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Alfred Treloar against Keil & Hannon, a partnership, and others. Judgment for plaintiff, and defendants appeal. Reversed in part, and affirmed in part.

Meredith, Landis & Chester and Wachhorst & Wachhorst, all of Sacramento, for appellants. L. T. Hatfield and Frank A. Prior, both of Sacramento, for respondent.

BURNETT, J. Plaintiff was injured in consequence of being struck by a vehicle driven by said E. P. Hannon of the said firm. The action against said copartnership and the individual members thereof was based upon the claim of negligence in producing said accident, and the evidence was sufficient to sustain the finding to that effect.

[1] The claim as to the casualty company's liability grows out of the execution by said company of an indemnity insurance policy issued to said Keil & Hannon. The said policy provides:

"Pacific Coast Casualty Company, of San Francisco, California, hereinafter called the company hereby insure Keil & Hannon, of the county of Sacramento, state of California, hereinafter called the assured, against loss and expense arising from claims upon the assured for damages on account of bodily injuries accidentally suffered or alleged to have been suffered during the period of this policy by any person, and caused by the horses or vehicles in his service and the use thereof, while in charge of the assured, or his employees."

Said policy also provides that:

"No action shall lie against this company for any loss or expense under this policy unless it shall be brought for loss or expense actually sustained and paid in consequence of a final judgment within 90 days from the date of said judgment and after trial of the issue."

There is no contention that Keil & Hannon, or either of them, or any one on their behalf, has paid any judgment or any money in consequence of the injury suffered by the plaintiff, nor is there any contention that any final judgment has been obtained in the action.

The complaint herein was brought against the defendants upon the theory that they are jointly and severally liable for the damages suffered, and the judgment, except as to the amount of damages, was in accordance with the prayer of the complaint. From the portions of the policy which we have hereinabove quoted there can be no possible doubt that the parties thereto intended—and by apt language expressed their intention—that the liability of the indemnifying company should attach only after loss or expense had been actually sustained and paid by the indemnitee. We are at a loss to understand how such intention could be more accurately or plainly expressed. It is true that the language is "that no action shall lie against the company," instead of "that no liability shall accrue to the company." But it is too plain for argument

that if no action will lie, no liability will be incurred.

It may be stated, also, that the portion of the said policy hereinabove first quoted, by express language limits the insurance to "loss and expense" incurred by the assured. This language necessarily implies that the assured must have suffered loss and expense before he has any claim against the insurance company for indemnification. It is to be observed that the insurance is not against liability that may be incurred by the assured. If so, a very different case would be presented. However, the conclusion of the lower court in awarding judgment against said insurance company is sought to be justified by reason of the following provision in said insurance policy:

"B. Upon the occurrence of an accident the assured shall give to the company, or to its duly authorized agent, immediate written notice thereof, with the fullest and most accurate information obtainable; and the company, at its own expense, will make such investigation as it may deem necessary. If a claim is made on account of an accident, the assured shall give like notice thereof; and the company at its own expense, will settle or contest the same. If a suit is brought on account of an accident, the assured shall forward immediately to the company, or to its duly authorized agent, every process and paper served upon him. The company, at its own expense, will settle or defend said suit whether groundless or not; the moneys expended in said defense shall not be included in the limits of the liability fixed under this policy. The assured shall not assume any liability, nor interfere with any negotiation for settlement or any legal proceeding, nor incur any expense nor settle any claim except at his own cost, without the written consent of the company."

It seems to be thought that this provision modifies, changes, or nullifies the other provisions, limiting liability to loss or expense that has been incurred and paid by the assured, but, attributing to the language its ordinary significance, we can reach no such conclusion. The purpose of the agreement requiring notice to be given to the indemnitor of any action that may be brought on account of an accident, and authorizing the company to contest or settle the same, was to protect the interest of the company, to prevent any possible collusion between the plaintiff and the assured; and it is quite natural and reasonable that since the company was interested in any judgment and the amount that might be awarded in the action, it should want to appear and contest the proceeding.

It is easy to understand, also, why the company should desire to have the option of settling or contesting the litigation, and that the matter should not be taken out of its hands by reason of any negotiation for settlement on the part of the assured.

A fair construction of the said provisions leads to the conclusion that, instead of modifying, defeating, or nullifying the effect of the language limiting the liability of the insurance company to the loss or expense in-

curred by the assured, they operate to extend an additional protection to the assured in the matter of providing that the expense of a contest of any litigation should be borne by the company, and not included in the limits of the liability fixed by the policy, and also to authorize and afford to the company the protection of conducting or of contesting or defending said litigation. It must be said, however, that there is some respectable authority for the position taken by the respondent.

The most carefully considered case in line with this contention is *Sanders v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 72 N. H. 485, reported in 57 Atl., page 655, 101 Am. St. Rep. 688, wherein it was held:

"So far as the agreement to defend involves the relief of the assured from the expense of such litigation, that agreement also involves the performance of the contract of indemnity by the assumption of the liability indemnified against."

This conclusion is reached by reason of the court's opinion of the meaning of the expression, "to defend." The court attributed to this phrase the signification "to successfully defend." In other words, it is held that the insurance company agreed that it would defend successfully any litigation for damages that might be instituted against the assured. To defend successfully was held equivalent to the expression to assume liability. Hence the court held that by this covenant the insurance company agreed to be subrogated to the liability incurred by the assured. It seems to us quite manifest that the said court placed a wrong interpretation upon the language used by the parties to said insurance policy. The expression to defend does not ordinarily mean, we think, to defend successfully, but as used herein its meaning is to contest the suit. We see nothing in the expression to indicate the intention of the insurance company to assume liability of the assured and to pay whatever judgment might be awarded in the action. Of course, the policy should be construed so as to give effect to every portion of it if such construction is reasonable, and we can see no inconsistency or conflict in the different provisions that we have hereinbefore quoted.

It may be said also that the respondent relies upon the case of *Moore v. Los Angeles Iron & Steel Co.* (C. C.) 89 Fed. 73, wherein it was held that section 2777 of the Civil Code, providing that one who indemnifies another "against an act to be done by the latter, is liable jointly with the person indemnified, and separately to every person injured by such act," is not limited to cases where the indemnitee binds himself, or is bound by law, to do some act that may result in damage to another, or to cases in which the indemnitor is held to be a joint trespasser or tort-feasor with the indemnitee; but it "includes * * * all cases of indemnity against future contingencies." It is to be

observed, however, that the policy of insurance in that case indemnified "against liability for personal injuries," and the language is thus quite different from that fixing the liability of the insurance company in the present instance. And it must be said also that the great and overwhelming weight of authority is decidedly against the position taken by respondent.

In *Poe v. Philadelphia Casualty Co.*, 118 Md. 347, 84 Atl. 476, the policy provided that the surety company "would on demand pay to said plaintiff the amount of any judgment recovered by it in said suit not exceeding \$6,000.00 with interest." Therein are traced historically indemnity policies issued by insurance companies, and it is pointed out that in the earlier ones the insurance was provided against "liability" incurred by the assured, and that under such policies the courts held that the liability of the insurance companies was fixed by the rendition of a final judgment, and that the casualty companies were liable on their contract, even though the employer had not discharged his liability by payment. Several decisions are cited based upon a construction of this language of the policy. Thereafter the wording of the policies was changed to cover only liability which had been paid. Attention is called to decisions construing this language wherein it was held, "The contract of the insurance company does not require that the payment should be made in cash," but that it is satisfied if the payment is made in property. Thereafter the language of the policies was changed by the insurance companies so as to limit recovery to "losses" resulting from liability and actually paid by the employer in money. And the court, after quoting the language of said policy, said:

"The distinction which is decisive of this case is now firmly established, and is nowhere more clearly stated than in *Amer. Emp. Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305, in these words: 'The difference between a contract of indemnity and one to pay a legal liability is that upon the former an action cannot be brought and a recovery had until the liability is discharged; whereas upon the latter the cause of action is complete when the liability attaches.'"

A large number of cases and other authorities is cited in support of said view.

In *Finley v. U. S. Casualty Co.*, 83 S. W., page 2 (113 Tenn. 592, 3 Ann. Cas. 962) it was held:

"Agreements in an employer's liability policy that, if suit is brought against the assured, he shall immediately forward the process to the insurer which will defend against or settle the claim, do not, when considered with a provision of the policy declaring its purpose to be indemnity to the assured 'against loss from liability for damages,' and another agreement that no action shall lie against the insurer in reference to any loss under the policy unless brought by the insured himself to reimburse him for payment by him in satisfaction of a judgment, render the policy one of indemnity against liability, but it is a policy against loss or damage by reason of liability, under which the amount

of insurance does not become available until payment of the loss by the assured, and cannot be impounded by an employé on recovery of a judgment against his employer."

In *Frye v. Bath Gas & Electric Co.*, 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500, it was held by the Supreme Court of Maine that:

"A contract to indemnify an employer against loss by reason of liability for accidental injuries to employes does not inure to the benefit of an injured employé so that he can enforce payment of it in case the employer becomes insolvent and makes an assignment for creditors before he receives his judgment so that the judgment cannot be enforced, especially where the contract provides that no action shall lie against the insurer, as respects any loss under the policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

In *Cushman v. Carbondale Fuel Co.*, 122 Iowa, 656, 98 N. W. 509, it was said:

"While the policy provided that the guaranty company might appear and defend for the fuel company in any action brought against it for personal injuries, such provision was for the protection of the guaranty company alone, and imposed no liability upon it beyond the terms of the contract. A court of equity can no more disregard the express provisions of the contract than could a court of law, and neither can make a new contract for the parties which would impose a liability not originally contracted for; hence whatever relief a court of chancery might grant plaintiff in any event must, of necessity, be based upon and be determined by the contract which the parties have themselves made. The only obligation of the guaranty company was to indemnify the fuel company against a loss actually sustained and paid in satisfaction of a judgment after trial of the issue.' This covenant is as explicit and certain as language could well make it, and, as between the parties to the contract, no recovery could be had against the guaranty company because the judgment against the fuel company was not paid, and consequently the covenant was not broken."

There is a large number of cases cited in support of the views announced by the court.

In *Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981, it appears that the employer's liability policy was subject to the agreement that if any suit was brought for damages, immediate notice should be given to the insurer, so that it could defend or settle the same, and that the insured would not settle or interfere with negotiations for settlement or in any legal proceeding without consent of the insurer, and it was further provided that:

"No action shall lie against the insurer for any loss under the policy unless it shall be brought by the insured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issues against the assured for personal injuries."

It was held by the court that "making a payment of a judgment against the defendant is no part of a covenant to defend the action," and there was no claim against the insurance company because the insured had not paid the judgment and therein was recognized the difference between such policies and one insuring against liability of the employer.

In *Carter v. Aetna L. I. Co.*, 76 Kan. 275, 91 Pac. 178, 11 L. R. A. (N. S.) 1155, the policy contained the stipulation as to liability similar to the one before us, and the court held that it was a contract of indemnity for the benefit of the assured, and that no right of action thereon arose against the insurance company until the assured sustained a loss by payment of a liability. The said policy contained a similar provision in reference to the defense or settling of an action, and it was held by the court that this did not change the effect of the other provisions as to its liability, the court saying:

"The fact that the insurance company made the defense for the bridge company against plaintiff's claim for damages did not estop it from denying liability under its contract. The right to defend was specifically given by the contract, and this burden was assumed for the reason that the award to be made in the proceeding might ultimately be the measure of its own liability. To defend the action in behalf of the assured was in no sense an agreement to pay the plaintiff's judgment, and could not have misled the plaintiff."

A similar view is expressed in *Puget Sound Imp. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 52 Wash. 124, 100 Pac. 190.

The provisions of the policy therein construed were similar to the ones before us, and it was therein held that the policy constituted a contract of "indemnity against loss," and not against liability merely, and no right of action accrued thereon until the assured had actually paid a judgment rendered against him.

In *Allen v. Gilman, McNeill & Co.* (C. C.) 137 Fed. 136, a similar policy was construed by the circuit court of Pennsylvania, and it was therein held that the policy was an agreement insuring the defendant against loss, and not against liability and therein reference is made to the case of *Sanders v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 72 N. H. 485, 57 Atl. 655, 101 Am. St. Rep. 688, *supra*, as follows:

"Against the ruling thus referred to is the single case of *Sanders v. Frankfort, etc., Ins. Co.* [72 N. H. 485] 57 Atl. 655 [101 Am. St. Rep. 688], in which an opposite conclusion is reached by the Supreme Court of New Hampshire in construing a policy like the one now under consideration. The opinion is careful, and deserves much respect; but it is certainly opposed to the weight of authority, and I am not satisfied with the construction of the policy that the court found it necessary to adopt in order to avoid the force of the provision forbidding suit by the insured until after he has paid the employee's judgment."

It is further said that the objection to the construction placed upon the policy by the said New Hampshire court is:

"That it defeats a plain and unambiguous provision by what appears to be a pure assumption that the parties did not mean what they clearly said. The suits which they had in mind and provided for were suits by the insured for losses, 'under this policy,' and for such losses the insurance company was liable whether it had defended the employees' suits or not. If it had defended these, it would probably be estopped to deny its liability afterwards. If it had refused

to defend, taking the ground that the policy did not cover the particular injury, it could raise that question afterwards when a suit should be brought by the insured against it after the employee had obtained a judgment and had been paid."

It might be said, also, that in *Northam v. Casualty Co. of America* (C. C.) 177 Fed. 981, a different construction is placed upon said section 2777 of the Civil Code from that in the *Moore Case* (C. C.) 89 Fed. 73, *supra*, and it is held that said section is to be regarded as a declaration of the common law, and that it announces a rule of no greater import. That it applies, in other words, to joint tortfeasors or where the liability of the indemnitor and indemnitee is joint and concurrent. As illustrative of this position are cited *Herring v. Hoppock*, 15 N. Y. 409; *Davidson v. Dallas*, 8 Cal. 227; *Lewis v. Johns*, 34 Cal. 629.

[2] As to said section we may say that it would not be competent for the Legislature to modify, defeat, or nullify a contract of the parties by creating a liability that was not contemplated or provided in their contract, and in the second place it is entirely obvious by the provisions of the succeeding section 2778 that the Legislature did not intend to change the liability of the indemnitor in such policy as the one herein involved. For therein it is provided:

"Sub. 2. Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof."

It may be stated finally that the encyclopedias and text-books approve the doctrine which we have herein announced.

Applying the familiar rules of interpretation we can reach no other conclusion than that the surety company is not liable for this claim. To hold that the surety company bound itself to defend *successfully* any suit that might be brought against the indemnitee and to assume any liability of the latter, and therefore satisfy any judgment that might be obtained against the employer in such case and under the circumstances herein appearing, would be doing violence to the language of the contract adopted by the parties themselves and supplying an additional covenant not to be found in the policy.

[3] There is some contention made that the judgment against the partnership cannot be supported for the reason that the partnership was dissolved before the action was begun. There is no doubt, however, that it was in existence at the time of the accident, and that the suit was properly brought against said partnership and the individual members thereof. It is equally clear that the judgment against C. H. Keil and E. P. Hannon, and each of them is justified, and under the circumstances it would seem to be a matter of no moment to them whether the partnership is still in existence.

The judgment as to the Pacific Coast Cas-

ualty Company, a corporation, is reversed and in other respects it is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Rehearing.

BURNETT, J. [4] Respondent in his petition for a rehearing claims that the court has construed the contract of indemnity in favor of the insurer rather than the insured, whereas, it is the latter that should be favored. We are aware of the rule that justly requires the courts to resolve doubtful and obscure provisions so as to give the fullest protection possible to the interests of the insured, and we are in accord with that policy, but it seems to us that to support the position of respondent in this case would require us to do violence to the plain terms of the contract which the parties have deliberately chosen.

Petitioner, with some degree of acerbity, complains because we failed to notice specifically some of the cases cited by respondent, especially *Rodgers v. Pacific Coast Casualty Company*, 33 Cal. App. 70, 164 Pac. 1115. Of course, there must be some limit to an opinion, and it is not generally supposed that the appellate courts in that respect usually err upon the side of brevity. The cases cited by respondent, though, were examined, and we thought our reference to them was sufficient for the purpose of the case in expressing our views as to the merits of the controversy. As to the *Rodgers Case*, we may add that in the opinion of the Second District Court of Appeal, written by Mr. Justice James, for whose judgment we have the highest opinion, the language of a policy similar to the one before us was construed in harmony with respondent's contention herein, but it is to be noted that the affirmance of the judgment of the lower court was also grounded upon the other position that there had been a payment of the judgment by the indemnitee; and, in denying the petition for rehearing therein, the Supreme Court limited its concurrence to that view, saying that the opinion of the District Court "also proceeds upon the theory that the payment by Irwin (Indemnitee) of the judgment against her in favor of the injured party is a *condition precedent to the existence of a cause of action in favor of Irwin against the company*, as indeed the policy expressly declares; but that such previous payment need not be made in money, but may be made in property of any kind, including the promissory note of Irwin if such note is *accepted expressly as payment*; a theory in which we concur." (Italics ours.)

The foregoing language seems very clear, and it can leave no doubt as to how the highest court of this state regarded a similar policy. It is expressly declared that a payment of the judgment by the indemnitee was a condition precedent to the existence of a cause

of action against the insurance company. It may be that we have misunderstood the significance of the terms employed by the Supreme Court, but, if it be so, we are fearful that we are without satisfactory excuse.

[5] There is some criticism of the declaration of this court as to the incompetency of the Legislature to change the terms of the contract of the parties. Probably the proposition was not expressed as clearly as it should have been. Of course, we assumed that the contract was legal, and what we intended to say was that, where parties have entered into a lawful contract and have clearly expressed their intention, it does not lie with the Legislature to provide a different contract for them.

We would be glad to afford relief to the plaintiff if we could so construe the policy, but we find ourselves unable to do so.

The petition for rehearing is denied.

We concur: CHIPMAN, P. J.; HART, J.

(36 Cal. App. 179)

COLE et al. v. MUGRIDGE. (Civ. 1556.)

(District Court of Appeal, Third District, California. Feb. 7, 1918. Rehearing Denied by Supreme Court April 4, 1918.)

1. VENDOR AND PURCHASER §21 — AGREEMENTS TO CONVEY — CONSIDERATION — CARE AND SUPPORT.

Agreements to convey property in return for support and care during life are enforced without reference to the form or phraseology of the writing by which they are expressed.

2. VENDOR AND PURCHASER §44 — MUTUALITY — AGREEMENT TO CONVEY LAND.

Evidence held sufficient to support a finding that there was a meeting of the minds in a transaction wherein defendant agreed to convey property in return for support and care during life.

3. APPEAL AND ERROR §1068(1) — HARMLESS ERROR — INSTRUCTIONS.

In action for damages for breach of contract to convey land in consideration for personal care, attention, companionship, and consolation in which good faith was not in issue, a statement in an instruction that "in cases of bad faith the measure of damages would be somewhat different" did not impute bad faith to the defendant, and could not have misled the jury, especially where the jury gave a verdict for less than the value of the property.

Appeal from Superior Court, Solano County; Henry C. Gesford, Judge.

Action by Bertram W. Cole and Nora E. Cole against Olive J. Mugridge. Judgment for plaintiffs, and defendant appeals. Affirmed.

Leon Samuels, of San Francisco, for appellant. James H. O'Leary, of Vallejo, and E. S. Bell, of Napa, for respondents.

CHIPMAN, P. J. This is an action for damages for breach of an alleged contract entered into by plaintiffs, who are husband and wife, and defendant on or about March 11, 1914, by the terms of which it is alleged that

in consideration of plaintiffs' giving defendant their personal care, attention, companionship, and consolation and furnishing defendant with necessary food during the remainder of her life, defendant would convey to plaintiffs a certain lot of land situated in the city of Vallejo, together with the dwelling house thereon and the furnishings therein, defendant to reserve unto herself an estate in said property during her life, plaintiffs to reside with her in said dwelling house on said premises, "free from rent, during the remainder of defendant's natural life."

It is alleged in plaintiffs' second amended complaint: That on March 23, 1914, and for a long time prior thereto, plaintiffs resided in the county of Worcester, state of Massachusetts. That about March 23, 1914, plaintiffs departed from their former home in the said county of Worcester for the city of Vallejo, arriving in said city about April 14, 1914. That on said day defendant had not conveyed said property to plaintiffs in accordance with said contract or at all. That on or about March 11, 1914, and April 14, 1914, and at all times between said dates, plaintiffs were ready and willing to comply with the terms of said contract and on April 14, 1914, at the said city of Vallejo, plaintiffs "offered defendant immediate compliance with the terms of said contract; but defendant then and there rejected plaintiffs' said offer of performance, and then and there refused to convey said property to plaintiffs in accordance with the terms of said contract, or at all, and then and there refused to allow plaintiffs to reside in said dwelling house with or without the use of said furnishings, during the remainder of defendant's natural life, or during any other period free from rent, or otherwise, or at all, and then and there refused to comply at all with the terms of said contract. By defendant's failure and refusal to comply with the terms of said contract as aforesaid, plaintiffs have suffered injury and damage as hereinafter alleged." That in order to comply with the terms of said contract on their part, plaintiffs were compelled to and did surrender a certain leasehold interest in certain land in said Worcester county that had four years to run and which was yielding plaintiffs an annual profit of \$1,200, and were obliged to pay the lessor the rents reserved, to wit, the sum of \$480, to plaintiffs' damage in the sum of \$5,280. That plaintiffs were for like reason obliged to sell and did sell certain farm implements and other personal property described, at a loss of \$602. That in coming to California in order to comply with the terms of said contract they incurred certain expenses, the items of which are enumerated, amounting to \$329, and that to return to Massachusetts the expense to plaintiffs will be a like amount. That plaintiffs were unemployed by reason of defendant's failure to perform on her part, for a period of 48 days, resulting in plaintiff's further

damage in the sum of \$240. The prayer of the complaint is for the sum of \$6,781.70 and costs of suit. The complaint is verified. The answer consists of specific denials of the averments of the complaint with the single exception that defendant admits that she would not convey said property to plaintiffs on or about the 14th day of April, 1914, or at any time. The cause was tried with a jury, and plaintiffs had a verdict for \$1,500, for which amount the court entered judgment with interest from its date, September 2, 1915, and for costs fixed at \$111.20.

[1] Appellant says in her brief that the facts are "extremely unusual," which may be said of most of the cases in this class, for it would be difficult to find any two alike in their facts. While this is true, it is also true, as was said in *Bruer v. Bruer*, 109 Minn. 260, 123 N. W. 813, 28 L. R. A. (N. S.) 608:

"By the modern trend of authority these transactions are placed in a class by themselves, and enforced without reference to the form or phraseology of the writing by which they are expressed."

The contract in question is chiefly derivable from letters exchanged between plaintiff Mrs. Cole and defendant Mrs. Mugridge. Mrs. Cole in her testimony thus explains how this epistolary correspondence sprang up:

"I first learned of Mrs. Mugridge in March, 1910, in Vallejo. I met Mr. Mugridge her husband in Dr. Klotz's office at that time, when I was there with my husband. Mr. Mugridge spoke to us first, and in the course of the conversation we found that Mr. Mugridge and I were from the same state, New Hampshire. We all left Dr. Klotz's office together and Mr. Mugridge walked with us as far as the St. Vincent Hotel, where we were stopping. He was very friendly to us and invited us to his home, at the same time telling us of his wife, whom he said was also a native of New Hampshire. After that we met him about half a dozen times. He made two or three visits to us at our hotel, and on each occasion invited us to come to his home; but we never did so. However, at his insistence, we did upon one occasion walk with him to the street corner near his home and he pointed it out to us. This is the same property which his wife later on promised to deed to us. About the last time he saw us, he asked my husband and myself to write to him, stating at the same time that his wife was very fond of postal cards, and asked us to send her some. About two weeks after meeting Mr. Mugridge, my husband and I returned to New Hampshire. After our return to New Hampshire I wrote to Mr. Mugridge and his wife answered the letter, giving as her reason for doing so that her husband could not see to write. After this, at Mrs. Mugridge's request, I wrote to her directly and sent her some postal cards. This was the beginning of my correspondence with her, and from then on many letters were exchanged between us."

At this time, 1910, defendant's family consisted of herself and husband and son. She was almost 73 years old; her husband several years older. He died some time prior to 1913, and her son also died in March of that year. The earliest letters are not in the record. Defendant introduced a letter written by Mrs. Cole of date January 1, 1913. There is nothing in this letter indicative of the wish on appellant's part to have respondents

come to California or of respondents' entertaining any intention to do so. Defendant introduced another letter written by Mrs. Cole dated March 4, 1913, in which the writer expresses her sorrow on hearing of the accident to Mrs. Mugridge's son. She writes of the griefs and troubles her own family is passing through and asks forgiveness for inflicting them upon her friend who has so many of her own. The next letter in order of time is one dated December 28, 1913, from defendant addressed to "My dear friends, Mr. and Mrs. Cole," partly written on that date, partly on January 4, 1914, and January 6, 1914. In this letter she dwells upon the death of her husband and especially the death of her son Charlie. In this letter she says that after the death of her husband she wanted to ask Mrs. Cole if she ever thought of coming out to California but "did not dare to" for fear she could not do her justice, adding:

"I don't know what will become of me if some body dont come to my relief for I cant always do as I do now, * * * if you ever want to come out here and can then write me so I can think, then I will write you more. * * * I have just got your New Years cards; how can you have so much patience with me? yet if you was here you could see for yourself all I can do is to thank you many times for all your kindness."

On February 1, 1914, appellant wrote Mrs. Cole, among other things saying:

"Would it be any temptation to you to come to California if I should tell you I would give you my home with what is in it. I have got to have some one and of course it wont be long that I shall need any one or anything, there are many who would come and be glad to, but I am afraid to ask any and if you are the kind of people I think you are I would gladly do all I could for you. Now think this matter over and write me and ask me anything you want to know and I will try to explain anything and everything and if it don't strike you favorably it will be all right and if it does ask any questions you want to, and I will try to answer satisfactorily."

Appellant wrote again February 16, 1914, in which she takes up the matter of respondents' coming to California, saying, among other things:

"I will willingly give my home to you and it is not likely I shall trouble anybody long for I am 76 years old, and it is not every one that reaches that age; * * * don't put any money into that field of potatoes but save it to come out here with, that is if you would like to come and I certainly would like for you to come; all you would have to do for me is to board me and take care of me a little and if I should get so I could not do for myself I will hire a nurse. My property is not involved in any way only with street work paving and so fourth which I have money to pay and I am trying every way to keep squair so as not to die in debt."

Again, in the same letter, she says:

"Just dispose of what you have and get ready and come right along and you will find everything on the squair for I could never take advantage of anyone much less one who is so kind as I think you and your husband are and you will find me just what I say, to be sure we have never seen each other, and I do hope we neither of us will ever be sorry for what we are trying to bring about."

In another letter of February 22, 1914, she describes to respondents her home, saying among other things:

"I do hope you will come, you will never get another chance like it, you never will find a home ready for you, I have been thinking of you all day and thinking what I wanted to tell you and I want you to come while I am living."

Again, on March 3, 1914, she wrote to respondents:

"I hope you will come soon and hope that we shall all be spaired to enjoy each others companionship."

And in the same letter she said that she had not mentioned the matter to any one for it would be time enough when the respondents came to her.

"I think I will have a deed made out to you and your husband to take effect at my death or would you rather I would wait till you get here? You answer this as soon as you get this letter, this house is insured for three years, and there is no incumbrance on it anyway only as I told you in the first letter the street work and I have money in reserve for that purpose."

In a letter of March 11, 1914, she says:

"I am going out this afternoon to look after your interests and if you come and I sincerely hope you will, I shall do all I can to make us happy."

The day following, March 12, 1914, she writes advising against bringing any furniture, saying:

"If I were in your place I would bring the traveling expenses down as low as possible for perhaps if you stay here till I am gone you will want to sell out and go East again, so perhaps it would be well to store it if you want to keep it."

On March 14 she wrote again:

"I have not spoken to anyone about you and shall not for if anything should happen which I do hope will not, everybody would blame me for taking up with strangers, but I put confidence in you both if you are strangers, I hope we wont always be * * * I will close now hoping to see you soon; write me and make a rough guess if not very accurate what time you will start and if I dont have everything done be assured it is not my fault. * * * P. S. Dont worry the Deed is all right dont say anything. I don't wonder you cried over your cow and calf, I should cry over chickens and pigs, or anything that had life that I had."

On March 22d she wrote Mrs. Cole again, addressing her as follows, "My dear niece or daughter or whatever you want to call me," in which she expresses the hope that they will be happy when they are all together. On March 23d she writes Mrs. Cole again, expressing the hope that they have done right in regard to the Coles coming to California, adding:

"I am willing and will do what I said I would if you come and I hope you will and that neither of us will be disappointed with the other, now what I write is for both your and my good so please take it so, I should feel very bad to have you come out here and find things not as well as you expected."

On February 10, 1914, Mrs. Cole wrote to appellant acknowledging the receipt of a letter from appellant, stating:

"Dear friend, do you mean that if we would go and take care of you and be kind to you as long as you lived that you would give me your

home for myself? * * * I would like to live there very much. I liked it when I was there. Of course, I should have to know just what you thought best to do before we gave up our place here. We only leased it, as I wrote you, but it was a chance one would seldom find, and the stock is ours what there is of it, and it is all we have in the world."

She asks her "Aunt Mugridge" to think the matter over for as the planting season was coming on they would have to know what they were going to do.

"Of course we would not want to sell our stock to pay our way out there and lose all we had here, unless we were sure of the place. I know we would do all in our power for you to help you and to make the sunset of your life as contented as possible after such a loss. It means a great deal to us all and I only hope we may all live to thank God for bringing us together in mutual help. Now, you too, write me just what you mean and think best to do. If I could afford it I would go out and talk with you myself, but it is more than I can do. We know each other pretty well, now don't we? I shall have this on my mind until I know."

On February 25th Mrs. Cole again writes Mrs. Mugridge acknowledging the receipt of her letter, stating:

"I received your welcome letter today, and I am all excitement myself. I believe it will mean more happiness for us all. It was quite a decision for me, because it meant so very much, for you see, we shall not have anything, practically, left, after we pay our fare out there. It will cost about two hundred dollars, but Auntie, I know you are true and would not let us give this chance up here, only to lose all. * * * Of course, I would not expect you to give me your home until you knew us, but I am sure you would do what was right under the circumstances. It will take a little time to dispose of all our stock but we will do it as quickly as we can. I hesitated a little at first, because I knew if we gave this place up we never would find again the chance we had here. * * * I want to say too, that it is not because you have a home and a little money alone, that I am going to you, it is both because I want a home and believe I can make you happier, Auntie, too, in your last years. It must have been meant to be so. I hope nothing happens in any way to any of us before we get together and try and find a little comfort for you."

On March 4, 1914, Mrs. Cole writes to Mrs. Mugridge:

"Started packing yesterday. One room done. Mr. C. packs everything in burlap and paper. * * * Keep up courage, Auntie, we will be there before very long now. I dread to see my animals go and break up but I hope we shall all be happy there together."

On March 9th she writes again, acknowledging the receipt of a letter from Mrs. Mugridge, among other things, saying:

"Auntie, if you feel perfectly willing I should feel pleased to have you make out the deed. God knows I do not anticipate anything happening to you, Auntie, but it would be almost like insuring us."

On March 16th she wrote reporting progress in her preparations for going to California and acknowledging the receipt of a letter from Mrs. Mugridge. On March 19th she wrote again, acknowledging the receipt of another letter and stating that they were about through packing, and on March 24th she wrote again at some length describing

the many things she had to do in disposing of their property, closing as follows:

"We will all be together soon now I hope and then we can both find comfort, sympathizing with each other and I think it will help us both. Don't try to do too much Auntie and keep as well as you can. We both send you sincere love until we can see you, which will be soon now."

On April 2d she wrote:

"I sent a letter to you yesterday but will send you a few words more today to tell you that we have secured our tickets and will leave for Cal. (and you) April 8th on a Wednesday and the trains are scheduled to arrive Monday night, April 13th, in San Francisco. * * * We will all be together soon now. Yes, it was a great decision for us all, but I am sure it was for the best, because we both mean to do right by each other, and we did need each other, didn't we? No, Auntie, I never thought you were rich, and you never misrepresented anything to me. What I did want was a home, and I was willing to do all we could for you in return for yours."

This ends the correspondence so far as shown in the record. Plaintiffs called upon the defendant at the trial to produce all the letters written by Mrs. Cole to the defendant, but the defendant stated that she could find no others except the ones already referred to. Mrs. Mugridge wrote very volubly and with great frankness and apparent sincerity, as did also Mrs. Cole. We think an examination of the letters taken in their entirety will show quite satisfactorily that the defendant was not only willing but very anxious to bring about the coming of Mr. and Mrs. Cole to California to live with her and care for her upon the terms substantially as set out in the complaint, and that the plaintiffs came to California induced thereto by the representations and promises made by the defendant, and that they would not otherwise have broken up their home in Massachusetts.

The defendant in her answer makes no claim of fraud or false representations or concealments on the part of plaintiffs, and, aside from the fact that Mrs. Mugridge was laboring under a feeling of great loneliness and sorrow because of the loss of her husband and son, there is nothing in the record tending to show that she was not possessed of average mental faculties or did not fully understand what she was doing.

Mrs. Cole testified:

"When we arrived in Vallejo, in April, 1914, we went direct to Mrs. Mugridge's house and Mrs. Mugridge came to the door; that was the first time any of us had met. We had lunch there and the first thing she said was, 'We have all done wrong. We have made a mistake.' We asked her what she meant by this and she told us that she meant that she should not have promised us her home and should not have had us come to California. We tried to convince her that it was all right and that we would all be happy together and asked her to place the deed she had made to us in escrow and to keep her promise to us, but she refused to do so. We stayed there from April 14, 1914, to May 27, 1914, and during this time we often tried to point out to her what a great wrong it would be for her not to keep her promise to us under the circumstances, and often asked

her to place the deed to the property in escrow, but she said she did not want to do so; that her husband had told her never to part with any of her property. We did everything we could to keep our promise to her and were always ready and willing to do so. While we were at her house we did everything in our power to make her happy and make it pleasant for her, assisting her in every way we could about the house and during this time bought most of the provisions for the house. We finally became satisfied that Mrs. Mugridge had no intention of keeping her promise to us; that she did not want us in her house, and so on May 27, 1914, we moved away from there. We inquired of Mr. Madren and he told us he had prepared a deed for Mrs. Mugridge in which she deeded the property at 412 Carolina street, Vallejo, to myself and my husband. This is the same property involved in this suit and which she promised to give us. I wrote Mrs. Mugridge many letters which she has not produced here. We did start packing some of our small things about March 4, 1914, but we were sure at this time from what Mrs. Mugridge had said to us in her letters that the agreement in question would be entered into. We did not finish packing our stuff and getting it away from our farm and stored until about March 19, 1914."

Mr. Madren, the person referred to by Mrs. Cole, testified that he was a notary public in and for the county of Solano.

"On March 11, 1914, at the request of Mrs. Mugridge, I prepared a deed of her house and lot at 412 Carolina street. I gave this deed to Mrs. Mugridge. My record shows deed dated March 11, 1914, executed by Olive J. Mugridge to Bertram and Edna Cole. The deed was a grant, bargain, and sale deed, and the consideration named was \$10."

The defendant, Mrs. Mugridge, testified that when the plaintiffs came to her house, she said to them:

"We had all made mistakes, and I made a mistake in sending for them and they had made a mistake in coming. The deed was mentioned and I said I had a deed made out, and they said 'Why don't you put it in escrow?' and I said, 'I can keep it just as well myself, but for all that if you stay here and do what is right, at my death you shall have my home;' but during the time they were at my house they did nothing for me and contributed nothing to my household expenses, but they lived at my house mainly at my expense. I refused to give them any deed and they wanted a deed, and such request was made several times."

In rebuttal, Mrs. Cole testified that:

"Mrs. Mugridge did not say on the occasion of our first visit to her home in 1914, while we were having lunch, that if we would stay with her and do what was right we should have her home at her death. While we began packing some of our furniture before the letter came in which Mrs. Mugridge said she had had the deed made, we did so because we felt from the way she had written in her letters that the agreement between her and us would be entered into."

There was some evidence as to the value of the premises, plaintiffs' witnesses placing it at \$2,700 or \$2,800.

[2] Defendant contends that no contract was entered into because—

"there never was any meeting of the minds of the parties to the alleged contract and the most that can be said in favor of the claim of respondents is that there was a mere suggestion, not an offer or proposal * * * accepted merely as a suggestion and in the hope that ultimately they would attain their object."

As we read the letters, we find in them a definite offer made by appellant definitely accepted and acted upon by respondents. After respondents had notified appellant that they were disposing of their property and preparing to come to California in compliance with appellant's request and, as the letters show, in the belief that appellant would do as she had promised, appellant wrote to hasten their coming and these urgent messages continued until late in March, 1914, and on March 11th she executed a deed of the property to respondents and so informed them by letter. On respondents' arrival at appellant's house, and without waiting to see whether her hopes of a happy life with them would or could be realized, appellant promptly told them a mistake had been made—she "had made a mistake in sending for them and they had made a mistake in coming," and her attitude remained unchanged toward respondents until they were compelled without fault of theirs, so far as the record shows, to quit the premises.

We do not think it necessary to resort to the books to justify us in holding that there was ample and legal support for the verdict of the jury.

[3] It was not error of the court to refuse to instruct the jury, as requested by defendant, that there was no contract between the parties. Defendant requested an instruction designated as No. 5 upon the measure of damages, and states that, while substantially given in another instruction by the court, the court erred in stating that "in cases of bad faith the measure of damages would be somewhat was different." The court then adds:

"In this case no specific price for the property having been alleged or proven to have been paid or agreed upon under the alleged contract or expenses incurred in examining title or preparing papers, you can make no allowance to plaintiffs on account of these items, notwithstanding you may find the contract to have been made and broken as alleged; and under such circumstances your verdict cannot exceed in amount the value of the property in controversy at the time of the breach of contract, if you find there was such a breach of contract, irrespective of any sum or sums of money which plaintiffs may have expended or expenses they incurred prior to the time plaintiffs took up their residence with defendant on or about April 14, 1915, unless you find from the evidence that any such sum or sums of money were properly paid out or such expenses were properly incurred in preparing to enter into possession of the premises in controversy."

The objection urged is what the court—"distinctly instructed the jury that there was bad faith on the part of appellant, and also that the jury was not, under the circumstances, confined to rendering a verdict for the price paid and the expense properly incurred in examining the title and preparing the necessary papers but could render a verdict up to the amount of the value of the property."

It is true that no issue of fraud, concealment, or bad faith was raised in the case, but we do not think the instruction complained of can reasonably be said to have imputed bad faith to appellant or that the jury could

have so understood the instruction. In point of fact, the verdict was less than the evidence showed was the value of the property. The instruction excluded as matter of damages all expenses incurred prior to the time plaintiffs took up their residence with the defendant. We cannot perceive any prejudicial error in the instruction.

No other error is specified. Defendant states "that the instructions given by the court were on the whole fair and unobjectionable."

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

(35 Cal. App. 776)

WATT v. BEKINS VAN STORAGE CO.
(Civ. 1963.)

(District Court of Appeal, Second District, California. Jan. 8, 1918. On Rehearing in Supreme Court March 6, 1918.)

APPEAL AND ERROR — 110—DECISIONS REVIEWABLE—ORDER DENYING NEW TRIAL.

Code Civ. Proc. § 963, as amended August 8, 1915, making orders denying new trials non-appealable, applies to an order entered after such date, although the right to appeal from the judgment in such case had expired before the amendatory act was enacted.

In Bank. Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by L. V. Watt against Bekins Van Storage Company. Judgment for plaintiff, and from an order denying a new trial, defendant appeals. Appeal dismissed.

R. T. Lightfoot, of Los Angeles, for appellant. Williams, Goudge & Chandler and Goudge, Robinson & Hughes, all of Los Angeles, for respondent.

CONREY, P. J. In this case the defendant on the 2d day of October, 1915, served and filed its notice of appeal from an order denying its motion for a new trial, which order was made September 13, 1915. Briefs were filed touching upon the merits of the case, and the appeal was submitted for decision. Thereafter the fact was noticed by us that at the time when said appeal was attempted to be taken, and also when the order was made, the law did not provide for appeals from orders denying motions for new trial. Formerly the right to take such appeals was provided for by section 963 of the Code of Civil Procedure. By an amendment of that section, in effect on and after August 8, 1915, that right has been taken away. With consent of counsel for respondent, we have permitted counsel for appellant to file a supplemental brief for the purpose of showing, if possible, that the law as thus amended is not applicable to this case. We have given careful consideration to his argument.

The question seems to have been definitely determined against the contention of appellant. In *Hirsch v. All Persons, etc.*, 173

Cal. 268, 159 Pac. 712, as well as in other cases there cited, the Supreme Court determined that the amendment in question is necessarily applicable in every case where the order was made subsequent to the date of the taking effect of the amendment; that it is the condition of the law at the time of the making of the order that controls.

Appellant calls our attention to the fact that the judgment in the case was entered on October 7, 1914; that at that time and until August 8, 1915, the time allowed for appealing from the judgment was limited to six months (Code Civ. Proc. §§ 939, 941b); that the defendant in this case had allowed that time to expire without appealing from the judgment; that the amendments to the two sections last mentioned, whereby, if the amendments could apply here, its right to appeal from the judgment would not expire until 30 days after entry in the trial court of the order determining defendant's motion for a new trial, in fact cannot be applicable here, and cannot have the effect to restore defendant's right to appeal from the judgment in this case, since by failing to appeal within six months the right to the judgment had become finally vested in the plaintiff as against any appeal therefrom, and remained subject only to the pending attack by means of the motion for a new trial. All of these statements we concede to be true, and the consequent hardship to the defendant is very apparent. But we are unable to derive therefrom any ground of support for its claim that these facts have the effect to preserve its right of appeal from the order denying its motion for a new trial. The Legislature had the power to take away defendant's right of appeal from that order at any time before the order itself was made. This power having been exercised, it is settled law, under the decisions to which we have referred, that the amended section 963 is applicable to a case like this, because in this case the order denying the motion for new trial was made subsequent to the 8th day of August, 1915. The position of appellant is not improved by the decisions rendered in *Schmitt v. White*, 172 Cal. 554, 158 Pac. 216, and *Murray v. Southern Pacific Co.*, 169 Pac. 675. Those decisions are merely to the effect that where the motion for a new trial was pending on the 8th day of August, 1915, the ruling on that motion may be reviewed on appeal from the judgment, as is permitted by section 956, Code of Civil Procedure, as then amended.

The appeal is dismissed.

We concur: JAMES, J.; WORKS, Judge pro tem.

Opinion of Supreme Court Denying Rehearing.

PER CURIAM. In denying the petition for a hearing in this court after decision

by the District Court of Appeal of the Second Appellate District, we deem it proper to say that we are not to be understood as conceding that the defendant did not have the right to appeal from the judgment within 30 days after entry of the order denying his motion for a new trial, for the purpose of having reviewed the latter order of the court (section 939, Code Civ. Proc.), notwithstanding that his right to appeal from the judgment had expired prior to the amendment of sections 939, 956, and 963, Code of Civil Procedure, in the year 1915. That very question is involved in a motion to dismiss an appeal now pending in this court. Its determination is unnecessary in this case.

The application for a hearing in this court is denied.

(36 Cal. App. 124)

WARD v. OTZEN PACKING CO.
(Civ. 2182.)

(District Court of Appeal, First District, California, Feb. 4, 1918. Rehearing Denied by Supreme Court April 4, 1918.)

1. APPEAL AND ERROR ¶1011(1)—**REVIEW—FINDING—CONFLICTING EVIDENCE.**

In the presence of conflict, not only in the evidence adduced on the whole case, but even in the testimony of defendant's witnesses as to a question of fact, the finding of the trial court must prevail.

2. WAREHOUSEMEN ¶34(7) — **NEGLIGENCE—STORAGE OF PRUNES—SUFFICIENCY OF EVIDENCE.**

In a prune grower's action against a packing company for negligent warehousing, evidence held to show that the company negligently warehoused the prunes, and that as a result they became moldy and sugared, to the grower's damage.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by James Ward against the Otzen Packing Company, a corporation. From judgment for plaintiff, and an order denying new trial, defendant appeals. Affirmed.

H. H. McPike and McPike & Murray, all of San Francisco, for appellant. William A. Kelly, of San Francisco, for respondent.

LENNON, P. J. The plaintiff, James Ward, was, in 1914, conducting a prune orchard in Marin county. He shipped three pickings, consisting of 13,175 pounds of prunes, to San Francisco, arriving on the 19th day of September, 1914. The prunes were delivered to the defendant, Otzen Packing Company, for final processing and packing in boxes. When so processed and packed they aggregated some 527 boxes, which were then stored in the wareroom of the defendant, where they remained from the month of October, 1914, to the latter part of January, 1915, when they were examined and found to be moldy, sugared, and in poor condition. The entire lot of prunes was finally sold at 3 cents per pound, with the exception of 112

pounds which sold for 1 cent per pound. The market price at that time was 6 cents per pound. The plaintiff thereupon brought suit against the defendant corporation charging that the defendant had negligently warehoused the prunes and claiming damage in the amount of \$500. The court found that the allegations of negligence were true, and that plaintiff was thereby damaged in the sum of \$500, minus \$27.31, the amount of defendant's counterclaim for storage due. Judgment was accordingly rendered in favor of the plaintiff, from which judgment and from the order denying a new trial defendant prosecutes this appeal.

The only question presented is as to the sufficiency of the evidence to sustain the finding of negligence on the part of the defendant corporation. It is contended that the evidence not only failed to show negligence on the part of the defendant in storing the prunes, but that it affirmatively showed that the condition of the prunes was caused by the failure of plaintiff to properly cure the prunes by sufficient sweating and drying. In this connection one Castle, a witness called upon behalf of the defendant, testified that "in very good weather—hot weather—five days would be the time for prunes to be on the trays." Another of defendant's witnesses, one Porter, testified that prunes should sweat from ten days to two weeks. In attempting to qualify these witnesses as experts, it was disclosed that neither had ever personally dried prunes, and that their testimony was based purely upon observation. Hunsinger, a witness called upon behalf of the plaintiff, testified that he had been in the business of growing and selling prunes "off and on for 30 years," and that he had usually picked, stored, and dried the prunes himself; that he had personally looked after the drying and dipping of the prunes in question; that as the prunes dried they were put in the storehouse on the ranch of the defendant and there turned twice. In effect this witness further testified that the method and time employed for the preliminary processing a quantity of prunes as small as the "batch" of prunes in question was a sufficient preparation for their packing and shipping. Both Hunsinger and Ward testified that the prunes when shipped from the ranch were in "fine condition."

There was also testimony to the effect that the character of the weather is an important factor in determining the method and time to be employed in processing prunes; that the weather during the period of time the prunes in question were drying was "first class" for that purpose—it was extra hot—and that while in "just moderate weather it takes from six to eight days" to dry prunes, still with extra hot weather they can be dried in four days, the time employed for the drying of the prunes in question.

[1] Thus it would seem that there was a conflict not only in the evidence adduced up-

on the whole case but even in the testimony of the witnesses for the defendant as to the time required for properly processing prunes. In the presence of such conflict, the finding of the trial court must prevail.

[2] That the defendant negligently warehoused the prunes and that as a result of that negligence the prunes became moldy and sugared may be fairly inferred from the following facts adduced upon the trial of the case, to wit: The prunes were piled in boxes in the storeroom of defendant within 12 feet of a large opening into an adjoining room which the defendant used for the purpose of processing fruit, and through this opening steam and moisture "kept coming out all the time" into the storeroom where the plaintiff's prunes had been stored. The molding of prunes may occur from several causes, according to the testimony of expert witnesses; one cause is vapor and steam coming in contact with them. This was evidently the theory of Otzen, the president and manager of the defendant corporation, as to the cause of the damage to the plaintiff's prunes, who, upon cross-examination, admitted that he had told the plaintiff that "he didn't know any reason for it except the steam and moisture from the processing room next door."

Under all of the circumstances of the case, the trial court was justified, we think, in finding that the defendant did not exercise the ordinary care required of it as a warehouseman, and that as a result of its negligence plaintiff was damaged.

The point made in support of the appeal that "there was a failure of direct evidence to justify the amount of the damage found" appears only in the closing brief of counsel for the defendant, where it is supported by an elaborate argument in conjunction with much mathematical calculation. But having been made only in the closing brief, we must decline to discuss it further than to say that a consideration of the evidence, direct and substantial adduced upon the entire case, in our opinion, sufficiently supports the trial court's finding.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

(36 Cal. App. 133)

WILLIAMS v. CITY OF VALLEJO et al.
(Civ. 1774.)

(District Court of Appeal, Third District,
California. Feb. 4, 1918.)

1. MUNICIPAL CORPORATIONS §44 — FREEHOLDERS' CHARTER — POWERS OF LEGISLATURE.

The Legislature can only approve or reject a proposed freeholders' charter, but is without power to amend or alter it.

2. MUNICIPAL CORPORATIONS §48(2)—CONTRACTS—PAYMENT—STATUTES APPLICABLE.

Where city of Vallejo, under freeholders' charter of 1899 (St. 1899, p. 370), contracted on June 19, 1911, for building a reservoir, the contract was governed by such charter, and not that of 1911 (St. 1911, p. 2004, § 66), requiring retention of 25 per cent. to pay laborers and subcontractors, since by section 128 thereof the charter became effective July 1, 1911, for all purposes, except election of officers, and Const. art. 11, § 8, providing for municipal charters, does not prevent the charter itself from stating its effective date.

3. MUNICIPAL CORPORATIONS §271—WATER SUPPLY—CHARTERS—POWERS—"MUNICIPAL AFFAIR."

Construction of reservoir for public water supply is a "municipal affair," within Const. art. 11, § 8, authorizing city charter empowering the city to make and enforce all laws relating to municipal affairs.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Affairs.]

4. MUNICIPAL CORPORATIONS §345 — CONTRACTS—PAYMENT—STATUTES APPLICABLE.

Since Vallejo charter of 1899 (St. 1899, p. 370) provides a complete scheme for city contracts and payment of material and labor claims thereon, Act March 27, 1897 (St. 1897, p. 201), as amended by Act May 1, 1911 (St. 1911, p. 1422), as to contractor's bond, does not apply to work in such city done under such charter.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Edwin H. Williams against the City of Vallejo and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Karl F. Kennedy and Edwin H. Williams, both of San Francisco, for appellant. James H. O'Leary and L. G. Harrier, both of Vallejo, for respondents.

CHIPMAN, P. J. This action was brought by plaintiff to recover judgment for the sum of \$3,496.44, with interest at seven per cent. from February 29, 1912, and for costs of action against the defendant city of Vallejo, and the defendants Pryor, Blake, and Chappelle, as individuals, by reason of their having been, at the time the alleged indebtedness occurred, members of the board of public works of the city of Vallejo. It is alleged in the complaint:

That on the 19th day of June, 1911, the city of Vallejo "duly and regularly authorized the board of public works of the city of Vallejo to accept the bid of the American Construction Company, a corporation, for the construction of a reservoir for the said city of Vallejo and to award a contract for the performance of said work to said American Construction Company. That thereupon and in pursuance of said authorization said board of public works of the city of Vallejo, and G. Pryor, W. P. Blake, and J. F. Chappelle, commissioners thereof, did accept said bid of said American Construction Company for the performance of said works, and did enter into a contract with said American Construction Company for the performance of said work, for the amount of its bid, to wit, the sum of \$35,925. That under and by the terms of said contract said reservoir was to be and actually was constructed upon land within the limits of said county of Solano, state of California, belonging to said city of Vallejo and

owned by it, and that all of said property is, and was at all the time herein mentioned, public property owned in fee simple absolute by said city of Vallejo." That at the time said contract was entered into said board of public works, "and the defendants herein and each of them, wholly failed and neglected to furnish or file with said board of public works or otherwise, or require said American Construction Company to furnish or file with said board of public works or otherwise any bond in favor of subcontractors, laborers, and materialmen * * * as required by that certain act of Legislature entitled, 'An act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal, or other public work,' approved March 27, 1897, and that no bond of any kind or character was filed by any person whomsoever at any time in compliance with the terms of the statute above mentioned or otherwise."

It is then alleged:

That the said American Construction Company entered upon the performance of the work and completed the same on or about February 29, 1912, "and thereupon said city of Vallejo and said defendants herein duly and regularly accepted said work from said American Construction Company and paid for the same in full. That the contract hereinabove mentioned was reduced to writing and entered into as a written contract." That during the performance of the work under said contract, the said American Construction Company employed certain five different persons, corporations, or companies to furnish certain work and labor and certain materials to be used in the construction of said reservoir, and in separate counts the complaint sets forth the fact showing that each of said persons did perform the work and furnish the materials as alleged, also setting forth the reasonable value of said work and that the said American Construction Company promised to pay in each instance the amount claimed therefor "immediately upon the completion of said work, but that, although often demanded, it has refused to pay" the amounts severally claimed by said claimants, and that the amount claimed in each instance is now "owing and unpaid on said account after deducting all just credits and offsets." That said claimants and each of them prior to the commencement of this action assigned their several claims to plaintiff and he is now the owner and holder thereof. That plaintiff has demanded settlement from defendants herein and each of them, of the several amounts shown by the complaint to be still due on said claims, "but that said defendants and each of them have wholly neglected and refused to pay the same or any part thereof."

The aggregate of these said several claims amounts to the sum above stated for which judgment is asked. The contract referred to in the complaint is not set out in full, nor is there any exhibit showing a copy thereof.

A general and special demurrer was filed, and the court ordered that it be sustained. Whereupon judgment was entered for defendants and that plaintiff take nothing by this action. Plaintiff appeals from the judgment.

The point chiefly relied upon by appellant is as follows:

"The city and its responsible officials are liable to the plaintiff for their failure to file a bond to secure the payments of the claims of laborers and materialmen in accordance with public works act."

The statute referred to is the act approved May 1, 1911 (Stats. 1911, p. 1422), amending

the act approved March 27, 1897 (Stats. 1897, p. 201). Section 1 of the act of 1911 provides as follows:

"Every contractor * * * to whom is awarded a contract for the execution or performance of any building, excavating, or other mechanical work for this state, or by any county, city and county, city, town, or district therein, shall, before entering upon the performance of such work, file with the commissioners, * * * common council, or other body by whom such contract was awarded, a good and sufficient bond * * * and must provide that if the contractor, person, company * * * fails to pay for any materials or supplies furnished for the performance of the work contracted to be done, or for any work or labor done thereon of any kind, that the sureties will pay the same in an amount not exceeding the sum specified in the bond; provided, that such claim shall be filed as hereafter required."

Section 2 of the act provides that any person furnishing materials or supplies used in the performance of the work contracted to be executed or performed, or any person who performed work or labor upon the same, or any person who supplies both work and materials, and whose claim has not been paid by the contractor, company, or corporation to whom the contract has been awarded, shall within 90 days from the time such contract is completed, file with the body of officers by whom said contract was awarded a verified statement, of such claim together with a statement that the same has not been paid.

Appellant also calls attention to section 66, article 11 of the 1911 charter (Stats. 1911, p. 2004), which provides that progressive payments may be made for work done under contracts, but—

"no contract shall provide for or authorize or permit the payment of more than seventy-five per cent. of the contract price before the completion of the work done under said contract and the acceptance thereof by the proper officer, department or board."

[1,2] Respondents contend that at the time the alleged contract was entered into the city of Vallejo had a freeholders' charter which controlled absolutely and was free from impairment by general laws as to all municipal affairs, and that this was the charter of 1899 (Stats. 1899, p. 370); that the contract under consideration was made June 19, 1911, whereas the charter of the city of Vallejo of 1911 went into effect July 1, 1911, by its own provisions, section 128 thereof being as follows:

"For the purpose of nominating candidates and electing the mayor, auditor, commissioners and school directors in accordance with this charter, this charter shall take effect from the time of the approval of the same by the Legislature; for all other purposes it shall take effect on the first day of July, 1911." Stats. 1911, p. 2027.

Appellant's reply to this contention is that under the provisions of article 11, § 8, of the Constitution, the charter went into effect March 11, 1911, the date at which the joint resolution approving and ratifying the charter was filed in the office of the secretary of

state "notwithstanding the provision in the charter itself to the contrary." The provision found in the Constitution reads as follows:

"The Legislature shall by concurrent resolution approve or reject such charter as a whole, without power of alteration or amendment; and if approved by a majority of the members elected to each house it shall become the organic law of such city or city and county, and supersede any existing charter and all laws inconsistent therewith."

In other words, the appellant contends that the taking effect of the charter is governed by the constitutional provision and not by the terms of the charter itself, and in support of this contention cites the case of *Burke v. Board of Trustees of San Francisco*, 4 Cal. App. 235, 87 Pac. 421. The quotation cited by appellant reads as follows:

"The act of March 3, 1899 (Stats. 1899, p. 57), is not available to the appellant. That act was a general law applicable to all counties, cities and counties and towns in the state, whereas the charter of San Francisco is a freeholders' charter, and, when approved by the Legislature in 1899, became by the express terms of the Constitution (article 11, §§ 6, 8) the organic law of the city and county, and superseded the existing charter and all laws inconsistent therewith, and thereafter the city and county was no longer subject to or controlled by general laws."

It is stated in the opinion that the charter of San Francisco went into effect January 1, 1900, and, as it further appears that the resolution of approval was passed in 1899, the charter itself must have declared when it was to take effect and this would seem to show that the case does not support appellant's contention. However, we entertain no doubt of the power of the people in adopting a freeholders' charter to provide when certain of its provisions shall take effect. The Legislature has no authority under the Constitution to make any alteration or amendment of the charter. Its sole power is to ratify or reject. It is true that the charter takes effect as declared by the court in the case cited when approved by the Legislature, but that case does not hold that the charter in all its provisions takes operative effect on the date of its approval by the Legislature. What the court said is entirely consistent with the view that the charter takes effect according to its provisions. We do not think the statute of 1911, or the charter adopted in that year, upon which appellant relies, is applicable here, but the right of recovery on the part of plaintiff must be determined by the provision of the charter of 1899 and the condition of the law prior to the adoption of the charter of 1911.

Appellant's argument is based exclusively upon rights alleged to arise out of the provisions of the charter of 1911, and unless that charter was in force when the contract was entered into the complaint fails to state a cause of action since no similar provisions are found in the charter as it stood prior to the execution of the contract.

[3] That the construction of a reservoir by a city upon its own land and to be used for

the benefit of the inhabitants of the city as a part of its water system constituted a "municipal affair" cannot admit of doubt. The Constitution expressly provides that:

"It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." Section 8, art. 11; *Burke v. Board of Trustees*, supra; *Dinan v. Superior Court*, 6 Cal. App. 217, 91 Pac. 806.

[4] The charter of 1899 provides a complete scheme for the letting of contracts, including the terms and conditions under which such contracts are to be let (Stats. 1899, p. 399), including also the giving of a bond by the contractor for the faithful performance of the contract (Stats. 1899, § 85, p. 402). It follows that the act of March 27, 1897, or the act of May 1, 1911, referred to by appellant, relating to the giving of a bond to protect materialmen and laborers employed by the contractor on public work, has no application to the present case. This seems to have been definitely settled as the law in the case of *Loop Lumber Company v. Van Loben Sels*, 173 Cal. 228, 159 Pac. 600. Defendant entered into a contract with the city and county of San Francisco to do certain sewer work. He gave bond as required by the act of March 27, 1897, for the protection of materialmen, mechanics, and laborers employed on the work. Defendant defaulted and the action was brought against him and his sureties. Plaintiff had judgment and on appeal the judgment was reversed. We quote from the opinion, written by Chief Justice Angellotti, 173 Cal. at page 232, 159 Pac. at page 602:

"We do not think it can be seriously questioned that a municipality may provide in its freeholders' charter for a complete scheme for the doing of such work that will be paramount to anything contained in any act of the state Legislature, and that, in regard to such municipality, anything contained in any general law of the state that is inconsistent with the charter provisions must be inoperative."

We quote further, 173 Cal. at page 233, 159 Pac. at page 602:

"Section 21 (referring to the charter of the city and county of San Francisco) provides for the contract and its execution. It requires, among other things, that, at the same time with the execution of the contract, the contractor shall execute to the city and county a bond conditioned 'for the faithful performance of the contract.' No other bond is required by the charter. * * * It is apparent that a complete scheme is thus provided by the charter for the doing of such work as is here involved, and that it was intended to specify all the terms and conditions upon which a contract was to be awarded and the work contracted for performed. * * * It seems to us to be perfectly clear that a state statute imposing other conditions on the contractor * * * is inconsistent with the charter provisions on the subject, and, consequently ineffectual for any purpose. It is urged that the act is not in conflict with the charter for the reason that the latter contains no provision at all in regard to such a

bond as is required by the act—neither requires such a bond nor in terms declares that no such bond is essential. But this in no degree affects the question. The charter does purport to provide all the conditions imposed on the contractor as a prerequisite to doing the work, including the giving of a bond for the faithful performance of the contract, and contemplates that upon compliance with those conditions he shall proceed with such work. Any law purporting to impose other conditions as a prerequisite to doing the work is necessarily inconsistent with the charter. It is not a case where the charter is silent upon the matter, and the authorities recited by respondent in this connection are therefore not in point. * * *

The Vallejo charter is quite similar to the charter of the city of San Francisco in its provisions relating to contracts respecting the letting of contracts, and as to contracts embracing a "municipal affair" its provisions are controlling. Respondents advance some other reasons in support of the judgment, but as we deem the foregoing as conclusive of the question presented by appellant, we need not consider them.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(38 Cal. App. 141)

WILLIAMS v. CITY OF VALLEJO et al.
(Civ. 1775.)

(District Court of Appeal, Third District, California. Feb. 4, 1918.)

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Edwin H. Williams against the City of Vallejo and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Karl F. Kennedy and Edwin H. Williams, both of San Francisco, for appellant. James H. O'Leary and L. G. Harrier, both of Vallejo, for respondents.

CHIPMAN, P. J. The general features of this action do not differ very materially from those presented in No. 1774, 171 Pac. 834, this day decided. In addition to the parties named as defendants in the action No. 1774 are the following: Board of trustees of the city of Vallejo and the members thereof, to wit: R. C. Pierce, J. Sullivan, Geo. Tripp, Wm. Herbert, and C. B. Butler; Geo. Hildreth, auditor of the city of Vallejo, and J. V. O'Hara, treasurer of the city of Vallejo. The averments in the complaint not found in the complaint in No. 1774 are the following: That the contract referred to entered into by the American Construction Company provided for payment in installments "in such manner that said American Construction Company should receive 90 per cent. of the total value of all the work done by it immediately upon the completion and acceptance thereof by said city of Vallejo, and that 10 per cent. and no more of the contract price should be reserved as a final payment upon said contract to be paid subsequent to the completion of the same." That at the completion of the contract the said company presented its demands for 90 per cent. of the full contract price for said work, to wit, the sum of \$32,332.50, and that in due course this amount was paid by the city and received by the company "immediately upon the completion of said work and contract * * * and the said payment constituted 90 per cent. of said contract price."

In the averments relating to the various claims assigned to plaintiff for work done and materials furnished, it is alleged: That the claimant in each case, "within 30 days subsequent to the time when said contract of said American Construction Company with the said city of Vallejo hereinabove mentioned was completed," filed his claim with the auditor of said city giving notice to withhold from said American Construction Company the amount of his claim, and further notifying said auditor that he had furnished materials as set out in the complaint, stating in general terms the kind of labor and materials furnished, names of persons to whom the same were furnished, and the amount and value of the same. "That due to the failure of the defendants and each of them to reserve 25 per cent. of the full contract price of said work from said American Construction Company as hereinabove set out, said demand (naming the claimant) was not satisfied or paid." In each count settling forth the various claims, the reasonable value of the work, labor, and material and the amount agreed by the company to be paid "therefor immediately upon the completion of said work" is stated, and also the amount paid and the amount remaining due. It does not clearly appear whether or not these several payments shown were made out of the 10 per cent. remaining after the payment to the construction company of the 90 per cent. as hereinabove shown, nor does it appear that the construction company was paid any portion of this 10 per cent. We infer, however, from the treatment of the case in the briefs, that these several payments referred to by the different claimants were paid out of this reserve 10 per cent., and appellant's contention is that the defendants are liable for "the failure of the defendants and each of them to reserve 25 per cent. of the full contract price of said work from said American Construction Company."

Appellant's argument takes the same course of reasoning as in the case No. 1774, and rests upon the assumption that the Vallejo charter of 1911 was in force at the time the contract was made with the American Construction Company, and that the statute of 1911 amendatory of the statute of 1897 applies. This we have shown in the case above referred to is an erroneous assumption upon the part of appellant.

We can discover no legal basis for this action, and the judgment is therefore affirmed.

We concur: HART, J.; BURNETT, J.

(36 Cal. App. 103)

CITY OF NAPA v. MAXWELL et al.
(Civ. 1755.)

(District Court of Appeal, Third District, California. Jan. 31, 1918. Rehearing Denied by Supreme Court April 1, 1918.)

1. APPEAL AND ERROR \S 419(1)—AMBIGUOUS NOTICE OF APPEAL—JURISDICTION.

While jurisdiction cannot be conferred by waiver or consent, where the attorney for defendant admits as contended by plaintiff's attorney, that the judgment for costs is fairly within plaintiff's notice of appeal, and the language of the notice is rather ambiguous in that respect, the court, on appeal, will consider the appeal as one from the judgment for costs and so review merits.

2. MUNICIPAL CORPORATIONS \S 378—STREET-OPENING PROCEDURE.

Street Opening and Widening Act (St. 1889, p. 71) \S 6, providing that, having acquired jurisdiction, the city council shall appoint three commissioners to assess benefits and damage, was not superseded by city charter providing that the duties of the commissioners under the

general law in the matter of opening, extending, widening, straightening, or closing streets shall be performed under the direction of the councilman in charge of the department of streets and public improvements and the city attorney, in view of charter section providing that except as otherwise provided the general laws relative to laying out, opening, extending, widening, straightening, or closing up, in whole or in part, shall control and all proceedings shall be in conformity therewith.

3. MUNICIPAL CORPORATIONS \S 266—STREET-OPENING PROCEEDINGS—COMPLIANCE WITH STATUTE.

Proceedings for street improvements being in invitum, the statutory requirements as to the essential steps to be taken must be observed with substantial strictness.

4. EMINENT DOMAIN \S 169 — STREET-OPENING PROCEEDINGS—CONDITION PRECEDENT.

Street Opening and Widening Act (St. 1889, p. 71) \S 6, requiring the appointment of three commissioners to assess benefits and damages in street-widening proceedings must be complied with before proceedings in condemnation can be maintained against an owner of property which may be taken or damaged for purposes of the improvement, and an appointment of two commissioners is insufficient.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by the City of Napa against Thomas Maxwell and another. From a judgment or order sustaining demurrer to complaint without leave to amend, the City appeals. Affirmed.

Wallace Rutherford, of Napa, for appellant. E. S. Bell, of Napa, for respondents.

HART, J. An opinion, prepared by Justice Burnett, was filed in this action on November 20, 1917. While in the original opinion the merits of the controversy were considered and discussed, the appeal was dismissed because this court had no jurisdiction thereof. A rehearing was granted on the petition of the appellant for the purpose of giving further consideration to the position taken by this court that the attempt by the plaintiff to take an appeal was abortive and also to consider whether, as the plaintiff contends in its petition, the complaint states a cause of action and is therefore good as against a general demurrer, no special grounds of demurrer having been set up against said pleading.

[1] In disposing of the appeal, this court, in its former opinion, said:

"We have considered the foregoing on the merits, but another question of serious moment arises, though not suggested by counsel, and that is whether we have any jurisdiction of the attempted appeal. The notice specifies that the appeal is taken from 'that certain judgment made and rendered on November 15, 1916, by the above-entitled court in the above-entitled action, and entered on November 15, 1916, sustaining said defendant's demurrer to said plaintiff's amended complaint without leave to amend and from the whole of said judgment. But the statute does not confer the right of appeal from a judgment or order sustaining or overruling a demurrer to a complaint, and it has been so declared several times by the appellate courts of this state. *Litch et al. v. Kerns et al.*, 8 Cal.

App. 747 [97 Pac. 897]; *Kinard v. Jordan et al.*, 10 Cal. App. 219 [101 Pac. 696]; *Hadsall v. Case et al.*, 15 Cal. App. 541 [115 Pac. 330]; *Hanke v. McLaughlin*, 20 Cal. App. 204 [128 Pac. 772]; *Foster v. Bowles et al.*, 138 Cal. 449 [71 Pac. 495]; *Wood, Curtis & Co. v. Missouri, etc., Ry. Co.*, 152 Cal. 344 [62 Pac. 868]. In a case like this where the demurrer is sustained without leave to amend, the proper course is to have a judgment entered dismissing the action and then the appeal is taken from this final judgment. But you look in vain through section 963 of the Code of Civil Procedure to find authority for taking an appeal from an order or judgment sustaining a demurrer to a complaint. The dignity of such an order, it may be said, is not enhanced by calling it a judgment."

Of course, there can be no question of the correctness of the rule as it is above set forth. And upon its face the appeal seems to be addressed entirely to the order sustaining the demurrer, for, as seen, it specifically refers to that order as a judgment and further says that the appeal is "from the whole of said judgment." There is, however, a judgment against the plaintiff for costs, and its attorney now contends that the appeal, being "from the whole of said judgment," must be considered to be from the judgment for costs. At the oral argument, the attorney for the defendants conceded that the language of the notice of appeal was broad enough to include an appeal from the judgment for costs. Of course, jurisdiction cannot be conferred by waiver or the consent of the parties, still, in this case, since the attorney for the defendants himself admits that an appeal from the judgment for costs is fairly within the scope of the notice of appeal, and since the language of said notice is rather ambiguous in that respect, we shall take a liberal view of the language of the notice of appeal and consider the appeal as one from the judgment for costs, and so review the merits.

Discussing the merits of the appeal. Justice Burnett, in the former opinion, stated the case and the views of this court as follows:

"This is an action commenced by the city of Napa, a municipal corporation, to condemn a strip of land to widen a street under the act of the Legislature of 1889, known as the street opening and widening act, Stats. of 1889, p. 70. A demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action was interposed by defendant Maxwell and sustained without leave to amend. From the judgment or order sustaining the demurrer the plaintiff appeals.

"The regular steps set forth in the act of 1889 were followed by the plaintiff until section 6 was reached, which requires the appointment of three commissioners. As to that requirement the city charter of Napa was followed on the assumption that the charter in this respect superseded the general law and provided for a different method for the assessment of damages and benefits. As to the further procedure the general law was followed.

"Section 6 of said street opening and widening act provides: 'Having acquired jurisdiction as provided in the preceding section, the city council shall order said work to be done, and unless the proposed work is for closing up, and it ap-

pears that no assessment is necessary, shall appoint three commissioners to assess benefits and damages and have general supervision of the proposed work or improvement until the completion thereof in compliance with this statute.' The section then provides that the compensation of the commissioners shall not exceed \$200 a month and requires an affidavit and bond of each commissioner.

"Section 68 of the Napa charter provides: 'The duties of commissioners * * * under the general law in the matter of opening, extending, widening, straightening or closing streets * * * shall be performed under the direction of the councilman in charge of the department of streets and public improvement and the city attorney, neither of whom shall receive compensation therefor.'

"The city council appointed the councilman in charge of the street department and the city attorney commissioners, and each put up a bond and took oath. In the lower court respondents urged in support of their demurrer that 'there was nothing in the city charter (section 68) which authorized the city council to appoint commissioners; that its only authority to appoint commissioners was derived under the provisions of section 6 of the street opening and widening act of 1889; that having appointed only two commissioners instead of three as provided for by section 6 of the act of 1889 it was without jurisdiction to act upon and confirm the report of the two commissioners.' The further claim was made that the two officials appointed, especially the councilman, were disqualified to act, and therefore their appointment was void.

"Section 67 of said charter provides: 'Except as otherwise in this charter or by ordinance of the city provided, the general laws of the state of California, or which may hereafter be adopted by the Legislature of this state, relative to * * * laying out, opening, extending, widening, straightening or closing up, in whole or in part, of any thereof; the condemning and acquiring of any and all lands necessary and convenient therefor; * * * the levying and collecting of assessments upon property for doing such improvement, or work, or carrying out all or any such purposes * * * shall control and all proceedings shall be in conformity therewith.'

"It is admitted by appellant that the general law must apply unless said section 68 of the Napa charter was intended to supersede said section 6 of said general law and does in sufficient phraseology provide that said two city officers shall perform the work required of commissioners in 'opening, extending, widening, straightening or closing streets.' It is apparent that the words of said section 68 were not aptly chosen for the purpose of conveying the meaning that said officers should perform the duties of commissioners. If such had been the intention of the framers of the charter it is somewhat surprising that they did not so express it, since it could have been done with such facility and simplicity. If the charter had provided that 'the duties of commissioners * * * shall be performed by the councilman,' etc., we would find just what might be expected to express the view contended for by appellant, and, of course, there would be no doubt as to the construction of the clause. It was provided, however, that these duties should be performed under the direction of these officers. The phrase presupposes that the actual work shall be done by some one else but it is to be supervised by the said city councilman and the city attorney. Webster's definition of 'supervision' is: 'The act of directing or of aiming, regulating, guiding, or ordering; guidance; management; superintendence.' If the expression were used in reference to mere manual labor there would manifestly be no doubt as to its significance. If it were provided that a certain building should be erected or a public improvement

should be made under the direction of these officers it would not for a moment be contended that they should perform the actual work of construction, but it would be readily admitted that they were to direct and supervise the manner in which the work should be done by others. In the present instance it might be said that there is less reason probably for supervising the work of assessing and apportioning the benefits and damages occasioned by said improvement, and it may be said also that the change contended for by appellant may have been contemplated in order to save expense, but the fact remains that the framers of the charter have deliberately—at least we must assume that it was done deliberately—chosen language that expresses an entirely different meaning. Some reference is made by appellant to the charters of Oakland and Valejo as indicative of a general purpose in the framing and enactment of these freeholders' charters to provide for such change. But it is manifest that those charters come nearer to an expression of intention to vest said power in the commissioner of streets and city attorney than does the provisions before us, for they expressly provide that 'no commissioners shall be appointed, and that all the duties imposed on commissioners * * * shall be performed under the direction of the commissioner of streets and city attorney of the city.' While such expression is not altogether clear, it does at least appear that it was the intention to have no other than said officers act as commissioners.

"Of course, the rule is that 'proceedings for the improvement of streets are in invitum and purely statutory, and afford no opportunity for invoking any of the principles of equity and the validity of an assessment therefor depends upon a statutory power, and the party seeking the right to enforce it must show that the statutory power has been strictly followed.' Warren v. Chandos, 115 Cal. 382 [47 Pac. 132]. As to the disqualifications of these officers to act as commissioners we do not agree with respondent. We think the contention in that respect is completely answered by the decisions in the case of United Real Estate & Trust Co. v. Barnes, 159 Cal. 242 [113 Pac. 167], to which we refer for a thorough consideration of the question. It may be, therefore, that these officers could constitute two of the commissioners to be appointed under the general law, but as to that we express no opinion."

[2] It is now argued by the appellant that the allegations of the complaint relative to the appointment by the city council of commissioners to assess damages, etc., involve evidentiary matter and are therefore unnecessary to the statement of a cause of action in eminent domain, and may be treated as surplusage; that, so viewing those allegations, the complaint states a cause of action to condemn property for a public use, since it contains a statement of all the facts required to be shown in such an action by section 1244 of the Code of Civil Procedure, to wit: (1) The name of the owner of the property; (2) the right of plaintiff; (3) a description of the land proposed to be taken and the statement that the same is a part of a larger tract described therein.

Upon further consideration of the proposition, we are convinced that the conclusion announced in our former opinion that section 68 of the charter of the plaintiff was not intended to supersede or take the place of the provisions of section 6 of the state law is correct. The language of section 68 of the charter appears to be clear as to the idea

intended to be expressed thereby and its meaning is plainly this: That the duties of commissioners or other officials authorized to be appointed by the general law of the state to attend to the matter of opening, extending, widening, straightening, or closing streets, etc., shall be performed by the commissioners and other officials so authorized to be appointed for that purpose under the direction of the councilman in charge of the department of streets and public improvements and the city attorney. In other words, section 6 of the statute of 1889 governs in the matter of the appointment and as to the number of the commissioners who are to assess benefits and damages in the case of the widening, extending, or straightening of streets, etc., and section 68 of the charter merely provides, and was obviously intended only to provide, that the duties which the general law imposes upon such commissioners shall be performed by such commissioners under the direction of the councilman in charge of the department of streets, etc., and the city attorney.

[3] It now remains to be seen whether the complaint, having alleged that the councilman in charge of the department of streets and the city attorney were by resolution of the council appointed commissioners to assess the benefits and damages, states a cause of action for the condemnation of property for street-widening purposes; or to state the proposition perhaps more accurately) has the plaintiff pleaded itself out of court by alleging in its complaint the fact that the said councilman and the city attorney were by the council appointed commissioners to perform the duties imposed upon the commissioners authorized and required to be appointed for the purpose of assessing benefits and damages by section 6 of the street widening act of 1889?

The question thus propounded may best be answered by a brief survey of the provisions of some of the sections of said act. We have already seen that section 6 of said act provides for the appointment of three commissioners for the purpose stated and in general language prescribes their duties. The succeeding sections, so far as they relate to the duties and powers of the commissioners, provide: That the commissioners shall view the lands described in the resolution of intention and, if necessary, take the testimony of witnesses, and thereupon proceed to determine the value of the land and damage to improvements and property affected; that, thereafter, having made their assessment of benefits and damages, the commissioners shall make and file with the city council a report thereof, and accompany their report with a plat of the assessment district, showing the land taken or to be taken for the work or improvement, and the lands assessed, etc.; that a copy of said report and plat, after such report and plat have been approved by the council, shall be filed by the city clerk in the office of the county recorder of the county; that the said report shall specify

each lot, subdivision, or piece of property taken or injured by the widening or other improvement of the street, or assessed therefor, together with the name of the owner or claimants thereof or other persons interested as lessees or incumbrancers, etc.; that, upon the filing of said report and plat in the clerk's office of the city council, the clerk shall give notice of such filing by publication for at least 10 days in one or more daily newspapers published and circulated in said city; that said notice shall require all persons interested to show cause, if any, why such report should not be confirmed, before the city council, on or before a day fixed by the clerk, and stated in said notice, etc.; that all objections shall be in writing and filed with the clerk, who shall lay the same before the council, which shall fix a day for hearing the same; that said report having finally been confirmed, a certified copy thereof, and of the assessment and plat, shall by the clerk be forwarded to the superintendent of streets. Other provisions relative to the duties of the superintendent of streets after receiving the report, assessment and plat follow, but it is not important that they should be referred to here; and then comes section 18 of the act which, among other things, provides:

"If any owner of land to be taken neglects or refuses to accept the warrant drawn in his favor as aforesaid, or objects to the report as to the necessity of taking his land, the commissioners, with the approval of the city council, may cause proceedings to be taken for the condemnation thereof, as provided by law under the right of eminent domain. The complaint may aver that it is necessary for the city to take or damage and condemn the said lands, or an easement therein, as the case may be, without setting forth the proceedings herein provided for, and the resolution and ordinance ordering said work to be done shall be conclusive evidence of such necessity."

Where, in the exercise of the taxing power or the right of eminent domain, the state imposes a tax upon the property of a citizen or authorizes it to be taken for a public use, the Legislature always takes the pains to point out with precision the mode and manner of exercising such power or right, and so important is the power thus to trench upon and even divest private rights to the owners of private property that the courts, in their adjudications in such cases, have always strictly applied the rule, above stated, that proceedings in street improvement, being *in invitum*, therefore the statutory requirements as to the essential steps to be taken in such proceedings must be observed with substantial strictness. The owner of property proposed to be taken for a specific purpose or to be taken or damaged for a public use is entitled to have the proceedings leading to that end carried out in all vital or material respects precisely as the Legislature has prescribed or established it.

In clothing municipal corporations with the power to widen or extend or straighten streets, the Legislature has been careful to provide in detail how that character of im-

provement may be done so as to protect the property owner whose property is to be affected by the improvement against unjust deprivation of private rights or the taking or taxing of his property without a public necessity therefor or the taking or damaging of more of his property than the requirements of the proposed improvement demand.

[4] The ascertainment of benefits accruing or the damage resulting to property affected by the proposed improvement by three commissioners appointed for that purpose is a substantial and an essential step to be taken before proceedings in condemnation can be instituted or maintained against an owner of property which may be taken or damaged for the purposes of the improvement. The property owner is entitled to the judgment of all three of the commissioners so appointed as to the value of his property to be taken or the damage which will result thereto by reason of the improvement. It will not do to say that because, perhaps two of the commissioners, being a majority, may agree upon and make a report, the appointment of two would satisfy the requirement of the statute as to the number to be appointed and to discharge the duties imposed upon them. There are substantial reasons against such an argument. The first is that the statute expressly provides that the number of commissioners shall be three. If, in the face of this provision, the council may appoint two, why could it not with equal reason determine that the appointment of one commissioner would be sufficient and so devolve the duties of the three commissioners required by the statute to be appointed upon a single person? Again, the third commissioner's judgment and voice might be sufficiently potent to control the determination of the result of the investigation; and if there should occur a disagreement between the commissioners as to the amount of damage which would be sustained to the property to be taken—two reaching one conclusion upon that all-important question and the third another—the dissenting commissioner's views and conclusion might be such as to justify the council in ordering a reinvestigation of the questions of benefits and damage and so finally bring about a report satisfactory to both the property owners and the city. These latter reasons merely go to the possible explanation of the underlying legislative motive in requiring three commissioners to be appointed for the purpose of performing the duties referred to; but, whatever may have been the motive in providing for three commissioners, the proposition remains that the Legislature has expressly and explicitly declared that that number shall constitute the commissioners who shall perform the duty of ascertaining and admeasuring benefits and damage, and, as above stated, there is no authority in the city council to

determine that that duty may or can be performed by a less or greater number of commissioners. The statute in that regard is, as before in effect declared, mandatory, and a compliance therewith is essential to the procurement of a valid report on benefits and damage, without which report and the confirmation thereof by the council an action to condemn the property of a person not willing to accept the damage so appraised cannot be instituted or maintained.

Now as to the complaint. Section 18 of the statute in question provides, as we have seen, that the proceedings which are required to be taken for the widening or extending or straightening of streets need not be pleaded in a complaint in an action for the condemnation of property which is required and sought to be taken for any of the purposes mentioned or which may be damaged by reason of such work or improvement. The plaintiff therefore would have stated a case in eminent domain if it had omitted any reference to the alleged appointment by the city council of commissioners to assess benefits and damage. But, as seen, the complaint alleges that the city council had appointed two commissioners to assess benefits and damages, and that the commissioners so appointed had performed the duties required of such commissioners by law and made a report which was filed, approved, and confirmed in accordance with the provisions of the general law. Thus the complaint itself affirmatively shows that the council, in the appointment of commissioners, did not follow the requirements of the general law in a vital particular, and that the work and the report of the so-called commissioners were without legal force, or, in other words, were and are wholly void. The plaintiff has thus unnecessarily pleaded itself out of court. And even if, under the circumstances, the complaint were sustained, the plaintiff (assuming, as we must, that the complaint states the truth as to the appointment of commissioners and their work as such) would fail at the trial to sustain its action by the proofs.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(26 Cal. App. 32)

FRANCK v. MORAN et al. (Civ. 1791.)

(District Court of Appeal, Third District, California. Jan. 24, 1918.)

1. FRAUDULENT CONVEYANCES — 273—LACK OF VALUABLE CONSIDERATION — PRESUMPTION.

Under Civ. Code, § 3442, providing that any transfer or incumbrance of property without a valuable consideration by a party while insolvent or in contemplation of insolvency shall be fraudulent and void as to existing creditors, if a transfer of property is made without a valuable consideration while the grantor is insol-

vent or contemplating insolvency, the undisputable presumption follows that the transaction is fraudulent, and the deed may be set aside at the instance of a creditor.

2. FRAUDULENT CONVEYANCES ¶74(2) — **TRANSFER WITHOUT VALUABLE CONSIDERATION—EVIDENCE.**

Where deed recited that it was given in consideration of love and affection and for better support and maintenance, as well as in consideration of \$1 and other valuable considerations, and plaintiff made no attempt to controvert the recital, it cannot be held that the transfer was without valuable consideration, in view of Civ. Code, § 1615, placing the burden of showing want of sufficient consideration on the party seeking to invalidate the instrument.

3. FRAUDULENT CONVEYANCES ¶308(1)—**INTENT TO DEFRAUD—QUESTION OF FACT.**

Whether a transfer was intended by the grantor "to delay or defraud any creditor or other person of his demands," within Civ. Code, § 3439, is a question of fact.

4. FRAUDULENT CONVEYANCES ¶273 — **INTENT TO DEFRAUD—BURDEN OF PROOF.**

In view of Civ. Code, § 3439, the burden is on the complaining creditor to show that the conveyance was made with intent to defraud.

5. FRAUDULENT CONVEYANCES ¶69(1)—**INTENT TO DEFRAUD—FUTURE CREDITORS.**

Under Civ. Code, § 3439, a deed is subject to nullification if the intention existed to defraud a "future creditor" of a just claim.

6. APPEAL AND ERROR ¶1008(1)—**FINDING—REVIEW.**

Question whether there was an intent of grantor to defraud creditors is to be determined from all surrounding facts, and if a court finding, with reference thereto, may be said to constitute a rational inference from the evidence, it cannot be disturbed by the appellate court.

7. FRAUDULENT CONVEYANCES ¶23—**INTENT TO DEFRAUD—EVIDENCE.**

Where a person indebted to another divests himself of all his property and thereby renders himself incapable of paying his debts, it may be just and reasonable to hold that he intended, when he executed a conveyance, to render creditors powerless to obtain satisfaction of their claims.

8. FRAUDULENT CONVEYANCES ¶154(1) — **RIGHTS OF GRANTEE—ESTOPPEL.**

Where credit was extended on the faith that the grantor was owner of the property, it would be inequitable to allow the grantees, who remained silent and failed to record their deed until the indebtedness was incurred, to prevent the creditor from resorting to such property, especially where grantor is insolvent.

9. FRAUDULENT CONVEYANCES ¶282—**CONVEYANCE AFTER FILING NOTICE OF SUIT—PRESUMPTION.**

Deed to defendant grantee being subsequent to filing of lis pendens in suit setting forth claim to property, the presumption is that the grantee was speculating on the chances of defeating a just claim.

10. APPEAL AND ERROR ¶1173(1)—**JOINT APPEAL—MODIFICATION OF JUDGMENT AS TO ONE DEFENDANT.**

Where appeal was taken jointly by all defendants from the whole of the judgment, the Appellate Court would hardly be justified in reversing a part of the judgment in favor of one appellant.

11. CONSPIRACY ¶14—**JOINT LIABILITY.**

Where there was some evidence that defendant, to whom was executed a deed only a short time before suit, became a party to a conspiracy to defraud plaintiff creditor, it would not be inequitable to hold him jointly liable for the consequences of the conspiracy, although he

was not directly connected with the fraudulent purpose in the beginning.

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Suit by William Franck, as administrator of the estate of Sarah B. Hunter, deceased, against John Moran and others, to set aside certain deeds to property. From judgment rendered, defendants appeal. Affirmed.

Braynard & Kimball, of Redding, for appellants. W. D. Tillotson, of Redding, for respondent.

BURNETT, J. This is an appeal from the judgment rendered by the superior court of Shasta county in a suit in equity to set aside two deeds to real property, in which action defendants' motion for a new trial was denied.

The property in question was, on November 18, 1905, owned by Sarah B. Hunter, who at that time and at all times subsequently had but one creditor, Franck & Co., to whom she then owed \$640.46. On said date she executed a trust deed to J. E. Hunter and Grant Hunter, for the benefit of Laura Hunter Newman, Ralph Newman, and Ruby Newman (Mrs. Moran), with directions to trustees to sell at Mrs. Laura Newman's orders and pay all proceeds to said Laura Newman. This deed was not recorded until 1915. It appears that on January 1, 1909, Sarah B. Hunter was indebted to Franck & Co. in the sum of \$2,614.25, on January 1, 1910, in the sum of \$3,499.90, and on January 1, 1911, in the sum of \$1,287.50. On December 31, 1910, she was given a credit of \$2,850 and during the next two years ending December 31, 1912, she was credited with \$1,200. It thus appears that, from 1905 to December 31, 1912, she was credited with \$4,050, and that the credit on December 31, 1910, was sufficient to cover the indebtedness as it stood on January 1, 1909. On January 23, 1913, Sarah B. Hunter executed a deed of the property covered by the trust deed to Laura Hunter Newman, which was recorded April 25, 1913. It may be noted in passing that respondent argues that this amounted to a repudiation by Laura Newman of the former trust deed. Sarah B. Hunter died March 31, 1913, and at the date of her death was indebted to Franck & Co. in the sum of \$1,203.60. On March 27, 1915, letters of administration were issued to respondent, William Franck, one of the members of the firm of Franck & Co., and, on April 7, 1915, he commenced suit against appellant Laura Hunter Newman, to set aside the deed recorded April 25, 1913. In this action a lis pendens was filed and recorded. Shortly thereafter, on May 6, 1915, the trust deed, dated November 18, 1905, was recorded, and soon after, on June 5, 1915, a deed from the trustees was executed to John Moran, for which appellants claim Moran paid \$1-

000. In September, 1915, the action was tried, and the deed of 1913 was ordered canceled. But, on July 29, 1915, plaintiff had started this action to set aside the trust deed of 1905 and the deed to Moran, alleging that they were made without consideration and to hinder, delay, and defraud creditors, and that John Moran took his deed with notice of the creditor's claim and in furtherance of a conspiracy to defraud said creditor.

At the conclusion of the trial the court made its findings among which were the following: (1) That the trust deed was made without consideration, and for the purpose of defrauding creditors at a time when the grantor, Sarah B. Hunter, was insolvent; (2) that the deed to John Moran was made without consideration, and for the purpose of hindering, delaying, and defrauding the creditors of Sarah B. Hunter; (3) that John Moran took said deed in pursuance of a conspiracy to defraud the creditors of the estate of Sarah B. Hunter; (4) that the trust deed and the deed to John Moran were recorded for the purpose of hindering, delaying, and defrauding creditors of Sarah B. Hunter, deceased; (5) that Sarah B. Hunter owned the property in controversy on January 23, 1913, the date of the deed to Laura Newman, declared canceled in the prior action.

The main complaint of appellants is that the above findings are not supported by the evidence.

The finding as to the said trust deed is the first consideration inviting attention. As to this, it is the contention of appellants that:

"There is no evidence that the trust deed was made without consideration, or that Sarah B. Hunter made the trust deed for the purpose of defrauding her creditors, or that she was at that time insolvent."

[1] The position is taken in contemplation of the statutory inhibition of what has been characterized as "actual fraud," and also of "constructive fraud." The former is referred to in section 3439, and the latter in section 3442 of the Civil Code. More strictly speaking, however, the latter prescribes a rule of evidence as to what shall indubitably constitute fraud. In other words, if a transfer of property is made "without a valuable consideration," and while the grantor is insolvent or contemplates insolvency, the indisputable presumption follows that the transaction is fraudulent, and the deed may be set aside at the instance of a creditor.

[2] Regarding this phase of the case first, we may observe the contention of appellants is that the recitals in the trust deed were the only evidence offered as to the consideration for which the deed was given, and these recitals are conclusive that such consideration was valuable. Thus it appears therein:

"Now therefore, in consideration of the promises and of the love and affection which the said party of the first part has and bears unto the said parties of the third part and for their better support, maintenance and protection as well as in consideration of the sum of one dollar in lawful money of the United States and other

good and valuable consideration which the said party of the first part acknowledges to have received of and from said parties of the third part," etc.

Respondent made no attempt to controvert said recital, and hence it could not be held that the transfer was "without valuable consideration." While the express declarations of the deed as to the consideration may be contradicted and controlled by parol evidence, if satisfactory, there was no such evidence offered herein, and there is no sufficient support, therefore, for the finding "that the said purported trust deed dated November 18, 1905, was without consideration." It will not be disputed that the burden of proof was upon plaintiff to overcome the proper inference from said recital, and it is equally plain that in this respect his position is vulnerable. As to the necessity for such proof on his part, we may refer to section 1615, Civil Code; *Anthony v. Chapman*, 65 Cal. 73, 2 Pac. 889; *Duffy v. Duffy*, 104 Cal. 602, 38 Pac. 443.

[3, 4] With equal earnestness appellants urge that the proof fails to make out a case contemplated by said section 3439. To make the instrument fraudulent under that statute there must be the intent in the mind of the grantor "to delay or defraud any creditor or other person of his demands." This is undoubtedly a question of fact and not of law, and the burden of proof is upon the complaining creditor to show that the conveyance was made with such intent. *Schell v. Gamble*, 153 Cal. 449, 95 Pac. 870.

[5-7] The only creditor at the time was E. Franck & Co. and the amount of the indebtedness was \$640.46. This was paid afterwards, and it is claimed that this furnishes conclusive evidence that at the time of the execution of the deed she had no intention of defrauding her creditor. The principle, however, is not limited to the debt owed at the time of the conveyance. The deed would be equally subject to nullification if the intention existed to defraud a future creditor of a just claim, and in this connection it is to be recalled that she continued to do business with said firm for many years, and was at no time entirely free from financial obligation to said Franck & Co. Of course, it is generally difficult to prove satisfactorily the intent in cases like this. It is not to be expected that the grantor would declare a purpose to defraud his creditors. Indeed, it is natural to suppose that he would, if possible, conceal such purpose and so dispose the circumstances, if he could, that a fraudulent intent could not be shown. The trial court is to reach a conclusion from the consideration of all the surrounding facts; and, if the finding may be said to constitute a rational inference from the evidence, it cannot be disturbed by the appellate court. We think the lower court may have reasonably concluded that on said November 18, 1905, Mrs. Hunter rendered herself insolvent by

conveying all her property. The showing as to this, it is true, is not very persuasive, but Mr. Franck's testimony under the circumstances should be deemed sufficient in view of the difficulty of proving the fact and the absence of any evidence that she had other property. In addition, it is clear that she continued indebted to the company till her death, and left no property to satisfy the obligation. It is not unreasonable to conclude that she anticipated and contemplated that condition, and that when she performed the very act that would prevent her from paying her just indebtedness, she had the intention of accomplishing that result. In other words, when it is shown that a person is indebted to another, and so continues, and that he has divested himself of all his property and thereby renders himself incapable of paying his debts, it may be just and reasonable to hold that he intended when he executed the conveyance to render the creditor powerless to obtain the satisfaction of his claim, and that this intention is virtually a fraud upon the creditor, and should not be countenanced in a court of justice. Of course, we do not say that a finding to the contrary might not have been justified, but we think the conclusion of the court in favor of respondent is not unreasonable.

[8] There is a slightly different view of the case, set forth in the pleadings and disclosed by the evidence, which harmonizes with the findings of the lower court and comports with the demands of equity and good conscience. It involves the principle of equitable estoppel. The credit for the indebtedness herein was extended Mrs. Hunter on the faith that she was the owner of the premises concerned in the suit. Mr. William Franck so answered in response to the question whether the firm extended credit "in the belief and understanding that Sarah B. Hunter owned the house and lot in French gulch." There was no evidence to the contrary, and we must accept such as the fact. Under these circumstances it would be inequitable to allow the grantees, after remaining silent and failing to record the deed until said indebtedness was incurred, to prevent the creditor from resorting to said property for the satisfaction of its claim. As between the vendee and creditor, in such a case, the vendor will still be considered the owner of the property. Otherwise he would be permitted to perpetrate a gross fraud upon the creditor. And the decisions are to the effect that the deed will be treated as fraudulent and void as to creditors without regard to whether the parties to the deed intended any fraud or not. There are many cases to the point, but we content ourselves with this quotation from *Curtis v. Lewis*, 74 Conn. 367, 50 Atl. 878:

"This rule of righteousness and broad principle of public policy, * * * as it relates to the delusion and injury of creditors through secret conveyance of land, it rests upon the principle, common to all jurisprudence, which imposes upon every man the duty of surrendering,

to those justly entitled, property in his legal possession which in equity and good conscience he ought not to retain, and which forbids any one to assert his rights when in equity and good conscience he ought not to assert them against one who has been injured and deceived through his conduct in respect to such rights."

The circumstance of insolvency on the part of the grantor, which we have already considered, furnishes an additional reason for applying such principle as against the grantees. *Clark v. Lewis*, 215 Mo. 173, 114 S. W. 604.

[9] The other consideration of importance relates to the question of whether Moran was a purchaser for value and in good faith. There is evidence that he paid \$1,000 for the deed, but there is no showing that he took without notice of the fraudulent character of the conveyance of November 18, 1905, or of the claim of respondent. He was the son-in-law of Laura Hunter Newman, one of the beneficiaries in the trust deed, and the husband of another beneficiary, and this consideration would furnish some ground for the inference that he had knowledge of the situation. Moreover, there was a lis pendens filed and recorded on April 7, 1915, in the case of William Franck, as Administrator of the Estate of Sarah B. Hunter, Deceased, v. Laura Hunter Newman, setting forth the claim of the plaintiff to the property in controversy; and, Moran's deed being subsequent to this date, the presumption is that he was speculating on the chance of defeating a just claim. Besides, it is alleged in the complaint, and not denied in the answer—

"that said John Moran well knew of the pendency of said action, and the said John Moran took said deed of conveyance knowing of the claim of the said E. Franck & Co. against the said estate of said Sarah B. Hunter, deceased."

It may be remarked, also, as of some significance, that Moran was not a witness at the trial nor was any explanation offered for his failure to testify. There seems to be no doubt that the trial court was warranted in holding that Moran's deed was without validity.

[10, 11] In addition to the cancellation of said deed of trust, the judgment provided for damages in the sum of \$202 for the rents and profits of the property subsequent to the time of the death of said Sarah B. Hunter, and it is claimed by appellant Moran that he is not liable for any portion of that sum, as his deed was executed only a short time before this action was commenced. But we think it sufficient to say that the appeal is taken jointly by all the defendants, and from the whole of the judgment, and this court would hardly be justified in reversing a part of that judgment in favor of one of the appellants. Besides, we think there is some evidence that Moran became party to a conspiracy to defraud respondent, and it is not inequitable to hold him jointly responsible for the consequences of that conspiracy, although he was not directly connected with the fraudulent purpose in the beginning.

We think the judgment just, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(36 Cal. App. 191)

PORTER v. ANGLO & LONDON PARIS NAT. BANK OF SAN FRANCISCO (ROTHENBERG, Intervener). (Civ. 2143.)

(District Court of Appeal, First District, California. Feb. 7, 1918.)

1. CORPORATIONS — 446 — SALE OF ALL CORPORATE ASSETS — CONSENT OF STOCKHOLDERS.

Money on deposit in the name of intervenor president, claiming title by bill of sale of corporation purporting to convey "all assets," was subject to execution on judgment against corporation which had ceased to exist where sale had not been made with consent of two-thirds of stockholders, as required by Civ. Code, § 361a; such sale being void as against execution creditor.

2. CORPORATIONS — 445 — SALE OF PROPERTY.

While the word "property" was not specifically employed in the bill of sale by the corporation to intervenor to designate the subject-matter of the transfer, the phrase "all the assets of the corporation" therein, with the preceding notice to consummate a sale of all assets, property, and effects of the corporation, comprehended and included the entire property of the corporation in the sale, so that the sale was void where not made with consent of two-thirds of stockholders, as required by Civ. Code, § 361a.

3. CORPORATIONS — 619 — DISSOLUTION — TRANSFER OF CORPORATE FUNDS — TRUSTEE.

Although a corporation died a natural death, where the fund in the corporation's bank account, notwithstanding its attempted transfer to the account of intervenor president and director was at the time of the dissolution and thereafter continued to be a corporate asset, the intervenor became a trustee of the fund in view of Civ. Code, § 400, providing that unless other persons are appointed the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders, or members of the corporation dissolved.

4. TRUSTS — 372(1) — INTERMINGLING OF FUNDS — PRESUMPTION.

If intervenor, after dissolution of corporation, continued its business, and money deposited by intervenor to his account, which represented funds of the corporation, was his own, it was the duty of the trial court to disentangle the account, and in so doing was permitted to presume that the several sums of money from time to time added to or withdrawn were no part of the trust fund.

5. TRUSTS — 372(1) — INTERMINGLING FUNDS — PRESUMPTION.

If, at the time of the levy of the execution, there remained of the original trust fund a sum equal to or in excess of the sum sued for and sought to be impressed with the trust, the legal presumption is that such sum, in the absence of a showing to the contrary, was part and parcel of the original trust fund.

6. APPEAL AND ERROR — 877(2) — PARTIES ENTITLED TO ALLEGE ERROR.

Where intervenor's interest in the action was only that of an individual acting to establish a purely personal claim to the money in suit, the invalidity of the judgment against de-

fendant bank cannot concern him in the absence of a showing that he had a valid individual claim, and will not be considered on his appeal.

Appeal from Superior Court, City and County of San Francisco; Geo. C. Crothers, Judge.

Suit by George K. Porter against the Anglo & London Paris National Bank of San Francisco and Louis Rothenberg, intervenor. Judgment for plaintiff, and intervenor appeals. Affirmed.

Henry G. W. Dinkelspiel and John R. Jones, both of San Francisco, for appellant. Wm. M. Cannon and Wm. M. Abbott, both of San Francisco, for respondent. Lillenthal, McKinstry & Raymond, of San Francisco, for defendant.

LENNON, P. J. On December 4, 1913, prior to the institution of the present action, the judgment against the Rothenberg Company, Incorporated, was recovered in an action wherein the plaintiff here, George K. Porter, was plaintiff and the said Rothenberg Company, Incorporated, was defendant. Execution upon the judgment thus obtained was issued and levied upon a certain sum of money on deposit in the name of the Rothenberg Company, "not incorporated," with the defendant in this action, the Anglo & London Paris National Bank of San Francisco. Upon a proceeding supplementary to said execution, Louis Rothenberg, the intervenor in the present action, appeared and claimed that the money so deposited and levied upon belonged to him because the Rothenberg Company, Incorporated, against which the judgment in the original action was obtained, had ceased to exist prior to the levy of the execution, and that immediately prior to its dissolution it had transferred the deposit in question to the Rothenberg Company, "not incorporated," under which name he individually was doing business.

The court in the original action, upon the hearing of the supplementary proceeding, ordered that the deposit in question be held by the defendant bank pending the result of the present action which, pursuant to the direction of the court, was instituted for the purpose of determining whether or not said deposit belonged, at the time of the levy of the execution, to the Rothenberg Company, Incorporated, or to the Rothenberg Company, "not incorporated." The plaintiff's complaint in the present action proceeded in substantial accord with the facts above narrated, and all of its material allegations were admitted by the bank defendant, save the allegation that on January 10, 1914, the date of the levy of the execution, there was on deposit with it the sum of \$650, or any other sum, belonging to and standing in the name of the Rothenberg Company, Incorporated.

Pursuant to stipulation and order, Louis Rothenberg, the intervener, interposed his complaint in intervention, wherein, among other things, he alleged that the Rothenberg Company, "not incorporated," was in fact himself doing business under the fictitious name of the "Rothenberg Company," and that he was the owner of the money which had been levied upon and on deposit with the bank defendant in the name of the Rothenberg Company, "not incorporated." After trial upon the issues thus raised, the court below found that, at the time of the issuance and levy of the execution in question, the bank defendant had in its possession and under its control an amount of money exceeding the sum of \$650 belonging to the Rothenberg Company, Incorporated; that the intervener did not then or at any other time have any interest in or title thereto; and that the same was subject to the lien of the plaintiff's execution. Judgment was accordingly entered in favor of the plaintiff and against the bank defendant and the intervener as well, from which judgment the intervener alone, and in his own behalf, has appealed.

The trial court's finding as to the ownership of the money in suit is assailed upon the ground that it is contrary to the evidence. The evidence in so far as it related to the ownership of the money in suit is in substance as follows: On and prior to June 30, 1913, the Rothenberg Company, Incorporated, was an ordinary commercial corporation. At midnight on the last-mentioned date the life of the Rothenberg Company, Incorporated, of which the intervener was then a director and the president, expired because of the fact that it had reached the period of its corporate existence as prescribed in its amended articles of incorporation, which were prepared and filed with the secretary of state after the rendition but before the entry of the judgment against it in the prior action. The life of the corporation as thus shortened ended before said judgment was entered. During the life of the corporation, to wit, on June 24, 1913, there was recorded with the recorder of the city and county of San Francisco a paper writing signed, "The Rothenberg Co., by J. Hursa, Secretary, Intending Vendor," and "Louis Rothenberg, Intending Vendee," which purported to give notice that on Monday, the 30th day of June, 1913, at the hour of 4:30 p. m., the Rothenberg Company, Incorporated, would, as "intending vendor," at its place of business in the city and county of San Francisco, "consummate" a sale to Louis Rothenberg, "intending vendee" * * * of all of the assets, property and effects of every kind and character belonging to the intending vendor." On June 30, 1913, a written bill of sale, as shown by secondary evidence after proof either of its loss or destruction by the intervener signed by Sanford Rothenberg, son of Louis Rothenberg, the intervener, and John

Hursa, respectively the vice president and secretary of the corporation, was executed to Louis Rothenberg, the intervener, which contained the recital, according to the recollection of an attorney witness for the intervener who drafted it, that "for and in consideration of the sum of \$10 gold coin in hand paid by Louis Rothenberg to the Rothenberg Company, receipt of which is acknowledged, it transferred to Louis Rothenberg all of the assets of the corporation." On the same day, June 30, 1913, pursuant to the sale thus attempted to be consummated, all of the assets of the corporation, save and except the corporation's money on deposit with the defendant bank, were thereupon delivered to the intervener. The corporation's money remained standing in the name of the corporation upon the books of the bank until the following day, July 1, 1913, when the account was transferred to Louis Rothenberg Company, "not incorporated."

The character and condition of this account prior and subsequent to July 1, 1913, and the circumstances attending its transfer on the books of the bank were shown, by a statement from the bank defendant, which was stipulated to be correct and admitted in evidence without objection, to be as follows: The account was originally opened as a corporation account prior to 1906 and, from that time, was carried under the title "The Rothenberg Co." upon the books of the Anglo California Bank, Limited, and was continued as a corporation account under the same title upon the books of the bank defendant which absorbed and succeeded to the business of the Anglo California Bank, Limited, until and including July 1, 1913, when "the balance in the account of the corporation amounting to \$1,863.05 was withdrawn by a properly signed check," and on the same day deposited with the bank defendant to the credit of the "Rothenberg Company." Checks upon the account of the Rothenberg Company, Incorporated, were signed "The Rothenberg Co., Louis Rothenberg, President." The check dated July 1, 1913, drawn by the Rothenberg Company, a corporation, on the bank defendant for \$1,863.05 and paid and canceled on that date by the deposit of the sum called for to the credit of the Rothenberg Company, "not incorporated," together with the closing statement of the account of the Rothenberg Company, Incorporated, was delivered to the Rothenberg Company, Incorporated, and is now in its possession. When this corporation account was thus transferred, it was represented to the bank that the new Rothenberg Company was not incorporated and the deposit tag for \$1,863.05, made at the time of the transfer, read, "The Rothenberg Co., Not Incorporated." Checks against this new account were signed "The Rothenberg Co., Louis Rothenberg." There was \$2,506.90 to the credit of this account on the books of the

bank defendant on June 10, 1914, the date of the issuance of the execution out of the prior action, and on that date directed to be and levied upon "any funds to the credit of the Rothenberg Company, a corporation." No account appeared on the date last mentioned nor at any time subsequent thereto on the books of the bank defendant.

The foregoing practically undisputed facts fully support the trial court's findings and judgment.

[1] Assuming, as counsel for the intervenor contend, that the bill of sale in question, which was the basis of the intervenor's claim of title to the money in suit, covered and controlled the corporation bank account and operated in and of itself and without more ado to transfer such account to the intervenor, nevertheless the very fact that it purported to transfer all of the assets of the corporation to the intervenor must result in its own undoing. This is so because no showing was made or attempted that the purported sale was consummated in keeping with the provisions of section 361a of the Civil Code. In fact it is fairly inferable from the evidence adduced upon the entire case that the provisions of that section were altogether ignored when the sale was made. That section reads:

"No sale, lease, assignment, transfer or conveyance of the business, franchise and property, as a whole, of any corporation now existing, or hereafter to be formed in this state, shall be valid without the consent of stockholders thereof, holding of record at least two-thirds of the issued capital stock of such corporation; such consent to be either expressed in writing, executed and acknowledged by such stockholders, and attached to such sale, lease, assignment, transfer or conveyance, or by vote at a stockholders' meeting of such corporation called for that purpose; but with such assent, so expressed, such sale, lease, assignment, transfer or conveyance shall be valid: Provided, however, that nothing herein contained shall be construed to limit the power of the directors of such corporation to make sales, leases, assignments, transfers or conveyance of corporate property other than those hereinabove set forth."

The quoted Code section was in force at the time of the sale in question and, as was said in the case of *South Pasadena v. Pasadena Land, etc., Co.*, 152 Cal. 581, 93 Pac. 490:

"This enactment is not, on its face, a mere negative or prohibitive statute, forbidding that which before was permitted. It is both affirmative and negative in its terms. * * * It expresses a consent to such transfer in the manner prescribed, as well as a prohibition against such transfer in any other mode. * * * It deprives ordinary private business corporations of the power they previously possessed to dispose of their entire property, franchises, and business, as a whole, at the will of a mere majority of the stockholders, or of less than two-thirds of them. * * *"

[2] We have no doubt but that the evidence shows that it was the intent and purpose of the purported sale in question to transfer the corporation "property as a whole" to the intervenor. While the word "property" was not specifically employed in

the bill of sale to designate the subject-matter of the transfer, nevertheless the phrase "all of the assets of the corporation" which was employed for that purpose in the bill of sale and the preceding notice of intention to consummate the sale comprehended, and, therefore, included, the entire property of the corporation in the sale. *Vaiden v. Hawkins*, 59 Miss. 406; *Lowber v. Le Roy*, 2 Sandf. 202; *Rep. Life Ins. Co. v. Swigert*, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328; *In re Atty. Gen. v. Atl. Mutual Ins.*, 100 N. Y. 279, 3 N. E. 193; *Fitzgerald v. Maxim Powder (N. J.)* 33 Atl. 1064; *Dauphin County v. Union, etc., Co.*, 2 Pears. (Pa.) 38.

Doubtless the trial court likewise construed the sale in question to be a transfer of the corporation's "property as a whole." If the sale in question had been made with the written consent of two-thirds of the stockholders of the corporation, such consent, by the express requirement of the statute, was necessarily an essential accompaniment of the instrument which evidenced the sale. And while such consent, if it had been expressed by a two-thirds vote of the stockholders at a stockholders' meeting called for that purpose, need not, perhaps, have accompanied the evidence of the sale, nevertheless such consent was not presumptively involved in the execution of the sale. Consequently, in the absence of a showing that such sale was consummated in conformity with the statutory requirements, the trial court correctly concluded that it was void as against the plaintiff, in the capacity of an execution creditor of the corporation, and therefore ineffectual as a transfer to the intervenor of any right or title whatsoever in and to the money in suit. *McShane v. Carter*, 80 Cal. 310, 22 Pac. 178; *Pekin Mining Co. v. Kennedy*, 81 Cal. 356, 22 Pac. 679; *Williams v. Gold Hill Mining Co.* [C. C.] 96 Fed. 454; *South Pasadena v. Pasadena, etc., Co.*, supra; *Bennett v. Red Cloud Mining Co.*, 14 Cal. App. 728, 113 Pac. 119.

As previously pointed out, it is the intervenor's contention that the transfer of the money in suit was made to him by virtue of the purported sale in question, and was consummated in full before the termination of the life of the corporation. No claim is made, and, indeed, none could be made in the face of the facts of the case, that the check, drawn and signed by the intervenor on July 1, 1913, on the account of the Rothenberg Company, Incorporated, was a separate and independent transaction. The check referred to, having been an integral and inseparable factor in the attempted consummation of the sale of the corporation's property as a whole, possessed no greater force and effect as an evidence of the intervenor's title to the money in suit than the bill of sale itself, and consequently must fall with the bill of sale. The conclusion which we have reached upon this particular phase of the case makes it unnecessary for us to discuss and decide the ques-

tion as to whether or not the intervener was without authority to execute the check in question after the death of the corporation.

It is urged upon behalf of the intervener that there was no evidence to show that the money on deposit in the name of the Rothenberg Company, "not incorporated," at the time of the levy of the execution, was the same fund transferred to the intervener on July 1, 1913. This contention rests upon the fact that the evidence shows that the account originally credited to the Rothenberg Company, Incorporated, was, after its entry in the name of the Rothenberg Company, "not incorporated," materially increased by deposits made from time to time by the intervener and at various times thereafter materially decreased by checks drawn upon it by the intervener.

[3-5] Responding to this contention, it will be noted that, in conjunction with the facts previously narrated, the record contains some evidence to the effect that the account in question never at any time between July 1, 1913, the date of its transfer and January 10, 1914, the date of the levy of the execution, fell "below somewhere about \$1,500." It will be remembered that the Rothenberg Company, Incorporated, died a natural death at midnight of June 30, 1913, and in as much as it was shown that the fund in the corporation's bank account, notwithstanding its attempted transfer to the intervener, was at the time of the dissolution of the corporation and thereafter continued to be, a corporation asset, the intervener, as a matter of law and in spite of himself, became a trustee of the fund represented by and credited to that account. Civ. Code, § 400. And if it can be said, in the face of the evidence upon this phase of the case to the effect that the intervener, after the dissolution of the corporation, continued the business of the corporation under its original name at its original place of business, that the money deposited by the intervener to the credit of the transferred account was his own or other than the corporation's money, then the trial court was confronted with the situation of the intervener as a trustee having intermingled his own or other moneys with a trust fund committed by law to his care and keeping and, in such a situation, it was the right and the duty of the trial court to disentangle the account. In so doing the trial court was permitted to presume that the several sums of money, from time to time added to or withdrawn by the intervener from the trust fund, were no part of the trust fund. If, as the evidence shows, and the trial court in effect found, at the time of the levy of the execution there remained of the original trust fund a sum equal to or in excess of the sum sued for and sought to be impressed with the trust, the legal presumption is that such sum, in the

absence of a showing to the contrary, was part and parcel of the original trust fund. *Elizalde v. Elizalde*, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861.

[6] This disposes of all of the points worthy of discussion made in support of the appeal, save the point to the effect that no execution could have legally issued out of the prior action because that action had abated by the death of the corporation before the entry of the judgment therein. Inasmuch as this particular point was made only in the closing brief of counsel for the intervener, we are not disposed to notice it further than to say that, conceding the correctness of the contention, the validity of the judgment in so far as it concerns the bank defendant, in the absence of an appeal by that defendant, is not before us, and that, inasmuch as the intervener's interest in the action was only that of an individual seeking to establish a purely personal claim to the money in suit, the invalidity for any cause of the judgment against the bank cannot concern him as an individual in the absence of a showing that he had a valid individual claim to the money in suit.

The judgment appealed from is affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

JONES et al. v. FIRST NAT. BANK OF
ADA et al. (No. 8340.)

(Supreme Court of Oklahoma. March 12, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐1230—SUPERSEDEAS BOND—ACCRUAL OF LIABILITY.

After the time has expired for appeal, and the judgment has become final, and not paid, or otherwise stayed, an action will lie on a statutory supersedeas bond, conditioned for the payment of "the condemnation money and costs in case of (the) judgment or final order shall be adjudged against it," even though the appeal has not been perfected, or fails for want of prosecution.

2. APPEAL AND ERROR ⇐1225—SUPERSEDEAS BONDS—TIME OF FILING—LIABILITY OF PRINCIPAL AND SURETIES.

Where a supersedeas bond has been executed, filed, and approved by the clerk of the court in which the judgment was rendered after the time allowed by the court in which execution may be stayed pending the filing of the petition in error and case-made in the Supreme Court, and the plaintiff in error thereafter filed his petition in error and case-made in the Supreme Court and has had the benefit accruing by virtue of the execution of said bond by a stay of said execution pending the disposition of his case in the Supreme Court, neither he nor his sureties will be permitted to deny liability upon said bond because the same was not filed within the time originally allowed by the court for the same to be filed.

Commissioners' Opinion, Division No. 3. Error from District Court, Pontotoc County; Tom D. McKeown, Judge.

Suit by the First National Bank of Ada and others against C. H. Jones and another. Judgment for plaintiffs, motion by defendant Gilmore for a new trial overruled, and his appeal dismissed, and he brings error. Affirmed.

E. S. Kerr, of Roff, for plaintiff in error. Robt. Wimbish and W. C. Duncan, both of Ada, for defendant in error First Nat. Bank of Ada.

HOOKEER, C. The bank sued one Gilmore in the district court of Pontotoc county and recovered a judgment. Gilmore filed a motion for a new trial, and the same was overruled on October 9, 1913. An execution was stayed by order of the court for ten days in which Gilmore was allowed to execute a supersedeas bond in the sum of \$2,519.50 to be approved by the clerk of the court pending the filing of his case-made and petition in error in the Supreme Court. Within the time a bond was presented to the clerk by Gilmore, but same was not approved, and about December thereafter he presented to said clerk the bond sued upon here as a supersedeas bond which was approved by the clerk, and Gilmore thereafter filed his appeal in the Supreme Court, but the same was dismissed thereafter by the court because it was not filed within time allowed by law. The bond as filed was in the sum of \$2,319.50, and was executed by plaintiff in error and others. Judgment was rendered in this action upon said bond against all of the makers, and the plaintiffs in error for themselves have appealed and contend that the judgment should be reversed for two reasons, namely:

(a) That the bond provided for the payment of the condemnation money in case of affirmance in whole or in part, and inasmuch as the appeal was dismissed the cause was not affirmed in whole or in part, and consequently there was no liability upon said bond.

[1] The dismissal of the appeal, because same was not filed in time, did not affect the judgment superseded; hence, under the authority of this court in the case of Crofut-Knapp Co. v. Weber et al., 167 Pac. 464, and Powell v. Edwards, 169 Pac. 617, not yet officially reported, this question must be determined adversely to the plaintiffs in error.

In the cases above cited, it is said:

"After the time has expired for appeal and the judgment has become final and not paid, or otherwise stayed, an action will lie on a statutory supersedeas bond, conditioned for the payment of the condemnation money and costs in case of (the) judgment or final order shall be adjudged against it," * * * or fails for want of prosecution."

[2] (b) That the bond was not filed within the ten days allowed by the court and not in the amount specified by the order of the court, hence the bond did not lawfully stay

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execution. This order was made on the date stated, and the bond was filed October 18, 1913, but was not approved. Thereupon additional sureties, including plaintiffs in error, signed the same about November 10, 1913, and the clerk approved it on December 1, 1913. No execution issued upon said judgment, for the same was stayed, and the case-made with petition in error attached was thereafter filed in this court and subsequently dismissed because not filed in time.

When the case-made in the original action was filed, it contained the bond duly approved by the clerk of the court, and the plaintiff in error in said cause obtained all the benefits therefrom, and it would seem that they nor their sureties are not now in a position to be allowed to escape liability upon said bond.

This court, in Ryndak v. Seawell, 23 Okl. 759, 102 Pac. 125, said:

"Plaintiff in error has had the benefit of the bond. The purposes of the bond have been accomplished. It has protected plaintiff in error Ryndak from an execution pending the appeal, and if defendant in error had, pending the appeal, undertaken to have execution issued, he would have been prevented from doing so by said bond, for if, on examination, such bond, when found filed among the records in the case, had not contained upon it the approval of the clerk, upon a showing of the plaintiff in error Ryndak that, if such omission of the clerk was due to no fault of plaintiff in error, the court would have permitted a nunc pro tunc order directing the entry of such approval. * * *"

And in the case of Mueller v. Kelly, 8 Colo. App. 527, 47 Pac. 72, the Supreme Court of Colorado said:

"The appeal bond was not filed within the time limited by the court, and we can readily agree with counsel in their observations upon the statutory character of appeals, and the steps necessary to give the appellate court jurisdiction, without accepting the conclusions which they reach upon the particular facts of this case. The effect of an appeal bond is to stay proceedings upon the judgment until the appeal is disposed of. At the solicitation of Roth & Co., a stipulation was procured from the adverse party, permitting them to file their appeal bond after the time allowed had expired. In pursuance of the stipulation, the bond was filed and approved. It must have been filed for the purpose of staying proceedings upon the judgment. It could have been filed for no other purpose. And the defendant, when he signed the bond as surety, is presumed to have known the object it was intended to accomplish. It seems to have efficiently served the purpose for which it was designed; and after the full benefit of the stipulation, and of the bond executed in pursuance of it, has been taken and appropriated, it is too late to question the validity of the bond. Abbott v. Williams, 15 Colo. 512, 25 Pac. 450.

"No objection either to the judgment or the bond was taken during the pendency of the appeal. The appeal was dismissed solely because of the failure in its prosecution. * * * The dismissal was therefore equivalent to an affirmance of the judgment."

The judgment of the lower court is therefore affirmed.

PER CURIAM. Adopted in whole;

(68 Okl. 39)

HARRIS v. MILLIGAN. (No. 8451.)(Supreme Court of Oklahoma. Feb. 12, 1918.
Rehearing Denied April 9, 1918.)*(Syllabus by the Court.)***1. JUDGMENT** \S 714(2)—**RES JUDICATA—SUBJECT-MATTER.**

A final judgment in an action for the replevin of cotton is not res adjudicata of an action for the damages sustained by the defendant as a result of the malicious and unwarranted institution and prosecution of the replevin suit.

2. JUDGMENT \S 714(1)—**RES JUDICATA—SUBJECT-MATTER.**

In order to constitute a good plea of res adjudicata, the subject-matter of the actions must be the same.

Error from District Court, Pottawatomie County; Chas. B. Wilson, Jr., Judge.

Action by W. H. Milligan against W. W. Harris. Judgment for plaintiff, and defendant brings error. Affirmed.

Baldwin & Carlton, of Shawnee, for plaintiff in error. Park Wyatt, of Tecumseh, for defendant in error.

OWEN, J. This action was begun by the defendant in error, in the district court of Pottawatomie county, to recover damages alleged to have been sustained by reason of the institution and prosecution of a replevin suit. The petition alleges, in substance, that Harris instituted an action in replevin against Milligan to recover possession of four bales of cotton. This action was begun in the justice of peace court, there decided in Milligan's favor, appealed to the superior court by Harris, and the appeal dismissed for want of prosecution. The petition also alleges that Harris was inspired and actuated by malice and ill will in the institution and prosecution of the replevin suit, and that Milligan was subjected to annoyance, trouble, inconvenience, and expense of defending the replevin suit, to his actual damage of \$35. The prayer was for this actual damage and exemplary damages. To this petition Harris pleaded a general denial and also a special defense of res adjudicata in the replevin action. To this special defense the court sustained a demurrer. Judgment was for Milligan, and Harris prosecutes this proceeding to reverse the judgment.

[1, 2] The only question presented by counsel in the brief is whether the judgment rendered in the replevin action was res adjudicata of the damages alleged to have been sustained by reason of the malicious institution and prosecution of the replevin suit. The assignment of error argued by counsel is the action of the court in denying the plaintiff in error the benefit of this plea. Counsel relies on the rule announced in Norton v. Kelley, 156 Pac. 1164, where it was said:

"A former judgment of a court of competent jurisdiction in a case between the same parties,

involving the same subject-matter, is final and conclusive, not only as to all matters litigated in the former case, but as to every matter which might have been pleaded or given in evidence, whether the same was pleaded or not."

That rule is well settled by the decision of this court, but has no application here, for the reason the subject-matter of the replevin suit was the four bales of cotton. The subject-matter of the instant case is the institution and prosecution of the replevin action. The rule announced applies only where cases involve the same subject-matter or thing sued for. Ratcliff-Sanders Gro. Co. v. Blue Jacket Mer. Co., 164 Pac. 1142. It has been held repeatedly that final judgment in an action involving title or possession to real estate is res adjudicata of a subsequent action involving the title or possession, although the subsequent action may be based on different reasons from those appearing in the first action, the subject-matter being the same.

The final determination of the replevin action in Milligan's favor gave him the right to proceed against Harris for such damage as he had sustained by reason of the malicious and unwarranted institution and prosecution of the action, and his damage so sustained was not within the issues of the replevin action, and not properly a matter to be adjudicated in that action. This is not in conflict with the case of Ray v. Navarre, 47 Okl. 438, 147 Pac. 1019, relied upon by counsel, where it was held the plaintiff might recover exemplary damages in the replevin action, where the damages were sustained as a result of the taking of the property, attended with circumstances of aggravation amounting to force and threats of violence. The damages there were within the issues for the reason they grew out of unlawful taking of the property. In the instant case the damages were not occasioned by the taking or retention of the property, but were sustained, as the jury found, as the result of the malicious and unwarranted institution and prosecution of the action which resulted in Milligan's favor.

The judgment of the lower court is affirmed. All the Justices concur.

MILLER v. THOMPSON. (No. 7691.)(Supreme Court of Oklahoma. Jan. 30, 1917.
Rehearing Denied April 16, 1918.)*(Syllabus by the Court.)***DEEDS** \S 72(3) — **SETTING ASIDE DEED—**
GROUND.

Where the weight of the evidence shows that for many years the relation of client and attorney had existed between a vendor and vendee, that the vendor imposed implicit confidence in the vendee, and constantly relied upon the vendee for advice, and the vendor had reached the age of 88 years, and was of feeble mind, but not incompetent at the time of execution of the deed, and the consideration named in said deed was a grossly inadequate consideration for the property described in said deed, equity will set

aside such deed, even though it is shown that the relation of client and attorney had ceased to exist between the vendor and vendee at the time of the execution of such deed.

Commissioners' Opinion, Division No. 3. Error from District Court, Creek County; Henry Asp, Special Judge.

Suit for injunction by Rufus B. Thompson against C. W. Wills, individually and as guardian, with receivership, and cross-petition by defendant, as guardian of Thomas Wills, an incompetent, with leave to plaintiff to dismiss the petition and to file an answer to the cross-petition. Judgment for plaintiff, motion for new trial overruled, and, after the death of Thomas Wills, the cause was revived in the name of C. H. Miller, as administrator, and he brings error. Reversed and remanded, with instructions.

John G. Ellinghausen, of Sapulpa, and Riddle & Hammerly, of Chickasha, for plaintiff in error. Geo. S. Ramsey, of Muskogee, Edgar A. De Meules, of Tulsa, and Malcolm E. Rosser, of Muskogee, for defendants in error.

COLLIER, C. The defendant in error instituted suit in the district court of Creek county, Okl., against C. W. Wills, individually, and C. W. Wills, as guardian, alleging that he was the owner in fee simple of an unincumbered right and title of the property described in the petition, and alleging that the plaintiff in error was interfering with plaintiff's tenants and slandering his title, and a decree of court was sought to prevent said defendant from further interfering with plaintiff's property. A temporary injunction was granted, and afterwards dissolved, and by agreement a receiver appointed to collect the rents of the property described in the petition.

The plaintiff in error filed an answer and cross-petition, and in said cross-petition averred that the said defendant in error held a pretended deed to the property executed by said Thomas Wills; that said deed was void, for the reason that at the time of its execution the said Thomas Wills was about 88 years of age, childish and feeble, and was incompetent to transact business; that said pretended deed was obtained by fraud, deceit, and false representations practiced on the said Thomas Wills by the said Thompson; that there was no consideration for the pretended deed; that at the time of the execution of said deed the defendant was, and had been for a long time prior thereto, acting as attorney and legal adviser of said Thomas Wills, and that the friendly relations of said parties were very close and intimate; and that, by reason of the confidential relations existing between them, said Thomas Wills had implicit confidence in the said defendant in error, and by reason thereof said pretended deed was void, and that the title to the property described in said deed was held in trust by defendant in

error for the said Thomas Wills. Upon the filing of said cross-petition by plaintiff in error as guardian of Thomas Wills, an incompetent, the defendant in error by leave of court dismissed his petition, and was permitted to file an answer to the cross-petition. In answer to the cross-petition, the defendant in error denied that the said Thomas Wills was the owner of the property described, averring that he, defendant in error, was a fee-simple owner of said property by virtue of said deed and conveyance executed by the said Thomas Wills in consideration of the discharge of an indebtedness due the said Thompson by Thomas Wills in the approximate sum of \$20,000, denying that at the time of the execution of the deed, or for a long time prior thereto, he was or had been acting in the capacity of attorney for said Thomas Wills, admitting that he enjoyed the confidence of said Thomas Wills; that he had various dealings with him, resulting in the indebtedness by said Thomas Wills to him in the sum above mentioned; that the deed of conveyance was made in consideration of the release and discharge of said indebtedness; that on the 11th day of February, 1910, he loaned to the said Thomas Wills the sum of \$4,000; that on 28th day of February, 1910, he loaned Thomas Wills the sum of \$4,900, which loan was evidenced by a promissory note of said date; that on March 28, 1910, he loaned to the said Thomas Wills the sum of \$3,000, which was evidenced by a promissory note; that on December 27, 1910, he loaned the said Thomas Wills the further sum of \$3,024.14, which amount was evidenced by a certain promissory note; that thereafter, on September 20, 1911, the said Thomas Wills executed a mortgage to him to secure said various sums to the amount of \$14,924.14, covering the property involved; that on July 1, 1912, he applied to the said Thomas Wills for the payment of interest upon said amount, and that said interest amounted to \$2,308.75, for which amount a note was taken; that on the 1st day of August, 1912, one B. C. Burnett and B. B. Burnett were indebted to the said defendant in error in the sum of \$1,621, which said note was indorsed and transferred to the First National Bank of Monett, Mo., which said defendant was compelled to pay to said bank, and that said note was paid to him by the said Burnetts executing a note in said sum, which said note was secured by the said Thomas Wills signing the same, and which defendant accepted upon the distinct understanding on the part of the said Thomas Wills that said amount should be included within the indebtedness secured by the real estate mortgage referred to, and that said mortgage should stand as security for said notes; that on the 9th day of September, 1912, it was agreed between defendant and the said Thomas Wills that defendant would take a deed to the property described, from said Wills to defendant, for the indebtedness

evidenced by the different notes referred to, which said indebtedness aggregated approximately the sum of \$20,000; that thereupon the said Thomas Wills executed to the said Thompson the warranty deed hereinbefore mentioned; and further averring that the said Thomas Wills was capable of executing said conveyance, that said transaction was in all respects fair, and that the property involved was worth no more than the sum of \$20,000; that by reason of such facts, and the execution of said conveyance, a fee-simple title to all of said property vested in defendant; that, if said fee-simple title did not vest under said conveyance, then he was entitled to have the same declared a mortgage, and his mortgage lien foreclosed upon said property. Defendant in error prayed that he be adjudged to own the fee-simple title to said property, and that title be quieted in him, and that the said C. W. Wills and Thomas Wills be perpetually enjoined from interfering with said title or said property, and further that, if the court found that the title did not vest, then the court should determine the exact amount of indebtedness and hold said conveyance a mortgage lien upon said property, and that the same be foreclosed.

To this answer the said guardian filed a general and special reply. The district judge certified his disqualification, and the said parties agreed upon the Hon. Henry Asp, member of the Oklahoma City bar, as special judge to try said cause. On the trial of the cause the court made the following findings of fact:

"In this case the court has endeavored to ascertain the exact truth as disclosed by the evidence. The court has no desire to shield anybody or to criticize any one in connection with the case. The case has been ably presented by able counsel. It is the duty of a court of equity, as I understand it, to try to do justice as between all parties. The evidence discloses that in 1902—I think it was in 1902—the defendant, cross-petitioner, employed the plaintiff, defendant to the cross-petition, as his attorney to try certain litigation arising out of contests on certain town property in the town site of Sapulpa, which litigation lasted for several years, and in which appeals were taken to the Commissioner of the General Land Office, and from there to the Secretary of the Interior; but all that litigation terminated prior to the transactions that are incident to this litigation. The firm of Thompson & Smith had some litigation for the cross-petitioner, involving the taxes on the property in controversy and other property owned by the cross-petitioner in the city of Sapulpa. The evidence disclosed that that litigation was practically handled by Frank P. Smith, of the firm of Thompson & Smith. The court finds that the plaintiff, R. B. Thompson, was a partner in the firm of Thompson & Smith. The evidence discloses that during the years 1910 and 1911 the cross-petitioner borrowed from the plaintiff Thompson several sums of money, and executed and delivered to the plaintiff his promissory notes. The first note is dated February 28, 1910, for the sum of \$4,900; and the next note is dated March 28, 1910, for the sum of \$3,000. The next one is dated December 27, 1910, for \$3,204.14. The next one is dated February 11, 1911, for \$4,000. (I think that is true that that is a renewal of a note given before these notes

introduced in evidence.) These four notes were secured by mortgage dated September 20, 1911, on the property described in the deed in controversy. There is also introduced in evidence a note for \$2,308.75, dated July 1, 1912, and another note for \$1,621, dated August 1, 1912, which two last notes are not covered by the mortgage, not included within the mortgage. The note for \$4,000, and the note for \$3,000, the note for \$3,204.14 are admitted to have been executed by Mr. Wills to the plaintiff. The court finds from the evidence that the note for \$4,900, executed February 28, 1910, was executed by Mr. Wills, and that the plaintiff on the same day delivered to Mr. Wills his check on the Creek Bank & Trust Company, which was received by Mr. Wills and charged to the account of Mr. Thompson on the books of the Creek Bank & Trust Company, and being included in the mortgage of date of September 20, 1911, so recognized by Mr. Wills, and the court is of the opinion that Mr. Wills received the proceeds of that check. The note for \$2,308.75, dated July 1, 1912, was executed and delivered by Mr. Wills to the plaintiff for interest on the four notes then held by the plaintiff against Mr. Wills, including the \$4,900 note. The court finds that the note for \$1,621 is dated August 1, 1912, and was given to the plaintiff by B. C. Burnett and Bates B. Burnett and Thomas Wills; Mr. Wills signing as surety. The aggregate of this indebtedness at the date of the execution of the deed in controversy was approximately \$19,000. In addition to this sum, the testimony discloses that there was approximately \$3,000 in taxes on the property, which was a lien on the property. The evidence does not disclose that in the creation of this indebtedness, or the settlement of it, that the cross-petitioner dealt with the plaintiff as his attorney: the loaning of the money being a business transaction in the mind of the court, distinct and apart from any relationship of attorney and client. The court finds that the consideration paid to the cross-petitioner was a fair value of the property included in the deed. In determining this question of value, the court has endeavored to consider all the facts and circumstances introduced in evidence with relation to the condition of the real estate market at the time of the conveyance, and the condition of the property as disclosed by the evidence. The court is of the opinion that at the time of the execution of the conveyance by Thomas Wills to the plaintiff, that the plaintiff then holding the note for \$2,308.75, dated July 1, 1912, and the note for \$1,621, dated August 1, 1912, they were unsecured, and requested of the cross-petitioner, Thomas Wills, to secure the same, and called upon said cross-petitioner to secure the same, and stated to Mr. Wills that he was informed that Mr. Wills had signed a bond for \$50,000 to secure the deposits by Creek county in the Farmers' & Merchants' Bank, that he was satisfied the bank was in a failing condition, and that he wanted security on these notes; that the cross-petitioner, Thomas Wills, at the time stated that he would prefer to give to the plaintiff a deed for the property upon which the plaintiff held a mortgage, in satisfaction of the indebtedness. The plaintiff, Mr. Thompson, accepted the proposition and drew a deed, which was executed by Thomas Wills, and duly acknowledged and delivered to the plaintiff. The court finds that, at the time Thomas Wills executed this deed and delivered the same to the plaintiff, he knew that he was executing a deed to this property. The cross-petitioner, Thomas Wills, at the time of the execution of the deed, was 89 years of age, was physically weak, and that his mental faculties were not as strong as they had been in his earlier life. But the court is of the opinion that he had sufficient mental capacity to understand the nature of the transaction, and that he was executing to the plaintiff a deed in payment of his indebtedness to plaintiff; that

the cross-petitioner, Thomas Wills, during the years 1910, 1911, and 1912, prior to the execution of this deed, had been transacting business, borrowing money, and executing notes and checks in payment of claims, and had sufficient mental capacity to transact the same; that for a year and half last past the mental faculties of Thomas Wills have been failing. The court finds that at the time of the execution of the deed there was no undue influence used in the way of threats of foreclosure of the mortgage or otherwise to secure the execution of the deed; that the execution of the deed was a voluntary proposition of Thomas Wills, which was accepted by the plaintiff. The court finds that there was a friendship existing between the plaintiff and Mr. Wills, arising out of their business relations. As to the suggestion of the appointment of a guardian for Mr. Wills, as testified to by the witnesses S. G. Wills and C. W. Wills, the court is of the opinion that that suggestion was made after the execution of the deed. The court is of the opinion that this deed should not be set aside. I do not believe it presents a case within the authorities that ought to require a court of equity to set aside the deed. It is the judgment of the court that the cross-petition of the plaintiff, Thomas Wills, by his guardian, C. W. Wills, be dismissed.

"Judge Riddle: A suggestion—Thomas Wills, through his attorneys, now requests the court to make a special finding of fact as to whether or not the relation of attorney and client existed between the said Wills and the plaintiff, Thompson, at the time the deed was executed.

"By the Court: The court will make the finding that at the time of the execution of this deed the relation of attorney and client did exist between Thomas Wills and the firm of Thompson & Smith. Thompson & Smith were his attorneys in matters not connected with the transaction, out of which the execution of this deed culminated. The court finds that at the execution of the deed the plaintiff, Thompson, has no actual knowledge of the pendency of the litigation relating to taxes on the property involved in the deed.

"Judge Riddle: I would like to make this request: Counsel requests the court to find as a matter of fact whether or not the defendant Wills reposed personal confidence in the plaintiff, Thompson, by reason of the friendship existing and their relation at the time of the execution of this deed. I think we are entitled under the evidence to have a finding on that point.

"By the Court: The court will make this finding: That there was a personal friendship and confidence existing between the cross-petitioner, Thomas Wills, and the plaintiff, Thompson, arising out of their business relations; but the court, from the evidence, cannot find that this personal confidence was the inducement or caused the execution of the deed in controversy.

"Judge Riddle: Counsel further requests the court to make a special finding as to the value of the property involved in this litigation at the time of the execution of the deed in question. I think we are entitled to that finding.

"By the Court. The court finds that at the time of the execution of the deed the property did not exceed the value of \$20,000.

"Judge Riddle: Counsel requests the court to find as a matter of law whether or not, from the facts found, the relation of attorney and client existed between Thompson and defendant Wills at the time of the execution of the deed.

"By the Court: Mr. Ramsey, what was your request, now?

"Mr. Ramsey: I made the request that the court find as a matter of fact that at the time this deed was executed Mr. Thompson was not giving any of his personal attention to any of the law business or legal business of Thomas Wills, and had not been representing Thomas Wills personally, as Thomas Wills' attorney, for at least two years prior to the execution of

this deed, and was not as a matter of fact giving any of his services or attention to Thomas Wills' legal business, at the time the deed was executed, nor had he given any of his attention to the legal business for Mr. Wills for at least two years prior thereto, and was not, at the instance of Mr. Wills or at his request or employment, attending to any of Mr. Wills' legal business at the time of the execution of the deed, and had not been for at least two years prior thereto.

"By the Court: The court will so find.

"Judge Riddle: Will the court make my finding of law, as requested, because I think the question was fairly and squarely raised.

"By the Court: The conclusion of law from the facts found: The court finds that the cross-petitioner, Thomas Wills, is not entitled to the relief demanded. The court declines to find as a matter of law that, in the transactions culminating in the execution of this deed, the plaintiff, Thompson, was the attorney for the cross-petitioner, Thomas Wills.

"To all of which judgment, and action of the court, the defendant Thomas Wills, and C. W. Wills, his guardian, in open court duly except, and further excepts to each finding of fact adverse to the interest and claim of the defendant Thomas Wills, and his guardian, C. W. Wills, and to each conclusion of law made by the court."

The court thereupon rendered the following judgment:

"It is therefore considered, ordered, and adjudged and decreed, by the court that the cross-petition of the defendant, C. W. Wills, as guardian of Thomas Wills, an incompetent, be and the same is hereby dismissed, and that the said defendant and cross-petitioner, C. W. Wills, as guardian of Thomas Wills, an incompetent, take nothing by his said action as set forth in his said cross-petition filed herein on the 13th day of November, 1912, and that the deed mentioned and described in the cross-petition of the said defendant C. W. Wills, as guardian of Thomas Wills, an incompetent, executed by the said Thomas Wills on the 9th day of September, 1912, and recorded in Book 61 at page 371, in the office of the register of deeds of Creek county, Okl., and conveying to the said plaintiff, R. B. Thompson, all and singular the east fifty (50) feet of lot one (1) in block forty-seven (47), and the south twenty-five (25) feet of lot twelve (12) in block forty-two (42), and the north forty feet (40) of lot two (2) in block sixty-five (65), all in the city of Sapulpa, in Creek county, state of Oklahoma, according to the official recorded plat of said city, be and the same is hereby adjudged, decreed, and declared to be the deed of the said Thomas Wills, and that by virtue thereof the said plaintiff is the owner in fee simple of said described real estate, and entitled to the possession thereof, and to the rents, issues, and profits thereof.

"It is further considered, ordered, adjudged, and decreed that the receiver heretofore appointed in this action be and he is hereby ordered and directed to turn over to the plaintiff, R. B. Thompson, the possession of said described property; that the said receiver be and he is hereby ordered and directed to make his report in writing to this court within thirty (30) days from this date, showing his receipts and disbursements as such receiver.

"It is further considered, ordered, adjudged, and decreed by the court that the said defendant C. W. Wills, a guardian of Thomas Wills, an incompetent, pay the court costs in this action accruing since the 13th day of November, 1913.

"It is further considered, ordered, adjudged, and decreed by the court that the said plaintiff and the said defendants each pay one-half of the costs of the receiver's expenses and allow-

ances for compensation; it appearing that the said receiver was appointed by agreement of the parties to this litigation.

"It is further considered, ordered, adjudged, and decreed by the court that all taxes and proper repair of the premises be paid out of the funds in the hands of the receiver, providing such funds are sufficient to pay the same; that upon the approval by this court of the report and accounts of the receiver, that the said receiver be discharged from further duty and responsibility in the premises; and that any balance of funds in his hands arising out of the receivership be paid to the receiver of the plaintiff herein, R. B. Thompson.

"To which decree, each and every part thereof, the said defendant C. W. Wills, as guardian of Thomas Wills, an incompetent, duly excepted and still excepts."

Within the statutory time the defendant moved for a new trial, which was overruled and excepted to. Shortly after the above stated decree was rendered the said Thomas Wills died, and the cause was revived in the name of C. H. Miller, as administrator of the estate of Thomas Wills, deceased, and the said C. H. Miller, as administrator aforesaid, brings error to reverse the decree rendered.

We agree with the statement of attorneys for the defendant in error that this case "largely turns upon the facts"—that the law is well settled. We go even farther, and are of the opinion, and so hold, that the case turns entirely upon the facts, and that the facts to be considered in this cause are as follows:

First. Was \$20,000, the amount stated as the consideration in the deed of Thomas Wills to defendant in error for the property therein described, a fair cash market price for the property?

Second. What were the relations existing by and between the said Thompson and the said Wills prior to and at the time of the execution of said deed?

Third. At the time of the execution of the said deed by Wills to Thompson, was Thompson the attorney of said Wills?

Fourth. Did the said Thompson, at the time of the execution of the deed under review, have the confidence of the said Wills, and did he wrongfully use the same to influence the said Wills to execute said deed?

This being an equity case, it becomes our duty to weigh the evidence and determine the cause in accordance with the weight thereof. The evidence of the defendant in error as to the value of the property in controversy was approximately \$18,000, as shown by taking the average values given by the six witnesses introduced by the defendant in error. Disregarding the testimony of Wills, who placed the value of the property at \$70,000, which we think was excessive, the evidence of the plaintiff in error as to the value of the property in controversy was approximately \$33,900, as shown by taking the average values given by the ten witnesses introduced by the plaintiff in error. The witnesses for the plaintiff in error and for the defendant in error are shown to be persons equally conversant with the values of the property in controversy; all of them being business men,

and some of them real estate dealers, in the city of Sapulpa.

It therefore clearly appears by the unquestioned weight of the evidence that the consideration named in the deed executed by Wills to Thompson was not an adequate cash consideration for the property, even if it be admitted that the said sum was paid by Thompson, and as to which there is at least a question as to a certain check testified by Thompson to have been paid by Thompson to Wills. The great inadequacy of consideration named in said deed certainly should have shocked the conscience of the trial judge.

"Ordinarily a mere inadequacy of consideration is not sufficient ground, in itself, to justify a court in canceling a deed; yet, when the inadequacy is so gross as to amount to fraud, or in the absence of other circumstances to shock the conscience, and furnish satisfactory and decisive evidence of fraud, it will be sufficient ground for canceling a conveyance or contract, either executed or executory; the rule being based upon the theory that fraud, and not inadequacy of price, is the sole reason for the interposition of equity." *Barker et al. v. Wiseman et al.*, 151 Pac. 1047.

The evidence in this case is very voluminous, and no possible good could come from reciting the same in detail. The undisputed facts are that the closest relations had existed between Thompson and Wills for many years prior to the transaction under review, that old man Wills had reached the age of nearly 90 years, that he was childish and totally incapacitated to handle a deal of the magnitude involved, and, whether or not Thompson was the attorney for Wills at the time of the transaction, at least Wills so regarded him and relied strictly upon his advice. We are unable to appreciate the attempted subterfuge that the partner of Thompson, and not Thompson, was the attorney for Wills; but, whether or not Thompson was the attorney of Wills at the time the transaction was made, we think is entirely immaterial, as certainly the weight of the evidence clearly shows that Wills was dominated entirely by Thompson, that Wills was "as clay in the hands of the potter" and could be molded in any manner that the interest of Thompson dictated.

We are of the opinion, and so hold, that at the time of the execution of the deed in controversy the weight of the evidence shows that Thompson had the entire confidence of Wills, and abused this confidence to the highest degree, turning the same to his own advantage, when his long previous relations with Wills should have actuated him to protect, rather than wrong, Wills; and this is emphasized when we take into consideration the undisputed testimony that old man Wills had reached the age of 88 years at the time the deed was executed and was in his second childhood, as shown by the ability of Thompson immediately after the execution of the deed to successfully advise and cause the old man to attempt, alone and unprepared, to leave his home without clothes or money;

Thompson accompanying him to the depot and buying a ticket for him to Texas.

"Equity will not refuse to set aside a contract when it plainly appears that one party overreached the other, and gained an unjust and undeserved advantage which it would be inequitable and unrighteous to permit him to enforce, although the victim owes his predicament largely to his own stupidity and carelessness."

In *Iredell & Stone v. H. L. Moody and Wife*, 41 Wash. 680, 84 Pac. 617, 85 Pac. 346, 5 L. R. A. (N. S.) 799, it is well said:

"It is well known that many good people and people of average or greater intelligence are sometimes duped and misled by the skill, cleverness, and artifices of those who are adepts in the matter of deceiving their fellow men; and courts should not throw about schemers of this kind a protection that will tend to encourage the practices of their arts."

If it be admitted that Thompson was not, at the time the deed was executed, the attorney of Wills, yet previously the relation of client and attorney for many years had existed, and the influence of Thompson over Wills, due to such relations, continued. In *Pomeroy's Equity Jurisprudence*, § 961, it is said:

"The general doctrine of equity applies to the parties after the legal condition of guardianship has ended, and as long as the dependence on one side and the influence on the other presumptively or in fact continues. This influence is presumed to last while the guardian's functions are to any extent still performed, while the property is still at all under his control, and until the accounts have been finally settled. It follows, therefore, that any conveyance, purchase, sale, contract, and especially gift, by which the guardian derives a benefit, made after the termination of the legal relation, but while the influence lasts, is presumed to be invalid and voidable. The burden rests heavily upon the guardian to prove all the circumstances of knowledge, free consent, good faith, absence of influence, which alone can overcome the presumption."

What is here said in regard to guardian and ward applies equally to client and attorney, though the relation of client and attorney had ceased to exist. In the well-considered case of *Daniel v. Tolon*, 157 Pac. 756, Judge Sharp quotes with approval *Story's Equity Jurisprudence*, § 317, which reads:

"But courts of equity proceed yet further in cases of this sort. They will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased and the relation become thereby ended, if the intermediate period be short, unless the circumstances demonstrate, in the highest sense of the term, the fullest deliberation on the part of the ward, and the most abundant good faith (*uberrima fides*) on the part of the guardian. However, in all such cases the relation is still considered as having an undue influence upon the mind of the ward."

The great weight of evidence being against the decree rendered by the special judge, the cause is reversed and remanded, with instructions that the judgment rendered, together with the finding of facts as found by special judge, be set aside and held for naught; that the deed executed by Wills to Thompson be set aside, canceled, and held for naught; that an account be taken to ascer-

tain what amount is due by the estate of Wills to Thompson; that the title to said property described in said deed be quieted in the heirs of Thomas Wills, deceased, upon the payment of any amount that may be found due by the estate of Thomas Wills to Thompson upon said accounting, and, if the amount found due to Thompson by said estate upon said accounting be not paid, that any legal mortgage held by Thompson for the payment of same be foreclosed; that the receiver at the earliest practicable date render to the trial court an account of all receipts and expenditures by him as such receiver; that the amount, if any, in his hands, be paid into court to await further decision of this cause, and that the receiver be retained to collect the rents of said property, and that as same are collected for each month that the same be deposited with the said district court to await the final disposition of this cause; and, the receiver having been appointed by agreement, that his fees and expenses be equally taxed against the parties to this suit, and that the other costs in this cause that have accrued to this date be taxed against the defendant in error.

PER CURIAM. Adopted in whole.

NOTE.—Judge RITTENHOUSE having disqualified as one of the judges to hear and determine this case, Judge COLLIER was called to hear the oral argument, and was assigned to write the opinion in this case.

THOMAS v. JAMES et al. (No. 8512.)

(Supreme Court of Oklahoma. March 5, 1918.
Rehearing Denied March 28, 1918.)

(Syllabus by the Court.)

1. MARRIAGE §40(11)—INVALIDITY—BURDEN OF PROOF.

One who asserts the invalidity of a marriage on the ground that one of the parties to the same has not been divorced from a former living spouse has the burden of proving that a divorce has not been granted to either party to the former marriage. This burden is substantial, and is not met by proof of facts from which mere inferences may be drawn.

2. MARRIAGE §13, 40(11) — COMMON-LAW MARRIAGE—VALIDITY—BURDEN OF PROOF.

Where the facts show that the mutual intention of a man and woman was to consummate marriage, and that they cohabited as man and wife, holding themselves out to the public and to neighbors as such at all times, a common-law marriage is established, and the burden is upon one who attacks such marriage to conclusively disprove the same or show its illegality or invalidity.

3. DIVORCE §320 — MARRIAGE §13 — REMARRIAGE TO EACH OTHER—PROOF.

It is unlawful for either of the parties to a divorce to marry any other person within six months after the granting of the divorce, but they are not prohibited by law from remarrying each other within such period, and their remarriage may be shown by facts from which a common-law marriage may be presumed.

4. EXECUTORS AND ADMINISTRATORS §17(3),
7—RIGHT TO ADMINISTRATION—WIDOW.

The surviving spouse of an intestate is entitled to letters of administration on the estate of the deceased, or to name some competent person to whom letters shall be issued.

5. EXECUTORS AND ADMINISTRATORS §17(1)
—MARRIAGE §50(1)—COMMON-LAW MARRIAGE—EVIDENCE—APPOINTMENT.

Facts in the instant case, as set forth in the opinion, examined, and held that a common-law marriage existed between the deceased and the plaintiff in error at the time of the death of the deceased, and that the plaintiff in error as surviving wife is entitled to waive her right to be appointed administratrix of the estate of deceased, and to name a competent person to act in such capacity.

Commissioners' Opinion, Division No. 1. Error from District Court, Tulsa County; Conn Linn, Judge.

Missouri A. Thomas, Mabel E. Walters, and Jacob Thomas each file petition for letters of administration on the estate of John Thomas, deceased. From judgment of the district court denying the petition of Missouri A. Thomas, and appointing Mabel E. Walters administratrix, Missouri A. Thomas brings error adversely to Rozella James and others. Reversed and remanded, with instructions.

John B. Means and N. J. Gubser, both of Tulsa, for plaintiff in error. Hulette F. Aby and Wm. F. Tucker, both of Tulsa, for defendants in error.

STEWART, C. Missouri A. Thomas filed petition in the county court alleging that she was the widow of John Thomas, who died intestate, and as such widow entitled to letters of administration on the estate of the deceased, or the right to name an administrator, the petitioner waiving the right to letters and requesting that N. J. Gubser, a competent and qualified person, be appointed as such administrator. Petition was also filed by Mabel E. Walters, daughter of the deceased by a former marriage, claiming the right to letters, and asserting that the deceased did not leave a surviving wife. Jacob Thomas, brother of the deceased, claiming to be an heir of the deceased, asked that letters be issued to Ollie Marshall. The respective petitioners were heard at the same time in the county court, such court finding that the marriage between Missouri A. Thomas and the deceased was void; that he had not been divorced from Mary Thomas, a former wife, and that said Mary Thomas was his surviving wife; that Rozella James, Jennie A. Patterson, and Mabel E. Walters were children of the deceased by such former marriage; that neither the said Mary Thomas nor any of said children were suitable persons to act as administratrix; and that letters of administration should issue to F. M. Rudolf upon his making bond and subscribing the oath required by law. An appeal being duly taken to the district court,

and, the matter coming on for hearing, the petitions of Missouri A. Thomas and Jacob Thomas were denied, and the court ordered that Mabel E. Walters, daughter of the deceased, be appointed administratrix upon making bond and subscribing to the oath as required by law. From the judgment of the district court, the petitioner, Missouri A. Thomas, duly prosecutes an appeal.

The only question to be determined is whether or not Missouri A. Thomas was the common-law wife of the deceased at the time of his death. If such relationship existed, Missouri A. Thomas, under section 6245, Revised Laws 1910, had the right to administer on the estate, or to name some competent person to act. There was no issue raised as to the competency of N. J. Gubser, who was named by the petitioner, Missouri A. Thomas, and, if, under the facts Missouri A. Thomas is the surviving wife of the deceased, it was the duty of the court to appoint N. J. Gubser administrator.

[1, 2] The uncontradicted evidence shows that about 37 years prior to the death of the deceased he contracted a common-law marriage with one Mary Nunn, and as the issue of such marriage there were at the time of his death three surviving children, all adults, to wit, Rozella James, Mabel E. Walters, and Jennie A. Patterson. Jennie A. Patterson having died since the perfecting of this appeal, her sole surviving heir, Pearl Laney, has been duly made a party. Mary Thomas, née Nunn, lived with John Thomas for 12 or 14 years, after which time they separated and have not lived together since. About 15 years prior to the death of John Thomas, Mary Thomas remarried, and has continuously resided with her second husband, one Beynes, since the date of their marriage. In 1909 John A. Thomas was married to the petitioner, Missouri A. Thomas, née Malone. They resided together as husband and wife until February, 1913, at which time Missouri A. Thomas obtained a divorce. There were no children as issue of such marriage, but Missouri A. Thomas had a daughter and young son by a former marriage. After the granting of the divorce John Thomas, whose home was in Tulsa, procured rooms apart from Missouri A. Thomas in another part of the city. A few weeks afterwards, however, he returned to Missouri A. Thomas at their former home, which home had been decreed by the court in the divorce proceedings to Missouri A. Thomas. After his return the two proceeded to cohabit and live together as husband and wife, he at the time saying that the divorce could not separate them, and that they would remain together until death, both agreeing to the proposition. John Thomas at the time told the children that he wanted them to call him father, and to be good to him and their mother. Many of the

neighbors testified as witnesses, all of the testimony showing that continuously afterwards the two were recognized as man and wife, and held themselves out to be such; that they continuously resided together and cohabited up to the time of Mr. Thomas' death on March 16, 1915, the children residing with them most of the time, he paying the household expenses and providing for the care and maintenance of the family, paying taxes on the home in which they lived, and introducing Missouri A. Thomas as his wife, acknowledging her children as his children, and assuming the attitude of a father toward them. It appears that Mrs. Thomas was a seamstress, doing sewing for some of her neighbors. These neighbors testified that they were present on different occasions at her home for the purpose of having sewing done; that Mr. Thomas would be present, and that he and Mrs. Thomas assumed toward each other the attitude of husband and wife. There is no testimony to show that there was any doubt in the neighborhood as to such relationship existing. On one occasion Mrs. Thomas applied for a position in a restaurant conducted in a building owned by the deceased, and the deceased, hearing of the incident, told the proprietor of the restaurant that his wife, meaning Missouri A. Thomas, did not have to work in a restaurant. At another time he told the proprietor of the restaurant that the son of Mrs. Thomas by a former marriage was his son, and bought a lunch and other articles for the boy at the restaurant. No one testified as to any understanding in the neighborhood that the relations between the deceased and Missouri A. Thomas were other than that of husband and wife. There is no evidence to show that the deceased did not have a divorce from his first wife, Mary Thomas. Missouri A. Thomas waited on the deceased in health and in sickness, attending him during his last illness and making arrangements for the funeral. On the day of his death, however, Mabel E. Walters, his daughter, arrived, and with her came a man from Sapulpa who, from the evidence, appears to have been on very friendly relations with her. This man testified that he sat up with the body on the night of the death, and that, during the conversation, Mrs. Thomas said the deceased always paid her \$5 a week for his board, and that Mabel E. Walters, daughter of the deceased, asked Mrs. Thomas whom she wanted to preach the funeral sermon, and that Mrs. Thomas said:

"There is no use to get a preacher; he couldn't do any more than preach his soul in hell."

The evidence shows that Mr. Thomas was a man who drank and gambled considerably, and was not of the highest moral character. Mrs. Thomas says that she did not say anything about her husband paying her \$5 a

week board. With reference to preaching the funeral, she swears that she said:

"There was no man who wants to preach a man in hell, and that Mr. Thomas never did go to church, and they don't know a thing about him."

It appears that Mrs. Thomas' son, Emmett, had been confined in the training school at Pauls Valley as a delinquent. A. M. Welch, the probation officer of the county, testified that, just before the divorce from Mr. Thomas, she desired him (Welch) to recommend a parole for the boy; that he objected to the boy staying at the Thomas home because the boy and Mr. Thomas had trouble, and Mr. Thomas' conduct did not help the boy; that Mrs. Thomas assured him that she was suing for divorce, and that he promised her to recommend a parole when she secured the divorce; that after the divorce the boy was accordingly paroled; that about six weeks or two months after the divorce, he saw Mrs. Thomas and told her he did not think she had kept faith with him as Mr. Thomas was living out at her home again, and that Mrs. Thomas either said that Mr. Thomas was boarding or was paying his way, and as he understood it, staying in separate apartments. A grocery man who had done business for about one year in the neighborhood testified that Mrs. Thomas on one occasion conveyed the impression that Mr. Thomas was paying board at \$5 per week, but his testimony is vague, and his recollection does not seem to be very distinct.

The foregoing is a fair statement of the facts as shown by the evidence. It is conceded by the parties to this appeal that the marriage of John Thomas and Mary Nunn was valid, and the children of the marriage legitimate. The petitioner, Missouri A. Thomas, does not seek to deprive the children of their right of inheritance as the legitimate children of John Thomas, but merely asserts her rights as the surviving wife of the deceased. It is also conceded that Mrs. Beynes, formerly Mary Thomas, has no right as heir, and that the question of her being divorced is not in issue. We will say, however, that under the uniform holdings of the courts, the burden would be upon those asserting that the divorce had not been granted to show that neither party to such marriage had obtained a divorce, and, it having been shown that both John Thomas and Mary Thomas had contracted second marriages, the presumption of the legality of such marriage must be overcome by those urging the illegality of the same, even to the extent, if necessary, of proving a negative. It must follow that the presumption is that the marriage of John Thomas and Missouri A. Thomas in 1909 was legal, but, it being admitted that, in January, 1913, a divorce was obtained, the question left for us to determine is whether or not the evidence is sufficient to indulge the presumption of a valid common-law marriage after the grant-

ing of the divorce. A common-law marriage duly entered into and established is as binding as a marriage of the most sacramental kind with ceremony performed by the highest dignitary of church or state. In *Clark v. Barney*, 24 Okl. 455, 103 Pac. 598, Mr. Justice Williams, speaking for this court, said:

"It seems to be the rule, where common-law marriages are permissible, that, although no subsequent marriage ceremony is performed, the parties having previously under the forms of law evidencing the contract of marriage, assumed that relation in good faith and innocent of any willful intention to commit wrong, believing that the contract of marriage was valid, and having continued that relation in good faith for a long period after it could have been legally assumed, the presumption arises that thereby they intended and meant marriage, mutually consenting to a contract of that character."

And it is said by Mr. Chief Justice Sharp of this court in *Chancey v. Whinnery*, 47 Okl. 272, 147 Pac. 1036:

"Where a marriage has been consummated in accordance with the form of law, the law indulges a strong presumption in favor of its validity. One who asserts the invalidity of such a marriage, because one of the parties thereto has been formerly married, and the spouse of such former marriage is still living, has upon him the burden of proving that the first marriage has not been dissolved by divorce or lawful separation."

See, also, *Jones v. Jones*, 164 Pac. 463, L. R. A. 1917E, 921, an opinion by Mr. Justice Hardy.

It is apparent that the petitioner in this case was only required to present by the evidence such a state of facts as would authorize the presumption of a common-law marriage after which the burden was upon the objectors through every stage of the proceedings, and in every material matter, to prove facts showing that such marriage did not exist, or was illegal or void. This burden is not met by the proof of facts from which mere inferences may be drawn, but is a substantial burden which must be shouldered. The interest of society, the protection of the home, and the preservation of the good name of the contracting parties as well as their posterity calls for this inflexible rule. While the failure to observe conventionality on the part of John Thomas and Missouri A. Thomas does not deserve the highest commendation, and their conduct in general may not be regarded as a high standard of ethics or of morals, yet, from the evidence in this case, we are of the opinion that, after the divorce, it was the bona fide intention of each of the parties to assume the marriage relationship with each other, and that their cohabiting together, and conduct toward each other, and with society at large, was such as to establish a bona fide common-law marriage; and that such marriage in fact and in law existed and continued until the time of the death of John A. Thomas. But the defendants in error urge that the cohabitation began after the divorce was meretricious and illicit in that it commenced before

the expiration of six months from the decree of divorce, hence their acts could not ripen into a lawful marriage. The statutes of Colorado provide:

"And during said period of one year from the granting of a decree of divorce neither party thereto shall be permitted to remarry to any other person." Rev. St. 1908, § 2122.

The Supreme Court of Colorado in *Matteote v. Matteote et al.*, 59 Colo. 566, 151 Pac. 448, says in the syllabus:

"Where a man and woman married, lived together for 6 years, entered into a separation agreement, lived apart for 8 months, during which time the husband secured a divorce, and thereafter by mutual consent of the parties cohabited together again as husband and wife in the same dwelling without remarriage, there being continuous and mutual acknowledgment of the married relation to their neighbors and acquaintances, and they enjoying the reputation, and living separate and apart from others and with one another until the death of the husband, the cohabitation after the divorce for 4½ years was a valid common-law marriage."

Our statute on the subject is similar to that of Colorado; the only material difference being the time within which the marriage is prohibited. The law of this state does not make it unlawful for parties to a divorce proceeding to remarry each other before the expiration of six months, but the statute provides that:

"It shall be unlawful for either party to such divorce suit to marry any other person within six months from the date of decree of the divorcement."

This provision was interpreted by the Supreme Court of the Territory in a criminal case (*Niece v. Territory*, 9 Okl. 535, 60 Pac. 300). The court used this language:

"It will be observed that the indictment charges that, 'Said A. P. Niece, then and there being, did then and there unlawfully, willfully and feloniously, marry and take to wife one N. J. Overman, and to her, the said N. J. Overman, was then and there married within six months from the date of the decree of divorcement.' The section of the statute under which said indictment was drawn expressly provides that, 'It shall be unlawful for either party to such divorce suit to marry any other person within six months from the date of the decree of divorcement.' Hence it is obvious that the words 'to marry any other person' are a material averment of the indictment. The indictment should have negated the fact that the said N. J. Overman was not the former wife of the defendant."

The law favors settlement of domestic difficulties and reconciliations between husband and wife. It is evident from the verbiage of the statute that the lawmakers had in mind such reconciliations when the same was enacted and did not intend to prevent a remarriage of the same parties in a divorce proceeding. But it is further urged that the evidence as to the deceased paying board, and the remarks of Mrs. Thomas concerning the funeral sermon, were sufficient to raise an issue of fact as to the common-law marriage. We do not find that the evidence, if true, is entirely inconsistent with such relationship. The husband could have paid board, and the marriage relationship existed. Such arrange-

ments are sometimes made between husband and wife. The remarks of the mother to the probation officer merely show a mother's solicitude for her son, and were in the nature of an evasion of further questions, which, if answered candidly, might have taken from her the custody of her child. When we take into consideration the evidence showing the immorality of the deceased, and his failure to attend church, the remark of Mrs. Thomas concerning a preacher is not unusual. Many times, under such circumstances, stern but well-meaning expounders of the gospel, in delivering a funeral discourse make remarks indicating the loss of hope for the soul of the deceased, which, to say the least of it, do not find receptive lodgment in the hearts of the bereaved.

[4, 5] We are of the opinion that the evidence in this case is sufficient to warrant the presumption of a valid common-law marriage between the petitioner, Missouri A. Thomas, and the deceased, and that the petitioner was entitled under the law of this state to name the administrator.

This cause is reversed, with directions to set aside the judgment rendered, and render judgment directing the county court to revoke the letters of administration heretofore granted, and to grant letters to N. J. Gubser, or to any other competent person named by Missouri A. Thomas; the costs of the appeal to be assessed against the defendants in error.

PER CURIAM. Adopted in whole.

WESTLAKE v. COOPER et al. (No. 8387.)
(Supreme Court of Oklahoma. Feb. 12, 1918.
Rehearing Denied March 26, 1918.)

(Syllabus by the Court.)

1. **BILLS AND NOTES** ⇨167 — **NEGOTIABILITY — ACCELERATING MATURITY.**

The negotiability of a promissory note is not destroyed by interpolating provisions for accelerating its maturity made in an accompanying mortgage, but not contained in such note.

2. **BILLS AND NOTES** ⇨365(1) — **BONA FIDE HOLDER—DEFENSES.**

Defenses available between prior parties to a negotiable promissory note cannot be interposed to defeat recovery thereon in an action by a holder in due course.

3. **APPEAL AND ERROR** ⇨173(1)—**THEORY OF DEFENSE.**

A theory of defense neither suggested by the pleadings nor relied upon at the trial will not be considered upon appeal.

4. **APPEAL AND ERROR** ⇨878(1)—**RIGHT TO ALLEGE ERROR—DEFENDANT IN ERROR.**

"This court will not consider whether, in the trial of a cause, there was error in a ruling against defendant in error, not involved in any error assigned by plaintiff in error, in the absence of a cross-petition in error." *St. Louis, I. M. & S. Ry. Co. v. Lewis*, 39 Okl. 677, 136 Pac. 396.

Commissioners' Opinion, Division No. 3. Error from District Court, Kingfisher County; James B. Cullison, Judge.

Action by Elva E. Westlake against Henry Cooper, Robert Tutt, and others. Judgment by default against all the defendants except defendant Tutt, who answered, and recovered judgment, and plaintiff brings error. Reversed, and cause remanded for a new trial.

F. L. Boynton and C. L. Billings, both of Kingfisher, for plaintiff in error. McKeever & Moore, of Enid, for defendant in error.

BLEAKMORE, C. This action was commenced in the district court of Kingfisher county on December 18, 1914, by the plaintiff in error against defendants in error, seeking recovery upon two promissory notes and the foreclosure of a real estate mortgage securing same. On December 4, 1915, judgment as prayed was rendered upon default against all defendants except Tutt, who had answered.

By the petition it is alleged, in substance, that Henry and Carrie Cooper executed and delivered to Robert Tutt their two promissory notes of date November 22, 1913, for \$100 and \$225, respectively, bearing interest at the rate of 10 per cent. per annum, payable at the office of Harry C. Fitch, Hennessey, Okl., on November 1, 1914, and November 1, 1915, together with a real estate mortgage securing the same, by the terms of which mortgage it was provided that "upon default of the payment of any part of the principal or interest or any one of said notes at maturity, or upon the failure to pay any lawful assessment upon said premises when the same shall become due and payable, each and all of said several amounts herein secured shall immediately become due and payable, and this instrument shall be subject to foreclosure according to law"; that before the maturity of said notes, the defendant Tutt indorsed upon each thereof, "Pay to Harry C. Fitch. Robert Tutt," and contemporaneously assigned and transferred the mortgage securing same, together with said notes, to Harry C. Fitch; that before the maturity thereof, for a valuable consideration, Fitch indorsed, transferred and delivered said notes, with the mortgage duly assigned by him, to the plaintiff, Westlake; that on the day of its maturity, through a notary public, plaintiff duly presented the \$100 note, and protested same for nonpayment, and pursuant to the provision of the mortgage, on December 15, 1914, declared the \$225 note due and payable, and duly presented and protested it for nonpayment; that at the time of making said protests the notary public posted notices of the same to Robert Tutt and Harry C. Fitch to their respective post office addresses, postage prepaid, etc.

Defendant Tutt answered by way of gen-

eral denial, and as a "second defense," after admitting the indorsement and delivery of the notes to Fitch, set forth that such indorsement was only for the purpose of transferring the notes and his rights under a certain chattel mortgage which he alleged had also been executed as security for the payment of said notes, and that it was at the time agreed between him and Fitch that he should not become liable as endorser upon said notes. He further alleged that he assigned the real estate mortgage in suit "without recourse," but that after its execution the assignment was altered to read "with recourse." The answer to the second defense alone is verified.

Trial was had between plaintiff and defendant Tutt on December 15, 1915, at which, over objection, defendant was permitted to adduce testimony tending to sustain the theory of his answer relative to the alleged agreement with Fitch releasing him from liability as an indorser. The court charged the jury as follows:

"The court further instructs you that there is but one question for you to determine in this case, namely: Were the notes and mortgage in question traded, delivered, and assigned by Robert Tutt to Harry C. Fitch with or without recourse? * * *

"The court instructs the jury that the defendant Robert Tutt in this case alleges and says that he traded, transferred, and assigned the notes in question and the mortgage to Harry C. Fitch, in full payment for a house and lot in the city of Hennessey, Okla., and that when he delivered said mortgage to the said Harry C. Fitch he assigned the same without recourse. * * *

"In this connection the court instructs you that said alteration is a very material alteration, and the burden of proof is upon the defendant Robert Tutt that said alteration was made, after the assignment and delivery of said notes and mortgage, by the defendant Robert Tutt, to Harry C. Fitch; and, if you find from the preponderance of the evidence in this case that the said notes and mortgage were sold and delivered to the said Harry C. Fitch 'without recourse,' and that the assignment of said mortgage was changed or altered to read 'with recourse' after said notes and mortgage were assigned and delivered to the said Harry C. Fitch, then it will be your duty to find for the defendant Robert Tutt."

There was verdict and judgment for defendant, and plaintiff has appealed.

If plaintiff is a holder in due course of the notes in suit, then clearly the collateral agreement with Fitch to the effect that defendant should not be liable, as indorser was not available as a defense to this action, and the instructions above set forth were prejudicially erroneous. Section 4107, R. L. 1910; *Hodgins v. Northwestern Finance Co.*, 46 Okl. 95, 148 Pac. 717. Defendant neither pleaded nor attempted to prove that plaintiff was not an innocent holder of the note in question and for value before maturity.

[1] It is contended by defendant that the \$225 note is not payable at a determinable future time (by virtue of the clause in the

mortgage accelerating its maturity if default be made in the payment of the \$100 note), but upon a contingency, and is therefore nonnegotiable, for which reason plaintiff could not take it as a holder in due course.

By the Negotiable Instruments Law (chapter 49, R. L. 1910) it is provided:

"Sec. 4051. An instrument to be negotiable must conform to the following requirements: * * *

"Third. Must be payable on demand, or at a fixed or determinable future time.

"Sec. 4054. An instrument is payable at a determinable future time, within the meaning of this chapter, which is expressed to be payable:

"First. At a fixed period after date or sight; or,

"Second. On or before a fixed or determinable future time specified therein; or,

"Third. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

"An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

Manifestly, by its own terms, the note in question is expressed to be payable at a fixed period after date, and, independently of the mortgage accompanying it, is a negotiable instrument. Do the provisions of the mortgage render its maturity contingent, and thus affect its negotiability?

The general rule frequently announced in this jurisdiction is that a note and a mortgage given to secure its payment are construed together (*Okla. City Development Co. v. Picard*, 44 Okl. 674, 148 Pac. 31; *Sims v. Cent. St. Bank*, 155 Pac. 878; *First Nat'l Bank v. Howard*, 158 Pac. 927, not yet officially reported); but, so far as we are informed, this court has never recognized the doctrine that under such rule the negotiability of a promissory note is destroyed by interpolating the collateral stipulations of an accompanying mortgage not contained in such note. If such were the rule, every note, when secured by mortgage however simple in its terms, might be deprived of its otherwise negotiable character.

It will be noted that the stipulation for acceleration of payment is contained in the mortgage, and not in the notes themselves. The notes are evidence of the debt, fixing the terms and time of its payment. The mortgage gives a lien upon real estate to secure the promise to pay contained in the note, and merely affords an additional remedy for failure to perform such promise; its provisions relating wholly to the security. The holder of the notes might have abandoned the mortgage entirely and sued and recovered on the notes; in which event the fact that a mortgage had been given as security (no matter what provision it contained relative to acceleration of the time of payment of such notes) would have been immaterial and ineffectual.

In *Farmers' Nat. Bank v. McCall*, 25 Okl. 600, 106 Pac. 866, 26 L. R. A. (N. S.) 217, it is said:

"It is further insisted, however, that section 793, Wilson's Rev. & Ann. St. Okl. 1903, which provides, 'Several contracts relating to the same matters between the same parties, and made as parts of substantially one transaction, are to be taken together,' concludes this question in favor of the defendant in error. This section was borrowed by the lawmakers of the territory of Oklahoma from the statutes of Dakota Territory. The same statute was retained in force in the state of North Dakota. In the case of First National Bank of St. Thomas v. Flath, 10 N. D. 281, 86 N. W. 867 (section 3900, Rev. Code N. D. 1899), this section was construed and held to constitute a rule of interpretation merely and united several contracts into a single contract only for such purposes, and that a real estate mortgage and the notes secured thereby did not constitute a single contract, but remained as separate contracts, except for the purposes of interpretation. No authority is cited by the defendant in error construing such provision otherwise. We necessarily conclude that the stipulation in the mortgage regarding attorney's fees does not render the note of December 19th non-negotiable. It is also a well-supported rule that, if the note is negotiable, the mortgage securing the same shares the same immunity from defense. First Nat. Bank of St. Thomas v. Flath, 10 N. D. 281, 86 N. W. 867; Carpenter v. Longan, 16 Wall. 271, 21 L. Ed. 313."

In Phillips v. Williams, 33 Okl. 766, 127 Pac. 1072, the court held:

"Where W. and wife sued P. on two notes, due, respectively, April 4, 1910, and September 4, 1910, and to foreclose a real estate mortgage executed by him, of even date, to secure their payment, and where the notes contained no reference to the mortgage but the latter provided that upon failure to pay principal and interest as evidenced by the first note, the mortgagees may declare the whole debt due and payable at once and proceed to collect said debt * * * and to foreclose said mortgage," held that, although the notes and mortgage evidenced separate contracts, the mortgagees could take advantage of said clause to foreclose, and that a personal judgment on both notes was proper."

And it quoted with approval the holding in McClelland v. Bishop, 42 Ohio St. 124, as follows:

"Where there is a series of negotiable notes in the usual form, for distinct sums of money, payable at distinct and specified times in the future, with a mortgage to secure each, according to its tenor and effect, which contains a stipulation that, if default be made in the payment of any one then each and all should fall due, and this mortgage to become absolute as to all said notes remaining unpaid at the happening of such default," held that such stipulation relates to the remedy by foreclosure or other proceedings under the mortgage, and upon such default the mortgage may be foreclosed for the whole debt. It is a stipulation for the advantage of the mortgagee, and of full force as to a remedy on the mortgage, but does not operate to vary or extinguish the obligations expressed on the face of the notes themselves for general purposes."

In Bright v. Offield, 81 Wash. 442, 143 Pac. 159, construing provisions of the uniform Negotiable Instruments Law identical with those above quoted from our statute, it is said:

"According to what we believe to be the better rule, a mortgage securing a note, though referred to in the note, but without expressly adopting its conditions, is merely ancillary to the note, and the conditions found in the mortgage alone will not change the character of the note as a negotiable instrument. The promise to pay

is held to be a distinct agreement from the mortgage, and, if couched in proper terms, the note is negotiable."

In Board of Trustees of Westminster College v. Peirsol, 161 Mo. 271, 61 S. W. 811, it is held:

"Where a deed of trust provides that in default in the payment of the interest the whole note shall become due for the purpose of foreclosure, the entire note becomes due for that purpose whenever the interest becomes due and remains unpaid, but, except for that purpose, the note is not affected by a deed of trust."

To the same effect is Owings v. McKenzie, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154.

We conclude that the stipulation in the mortgage accompanying the notes in suit in no wise affected their negotiability, and, as a corollary, that plaintiff is a holder thereof in due course.

[2, 3] It is urged by defendant in his brief that the provision in the mortgage to the effect that upon default in the payment of the first note the second should immediately become due and payable, if relating merely to the foreclosure of such instrument, could not accelerate the maturity of the second note so as to affect his liability as an indorser, and therefore the notice of its dishonor alleged to have been given before its maturity was ineffectual, and also that the action upon such note was prematurely commenced.

As to this contention it seems sufficient to say that such theory of defense was not suggested by the pleadings or relied upon at the trial in the court below, but is presented here for the first time, and therefore may not properly be considered." Buel, Pryor & Daniel v. St. Louis & S. F. Ry. Co., not yet officially reported, 163 Pac. 536.

Defendant further contends that, notwithstanding he was permitted to introduce evidence and prevail in the trial court upon a theory of defense not available against plaintiff, yet the judgment in his favor was properly rendered, and should be affirmed, for the reason that plaintiff failed to establish that notice of dishonor of the notes in suit, without which he was discharged from liability as an indorser, was given him as required by the Negotiable Instruments Law, and upon this phase of the case insists that the court below erred in overruling his demurrer to plaintiff's evidence.

Under the rule which obtains in this jurisdiction we are precluded from considering the action of the trial court in this regard.

[4] In St. Louis, I. M. & S. Ry. Co. v. Lewis, 39 Okl. 677, 136 Pac. 396, it is held:

"This court will not consider whether, on the trial of a cause, there was error in a ruling against defendant in error, not involved in any error assigned by plaintiff in error, in the absence of a cross-petition in error."

And in the body of the opinion it is said:

"At the conclusion of the evidence the trial court sustained a demurrer to the evidence offered for the purpose of showing subsequent illness resulting from the cold suffered by plaintiff while in the waiting room, and, by the instructions given the jury, limited her right of recov-

ery to pain and suffering experienced by her during that time; but, although plaintiff excepted and at this time complains of this action of the trial court, she has not filed cross-assignment of errors here, and we are unable to consider whether there was error in this ruling."

In *Hume, Trustee, v. Brown Shoe Co.*, 33 Okl. 634, 126 Pac. 823, it is held:

"Alleged errors committed by the trial court, of which defendant in error complains will not be considered, but held to be waived, where no cross-petition in error is filed."

And in the body of the opinion it is said: "Counsel for defendant seeks to present in his brief the error which he contends the court committed in overruling his motion striking at the service had in this case; it being his claim that the same was insufficient to secure jurisdiction of the defendant, and that the judgment rendered herein was therefore void. No cross-petition in error setting forth this error was filed; and, in the absence thereof, the error complained of, if any existed, cannot be considered, and will be held to have been waived."

"An error complained of by a defendant in error will not be considered in this court when he fails to file a cross-petition in error."

See *Hanna v. Barrett*, 39 Kan. 446, 18 Pac. 497. See, also, *Waterson v. Devoe*, 18 Kan. 223.

Because of the error in the instructions submitted to the jury the judgment should be reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

FIRST NAT. BANK OF DALTON, OHIO, v. CUMMINGS. (No. 8712.)

(Supreme Court of Oklahoma. March 26, 1918.)

(Syllabus by the Court.)

1. **BILLS AND NOTES** §330—NEGOTIABILITY—PURCHASER AS "INDORSEE"—DEFENSES.

When a payee of a negotiable promissory note transfers it by indorsing thereon, "For value received I hereby guarantee payment of the within at maturity, or any time thereafter, with interest at the rate of eight per cent. per annum until paid waiving demand, notice of nonpayment, and protest," the purchaser is an indorsee within the rule protecting an innocent purchaser of such paper in due course for value, and before maturity against defenses good between the original parties.

[Ed. Note.—For other definitions, see *Words and Phrases*, Second Series, *Indorsee*.]

2. **CASE OVERRULED.**

The case of *Ireland et al. v. H. W. Floyd*, 42 Okl. 609, 142 Pac. 401, L. R. A. 1915C, 661, is expressly overruled.

Commissioners' Opinion, Division No. 1. Error from District Court, Major County; James B. Cullison, Judge.

Action by the First National Bank of Dalton, Ohio, against William L. Cummings. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with instructions to set aside judgment and to grant a new trial.

C. B. Wood, of Fairview, and D. H. Denman, of Okmulgee, for plaintiff in error.

Harry Randall, of Fairview, for defendant in error.

COLLIER, C. This is an action brought by the plaintiff in error, hereinafter styled plaintiff, against the defendant in error, hereinafter styled defendant, and other persons who were not served, to recover upon a promissory note, which said note, and the indorsement thereon is as follows, to wit:

"\$400.00. Togo, Okla., Nov. 25, 1909, June 7, 1911, after date, for value received, we jointly and severally promise to pay to Clyde E. Rudy or order four hundred and no/100 at the Cleo State Bank, with interest at 8 per cent. per annum, interest payable annually from date.

"Oscar G. Peck.

"William L. Cummings.

"D. C. Cox.

"Dan Robison.

"H. O. Shroyer."

Notary indorsement on face of note:

"Protested for nonpayment, June 10, 1911. J. E. Green, N. P. \$2.00 \$402.00 \$402.00."

Indorsement on back of said note:

"For value received I hereby guarantee payment of the within at maturity, or any time thereafter, with interest at the rate of eight per cent. per annum until paid waiving demand, notice of nonpayment, and protest.

"[Signed] Clyde E. Rudy."

The issues were tried between the plaintiff and defendant. The defendant, Cummings, filed an amended answer in which he admitted the execution of the note sued upon, but alleged that the note was secured by fraud and false representations. He also alleged that the note was given in part payment for a stallion, jointly purchased by a number of persons, and that it was agreed between the purchasers and the agent of the seller that each of the purchasers should give his separate note for his separate share in the enterprise, and that each should be liable for his own share only; that the note sued on was procured by an agent of the payee by coming to his house, lit up by a smoky old lantern, misrepresenting the contents of the note, reading the same incorrectly, and that by reason of failing eyesight and the smoky old lantern defendant could not see to read the note. A failure of guaranty in the sale of the stallion was also alleged, and evidence admitted tending to prove a breach of warranty in the sale of the stallion for which the note sued upon was given. The plaintiff replied and denied all the material allegations contained in the amended answer of the defendant. The note was introduced in evidence, and there was evidence that the bank purchased the note in good faith, in due course of business, for value, before maturity. Under the view we take of the case, we deem it unnecessary to set up the evidence of the defendant tending to support any of the equities set up by him in his amended answer.

Among other instructions, the court instructed the jury:

"No. 8. The jury is further instructed that the note in suit is nonnegotiable and that the plaintiff in this case took the note in suit from Clyde E. Rudy subject to all the equities and defenses against it; in favor of the defendant, that the defendant would have had if the note had remained in the hands of the said Rudy, and the fact that the note is nonnegotiable was notice to the plaintiff of such equities and defenses."

[1] The defendant insists that the indorsement on the back of the note, "For value received, I hereby guarantee payment of the within at maturity, or at any time thereafter, with interest at the rate of eight per cent. per annum until paid, waiving demand, notice of nonpayment, and protest," is not such an indorsement as to shut out the equities of the original makers of the note.

If the note was nonnegotiable then it was subject in the hands of the plaintiff to the equities of the maker against the original payee, and such equities was a defense to this action. On the other hand, if the note was negotiable, and plaintiff acquired the same in good faith, in due course of business for value before maturity, and without notice of the equities of the defendant, the defendant could not avail himself in this action of the defenses attempted to be interposed by his amended answer. It therefore follows that the controlling question in the instant case is as to the negotiability of the note sued upon. The authorities are not in harmony upon this question.

In McNary et al. v. Farmers' Nat. Bank, 33 Okl. 1, 124 Pac. 286, 41 L. R. A. (N. S.) 1009, Ann. Cas. 1914B, 248, it is held:

"An indorsement on the back of a nonnegotiable promissory note, which reads: 'For value received I hereby guarantee the payment of the within note at maturity, or at any time thereafter, with interest at the rate of _____ per cent. per annum until paid. Waiving demand, notice of nonpayment, and protest, as collateral'—signed by the payee, is sufficient to pass the title to the paper."

In the opinion in said case is the following from the opinion in Robinson v. Lair, 31 Iowa, 9:

"It is insisted that the writing, on the back of the note, as follows: 'For value received, we guarantee the payment of the within note, and hereby waive demand, and notice of nonpayment'—does not amount to an indorsement of the note, and does not express an intention to convey the title from payees to plaintiff. We confess ourselves unable to give effect to the contract of guaranty of payment, and waiver of demand and notice, if the payees still intend to retain the title. The writing simply constitutes an indorsement, with an enlarged liability."

In the case of Kellogg v. Douglas Co. Bank, 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596, the indorsement reads:

"For value received, we hereby guarantee payment of within note at maturity, waiving demand, protest, and notice of protest."

The court in said case said:

"The indorsement to the Chemical National Bank was sufficient. It was placed on the back of the note, and, while it was a guaranty of payment, it was also an indorsement of the note. The guaranty itself would be senseless

and wholly inoperative, unless the note was transferred by the payee to a third party. Such indorsements are not at all uncommon. * * * This was both a guaranty and an indorsement, which passed a full title to the note."

Section 4632, Revised Laws, reads:

"In the case of an assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or other defense now allowed; but this section shall not apply to negotiable bonds, promissory notes, or bills of exchange, transferred in good faith and upon good consideration, before due."

In G. S. Maddox v. M. Y. Duncan, Supreme Court of Missouri (Division No. 2) 143 Mo. 613, 45 S. W. 688, 41 L. R. A. 581, 65 Am. St. Rep. 678, it is held:

"One who writes on the back of a note an assignment with a guaranty of payment is an indorser."

In the notes of L. R. A. (volume C) (N. S.) 661, to the said case of Frank N. Ireland et al. v. H. W. Floyd, 42 Okl. 609, 142 Pac. 401, L. R. A. 1915C, 661, we find:

"As said in Hendrix v. Bauhard Bros., 138 Ga. 473, 43 L. R. A. (N. S.) 1028, 75 S. E. 588, Ann. Cas. 1913D, 688: 'On the subject of indorsements like the one here involved, there are two conflicting lines of authority. On the one hand it has been held by the Supreme Court of United States and some inferior federal courts and by the courts of two or three states, that an entry of a guaranty followed by the signature of the payee on the back of a note payable to order does not amount to such an indorsement as to carry title and cut off defenses existing against the payee. * * * The reasoning on which this class of cases is based is that the indorsement is not in blank, but is filled up; that it expresses fully the contract, and can raise no implication of another. Opposed to this view are the decisions in a very large number of states. Numerically, the latter class of decisions greatly preponderates, and we think the reasoning on which they are based is sounder than that contained in the class first mentioned.' And, accordingly, it is held in this case that an indorsement, 'For value received, we hereby warrant the makers of this note financially good on execution.' Written and signed by the payees on the back of a promissory note payable to order, which they have negotiated and delivered for value, is sufficient to transfer title to the note; and if made before maturity to a bona fide purchaser, without notice of any defense, he will be protected from all defenses which the maker may have, except those expressly allowed by statute."

In M. W. Dunham v. Peter L. Peterson et al., 5 N. D. 414, 67 N. W. 293, 36 L. R. A. 232, 57 Am. St. Rep. 556, it is held:

"When the payee of a negotiable promissory note transfers it by indorsing thereon a guaranty of payment, the purchaser is an indorsee, within the rule protecting an innocent purchaser of such paper for value, and before maturity, against defenses good between the original parties."

In said case of M. W. Dunham v. Peter L. Peterson et al. supra, the authorities pro and con upon the question of the negotiability of a promissory note, which has been indorsed as the note upon which this action is predicated, are gathered in the notes to said case, to which reference is made.

In *Kellogg v. Douglas County Bank et al.*, 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 593, it is held:

"An indorsement made on the back of promissory note in the following language: 'For value received, we hereby guarantee payment of within note at maturity, waiving demand, protest, and notice of protest,' signed by the payee of the note, is a commercial indorsement as well as a guaranty of payment; and, the note being negotiable in form, is sufficient to pass a valid title to the paper and protect an innocent purchaser thereof."

In *Mangold & Glandt Bank v. Utterback*, 160 Pac. 713, L. R. A. 1917B, 364, it is held:

"When the payee of a negotiable promissory note transfers it by indorsing thereon: 'Payment guaranteed. Protests waived'—the purchaser is an 'indorsee,' within the rule protecting an innocent purchaser of such paper for value and before maturity against defenses good between the original parties."

In said last-named case Commissioner Matthews, in a well-considered opinion, cites many authorities upon the question at bar, and holds that notwithstanding the case of *Ireland et al. v. Floyd*, supra, that holds:

"The word 'For value received I hereby guarantee payment of the within note and waive demand and notice of protest on same when due,' written on the back of a note by the payee, do not constitute an indorsement and transfer in due course, but constitute a mere guaranty of payment. And the maker of such note is entitled to make the same defenses against same in the hands of the holder under such guaranty that he would be entitled to make if it were in the hands of the original payee"

—is not the law, and indirectly overrules said case of *Ireland et al. v. Floyd*, supra.

[2] While the holding in *Ireland v. Floyd*, supra, is supported by a respectable line of authorities, we think the weight of authority and the best reasoned cases are against the holding in said case, besides, regardless of what may have been held in other jurisdictions, the weight of authority in this jurisdiction (*McNary et al. v. Farmers' Nat. Bank*, supra, and *Mangold & Glandt Bank v. Utterback*, supra) is that, under the indorsement of the note here sued upon, the note was a negotiable note and the defense attempted to be interposed by the defendant could not legally defeat a recovery by the plaintiff, and the court committed reversible error in giving said instruction No. 8, which instructed the jury "that the note was nonnegotiable, and the defendant entitled to interpose his equities against a recovery thereon." The defendant not having interposed any legal defense to the action was entitled to judgment upon the note sued upon. The case of *Ireland v. Floyd*, supra, is hereby expressly overruled.

This cause is reversed and remanded, with instructions to the trial court to set aside the judgment rendered in favor of the defendant, and to grant a new trial.

PER CURIAM. Adopted in whole.

(68 Okl. 83)

In re **FIRST STATE BANK OF OKLAHOMA CITY.** (No. 8844.)

(Supreme Court of Oklahoma. Jan. 29, 1918.
Rehearing Denied March 26, 1918.)

(Syllabus by the Court.)

1. **TAXATION** ⇐218—**EXEMPTIONS—CONSTITUTIONAL PROVISIONS.**

Section 7 of the act of March 6, 1913 (Sess. Laws 1913, p. 30), making depositors' guaranty fund warrants "Nontaxable for any purpose whatsoever," is not repugnant to section 50, art. 5, of the Constitution, placing an inhibition upon the Legislature from passing laws exempting property from taxation.

2. **TAXATION** ⇐218—**EXEMPTIONS—CONSTITUTIONAL PROVISIONS—"PROPERTY."**

Section 50, art. 5, of the Constitution, prohibiting the Legislature from passing laws exempting any property within the state from taxation, except such as is named in section 6, art. 10, was not intended to prohibit the Legislature from exempting warrants issued by the state banking board, pursuant to statutory authorization, in aid of the depositors' guaranty fund. Such warrants being instrumentalities of government do not constitute "property" within the meaning of the constitutional limitation against exempting property from taxation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property.]

3. **APPEAL AND ERROR** ⇐761, 1078(1)—**BRIEFS—REVIEW.**

The primary object of a brief is to convey information to the court. This cannot be done without clearly stating the manner in which the controverted points arose, the facts which constitute the groundwork of the legal dispute, and the governing propositions of law. This court is not required to examine the record in search of prejudicial errors not pointed out in compliance with its rules, or to decide grave and difficult law questions not urged and supported by argument and the citation of authorities where possible.

Error from District Court, Oklahoma County: Frank Mathews, Judge.

Proceeding instituted for the correction and adjustment of the assessment of the property of the First State Bank of Oklahoma City for the year 1915. From a judgment of the district court reversing an order of the county board of equalization of Oklahoma county, the board brings error. Affirmed.

Charles B. Selby, Co. Atty., and Porter H. Morgan, Asst. Co. Atty., both of Oklahoma City, for plaintiff in error. Asp, Snyder, Owen & Lybrand and George B. Rittenhouse, all of Oklahoma City, for defendant in error.

SHARP, C. J. [3] The one assignment of error contained in the brief of plaintiffs in error is that:

"The lower court erred in reversing the action of the board of county commissioners sitting as a board of equalization."

The assignment is insufficient under rule 26 of the Supreme Court (47 Okl. page 1, 165 Pac. 1x) to present for review the errors alleged to have been committed by the trial court. By it we are not informed in what respect the trial court erred, but simply that

It did err; neither are we able to say, from an examination of the record, of what the error consisted, as the journal entry is incomplete and obviously omits a portion of the findings of the court, as well as the conclusions based thereon. Aside from the statute authorizing the issuance of the depositors' guaranty fund warrants, and section 50, art. 5, of the Constitution, we are cited to no authorities in support of the contention of the plaintiff in error. Questions involving the proper method of taxation of state banks, or of the shareholders therein, as well as of the right of one or the other, to a deduction from the assessed value of the property taxed on account of corporate ownership of public securities, are too important to be determined in advance of a full discussion upon a case properly presented.

[1, 2] Notwithstanding the failure to observe and comply with the well-known rule of the court as to the requisites of the brief of plaintiff in error, we believe that the public importance of the question of the taxability of the depositors' guaranty fund warrants is such that the court should decide the one and only question briefly considered by counsel for plaintiff in error; that is, the power of the Legislature to exempt from taxation the depositors' guaranty fund warrants issued by the state banking board under authority of section 6, c. 22, of the act of March 6, 1913 (Sess. Laws 1913, pp. 27-30), and by section 7 of which act it was provided that "said warrants shall be nontaxable for any purpose whatsoever." It is urged that as section 50, art. 5, of the Constitution, forbids the Legislature from enacting a law exempting any property within the state from taxation, except as otherwise provided in the Constitution, and as the guaranty fund warrants do not come within the terms of section 6, art. 10, of the Constitution, defining what property shall be exempted from taxation, the act is repugnant to the Constitution, and that, notwithstanding the legislative intention to exempt, the exemption provision, because of the constitutional limitation, must fail.

The general question of the power of the Legislature to exempt public securities in the form of bonds from taxation was involved and decided by this court in *Re Assessment First National Bank of Chickasha*, 160 Pac. 469, L. R. A. 1917B, 294. It is contended, however, by plaintiff in error, that the decision in that case should not control the case at bar. The *Chickasha Case* involved the taxability of state public building bonds authorized by chapter 89 of an act of the Legislature approved March 15, 1911 (Sess. Laws 1910-11, pp. 194-199), paragraph 7 of which provided that the bonds so issued should be nontaxable for any purpose. In that case we said that:

"The proceeds of the sale of the bonds, authorized by the act, were to be used by the state for the payment of the construction of needed chari-

table and penal institutions and public buildings. Such was the governmental object sought to be effected by the issuance and sale of said bonds. To its accomplishment the good faith of the state was solemnly pledged to safely keep and preserve the proceeds of the sale and rental of the public lands of the state, named in the act, and to apply said proceeds to the payment of the bonds issued, with interest thereon, as the same matured. It was necessary, or at least so considered, that the credit of the state be employed in order that it might promptly and faithfully discharge the obligations assumed by and resting upon it. The issuance of bonds secured in the manner provided for was a method usual and ordinary of using the state's credit. When a state issues its bonds in conformity to law in order to raise money to accomplish and carry out a governmental purpose, the instruments issued by it for that purpose are instrumentalities of government. Such obligations constitute the means resorted to by the state to effectuate the powers of government. In the hands of the purchasers such credits may be the subject of taxation, unless because of some superior intervening right, providing the intention to tax is manifest. Cases involving the liability of state or municipal bonds to taxation very generally hold that laws providing for the imposition of taxes will not be construed to authorize the collection of a tax upon such bonds, unless there is in the law clear language that such was the legislative intent. The statute authorizing the issuance of the bonds, it must be remembered, in terms provided that they should be nontaxable. The pledged immunity on the part of the state attached in the act, so that at no period of time were the bonds subject to taxation."

But the rule there invoked and applied, it would seem, is decisive of the case at hand, as a close analysis of the applicatory principle will disclose. Each involves the conception and administration of a comprehensive scheme of legislation; the instant one, the control of the state over banks organized and doing business under its laws, and the security afforded depositors therein; and, in a sense, the business public generally. In the 1913 act is found express authority for the issuance of certificates of indebtedness to be known as "Depositors' Guaranty Fund Warrants of the State of Oklahoma," whenever the depositors' guaranty fund on hand should be insufficient to pay the deposits of failed banks, or other indebtedness properly chargeable against the same, in order that the banking board might be able to liquidate the deposits of failed banks, or any other indebtedness for which the board was legally liable. These warrants were made a charge and lien not only upon the depositors' guaranty fund, when collected, but a lien upon the capital stock, surplus, and undivided profits of each and every bank operating under the banking laws of the state to the extent of the liability of any such bank to the guaranty fund. Authority was conferred upon the banking board to negotiate or otherwise dispose of such warrants at not less than par value in such manner as it might deem fit to facilitate the liquidation of failed banks. Power was also conferred upon trust companies, building and loan associations, or insurance companies, organized under the laws of the state, to invest their capital and surplus in such warrants; also, that any foreign corpora-

tion, which, under the laws of the state, was required to deposit security in the office of the state treasurer, in order to do business in the state, might deposit guaranty fund warrants in lieu of any other security required by law to be so deposited. Further, that officers having charge of any sinking fund of the state, or any county, city, town, township, or school district thereof, might invest the sinking funds of the state or of any of the enumerated subdivisions thereof, in warrants issued under the authority of the act, and that said warrants should constitute security for the deposit of any public funds and for the investment of trust funds.

The obvious purpose of the Legislature in providing for the issuance and sale of the warrants was to enable the banking board to liquidate the deposits of failed banks and to meet its other obligations chargeable against the depositors' guaranty fund. It was only when such fund on hand was insufficient to pay depositors of failed banks, or other indebtedness chargeable against it, that the banking board had authority to issue the certificates. The ultimate object of the legislative enactment was to enable the banking board to have at hand an available fund out of which to pay any indebtedness for which the fund was liable. By such means public confidence in the administration of the state banking law in its entirety was effectuated. The act of December 17, 1907 (Laws 1907-08, c. 6, art. 2), followed by the act of May 26, 1908 (Laws 1907-08, c. 6, art. 1), creating the depositors' guaranty fund, had, in its administration during the formative period of the state, proven a severe tax upon the solvent banks subject to its provisions. Not only was the assessment regularly imposed deemed onerous, but provisions were made for additional or emergency assessments to pay the depositors of failed banks. When it was ascertained that the amount realized from the fixed and emergency assessments was insufficient to pay off the depositors of all failed banks having valid claims against the depositors' guaranty fund, the state banking board was authorized to issue and deliver to each depositor having such unpaid deposits a certificate of indebtedness therefor bearing six per cent. interest. Such was the situation in the month of December, 1912, and to which the state bank commissioner, in transmitting to the Governor his third biennial report, called attention. The letter in part reads:

"Within the first few months of my administration (which began in March, 1911), the fact was disclosed that the department had many insolvent banks on hand; some of which it was imperative to take charge of and liquidate at once; others should have been liquidated thereafter, but as our guaranty law provides that all depositors shall be paid at once, in full, there being no funds on hand, and our banks, as a whole, being unable to stand additional excessive and heavy assessments, the department was prevented from handling them in the proper manner at the time. Since the last biennial report the banking board has made emergency assessments amounting to 1½ per cent. on aver-

age daily deposits of all banks. This levy was made to take up outstanding warrants and pay depositors of failed banks."

The conditions were such and the demands upon the guaranty fund so large in amount that its administration had caused the law to be regarded, in some quarters at least, with disfavor, and had made its successful administration a matter of much difficulty. It will be noted that at the following session of the Legislature the act was passed authorizing the banking board to issue and provide for the sale of certificates of indebtedness to be known as depositors' guaranty fund warrants, the purpose of which was to effectuate generally the laws providing for the guaranty of bank deposits, and at the same time to lessen, so far as might safely be done, the burden upon contributing solvent state banks.

It is no longer open to question that the levy and collection, under state statute, of every bank existing under the state laws, of an assessment based upon average daily deposits for the purpose of creating a depositors' guaranty fund, to secure the full repayment of deposits in case any such bank becomes insolvent, is a valid exercise of the police power, or that the police power of the state extends to the regulation of the banking business. *Noble State Bank v. Haskell*, 22 Okl. 48, 97 Pac. 590; *Id.*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487; *Lankford v. Platte Iron Works*, 235 U. S. 461, 35 Sup. Ct. 173, 59 L. Ed. 316. As much may be said of the act of March 6, 1913, authorizing the issuance of certificates of indebtedness in aid of the successful carrying out of the law. The latter, as well as the former, was but the valid exercise of governmental control over banks created and doing business under state laws; to make secure the main purpose thereof—that of protection to the depositor—by providing for a fund with which to meet its requirements when needed, by means of money received on account of the sale of the warrants. As in *Re Assessment First National Bank*, supra, the proceeds of the sale of the bonds was to be used by the state for the payment of the construction of needed penal and charitable institutions and public buildings, so here the proceeds of the sale of the warrants was to be used by the banking board, a branch of the executive department of the state, for the prompt payment of depositors in failed state banks and of the claims properly chargeable against the guaranty fund.

The issuance of the warrants and making them a charge and first lien upon the guaranty fund when collected, and a first lien against the capital stock, surplus, and undivided profits of all state banks to the extent of the liability of such banks to the fund, was a practical, and time has proven a wise, solution of the difficulty of which the bank commissioner complained. In its

operation it empowered the banking department to raise money with which to meet its obligations arising under the law, and thereby enable the officers of the board to carry on and perform an important governmental function. In such situation the obligations issued by the board under legislative sanction are instrumentalities of government. As was said in the Chickasha Bank Case, "Such obligations constituted the means resorted to by the state to effectuate powers of government." The fund, whether considered a fund of the state or under the management of the state, was under the direct control and supervision of the state banking board. The purpose of its creation was to enable the board, as an administrative body, to perform the great and central purpose of the act—that of securing depositors in failed state banks the full repayment of their deposits. The warrants so issued constituted an instrumentality of the state adopted and administered under its laws, when the exigency required, and in the furtherance of its general policy of control over its banking institutions. Such instrumentalities are generally exempt from all taxation by the state itself, as well as its municipal subdivisions, either by express provisions of law or by implication. Here the exemption is in express terms; in language not susceptible of misunderstanding. Constituting instrumentalities of government that a part of its laws might be efficiently administered, the warrants did not constitute property within the meaning of the constitutional limitation against exempting property from taxation; hence the rule announced in the Chickasha Bank Case is applicable and conclusive as to the power of the state to exempt the warrants from taxation.

At the time the bank purchased the warrants, its vice president testified that he was advised by the then Governor that the warrants were exempt from taxation. Also, it appears that such was the understanding of the bank commissioner, who, in an official communication to counsel for the bank, called attention to the 1913 act providing that such warrants should bear 6 per cent. interest and should be nonassessable for any purpose. His letter in part is as follows:

"Accordingly, state banks of this state were advised to purchase said warrants, by this department, as a safe, conservative investment, and free from taxation."

The power of the Legislature to exempt the warrants from taxation being made to appear, it follows that the purchasers of such securities are entitled to rely upon the letter of the statute making them "nontaxable for any purpose whatsoever." The exemption from taxation clause is contained in the very statute that gave life and being to the warrants, and upon the inviolability of which the purchasers thereof had full right to depend. *Noble State Bank v. Haskell*, supra;

In re Assessment First National Bank, supra.

As to how state banks should be assessed and as to the right of such banks, acting either for themselves or for their stockholders, to deductions from the value of their taxable property on account of the corporate ownership of such warrants, we express no opinion, and nothing contained herein shall be construed as decisive of either proposition. These important questions will only be passed upon when properly raised in this court and submitted in conformity to the court rules. That in the instant case the result may be to sustain the trial court's action directing the deduction on account of the ownership of the warrants will not afford grounds for a different conclusion. In such situation we must for the time indulge the presumption that the trial court correctly decided the law in these respects.

The judgment of the trial court is affirmed. All the Justices concur.

HART-PARR CO. v. THOMAS. (No. 8056.)
(Supreme Court of Oklahoma. March 12, 1918.
Rehearing Denied April 9, 1918.)

(Syllabus by the Court.)

1. PLEADING \S 207—GENERAL DEMURRER—
MISJOINDER OF CAUSES OF ACTION.

A general demurrer does not go to a misjoinder of causes of action, and in order to attack a misjoinder of causes of action, a demurrer for such misjoinder must be interposed.

2. APPEAL AND ERROR \S 171(3)—REVIEW—
THEORY OF CASE BELOW.

Where a petition is filed in an action for damages for breach of warranty in the sale of machinery, and there are also sufficient averments in the petition upon which to predicate rescission, and said petition is not demurred to on the ground of misjoinder of causes of action, and the court announces that the case will be tried upon the issue of rescission, and no objection is made thereto, and the case is tried upon such issue, on appeal to this court, this court will not entertain a contention that said cause is tried without the issue joined.

3. APPEAL AND ERROR \S 171(1)—THEORY OF
CASE BELOW—EFFECT.

Where a party tries his case upon one theory without objection, he will not be heard, on appeal, to urge a different theory of the case than the one on which it was tried.

Commissioners' Opinion, Division No. 1. Error from District Court, Woods County; W. C. Crow, Judge.

Replevin by the Hart-Parr Company against A. N. Thomas. Judgment for defendant, motion for new trial overruled, and plaintiff brings error. Affirmed.

H. A. Noah, of Alva (Chester I. Long, and Austin M. Cowan, both of Wichita, Kan., of counsel), for plaintiff in error. L. T. Wilson, of Alva, and J. N. Tincher, of Medicine Lodge, Kan., for defendant in error.

COLLIER, C. This is an action in replevin, brought by the plaintiff in error, here-

inafter styled plaintiff, against the defendant in error, hereinafter styled defendant, based upon notes and mortgage given for the purchase of threshing machinery, purchased by the defendant from the plaintiff. The defendant answered and filed a cross-petition, praying for damages of \$1,000 for the breach of a warranty in said machinery, and tendered in the pleadings delivery of all of the property sued for, except an engine, which was not purchased from the plaintiff, and upon which the mortgage was given in addition to said threshing machinery purchased from the plaintiff. The plaintiff demurred to the answer and cross-action, upon the ground "that the same failed to state facts sufficient to constitute a defense or to sustain an action," which demurrer was overruled and exception saved. Thereupon plaintiff filed reply to said answer and cross-petition, denying the allegations thereof. Upon a statement by the court that the parties differed on the law as to what issue should be submitted in the cause, it was claimed by the defendant that he was entitled to rescind, and it was then announced by the court that that issue would be submitted, and to this announcement of the court plaintiff did not object. The court and counsel having consulted, the cause proceeded, and was tried as one for rescission.

The evidence is exceedingly voluminous, and we do not deem it necessary to recite it in detail. The undisputed evidence is: That the machinery in question, except the engine which belonged to the defendant, was purchased from the plaintiff under a guaranty as to its efficiency; that the defendant paid freight thereon in the sum of \$90; that shortly after commencing threshing operations, the defendant complained to the plaintiff of the failure of the machinery to meet the guaranty, and thereupon an agent of the plaintiff was sent out to endeavor to properly adjust and cause the machinery to meet the guaranty. It was also shown by uncontradicted evidence that the value of the engine included in the mortgage, which was not purchased from the plaintiff, but was owned by the defendant, was \$1,000. The execution of the notes and mortgage, the basis of this action, was admitted by the defendant, and that the notes given for said threshing machinery had not been paid. It was also in evidence, and undenied by the plaintiff, that all of said threshing machinery purchased from the plaintiff, and said engine, had been seized and disposed of by the plaintiff. The evidence was in conflict as to whether or not the machinery came up to the warranty, as to whether or not the action of the plaintiff through its agents was such as to waive a return of the machinery by the defendant to the plaintiff, and whether or not the plaintiff, prior to the commencement of this action, tendered a return of said property to the plaintiff. There were

very many objections to the admission and exclusion of evidence, to which proper exceptions were saved.

The court, among other instructions, gave instruction No. 3, which was duly excepted to, and which reads:

"You are instructed that in order to entitle the defendant to a cancellation of the notes and mortgage sued upon, it was necessary for him to make a tender, that is, a return of the property, or an offer to so return said property to the plaintiff or its authorized agent, within a reasonable time after the discovery of the defects complained of, if there were such defects, and he did not do this, and therefore unless you find from a preponderance of the evidence that the actions and conduct of the plaintiff were such as to relieve the defendant of the necessity of making a return of said property; and in this connection you are instructed that if you find from a preponderance of the evidence that the defendant within the time stated in the warranty contract notified the plaintiff of alleged defects in said machinery, and that thereafter the plaintiff sent its agent to remedy the defects alleged to be in said machinery; and if you further find from a preponderance of the evidence that the said agent did not remedy the alleged defect, but represented and held out to the defendant that said machinery could be fixed, and directed him to wait for the company to fix the same; and if you further find from a preponderance of the evidence that the defendant relied upon said promise to cure said defect, if there were any, in said machinery, and for that reason did not return the machinery—then your verdict should be for the defendant, and you should fix the amount of his recovery at the reasonable market value of the traction engine at the time it was seized by the plaintiff, together with the amount of freight paid by the defendant, the amount of the freight not to exceed the sum of \$90."

The plaintiff requested the giving of the following instructions:

"The court instructs the jury that the defendant can only recover under the terms of the warranty upon which the separator was bought if he has made a legal tender of the property back to the plaintiff by a preponderance thereof that he did make such tender before he had, by his acts, accepted the machine; that he cannot recover anything against the plaintiff, but your verdict must be for the plaintiff in the full amount of his claim.

"The court instructs the jury that the defendant had ten days in which to give notice of his dissatisfaction with the machine in question; and, unless you find by a preponderance of the evidence that he not only did give such notice, but also after the visit of the expert Newby gave new notice of his dissatisfaction, then you must find for the plaintiff.

"The court further instructs the jury that if you find from the evidence that the defendant, on the 13th day of July, 1915, notified the plaintiff that he had then, since commencing his run with the machine in question, threshed 20,000 bushels of wheat, and had contracted 2,000 acres additional, and expected to have a good run, the defendant cannot be heard to say thereafter that he had not accepted the machine in question, and your verdict should be for the plaintiff.

"The court instructs the jury that the defendant admits all the material allegations of the plaintiff's petition to be true, and thereby assumed the burden of proving by a preponderance of the evidence, not only that the machine in question worked badly or was defective, but also that he himself, and not some other person or persons was thereby injured and damaged."

The court refused to give said requested instructions, and the plaintiff severally excepted to such action of the court.

The jury returned a verdict in favor of the defendant in the sum of \$1,090, to which plaintiff excepted. Plaintiff made timely motion for a new trial, which was overruled and judgment entered on the verdict, to which the plaintiff duly excepted, and to reverse said judgment prosecutes this appeal.

[1] A general demurrer to the petition does not raise the question of misjoinder of causes of action, and the court did not err in overruling the general demurrer to the answer and cross-petition. In order to raise a question of misjoinder of actions a petition must be demurred to upon that special ground. Subsection 5, section 4740, Revised Laws.

[4] We are of the opinion that the averments of the plaintiff are sufficient to sustain an action for damages, and also for an action for rescission. It is a settled proposition of law that where a breach of warranty occurs in the sale of property, the purchaser has two remedies. He may retain the property purchased and bring action for damages, or he may bring an action for rescission, but he cannot prosecute the two inconsistent actions at once.

"Where a machine is sold accompanied by a warranty as to fitness, and the machine delivered, and part of the purchase price paid, on failure of the warranty the purchaser has two remedies at his election: He may keep the machine and recoup or recover in damages the difference between the price agreed to be paid and the actual value of the machine, together with a fair compensation for the loss incurred by an effort in good faith to use it for the purpose warranted; or he may promptly return the machine as soon as he discovers the defects, and recover the consideration paid, or offer to restore the same on condition that the seller shall return all received by him." *D. M. Osborne & Co. v. Fritz Walther*, 12 Okl. 20, 69 Pac. 953.

"The buyer may not pursue two inconsistent remedies. If he choose to exercise the special remedy by returning the article to the seller, he is then confined to a recovery of the purchase money paid, and cannot maintain an action to recover damages for a breach of the warranty." 30 Am. & Eng. Enc. Law (2d Ed.) p. 197.

"The buyer of a machine may, on finding that it is not as warranted, rescind the sale and recover the price, or he may retain it and recover the damages sustained; but he may not pursue both remedies at the same time." *Blake-Rutherford Farms Co. v. Holt Mfg. Co.*, 70 Wash. 192, 126 Pac. 418.

"The purchaser of a machine, on finding that it is not as warranted, may refuse to accept, rescind the sale, and recover what he has paid on the price, or retain the machine and set off against the price such damages as naturally result from the breach of warranty, though he may not pursue both remedies simultaneously." *Houser & Haines Mfg. Co. v. McKay*, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925.

[2, 3] Had proper objection been made when it was announced by the court that the

cause would be tried upon the issue of rescission, and proper pleading filed setting up an estoppel to have rescission after bringing an action for damages, we are of the opinion that the overruling of such objection and the trial of the cause upon the issue of rescission would have been prejudicial error, but, no objection having been made by plaintiff to a trial of the cause upon the issue of rescission, and the trial having been upon that issue, it comes too late upon appeal to raise objections as to the issue upon which the case was tried. Having tried the case upon one theory, the defendant is bound thereby, and cannot question the same on appeal. *Border v. Carrabine*, 24 Okl. 609, 104 Pac. 906; *Wallace v. Killian*, 40 Okl. 631, 140 Pac. 162; *Brisley v. Mahaffey*, 167 Pac. 984.

"A party is bound in the appellate court as to the nature and form of the action by the theory upon which it was tried in the court below." *J. R. Watkins Med. Co. of Winona, Minn., v. Coombes*, 166 Pac. 1072.

Two inconsistent causes of action are involved in one count, but, no objection having been made to the trial of the cause as one of rescission, this court will not review such pleading; action of the plaintiff having waived the same.

We have carefully examined the objections to the admission and exclusion of evidence, and are unable to say that the action of the court thereon was prejudicial error.

We have duly considered the instructions of the court to which exception was saved; and, while it may be that it is not quite as definite as it might have been upon the question of the breach of warranty, yet, when taken into consideration with the entire instructions of the court, we are unable to see that the giving of such instructions worked a miscarriage of justice.

We have carefully reviewed the requested instructions of the plaintiff which were refused by the court, and we think the court did not commit reversible error in refusing to give either one of said requested instructions.

[5] Where there is evidence reasonably tending to support a verdict, though the evidence is in conflict, and the issues are submitted under proper instructions of the court, and the verdict of the jury is approved by the trial court, as in the instant case, this court will not disturb the verdict. *Dill v. Malot*, 167 Pac. 219; *Bartlesville Zinc Co. v. James*, 166 Pac. 1054; *City of Eufaula v. Okla. Corrugated Steel and Iron Co.*, 166 Pac. 881.

This cause is affirmed.

PER CURIAM. Adopted in whole.

(77 Okl. 165)

ST. LOUIS & S. F. R. CO. v. STACY.
(No. 6376.)(Supreme Court of Oklahoma. March 21, 1916.
On Rehearing, March 26, 1918.)*(Syllabus by the Court.)***1. CARRIERS** \S 282, 304(1) — **PERSONS ON PLATFORM OF STATION—INVITATION—"INVITEE"—"BARE LICENSEE."**

A person who goes upon the platform of a common carrier to accompany friends and acquaintances to trains upon which they are about to depart, or who goes to such station to attend in some proper way to the shipment of a corpse, is upon such premises by implied invitation, but a person who goes to see the shipment of a corpse and is not interested in the manner of such shipment, but is actuated by curiosity, is a "bare licensee."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Invitee; Licensee.]

2. CARRIERS \S 282, 304(1) — **PERSONS ON PLATFORM OF RAILWAY STATION—"INVITEE"—"BARE LICENSEE."**

A person who goes upon the premises of a carrier by implied invitation, by abandoning the original purpose which implies such invitation, and by going through curiosity, or for their own pleasure, upon a part of the carrier's platform, where the original purpose would not have taken such person, may thereby change their status from that of an "invitee" to that of a "bare licensee."

3. APPEAL AND ERROR \S 207—**IMPROPER REMARKS OF COUNSEL—OBJECTION AND EXCEPTION.**

In order to preserve for consideration by this court improper remarks of counsel, it is only necessary to seasonably object thereto, and, if the objection be overruled, to except to the ruling. It is not necessary to request the court to admonish the jury in regard to such remarks.

4. APPEAL AND ERROR \S 1060(1)—**TRIAL** \S 133(1) — **HARMLESS ERROR — REMARKS OF COUNSEL.**

Remarks of counsel examined, and held prejudicial. Further held that it was error upon the part of the trial court to refuse and neglect to sustain an objection to such remarks, and to neglect to properly admonish the jury in regard thereto.

*On Rehearing.***5. CARRIERS** \S 304(1)—**PERSONS ON PREMISES—IMPLIED INVITATION—"INVITEE."**

A person who goes upon the platform of a railway station to accompany friends and acquaintances to a train upon which they are about to depart as passengers, and to attend in some proper way the shipment of a deceased person, a relative of the passenger and an old friend of the plaintiff, whom the passenger is taking to another state for burial, is upon such premises by implied invitation of the railway company.

6. CARRIERS \S 304(2)—**PERSONS ON PREMISES—INVITEES—CARE REQUIRED.**

A railway company owes such invitee the duty of using ordinary care to keep in a reasonably safe condition all portions of its platform to which he would naturally or ordinarily be likely to go.

7. CARRIERS \S 320(29) — **INVITEE'S USE OF PLATFORM—QUESTION FOR JURY.**

Whether the place on the platform where the plaintiff was injured was a place where she would naturally or ordinarily be likely to go is a question of fact for the jury.

Commissioners' Opinion, Division No. 2. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by Betty Alexander, reviewed after appeal in the name of Irving Stacy, her administrator, against the St. Louis & San Francisco Railroad Company, for personal injuries. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and Fred E. Suits, both of Oklahoma City, for plaintiff in error. B. B. Blakeney and J. H. Maxey, both of Tulsa, for defendant in error.

BURFORD, C. The facts depended upon for a recovery in this case, as alleged by the plaintiff, were substantially as follows: Betty Alexander, the plaintiff, was an old friend of a Mrs. Gossett and of her mother. The mother died, and transportation for the corpse over the lines of the defendant from Davenport, Okl., was arranged. A son of Mrs. Gossett, one Granby Hazelrigg, was to accompany the body on the journey. Mrs. Alexander, by invitation of Mrs. Gossett, accompanied her to the defendant's depot at Davenport, to meet the train upon which the corpse was to be shipped. This train arrived a little after 7 o'clock in the evening at a time of year when it was dark at that hour. After bidding good-bye to Hazelrigg, after the arrival of the train, Mrs. Alexander started forward to where the corpse was being loaded into the baggage car, and in doing so stumbled over a piece of gas pipe lying on the ground, and fell against the handle of a baggage truck, standing on the platform, which handle was down. She fell to the ground, fracturing her hip and spraining her ankle. The presence of the gas pipe, the fact that the handle of the truck was down, and that the platform was not properly lighted, are alleged as negligence. The defendant answered by a general denial and pleaded contributory negligence. The evidence was conflicting as to the lighting of the platform. There was some evidence tending to show negligence in this regard. The only evidence in regard to the gas pipe was that of Mrs. Alexander, who did not testify that she saw any such pipe, but that she stepped upon something round, which turned under her foot, and that of J. L. Robinson, a brother-in-law, who testified that he found a piece of gas pipe near the truck handle early upon the morning following the accident. None of the witnesses present the night of the accident—and there were many—saw any such pipe. The only evidence of negligence in regard to the truck handle is that it was down, and plaintiff stumbled over it. The evidence upon the part of the defendant showed without contradiction that its employé had hooked up the handle when the truck was last

used, that it was so hooked up shortly before the train arrived, and that there were some boys playing about the truck about the time the train came in. The undisputed evidence further showed that Mrs. Alexander left Mrs. Gossett, at whose invitation she had come and who was herself not a prospective passenger, bade good-bye to Hazelrigg, and then went toward the baggage car to see the corpse loaded; that this duty was being attended to by the regular pallbearers; that the coaches for white passengers stopped west of the waiting room while the truck was east of the waiting room in a sort of alcove formed by the bay window of the depot and an inclined runway to the freight house; that there was ample passageway between the truck and the train, but that plaintiff chose to go between the truck and the depot, and in so doing stumbled over the truck handle and was injured. There was conflict in the testimony as to the location of the truck, the witnesses for the defendant placing it 44 inches from the depot while those for plaintiff placed it further out in the platform.

[1, 2] Under this state of facts it is urged that it was error for the trial court to refuse to instruct a verdict for defendants. In our judgment there is no reasonable evidence supporting the allegation of negligence in leaving the truck handle down. It is not a case where the maxim *res ipsa loquitur* applies, especially in view of the defendant's undisputed evidence as to the condition of the handle shortly before the accident. The evidence in relation to the gas pipe, though perhaps sufficient to go to the jury, is far from convincing. There is evidence of negligence in relation to the lights sufficient to carry the case to the jury, and to support a verdict for plaintiff, unless, as contended by defendant, the plaintiff, was, under the circumstances of the case, not an invitee, but a bare licensee to whom defendant owed only the duty not to injure her by lack of reasonable care. Many authorities pro and con are cited upon the proposition of the duty owed by a carrier to persons not passengers and upon the distinction between persons impliedly invited and bare licensees. In our judgment, it is only necessary to consult the decisions of our own state in order to determine the question. In *A., T. & S. F. Ry. Co. v. Cogswell*, 23 Okl. 181, 99 Pac. 923, 20 L. R. A. (N. S.) 837, this court, in considering the case of a person injured while going to a train to meet a passenger upon purely private business not connected with that of the carrier in any way, said:

"A railway company is bound to exercise ordinary care for the safety of a person who is upon its premises for the purpose of meeting an incoming passenger, and is liable to such person for injuries sustained on account of the railway company's failure to exercise such care. A person went to the depot of a railway company to meet an incoming passenger, with whom he had an engagement to meet him for the purpose of continuing, after he had met him, a business negotiation between them. Held,

that the railway company was liable to such person for injuries received by him because of the negligence of the company in permitting its station platform to become in a dangerous condition, on account of which said person fell and was injured."

In the opinion the court says:

"A person who does not go upon the premises of a railway company as a passenger, servant, trespasser, or as one standing in any contractual relation to the corporation, but who is permitted by the company to come upon its premises for his own interest, convenience, or benefit, is upon the premises of such railway company as a licensee. * * * *Woolwine's Adm'r v. Ches. & O. Ry. Co.*, 36 W. Va. 329, 15 S. E. 81, 16 L. R. A. 271, 32 Am. St. Rep. 859; *Sweeny v. Old Colony, etc., Ry. Co.*, 10 Allen (Mass.) 368, 87 Am. Dec. 644; *Pittsburg, F. W. & C. Ry. Co. v. Bingham, Adm'r*, 29 Ohio St. 364; *Burbank v. Ill. Cent. Ry. Co.*, 42 La. Ann. 1156, 8 South. 580, 11 L. R. A. 720; *Elliott on Railroads* (2d Ed.) vol. 3, par. 1251. On the other hand, one who goes upon the premises of a railway company to transact business with it or its agents or to transact business in the operation of the road, or who is there by invitation of the company, express or implied, is lawfully there, and the railway company owes him a duty of using ordinary care in the construction and maintenance of its depot and platforms to avoid injuring him. *Bennett v. L. & N. Ry. Co.*, 102 U. S. 577, 26 L. Ed. 235. One who goes with the permission and acquiescence of the owner upon the premises of another solely for his own pleasure and benefit goes as a licensee. *Benson v. Baltimore Traction Co.*, 77 Md. 535, 25 Atl. 973, 20 L. R. A. 714, 39 Am. St. Rep. 436; 3 *Elliott on Railroads* (2d Ed.) par. 1248. But one who goes upon the premises of another in a common interest or to a mutual advantage is there under the implied invitation of the owner. The test as to whether there is an implied invitation is stated by Mr. Campbell in his treatise on Negligence in the following language: 'The principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is mere pleasure or benefit of the person using it.' This language is quoted with approval in *Bennett v. L. & N. Ry. Co.*, supra; but the court in that case does not, and we do not here, undertake to say that this principle furnishes an invariable test by which it may be determined in every case whether a person is upon the premises of another under an implied invitation. The courts have not, to our knowledge, fixed any general rule by which such test may be made, and whether an invitation exists in any case must be determined by the circumstances surrounding the case. But, where the facts of any case bring it within the language of the first sentence of the above quotation, an invitation is implied. It now seems to be the doctrine of the various state courts of the Union that one who goes to the premises of a railroad company to meet an incoming passenger or to accompany a departing passenger is within this rule, and goes upon the premises of the railway company under an implied invitation of the company. * * *

The omitted portion of this quotation is that relating to degree of care disapproved by the court in *Wilhelm v. M., O. & G. Ry. Co.*, 152 Pac. 1088, L. R. A. 1916C, 1029.

"The general practice of the members of the public of accompanying departing friends and acquaintances to the stations of railway companies upon whose passenger trains such friends and acquaintances are to depart, and of meeting and receiving at said places friends and acquaintances who are passengers on incoming trains, is one in which the railway company

has an interest in common with the members of the public who go to its stations for such purposes. One who travels upon passenger trains must go to the places provided by the railway company for receiving him and for beginning his journey, and he has a right to have some one carry or accompany him to such places, and one who rides upon the passenger trains of a railway company must, in order to reach his ultimate destination, depart from the train and from the premises of the railway company, and such person has a right to have some one meet him and accompany him in his departure therefrom. In many instances, without such right, persons would be unable to travel upon passenger trains or to do so only with great inconvenience. It is true the facts in the case at bar do not make it such a case, but the principle is illustrated by such instances. The right of a person who travels upon passenger trains to have his friends and acquaintances accompany him in departing to the station of the railway company, or to meet and receive him at such place upon his coming, adds to the convenience and pleasure of traveling upon the company's railroad, and tends to lessen its inconveniences and burdens, and thereby tends to encourage travel, in all of which the railway company has an interest. Its interest in having passengers met at its stations by their friends and acquaintances is one in common with the interest of the persons who meet such a passenger, and we do not think that the reason of the rule requires it to be narrowly confined only to those persons who go to meet an incoming passenger purely for social pleasure or from the promptings of friendship or kinship; and the fact that one who meets an incoming passenger, acquaintance, or friend is prompted by the motive of ultimately consummating a business transaction, which may result profitably to him or both to him and the passenger, does not take him without the rule."

This doctrine has been followed by this court in *A. & T. & S. F. Ry. Co. v. Jandera*, 24 Okl. 106, 104 Pac. 339, 24 L. R. A. (N. S.) 535, 20 Ann. Cas. 316.

It is true that these cases do not refer to persons accompanying a corpse, but it cannot be gainsaid that there is a duty to the remains of the dead on their way to their last resting place, as well as to the living. The same tender feelings which draw friends and relations to be with the traveler at the hour of his arrival or departure urge care and attention to the remains of the dead. A corpse is the proper subject of a shipment by rail, and for it is purchased a passenger ticket. We are unwilling to hold that a person may not, under proper conditions, accompany a corpse to a train, upon which it is about to be shipped, without becoming a trespasser upon the carrier's property. But it does not follow that the plaintiff in this case is protected by the rule announced. The evidence tended to show strongly that she came to the depot to comfort Mrs. Gossett. She did not accompany the corpse, nor, so far as the record shows, did she have anything to do with the loading, transportation, or procuring tickets for the corpse. She might have come to the depot as accompanying Mrs. Gossett and to bid good-bye to Hazelrigg, and by reason thereof have become an invitee of the carrier to whom it would owe a duty of ordinary care to see that she was not injured while going about

the business legitimately connected with the object for which she came, and yet, if she abandoned those objects, and out of idle curiosity went to see the loading of the corpse, with which she had nothing to do, she would lose her status as an invitee and become a bare licensee, and, if injured otherwise than by lack of reasonable care, upon a part of the premises where the carrying out of the original objects of her visit would not reasonably have taken her, the carrier would not be liable. The evidence strongly tends to show that this is exactly what occurred, but there was some evidence which made her intention and objects in going to see the loading of the corpse, and linked therewith her status as an invitee or bare licensee at that time, a question for the jury under proper instructions of the court. The trial court gave an instruction somewhat along this line as follows:

"The jury are instructed that if they believe and find from the evidence that the plaintiff on the 19th day of December, 1912, visited the defendant's station from motives of curiosity or for purposes not connected with the business of the defendant, she is what is known in law as a 'bare licensee,' and cannot recover from the defendant on account of any injury sustained, unless such injuries were wantonly or willfully inflicted; and, unless you so find, your verdict should be for the defendant."

This instruction comprehended nothing of the elements of possible change of legal relation between the plaintiff and the carrier after plaintiff's arrival at the station.

Defendant offered an instruction, which was refused and exceptions taken, which reads as follows:

"You are instructed that if you believe and find from the evidence that plaintiff was not assisting in the loading of the corpse upon defendant's train and not interested in the manner of loading same, she would not be entitled to recover for the injuries complained of here, and your verdict should be for the defendant."

This instruction might have been more aptly worded, but in our judgment it fairly raises the question of the plaintiff's status at the time the corpse was being loaded. There can be no question under this record but that the place where plaintiff was injured was one in which she would not have been in pursuance of the object of comforting Mrs. Gossett or bidding farewell to Hazelrigg. Her injury was occasioned solely by her desire to see the loading of the corpse. If at that time she was not even "interested in the manner of loading" it, she could have had no other object in going to the place where the loading was being done except curiosity. Although this instruction might have been couped with the one given and put in more apt language, in our judgment, under the circumstances, in view of the fact that the instruction given, which held the railway company only for wanton or willful injury, was not excepted to by either party (see *Wilhelm v. M., O. & G. Ry. Co.*, supra), it was error to refuse it.

[3, 4] Error is also alleged upon the failure of the court to sustain an objection, and ad-

monish the jury in relation to certain remarks made by counsel for the plaintiff. In the course of his closing argument counsel for plaintiff said:

"Gentlemen of the jury, these were our witnesses. We have been down there, and taken their depositions, and the testimony they gave at that time was altogether different from that they gave on the stand, but when we got ready to use the depositions we found that the railroad company had brought the witnesses here, and under the law we couldn't use the depositions. We took the deposition of a trained nurse that waited on Mrs. Alexander, and when we got ready to use that deposition we found that the railroad company had brought her here too. (The defendant objects to remarks of counsel, and asks the court for a ruling on said objection.)

"The Court: I will give you an exception. (Defendant excepts.)

"Counsel for Plaintiff (to the jury): 'I don't care how many exceptions they take. To my mind the meanest crime on the face of the earth is base ingratitude.'"

These remarks were highly improper. In the first place, counsel evidently desired to convey the impression that it was wrong for the defendant to bring witnesses to the trial whose depositions had previously been taken by plaintiff. Such an inference is so obviously improper that the only purpose which could have animated counsel was to prejudice the jury against the defendant by imputing to it some underhand practice. Courts strongly favor the production of a witness upon the stand. The demeanor, manner of testifying, and conduct of a witness are of almost as great importance as his testimony. Sometimes they rightfully give the lie to the spoken words, which fall from his lips. It is the fact that the jury sees the witnesses that has led appellate courts in cases at law to refuse to pass upon the weight of the evidence. It was largely because of the facts that formerly the practice was general to try equity cases upon deposition that the rule that appellate courts would pass upon the weight of the evidence in equity cases was established. In the instant case there could be no question that the presence of the witnesses was not only proper, but beneficial, to a fair trial.

But the considerations above referred to are not all which condemn the remarks made by counsel. After the evidence was in, without the sanctity of an oath and without the privilege of cross-examination by the other party, he proceeds to testify that the evidence of the witnesses as given in the deposition "was altogether different" from that they gave on the stand. The statement was not in any manner justified by the record. If counsel took depositions, they were certainly in his control or in the files of the court. If there was a variance in the testimony given by the witnesses on the trial and in the depositions, the depositions were competent, tending to contradict the witnesses. Not a deposition nor portion of a deposition of any witness called by the defendant was offered

at the trial, either for this purpose or any other. Under such circumstances it was entirely outside the record and highly improper and prejudicial for counsel to state that the testimony given in the deposition was "altogether different" from that given on the witness stand.

In the *City of Shawnee v. Sparks*, 26 Okl. 665, 110 Pac. 884, improper remarks were made, an objection taken, and the trial court admonished the jury as follows:

"Gentlemen of the jury, You will not consider statements of counsel made in their argument outside the record. You will consider only the evidence before you and the instructions of the court."

In commenting thereon this court said:

"Where counsel in argument makes statement of a material fact not in evidence against the objection of the other party, he violates the right of a fair trial, and where the trial judge fails to pass squarely on the objection, and, if sustained, fails to admonish the jury to disregard such statement as not in evidence, we must reverse, unless this court can ascertain from the record that no harm resulted."

And again:

"It will not do to say that the objection of counsel followed by the admonition of the judge not to consider the statement as to the interest or lack of interest of defendant in the case as affecting its liability nor the absence of Judge Cassidy, but to determine the question of liability from the law and the evidence, was sufficient to cure the prejudice; for the reason that it was the duty of the judge to pass squarely upon the objection, and either sustain or overrule, and, if sustained, to instruct the jury to disregard the fact stated as not in evidence, and not, by telling them to determine the question of liability on the law and the evidence, apparently leave it to the jury to first determine whether the objectionable statement was or was not in evidence."

In the case at bar counsel objected, and specifically asked the court to pass upon the objection, and the court, without ruling upon said objection, stated, "I will give up an exception." This was all that counsel for defendant could do, and is sufficient to raise the question for consideration here.

In *Coalgate Co. et al. v. Bross*, 25 Okl. 245, 107 Pac. 425, 138 Am. St. Rep. 915, Chief Justice Kane, speaking for the court, said:

"There is considerable confusion upon the question, how may error in allowing a prejudicial line of argument be saved for review in an appellate tribunal. This court has not committed itself on the question, and is disposed to follow the rule approved by Mr. Thompson in his work on Trials (vol. 1, § 962) that 'the more correct view is that such an irregularity can only be saved for appellate review by an objection seasonably made and exception properly taken, if overruled.'"

In *City of Shawnee v. Sparks*, supra, this court held that where such an objection was made, it was the duty of the trial court to pass squarely upon the objection, and, if sustained, to properly admonish the jury.

In *St. L. & S. Ry. Co. v. O'Connor*, 43 Okl. 268, 142 Pac. 1111, it was said:

"Counsel failed to request the court to withdraw said remarks and to admonish the jury not to consider same. Under * * * *Coalgate Company v. Bross*, 25 Okl. 244, 107 Pac. 425,

138 Am. St. Rep. 915, this is a prerequisite, in order to secure favorable consideration by the appellate court."

It is our view that the expression just quoted was not intended to go beyond the holding in the case there cited, and that it was not intended to hold that, in addition to an objection to the improper remarks and an exception if overruled, counsel must request the court to withdraw the remarks and admonish the jury, as that would be a duty incumbent upon the court to perform under *City of Shawnee v. Sparks*, supra, if the objection were sustained, and a useless formality if the objection were overruled. However, in order that there may be no confusion in the practice, anything in *St. L., I. M. & S. Ry. Co. v. O'Connor*, supra, relating to this subject, which goes beyond the rule laid down in *Coalgate Co. v. Bross*, supra, is hereby expressly overruled.

For the errors noted, the cause should be reversed, with directions to the trial court to grant a new trial and take such further proceedings as may be proper and not inconsistent with this opinion.

PER CURIAM. Adopted in whole.

On Rehearing.

PER CURIAM. After oral argument and a careful examination of the record upon petition for rehearing, the court is satisfied that the judgment of the court below was properly reversed by the commission on account of improper remarks of counsel for plaintiff in his argument to the jury. We are unable, however, to concur in that part of the opinion which holds that it was error for the trial court to refuse to give the following instruction requested by counsel for defendant:

"You are instructed that if you believe and find from the evidence that plaintiff was not assisting in the loading of the corpse upon defendant's train, and was not interested in the manner of loading same, she would not be entitled to recover for the injuries complained of here, and your verdict should be for the defendant."

As this part of the opinion would be likely to mislead the trial court upon the new trial which must be had, we deem it necessary to state briefly the applicable principles of law.

[5, 6] The commission properly holds: That a person who goes upon the platform of a railway station to accompany friends and acquaintances to a train upon which they are about to depart as passengers, and to attend in some proper way the shipment of a deceased person, a relative of the passenger and an old friend of the plaintiff, whom the passenger is taking to another state for burial, is upon such premises by implied invitation of the railway company. Undoubtedly the uncontradicted evidence shows that the plaintiff belongs to this class of persons. As

an invitee the company owed the plaintiff the duty of using ordinary care to keep in a reasonably safe condition all portions of their platform to which she would naturally or ordinarily be likely to go. 3 Thompson on Negligence, § 2691; *A., T. & S. F. Ry. Co. v. Cogswell*, 23 Okl. 181, 99 Pac. 923, 20 L. R. A. (N. S.) 837; *Banderob v. Wisconsin Central Ry. Co.*, 133 Wis. 249, 113 N. W. 738; *Union Pac. Ry. Co. v. Evans*, 52 Neb. 50, 71 N. W. 1062.

[7] Passengers, invitees, or others bearing similar relations to railway companies are not required to place themselves in straight jackets upon their arrival at stations, in which they must remain while awaiting the arrival of their train, or the departure or arrival of their friends. Such persons are entitled to reasonable freedom of action upon the platforms provided by the company for their accommodation and convenience, and the company is under obligation to keep in a safe condition all portions of their platform to which such persons do or would naturally resort. Whether the place where the plaintiff was injured was a place where she would naturally or ordinarily be likely to go is a question of fact for the jury. *Banderob v. Wisconsin Central Ry. Co.*, supra. This phase of the case was sufficiently covered by the following instruction, which was given to the jury by request of counsel for defendant:

"You are instructed that the defendant is required to maintain in a reasonably safe condition only such portions of its platform or premises on or upon which passengers, or those upon the premises for the purpose of meeting or taking leave of passengers, may be expected to go; and, if you believe and find from the evidence in this case that the truck in question was so placed as not to endanger the safety of persons boarding or leaving its trains at the places provided for that purpose, or of persons accompanying or meeting such passengers at such places, the defendant would not be liable to one upon such premises who, for motives of curiosity or otherwise, leaves a safe place provided for such passenger, and sustains injury on account of having gone to a place not provided for the accommodation of passengers, and at which such passengers or their attendants are not reasonably to be expected."

With these modifications, the opinion prepared by the commission is approved, and the petition for rehearing denied. All the Justices concur.

GLOBE & RUTGERS FIRE INS. CO. v.
CREEKMORE et al. (No. 7657.)

(Supreme Court of Oklahoma. Nov. 20, 1917.
Rehearing Denied April 9, 1918.)

(Syllabus by the Court.)

1. EVIDENCE §230(6) — ADMISSIONS—TITLE TO LAND.

Admissions made by one who at the time held the legal title, to the effect that he had contracted by parol to sell the same to another, and had received the pay therefor, are competent evidence against all persons claiming title under or through him.

2. INSURANCE §282(1) — FIRE INSURANCE — INTEREST OF INSURED—RECOVERY.

The condition of a fire insurance policy that the same shall be void if the interest of the insured be other than unconditional and sole ownership, etc., is a reasonable and valid provision, and if the insured has not such title or interest, he cannot recover on the policy.

3. INSURANCE §646(2)—FIRE INSURANCE—TITLE OF INSURED—BURDEN OF PROOF.

The burden of proving that the ownership of the insured was not sole and unconditional is on the insurer.

4. INSURANCE §282(2) — FIRE INSURANCE — "UNCONDITIONAL AND SOLE OWNER"—PURCHASER UNDER EXECUTORY CONTRACT.

A vendee of land who occupies the same under an executory contract of purchase is the unconditional and sole owner of the same and of the fee-simple title thereto within the provision of an insurance policy above quoted, and this is true, although the entire purchase price has not been paid.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unconditional and Sole Ownership.]

5. INSURANCE §282(2) — FIRE INSURANCE — MATERIAL REPRESENTATION.

A statement made by the insured to the company "that the title to the land as described in this policy is yet in the Osage Land & Development Company, of Osage, Okl., and that they have made a contract for deed, and that the same is to be delivered to Dud Moore when the balance of the payments due on the purchase price has been made, and that the buildings on the said lots are the property of the assured, W. J. Creekmore, E. M. De Moss and Dud Moore, as shown in this policy," is a material representation concerning the subject-matter of the insurance, and, if untruthfully stated, sufficient to render the policy void.

Commissioners' Opinion, Division No. 3. Error from Superior Court, Tulsa County; M. A. Breckinridge, Judge.

Action by W. J. Creekmore and another against the Globe & Rutgers Fire Insurance Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Scothorn, Caldwell & McRill, of Oklahoma City, for plaintiff in error. George T. Brown and John B. Meserve, both of Tulsa, for defendants in error.

HOOVER, C. The record discloses that on the 20th day of March, 1910, W. T. Leahy and wife sold and conveyed by general warranty deed the real estate involved here to S., G., R., and L., and that on the 4th day of October, 1910, S. conveyed all of his interest in said property to his three associates. On the 28th day of October, 1910, the Osage Land & Development Company entered into a contract of sale for a certain part of this property with one Grissinger, which contract of sale was filed of record on the 29th day of October, 1912. The Osage Land & Development Company was organized about the 1st of April, 1910, by the aforesaid L., G., and R. On the 25th day of April, 1911, the aforesaid L., G., and R. conveyed by warranty deed to one A. J. Burt, H. W. Bigham, Charles F. Gartner, and David L. Doub an undivided twenty-eight fifty-eighths of said property,

and on the 5th day of March, 1913, the sheriff of Osage county executed a sheriff's deed to one Lokey Harford, as the purchaser at a foreclosure sale had by virtue of a judgment rendered in an action by Leroy Saddler foreclosing a mortgage which was executed on said property on the 1st day of April, 1910, by all of the parties mentioned above. The defendants in error, by proper assignment and transfer, acquired all the right, title, and interest vested in Grissinger by virtue of the contract for deed made by the Osage Land & Development Company with her.

On the 10th day of April, 1912, the defendants in error entered into an insurance contract with the plaintiff in error, whereby, in consideration of the premium expressed therein, the said plaintiff in error issued upon the property involved in this action policy No. 731941, insuring the same against loss by fire from the 10th day of April, 1912, to the 10th day of April, 1913. On the 7th day of March, 1913, the two-story frame building covered by said policy was destroyed by fire, and certain goods and chattels therein stored were likewise burned. Thereupon the defendants in error furnished the necessary proof of loss and demanded payment of the insurance when the company refused, and this suit was instituted by the defendants in error against the plaintiff in error to recover the sum of \$1,500 for the loss of the frame building, and \$200 for the loss of the personal property.

[1] Upon the trial of this action in the court below, the trial court permitted one Dudley Moore and one F. C. Grissinger to testify as to certain conversations had by them with the officers of the Osage Land & Development Company as to the title to this property, and as to the authority of the Osage Land & Development Company to make and enter into the contract for deed which was made by said company with Grissinger. Moore was interested with Dunn in acquiring an assignment of said contract from Grissinger, and the theory which actuated the lower court in admitting this testimony was evidently that these declarations of the officers of the company were adverse to their interest as the record holders of the legal title, as according to the records these officers and another as individuals held the fee-simple title to the property involved in this action.

Jones on Evidence (2d Ed.) p. 240, is as follows:

"Admissions made by one who at the time held the legal title to the effect that he had contracted by parol to sell the same to another and had received the pay therefor are competent evidence against all persons claiming title under or through him. The principle on which such evidence is received is that the declarant was so situated that he probably knew the truth, and his interests were such that he would not have made the admissions to the prejudice of his title or possession, unless they were true."

And Mr. Wigmore in his work on Evidence, § 1080, says:

"The admissions of one who is privy in title stand upon the same footing as those of one who is privy in obligation. Having precisely the same motive to make correct statements, and being identical with the party in respect to his ownership of the right in issue, his admissions may, both in fairness and on principle, be proffered in impeachment of the present claim. * * * This principle is to-day nowhere denied. But its recognition was slow in coming. Of the fundamental and common doctrines of our law of evidence, this was perhaps the latest to receive judicial recognition. * * *"

And at section 1082 the same author says:

"By the general principle the statements of a grantor of realty, made while title was by hypothesis still in him, are receivable as admissions against any grantee claiming under him. * * * It is sufficient here to say that the principle is to-day fully and universally conceded, subject only to a modification due merely to its conflict with another principle: It is to be noted that, upon this principle, statements made before title accrued in the declarant will not be receivable. On the other hand, the time of divestiture, after which no statements could be treated as admissions, is the time when the party against whom they are offered has by his own hypothesis acquired the title; thus, in a suit, for example, between A.'s heir and A.'s grantee, A.'s statements at any time before his death are receivable against the heir; but only his statements before the grant are receivable against the grantee."

And in 16 Cyc. 986, it is said:

"Declarations of an owner of land prior to his conveyance are competent as against his grantee and other privies, in disparagement of his title. They are also competent to show the existence of easements on the premises. * * *"

Applying the rule announced by the authorities above cited, we are of the opinion that this evidence was competent, and that the trial court did not commit error in permitting the same to be introduced.

[2-4] The policy in suit contains the following provisions:

"This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein. * * * This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple."

The policy of insurance had the following indorsement thereon attached by its local agent:

"This indorsement is made for the purpose of showing that the assured under this policy are the sole and undisputed owners of the property as described in this policy of insurance. That the title to the land as described in this policy is yet in the Osage Land & Development Company, of Osage, Okla., and that they have made a contract for deed, and that the same is to be delivered to Dud Moore when the balance of the payments due on the purchase price has been made, and that the buildings on the said lots are the property of the assured, W. J. Creekmore, E. M. De Moss and Dud Moore, as shown in this policy."

"Attached to and made a part of Globe &

Rutgers Fire Insurance Company policy No. 731941 of New York City, N. Y."

It is asserted by the company that this statement as to the ownership of said property and as to the title thereof constituted a warranty, which, if untrue, vitiated the policy; that this statement was untrue because the legal title to this property was not in the Osage Land & Development Company, nor had it ever been; that while it is true that the company had executed a contract for a deed to one Grissinger, which contract had been assigned until all her rights had passed to the defendants in error, yet, under the record, the company did not then, nor at any other time, have legal title to this property, nor were Creekmore and Moore the owners of the building separate and apart from the real estate upon which it was located.

It appears that the defendants in error believed in good faith that the Osage Land & Development Company had the legal title to this property, and full authority to execute the contract in question to Grissinger, and that, relying thereupon, these defendants in error, believing that they would in time acquire a legal title to this property, erected these improvements thereon, and to protect themselves in case of fire procured this insurance. The question involved here is not whether they had such an interest, which they were entitled to protect by insurance, but whether the policy in question was void by reason of the misstatement as to the character of the title thereto. In R. C. L. vol. 14, § 229, it is said:

"Standard policies now in use usually provide that the policy shall be void if the insured is not the sole and unconditional owner of the property insured. Such a clause applies to conditions existing at the date of the policy, and not to future changes in title. * * * To be unconditional and sole an interest must be completely vested in the assured, not contingent or conditional, nor for others, nor in common, but of such nature that the assured must sustain injury or loss if the property is destroyed, and this is so whether the title is legal or equitable. An insured's ownership is sole when no one else has any interest in the property as owner, and is unconditional when the quality of the estate is not limited or affected by any condition. The burden of proving that the ownership of the insured was not sole and unconditional is on the insurer."

And in section 230 the same author says:

"An insurance company has a right to insert a condition in a policy that it shall not be liable if the title or interest of the assured is less than the entire, absolute, unconditional, unincumbered fee-simple ownership; and if the insured has not such a title or interest, he cannot recover on the policy. * * *"

The authorities are almost uniform that the insurance company has a right to insert as a condition in its policy that it shall not be liable if the title or interest of the assured is less than the entire, absolute, and unconditional fee-simple ownership. But they likewise hold that the interest of a purchaser under an executory contract of sale is the sole and unconditional owner within the true

meaning of the ordinary clause on that subject in insurance policies, because the vendor may compel the vendee to pay for the property, and to suffer any loss that occurs. But, however, to hold the interest of the vendee sole and unconditional, the contract must be enforceable. See 14 R. C. L. § 234. This court, in the case of *Ark. Ins. Co. v. Cox*, 21 Okl. 873, 98 Pac. 552, 20 L. R. A. (N. S.) 775, 129 Am. St. Rep. 808, said:

"The authorities hold, almost without exception, that a vendee of land who occupies the same under an executory contract of purchase is the unconditional and sole owner of the same and of the fee-simple title thereto within the provision of policies of insurance above quoted, and that this is true, although the entire purchase price has not been paid. * * * Plaintiff at the time of the insurance of the policy occupied the lands upon which the property insured was located, and he had placed thereon the buildings insured under the policy, and he had occupied the land under the contract of purchase, on which he had paid all the purchase price except \$75. He was the unconditional and sole owner in fee simple of the equitable title to said land, and had such an interest therein as was required by the conditions of the policy relied upon for a forfeiture, except that he did not own the legal title. * * *"

And it was further said in the case above cited:

"Was plaintiff the unconditional and sole owner of the equitable title to the land on which the property insured was located? There is no denial that Folsom held the legal title to the land in controversy, or that the contract of sale between him and the plaintiff is valid; and since the burden of proof is upon defendant to establish such facts as were necessary to avoid the policy, in the absence of any attack upon the validity of the contract between Folsom and plaintiff, it will be assumed that it was valid, and passed the interest in the land in controversy purported to have been passed by such contract."

In the case at bar the contract in question was executed by the Osage Land & Development Company with the assignor of the defendants in error. The record fails to show that the grantor in said contract at the time of its execution held the legal title to the land in controversy, and the validity of that contract is assailed here. Likewise in *Atlas Fire Ins. Co. v. Malone*, 99 Ark. 428, 138 S. W. 962, Ann. Cas. 1913B, 210, the Supreme Court of Arkansas says:

"In an action on a fire insurance policy, the burden is on the insurer to show that the insured's interest was other than an unconditional and sole ownership, within a provision that the policy shall be void in such event. The insured under a fire insurance policy is the substantial owner within a provision that the policy shall be void if his interest is other than an unconditional and sole ownership, where he is in un-

disputed possession, claiming to be the sole owner under a warranty deed, though the deed recites an outstanding interest in a minor heir, a conveyance of which to the insured the grantors covenanted to obtain on her reaching her majority."

In the instant case the company had notice that the interest of the insured was not that of a sole and an unconditional owner, as appears from the indorsement made by the agent and attached to the policy.

[5] It must be conceded that it was the duty of the insured, where they were not the sole and unconditional owners of the property as contemplated by the policy, to correctly state to the insurer the character of title they claim thereto. This they attempted to do, and thought they were doing, when they told the agent of the company that the legal title to the property was in the Osage Land & Development Company, and thought that they held a contract for a deed which was to be delivered to them when the purchase money was paid. This statement was not true, as the legal title to this property, from this record, was never owned by the Osage Land & Development Company, and the authority of the company to execute a contract for a deed is not shown by the record, nor can it be inferred from the evidence. The defendants in error did not have an enforceable contract; that is, one which they could go into a court of equity and force the company to execute to them a deed which would convey any title to this property to them.

It must be borne in mind that Leroy Sadler held a mortgage upon this property; that Winans and Harn held a mortgage upon this property; that twenty-eight fifty-eighths thereof had been conveyed to other parties; and that the legal title, as shown by the record, was in the three incorporators of the Osage Land & Development Company, and had never passed to the company at the time of the execution of this contract. Under the facts of the case, we must hold that the defendants in error never had an enforceable contract, and were therefore not the sole and unconditional owners as contemplated by the provisions of the policy, and that the statements made by them at the time this indorsement was made upon the policy did not truly state the condition of the title, and on account thereof no liability can attach to the company by virtue of the policy.

The judgment of the lower court is therefore reversed.

PER CURIAM. Adopted in whole.

(88 Or. 533)

BLACK v. SOUTHERN PAC. CO.

(Supreme Court of Oregon. May 14, 1918.)

1. EVIDENCE \S 518—CARRIAGE OF FREIGHT—EXCESS CHARGES—CONSTRUCTION OF TARIFF PROVISIONS—STATUTE.

Under L. O. L. \S 136, specifying what questions are to be decided by the court, in an action to recover excess freight charges paid a railroad, it is the exclusive province of the court to construe tariff provisions involved, and it is error to permit rate experts to construe them.

2. CARRIERS \S 26—CARRIAGE OF FREIGHT—EXCESS CHARGE—RECOVERY.

Neither the shipper of freight nor the carrier is bound by the rate actually paid; the shipments being controlled by whichever published rate is applicable, so that, if a shipper paid more than the lawful rate, he is entitled to recover the excess.

3. CARRIERS \S 30—CARRIAGE OF FREIGHT—CONSTRUCTION OF TARIFF PROVISIONS—STATUTE.

Under L. O. L. \S 715, as to the construction of a statute or instrument, if possible, tariff provisions of a freight carrier by rail should be construed so as to give effect to all the language employed in them.

4. CARRIERS \S 30—CARRIAGE OF FREIGHT—RATES—CONSTRUCTION OF TARIFF PROVISIONS.

Where tariff provisions of a railroad specified a rate of \$1 per 100 pounds for fish, salted and pickled, including caviar, under "refrigeration," minimum carload rate 30,000 pounds per car, and a rate of 85 cents per 100 pounds for fish, salted and pickled, including caviar, minimum carload weight 40,000 pounds, for carrying pickled fish "under refrigeration," which could only be done in refrigerator cars, the railroad was entitled to charge the shipper \$1 per 100 pounds for transportation; an extra fee for refrigeration being charged.

Department 1. Appeal from Circuit Court, Multnomah County; Wm. N. Gatens, Judge.

Action by George Black against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Reversed.

This action was brought to recover alleged excess freight charges paid to the Southern Pacific Company for transporting 55 carloads of pickled fish, over its lines and connections, from California to New York. The shipments were made on and between May 7, 1910, and June 25, 1912. The two following tariff provisions, having been published, posted, and filed with the Interstate Commerce Commission, were in effect from March 22, 1910, to August 19, 1912:

"Fish, salted and pickled (including caviar), under refrigeration, subject to storing in transit privileges, as published in tariffs of individual lines, lawfully on file with the Interstate Commerce Commission, rate \$1.00 per 100 lbs., Min. C. L. Wt. 30,000 lbs. per car."

"Fish, salted and pickled (including caviar), Min. C. L. Wt. 40,000 lbs., subject to storing in transit privileges, as published in tariffs of individual lines, lawfully on file with the

Interstate Commerce Commission, rate 85 cents per hundred pounds."

During all the times mentioned in this opinion the following provision, relating to refrigeration and approved by the Interstate Commerce Commission, was in force:

"Rates named in this tariff do not include charges for icing and care of refrigeration of freight in transit when it is so forwarded. Refrigeration being a special service separate and distinct from transportation, the charge made for refrigeration is in addition to the transportation rates named herein."

The carrier charged and the shipper paid the \$1 rate on all the shipments. The weights of the respective shipments varied from 34,976 pounds to 55,400 pounds. The shipper ordered all the fish to be moved in Pacific Fruit Express Company cars "under refrigeration," and every shipment was "actually moved in Pacific Fruit Express Company cars, and that the shipments were under refrigeration, for which service each car was charged \$70, and which sum shippers paid in addition to freight charges."

The complaint is framed upon the theory that all the shipments were covered by the 85-cent rate, and that therefore the plaintiff was entitled to recover all sums paid in excess of that rate. The parties agreeing, the cause was heard and decided by the court without the aid of a jury. The findings of fact and conclusions of law were for the plaintiff, and the defendant appealed from the consequent judgment.

Alfred A. Hampson, of Portland (Ben C. Dey, of Portland, on the brief), for appellant. Alex. Bernstein, of Portland (Bernstein & Cohen, of Portland, on the brief), for respondent.

HARRIS, J. (after stating the facts as above). The main question for decision is whether the shipments were covered by the 85-cent rate or by the \$1 rate. The contention of the plaintiff is clearly stated in his brief in the following language:

"The plaintiff herein maintains that at the time of these shipments when he presented for shipment a minimum of 40,000 pounds, he was entitled to an 85-cent rate, and if he demanded refrigeration, he was entitled to have same forwarded under refrigeration by the payment of the additional sum of \$70 per car. * * * A fair interpretation of the tariff therefore as extant when the shipments were made was that when the shipper presented 40,000 pounds minimum weight of the article mentioned in the tariff, he could forward it for 85 cents, and if he desired refrigeration, he could order it under refrigeration, paying therefor the additional sum as published for such additional service. In this instance it was \$70 per car, and that amount was paid for each car that the shipper used."

The defendant argues that the circumstance of whether or not the shipment is

"under refrigeration" determines the rate to be charged.

It will be helpful if we first notice the conditions as they are found in practice. Among the cars used by carriers are the ordinary box cars and refrigerator cars. There are a number of points of difference between an ordinary box car and a refrigerator car of the same exterior measurements. A refrigerator car has thick walls, and is equipped with ice bunkers; it costs more, weighs more, and at the same time has less cubical carrying capacity than an ordinary box car. The words "under refrigeration" have a definite and well-understood meaning. A shipment "under refrigeration" means goods moved in a refrigerator car supplied with ice; and when goods are ordered to be transported "under refrigeration" it means, in the language of one of the witnesses, "that the shippers desire the goods to move in refrigerator cars with ice in the tank." B. H. Trumbull, a witness for the plaintiff, testified that it is impossible "to move pickled fish under refrigeration in an ordinary box car," and "for this fish to move under refrigeration it is absolutely necessary that it move in a refrigerator car." A refrigerator car moving "under refrigeration" is iced when the car is loaded, "and then kept re-iced in transit about every 200 miles apart," and since it "cannot be allowed to lay around," it is "given preference in handling," and its movement is expedited.

It must be remembered that the specified freight rates do not include charges for icing and care of refrigeration in transit. The charge of \$70 made and paid upon each car for refrigeration was in addition to whatever transportation rate was properly chargeable. It must also be remembered that all the shipments in question were ordered by the shipper to be moved "under refrigeration," and therefore to comply with this order the carrier was necessarily obliged to move the goods in refrigerator cars.

[1, 2] It is the exclusive province of the court to construe the tariff provisions involved in this controversy, and it was therefore error to permit rate experts to construe them. Section 136, L. O. L.; *Oregon R. & N. Company v. Coolidge*, 59 Or. 5, 9, 116 Pac. 93. Neither the shipper nor the carrier is bound by the rate actually paid because the shipments are necessarily controlled and governed by whichever published rate is applicable to the shipments, and hence if the shipper paid more than the lawful rate he is entitled to recover the excess. *Texas & Pacific Ry. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011.

[3, 4] Our statute (section 715, L. O. L.) declares that:

"In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is, in terms or in sub-

stance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all."

If possible, the tariff provisions should be so construed as to give effect to all the language employed in them. *Arment v. Yamhill County*, 28 Or. 474, 479, 43 Pac. 653; 2 Elliott on Contracts, § 1515. Both tariff provisions relate to "Fish, salted and pickled (including caviar)"; one provision contains the words "under refrigeration" while the other tariff provision does not contain these words. The provision which contains the words "under refrigeration" fixes 30,000 pounds as the minimum carload weight with a rate of \$1 per hundred pounds, while the other provision prescribes 40,000 pounds as the minimum carload weight with a rate of 85 cents per hundred pounds. Finding as we do a difference between both the minimum weights and the rates, and observing as we must that the words "under refrigeration" appear in the provision which fixes the higher rate for the lower minimum carload weight, and that these words are omitted from the provision which names the lower rate for the greater minimum carload weight, we must conclude that the words "under refrigeration" were designedly inserted in one provision and deliberately omitted from the other. The relative position occupied by the words "under refrigeration" is also important. Both provisions speak of "Fish, salted and pickled (including caviar)"; but only one provision contains the qualification "under refrigeration," and that qualification appears immediately after the words "Fish, salted and pickled (including caviar)"; and hence the plain meaning of this tariff provision is that "Fish, salted and pickled (including caviar)" when "under refrigeration," must be charged with the \$1 rate. If the rate is to be determined by the minimum weight rather than by the circumstance as to whether the freight is under refrigeration, the words "under refrigeration" are practically meaningless; and in this connection it is interesting to note that when B. H. Trumbull, a rate expert called by the plaintiff, was asked "how do you explain the fact that the words 'under refrigeration' appear under the dollar provision, and not under the 85-cent provision?" he answered thus, "I don't know that I would explain that at all."

Both before and after the shipments in question a change was made in the wording of the tariff provisions relating to salted and pickled fish, and the plaintiff claims that these changes lend support to his contention. These two tariff provisions were originally proclaimed on December 6, 1909, when they appeared in the following form:

"Fish, salted and pickled (including caviar) in refrigerator cars, subject to storing in trans-

it privileges as published in tariffs of individual lines lawfully on file with Interstate Commerce Commission, minimum weight 30,000 lbs.\$1.00.

"Fish, salted and pickled (including caviar) in ordinary box cars, minimum carload weight 40,000 lbs., subject to storing in transit privileges as published in tariffs of individual lines lawfully on file with Interstate Commerce Commission.....85 cents."

The first change occurred on March 22, 1910, when the provisions were issued in the forms which have already been quoted, and were effective when the shipments in question were made. The second change occurred on August 19, 1912, when the provisions were made to read thus:

"Fish, salted and pickled (including caviar) in barrels, under refrigeration, subject to storing in transit privileges as published in tariffs of individual lines lawfully on file with Interstate Commerce Commission, minimum weight 30,000 lbs.\$1.00.

"Fish, salted and pickled (including caviar) in barrels, not under refrigeration, minimum carload weight 40,000 lbs. subject to storing in transit privileges as published in tariffs of individual lines lawfully on file with Interstate Commerce Commission.....85 cents."

Aside from the words "in barrels" found in both provisions as published on August 19, 1912, the wording has remained practically unchanged in each provision, except in one particular. The provision prescribing the \$1 rate was changed on March 22, 1910, by substituting the words "under refrigeration" for the words "in refrigerator cars"; and no other alteration was made afterwards, except to insert the words "in barrels." The first change in the 85-cent provision was made on March 22, 1910, by omitting the words "in ordinary box cars"; and the second alteration was made on August 19, 1912, by inserting the words "in barrels, not under refrigeration."

An examination of the three several forms in which each of the two provisions has appeared will disclose that at all times pickled fish shipped "under refrigeration" moved at the \$1 rate. Since salted and pickled fish cannot be moved "under refrigeration," unless shipped in refrigerator cars, it necessarily follows that when a shipper ordered fish moved "under refrigeration" it was shipped in refrigerator cars, and therefore at the \$1 rate, even under the form of the \$1 provision as first published. While it is not necessary to inquire into the reason for the changes in the wording, it has been suggested that the first alteration was made in order to permit the carrier, if it wished, to move fish "not under refrigeration" in any available equipment. Notwithstanding the very ingenious argument which learned counsel for plaintiff predicate upon the changes in the wording of the tariff provisions, we construe the provisions to mean that the specified commodity when shipped "under refrigeration" at all times moved

at the \$1 rate. This is the construction given by the Interstate Commerce Commission. Although writing about a controversy which probably arose under the tariff provisions as published on August 19, 1912, the commission said in *Hume Company v. Southern Pacific Company*, 33 Interst. Com. Com'n, 126, that the rate "is \$1 per hundred pounds when under refrigeration and 85 cents per hundred pounds when not under refrigeration. Both rates have been in effect for a number of years."

The judgment appealed from is reversed, and the defendant is entitled to a judgment for its costs and disbursements.

MCBRIDE, C. J., and BURNETT and BENSON, JJ., concur.

(14 Okl. Cr. 692)

CARIGNANO v. STATE. (No. A-2909.)

(Criminal Court of Appeals of Oklahoma. May 18, 1918.)

Appeal from County Court, Latimer County; C. R. Hunt, Judge.

C. Carignano was convicted of the offense of unlawful possession of intoxicating liquors, and he appeals. Judgment affirmed.

Jones & Lester, of Wilburton, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. C. Carignano was convicted in the county court of Latimer county of the offense of unlawfully having possession of certain intoxicating liquors with the intent to dispose of same by sale, barter, et cetera, in violation of the laws of this state.

The proof on behalf of the state shows that a search was made of his premises in the town of Wilburton on the 26th day of June, 1916, and two cases containing 24 quarts of whisky, and a barrel containing 72 quarts of beer were found stored in a warehouse on his premises connected with his storeroom. It was also proven that the defendant had paid the special tax required of retail liquor dealers by the United States government on March 27, 1916, covering a period from July 1, 1915, to June 30, 1916. On cross-examination the defendant admitted that he had been convicted of violating the prohibitory liquor laws of this state on four previous occasions. The jury assessed his punishment at a fine of \$75 and confinement in the county jail for a period of 30 days.

The defense interposed by defendant was not believed by the jury, and, as the state's evidence is sufficient to sustain the conviction,

any controverted question of fact, therefore, was settled by the jury's verdict.

We have carefully examined the record, and the assignments of error presented in the brief of counsel for plaintiff in error. No new questions are raised, and nothing that would in any way tend to prejudice the substantial rights of plaintiff in error is presented for our consideration.

It is the opinion of the court that the judgment of conviction should be affirmed; and it is so ordered.

(64 Colo. 47)

SHAFFER v. GEORGE. (No. 8728.)

(Supreme Court of Colorado. Oct. 8, 1917.

Rehearing Denied April 1, 1918.)

1. GUARANTY §36(8)—ASSUMPTION OF DEBTS BY BUYER—"CURRENT LIABILITIES."

Where one purchased all the stock of a company, agreeing to assume "all current liabilities," such words include the current liabilities of the company for monthly payments of rent under a lease existing at time of guaranty (citing Words and Phrases, Current).

2. LANDLORD AND TENANT §160(2), 208(2)—EXPRESS COVENANT RUNNING WITH LAND.

Covenants to pay rent and to yield up the premises in a required condition run with the land, and assignee, upon acceptance of a lease, becomes liable under these covenants.

3. LANDLORD AND TENANT §160(2)—COVENANT TO YIELD PREMISES AT END OF TERM—CANCELLATION OR ABANDONMENT OF LEASE.

Under a covenant to yield up premises in good repair at expiration of term of lease, the lessee becomes liable immediately upon termination by cancellation or abandonment.

4. LANDLORD AND TENANT §110(2)—TERMINATION OF LEASE—ABANDONMENT AND ACCEPTANCE.

The abandonment of the premises by lessee's assignee without acceptance of surrender by lessor does not terminate the lease nor destroy such assignee's estate.

5. APPEAL AND ERROR §171(1)—THEORY OF CASE BELOW.

The rule of law that an assignee of a lease is liable only for covenants broken while in possession of the premises cannot be applied where no attempt to separate the amounts of alleged damage to the premises as between the different assignees of lease was made and no objection offered to evidence covering damages for whole period.

6. APPEAL AND ERROR §171(1)—REVIEW—CHANGE OF THEORY.

Where a trial upon a covenant to yield up premises leased in required condition was had upon the theory that defendant, assignee, was liable from inception to termination of lease, it cannot be contended upon error that assignee was liable only during time of his possession.

Bailey, J., dissenting. Garrigues, J., dissenting in part.

En Banc. Error to District Court, Denver County; Charles C. Butler, Judge.

Action by Herbert George against John C. Shaffer. Judgment for plaintiff, and defendant brings error. Affirmed.

M. H. Kennedy and L. M. Goddard, both of Denver, for plaintiff in error. Bartels, Blood & Bancroft, of Denver, for defendant in error.

SCOTT, J. On the 10th day of June, 1910, the defendant in error, Herbert George, entered into a written contract of lease with Jared Newell Husted, whereby the said George leased to the said Husted a building and premises at 1735 to 1737 Champa street in the city of Denver, for the term of one year, with the privilege to Newell, at his option, to extend the period for which said lease was to run an additional five years. The lease provided that Newell should have the right to assign it to a corporation to be organized for the purpose of publishing a daily newspaper. Thereafter Newell assigned the lease and delivered possession of the premises to the Denver Times Publishing Company. This company secured an extension of the lease under its terms, for a term of five years from the 10th day of June, 1911. The lease provided for monthly payments as rent of \$500, and further that in case the lessee should occupy the second floor of the building, which might be done upon the lessee securing a vacation thereof by the occupying tenants, the monthly rental in such case should be \$650. On or about the 15th day of January, 1912, the Times Company sold its newspaper property and assigned the lease to the Speer Publishing Company. This company acquired the second floor and thereafter occupied the entire building, and for which it paid the monthly rental of \$650, as provided in the lease, and continued to so occupy the building until the date of the removal of the newspaper plant and the abandonment of the premises. On the 21st day of October, 1913, the plaintiff in error, John C. Shaffer, purchased all the stock and bonds of the Speer Publishing Company. As a part of the consideration for the sale to and purchase by Shaffer of the stock and bonds of the Speer Company, Shaffer agreed to and did assume "all current liabilities" of the Speer Company. On or about the 25th day of October, 1913, the newspaper property was removed from the premises, and the Speer Company and Shaffer declined to pay further rent under the lease. George declined to accept the keys to the building or to release the lessees, and did not do so until the 28th day of September, 1914. This suit is to recover the rent under the terms of the lease, from the date of removal from the building until September 26, 1914, and for damage to the building under the covenant in the lease to leave in good repair. The lease under the extension was to expire by limitation of time on the 10th day of June, 1916. Verdict and judgment was rendered in favor of the plaintiff in the sum of \$10,900.

The covenant in the lease under which the plaintiff claims damages to the building is as follows:

"And the said party of the second part covenants with the said party of the first part that the said second party has received said demised premises in good order and condition, and at the expiration of the time of this lease will yield up the said premises to the said party of the first part, in as good order and condition as when the same were entered upon by the said party of the second part, loss by fire, or inevitable accident, or ordinary wear excepted, and also will keep said premises, including all gas pipes, water pipes, electric wires and sewer connections in good repair during this lease at his own expense."

The errors assigned are substantially embraced in objections to a part of the instruction of the court, which reads as follows:

"You will find a verdict for the plaintiff and against the defendant John C. Shaffer in the sum of \$7,150 for rent due, and also in such further sum not exceeding \$8,000 as you find from the preponderance of the evidence that it would cost on September 26, 1914, to then place the leased premises in as good order and condition as they were in when the lease was executed, to wit, on June 10, 1910, ordinary wear excepted. In this connection the court instructs you that if you find from the preponderance of the evidence that the plaintiff at or before the time he executed the lease, or at or before the time he assented to the assignment of the lease by the Denver Times Printing & Publishing Company to the Speer Publishing Company, knew that the premises were to be used for conducting a newspaper or printing and publishing business, then the words 'ordinary wear' as used in the lease mean such ordinary wear as buildings are ordinarily subjected to in the conduct of the newspaper or printing and publishing business; but this does not include the removal or condition to the building of walls or partitions, nor does it include other substantial changes or alterations in the structure itself."

[1, 2] The objections to the direction of the court to find for the plaintiff for the rent are: (a) That the guaranty of the defendant to pay "current liabilities" does not create a liability to pay rent under the terms of the lease; and (b) that the question as to when the lease was terminated should have been submitted to the jury.

The Speer Company was the assignee of the lease and admittedly liable upon all covenants therein. Shaffer assumed "all current liabilities" of the Speer Company. The word "current" is defined by the authorities as "running, moving, flowing, passing. Passing from one to another, especially, widely circulated, publicly known, general, prevalent, as, the current ideas of the day; now passing; present in its course; as, the current month of the year." 2 Words and Phrases, 1790; 8 Am. and Eng. Enc. Law, 498.

It is quite clear that the monthly payment of its rent under the terms of the lease was a liability present in its course of business, and was therefore a current liability of the Speer Publishing Company. The contract of lease was in existence at the time of the guaranty, and was not a liability to arise in the future, but then existed. *Hart v. Wynne* (Tex. Civ. App.) 40 S. W. 848.

It is the accepted rule of law that covenants to pay rent and to yield up the premises in a required condition are covenants which run with the land, and that an assignee of a lease who accepts it is liable on these covenants. Indeed, plaintiff in error cites the well-considered statement of the rule from *Jones on Landlord and Tenant*, § 455, as follows:

"An assignee of a lease is bound by privity of estate to perform the express covenants which run with the land; but, in the absence of express agreement on his part, he is liable only on such covenants as run with the land and only during such time as he holds the term. When the assignee accepts the assignment of a lease, he is charged with knowledge of the covenants therein and takes it cum onere, subject to the payment of the rent which shall thereafter become due, and to the performance of the covenants running with the land which, by the terms of the lease, the lessee was bound to perform. Because of privity of estate he is liable upon covenants maturing and broken while the title is held by him. The law has been stated to be that 'the assignee is answerable for the rent during his ownership of the term under the assignment, and his liability therefor arises out of the privity of estate, and this, without reference to any obligation assumed by him in the contract of assignment.' The original lessee is bound by the contract to make the payments. The assignee is bound by his acceptance of the lease to make good the covenant to pay rent therein contained. His liability is upon the covenants and arises, not from any express assumption or agreement to pay it, which might be contained in the written assignment, but from the privity of estate by reason of his ownership and right to enjoy the benefits of the lease.

"The assignee is in privity of estate, but not in privity of contract with the lessor, and is only liable on covenants which run with the land, such as covenants for rent, to pay taxes, and to yield up premises in good repair."

To the same effect, see 1 *Underhill on Landlord and Tenant*, § 386, where the reason for the rule is stated to be:

"Any liability the assignee of the lessee may have is only incumbent upon him because of the equitable principle that he who enjoys the benefits of an existing condition of affairs cannot shift its duties. After the assignment the assignee has the sole right of possession under the lease, and, having this right, he must accept the accompanying duty or duties. The right of possession and the enjoyment of possession impose upon him the obligation to return their equivalent. Hence, he must do for the landlord everything that his assignor had agreed to do as an equivalent of the enjoyment of the premises. This class of covenants which are by a fiction said to run with the land comprise all those which involve the doing of something to or about the land itself. They are very numerous and include almost every conceivable covenant which can be inserted in a lease. It is not necessary where by its nature a covenant runs with the land that it shall contain the word 'assignee' or 'assigns.'"

To sustain the contention of plaintiff in error that the assumption of all current liabilities does not include liability on the lease he cites *State v. County of Marion*, 21 Kan. 419, and *Matter of Assignment of Havenor*, 70 Hun, 56, 23 N. Y. Supp. 1092. These authorities do not, in our opinion, sustain the contention, nor vary the rule as above stated. In the former case it was simply held that

the board of county commissioners have no power to appropriate funds raised by taxation to defray current expenses, for the erection of permanent county buildings, and particularly in view of statutes providing specifically for the creation of funds for the construction of permanent county buildings. The latter case involved an assignment for the benefit of creditors and is not in point.

[3] It is further contended by plaintiff in error that he is not liable on the covenant to yield up the premises in good repair at the expiration of the lease, for the reason that the lease had not expired by the efflux of time, but by expiration on cancellation. This contention cannot be sustained either upon principle or authority.

The rule of law in this regard is stated in 2 Underhill on Landlord and Tenant, § 534, to be:

"The question what is meant by the words 'expiration of the term' may arise where the lease is surrendered before the term has expired by the lapse of time. Unquestionably the parties to such a covenant 'by expiration of the term' mean in most cases that no cause of action shall accrue until the end of the full term caused by the natural efflux of time. But a lease may expire in many other ways than by lapse of time, as, for example, by the taking of the premises for public uses, by certain wrongful acts of the tenant, by surrender, or by eviction. And where the term thus expires, it is as much at an end as if it had expired by the lapse of time. Neither party can thereafter obtain any rights under it, though either may enforce against the other any rights of obligation which may have accrued theretofore. Hence, where a lease is surrendered during the term by the agreement of the parties, a cause of action on a covenant to surrender in good condition at the expiration of the term at once accrues to the lessor, and, if the premises are not returned in good condition at the time of the surrender, the lessor may sue at once for damages."

Counsel cite Reed v. Showhill, 51 N. J. Law, 162, 16 Atl. 679, 33 L. R. A. 683, to the contrary. If this case can be said to sustain the contention, it is without precedent, and, so far as we are aware, has never been followed. On the contrary, it has been expressly repudiated. Marshall v. Rugg, 6 Wyo. 270, 44 Pac. 700, 45 Pac. 486, 33 L. R. A. 679, and authorities cited.

[4] The plaintiff in error further contends that the Speer Company had transferred all its interest in the lease to the Denver Publishing Company on October 31, 1913, and had therefore gone out of possession at that time.

There is no such testimony in the record. It is true that the complaint alleged upon information and belief that on January 30, 1914, the Speer Company had assigned its interest in the lease to the Denver Publishing Company, an original party to this suit; but this allegation was denied, and there was no proof of such an assignment at any time, and because of this failure of proof the trial court dismissed the Denver Publishing Company as a party defendant. Therefore, so far as it appears from the proof, the Speer

Company continued, as the assignee of the lease, in legal possession until the lease was terminated. The mere abandonment of the premises did not operate to destroy the estate of the Speer Company. There was no evidence tending to show that the owner accepted the surrender of the lease at that time, nor until September 26, 1914.

It was said by this court in Symes Investment Co. v. Wheelock, 55 Colo. 459, 136 Pac. 65, that:

"It is fundamental that a tenant cannot, by voluntarily surrendering possession of the premises, evict himself. Lettick v. Honnold, 63 Ill. 335. The renting of other quarters by defendant, notice of vacation on a certain date, and vacation of the premises accordingly, constituted an abandonment, and entry thereafter by the landlord was not an eviction. Humiston et al. v. Wheeler, 175 Ill. 516, 51 N. E. 893. It is essential to even constructive eviction that the conduct of the landlord be more than a mere trespass and such as to effectually deprive the tenant of the use and benefit of all or some part of the premises. 2 Underhill on Landlord and Tenant, §§ 670, 671."

To the same effect is Fehringer v. Wagner Co., decided by this court, 61 Colo. 359, 157 Pac. 1071.

[5] It is further urged that under the well-settled rule of law an assignee of a lease is liable only for the covenants broken while he is in possession; that Husted and the Times Company committed the acts complained of as to the condition of the property, and therefore the Speer Company was not liable. The principle of law must be conceded, but the record does not justify the statement of fact.

It is not disputed that the Speer Company alone took over, arranged, and occupied the second floor, which was at no time used or occupied by the Times Company. The testimony does not separate the amounts of alleged damage as between the Times Company and the Speer Company. No effort was made by the defendant to do so, nor was objection made to the introduction of evidence covering damage for the entire period of the lease.

[6] The case was tried upon the theory of liability or no liability for the entire period. The testimony of plaintiff's witnesses fixed the damages at \$8,800. The testimony of defendant's witnesses fixed the damage at \$1,306. The jury found the damages to be in the sum of \$3,750. Whether or not this finding included damage occurring during the period of the occupancy by the Times Company is not made clear.

Upon the trial, the theories of the partners were stated by counsel to be:

"So we are suing for this \$7,150 rent and for \$8,000 that we contend it will cost the plaintiff to restore this building to its original order and condition."

And by defendant's counsel:

"Instead of being a building which is absolutely unrentable, we will show you instead of its taking \$6,000 or \$7,000 to put this building back, we will show you by competent contractors of this town that it would not take more than \$1,100 to put the building absolutely in as good rental shape as it was when it was rented.

The evidence will show that whatever damage was done to the building during the occupancy was the result of what can be considered ordinary wear and tear in the business of the publication of a newspaper. And so the defendant disclaims any liability under this lease, any liability to pay rent, or any liability to respond for damages to the building by virtue of any negligence or anything else."

The testimony of both parties was directed to the condition of the building in June, 1910, when the lease was executed, and its condition on September 26, 1914, when the lease was terminated. It will thus appear that the theory for which plaintiff in error now contends is a new and entirely different one from that presented on the trial. Then, the theory was as to liability of defendant under the covenants of the lease from its inception to its termination. Now, upon error, it is contended that recovery may be had during a period only between the assignment of the lease to the Speer Company and the abandonment of the property. There is no better settled rule of this court than that one who goes through a trial upon the theory that a certain matter is in issue will not be heard to say in the event of review that there was no such issue. It was the clear duty of the defendant to properly assert and prove his contention upon the trial, and his failure or neglect to do so was at his peril.

The language of the court in *Savage v. Central Elec. Co.*, 59 Colo. 66, 148 Pac. 254, applies with equal propriety and force to the circumstances of this case. It was there said:

"It is now contended by plaintiff that the answer contains no sufficient plea of breach of contract. No attempt was made below, either by motion or otherwise, to make the answer more specific, definite, and certain. Its averments were put in issue, and plaintiff made no objection to the introduction of evidence by the defendant tending to prove the claimed breach, but, on the contrary, offered evidence at length in denial thereof. The sufficiency of the answer to present the question of a breach of the contract is urged for the first time in this court. The pleading was treated by the parties as presenting that issue, and trial had on that theory, and therefore any insufficiency of the pleading in this respect must be regarded, upon review, as waived. In other words, a party who tries a cause on the theory that a given matter is in issue, when defeated on that proposition, will not thereafter be heard to say there was no such issue. *D. T. & Ft. W. R. R. Co. v. Smock*, 23 Colo. 456, 48 Pac. 681."

The defendant cannot now complain, if admitting his failure to present the issue upon the trial. If this court is to assume issues not presented to the trial court, the result will be prolonged, if not interminable, litigation. Besides, in fairness and justice to the trial court, only such issues as are there presented should be reviewed here.

The judgment is affirmed.

BAILEY, J., dissenting. GARRIGUES, J., concurring in part and dissenting in part. WHITE, C. J., not participating.

GARRIGUES, J. As to the part of the opinion holding Shaffer liable for the rent, I concur. As to the part relating to damages to the building, I dissent.

The evidence shows the building was rented for a printing office and that the interior had to be changed and rearranged to make it suitable for that purpose. Mr. George knew of this, and was shown the changes that would have to be made in execution of the lease and consented thereto. It was not the agreement nor the intention of the parties that the tenant should replace these changes at the termination of the lease and put the building back as it was before the lease was executed. If it had been, the lease would have specifically so provided. The clause that the premises should be surrendered at the termination of the lease in as good condition as when taken, except as to ordinary wear and tear, relates to its use with these physical changes made by the tenant. I fear that branch of the case relating to damages to the building was tried to the court and submitted to the jury on the erroneous theory that it was the duty of the tenant at the termination of the lease to restore the interior of the building, or put it back in the condition it was in when the lease was executed. This being the case, I concur in the opinion that the judgment for the rent should be affirmed; but I think that branch of the case relating to the damages to the building should be reversed, and the cause remanded for a new trial.

(64 Colo. 189)

BURNHAM LOAN & INVESTMENT CO. v. SETHMAN et al. (No. 8781.)

(Supreme Court of Colorado. Feb. 4, 1918.
Rehearing Denied April 1, 1918.)

1. BILLS AND NOTES \S 337—BONA FIDE PURCHASERS—"HOLDER IN DUE COURSE."

Where a negotiable note, given for stock in a corporation under certain oral promises not made good, and indorsed in blank, delivered to an agent, by whom delivered to plaintiff before maturity as collateral for a loan without plaintiff's knowledge of any defense or defective title, as provided in Commercial Code 1897 (Laws 1897, p. 222) \S 55, 56, plaintiff was a holder in due course under section 52, par. 4.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Holder in Due Course.]

2. BILLS AND NOTES \S 340 — BONA FIDE PURCHASERS—CONSTRUCTIVE NOTICE—GOOD FAITH.

That the holder of a note indorsed in blank by payee corporation by its president received it to secure a private loan to one he knew was payee's treasurer, to whom the president stated the note had been transferred for value, is insufficient in law to warrant an inference of bad faith of holder.

3. BILLS AND NOTES \S 340—BONA FIDE PURCHASERS—CONSTRUCTIVE NOTICE—DUTY TO INQUIRE.

One taking a negotiable note, indorsed in blank by payee corporation as collateral to se-

cure a private loan to its treasurer, who inquired for president's authority to indorse and treasurer's private ownership, was not negligent to the point of bad faith constituting notice, under Commercial Code, 1897, § 56, not being bound to inquire of maker.

4. BILLS AND NOTES — 363—RIGHTS OF BONA FIDE PURCHASERS AGAINST MAKER.

Where one made a negotiable note for stock in a company, which the company indorsed in blank and delivered to an agent, who transferred it to a holder in good faith and without notice of defenses, the maker, rather than the holder, should suffer loss.

Hill, C. J., dissenting.

En Banc. Error to District Court, City and County of Denver; James H. Teller, Judge.

Action by the Burnham Loan & Investment Company against George H. Sethman and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions to enter judgment for plaintiff.

Plaintiff below, the Burnham Loan & Investment Company, plaintiff in error, brought this suit as pledgee, against George H. Sethman on his promissory note for \$10,002, given to the German-American Indemnity Company in payment for stock, and negotiated and delivered to plaintiff by one S. N. Mitchell as collateral security to his note for \$3,000. The trial court found that plaintiff was not a holder in due course, basing its finding upon a lack of diligent inquiry amounting to bad faith in accepting the note, and rendered judgment in favor of defendant.

Plaintiff's business was loaning money. One R. A. Ramey, who was its secretary, treasurer, and general manager and had entire charge of the business, made the loan to Mitchell which resulted in this litigation. The business of the German-American Indemnity Company, hereinafter called the Indemnity Company, was writing insurance. One E. C. Harrell was its president and general manager, and the by-laws gave him the entire charge and control of all its business. Mitchell was treasurer, but in name only, his duty as such being to pay out money on the order of the president and secretary. He had nothing to do with the books, and had no possession or control of the company's notes and bills receivable. He was under contract as the general stock salesman on commission. The by-laws provide that the notes and bills receivable of the company should be kept by the secretary, which office was held by one Dr. Brown. Defendant Sethman was a civil engineer for companies employing workmen, and one Harry Ramey, son of R. A. Ramey, was an insurance solicitor for the Indemnity Company, but was in no way connected with or identified with plaintiff.

March 5, 1912, Sethman went to the Indemnity Company's office in Denver and bought from Harrell, the president, 3,334 shares of the capital stock of the company at \$3 per

share, of the par value of \$1 per share, amounting to \$10,002, for which he made, executed, and delivered to the company his promissory note in ordinary form, payable in 60 days. Harry Ramey and one Reid were instrumental in securing Sethman as such purchaser. Harrell as president and general manager promised Sethman, if he would buy the stock and give the company his note for the purchase price, that it would retain possession of the note; that the company would issue him the stock and elect him treasurer at a salary of \$2,500 a year; that the duties of the office would not interfere with his usual occupation; that he would not be required to meet the note at maturity, but the company would renew it from time to time until his salary paid the amount due thereon; that the company desired the names of the various corporations with which he was associated as engineer, and wanted his influence with their workmen to induce them to take out policies of insurance. The stock was never issued to him, and he was not elected treasurer. His note was indorsed by the payee in blank and delivered by Harrell to Mitchell, who on the 18th applied to plaintiff for a loan of \$3,000, and offered the Sethman note so indorsed and in his possession, together with 3,000 shares of the capital stock of the Indemnity Company, standing in the name of Harrell, also indorsed in blank, as collateral security for the loan. Mitchell told Ramey that the note was assigned to him (Mitchell) on account of commissions the company owed him on stock sales. Ramey went to the company's office and inquired of Harrell regarding his authority as president to make the indorsement, and was shown the following by-law, passed when Harrell was elected president, under which the company had been working some two years:

"Duties of President. It shall be the duty of the president to preside at all meetings of the board of directors, to sign all deeds, bonds, certificates of stock, checks, and documents of any description of the company, and to have general supervision of all meetings, either stockholders' or directors' meetings. It shall be his duty to call all meetings, either regular or special, and the call shall be made in accordance with the by-laws. It shall be his duty to secure the services and fix the remuneration of agents, employees and assistant officers for the general promotion and welfare of the company, and shall have entire charge of the affairs of the company. A suitable compensation, to be determined by the directors, shall be allowed the president for his services. Motion duly seconded by Mr. Probst and unanimously adopted and the by-laws so amended."

Harrell also told Ramey the note was given for stock sold and delivered to Sethman. After making further inquiry, plaintiff made the loan and paid out the money on Mitchell's order, taking his note therefor payable in 90 days, and Mitchell delivered to plaintiff the Sethman note as collateral. While plaintiff made a personal loan to Mitchell,

in fact, the money was borrowed to pay agents' advance commission on the sale of the stock to Sethman for which the note was given, and was used for that purpose. The company agreed to pay its agents 30 per cent. commission on the sale of stock, and required them to give 10 per cent. of this to Mitchell as general agent, and he under some agreement was to divide this with Harrell. The commission on the Sethman sale was \$3,000, the amount of the Mitchell loan. Reid and young Ramey were the agents instrumental in producing the purchaser, and on this account each received one-third of the proceeds of the Mitchell loan; the remainder, under their agreement, should have been divided between Harrell and Mitchell, but Harrell overlooked this detail, and Mitchell, as a fact, received nothing out of the loan, though it was made in his individual name. So while ostensibly and in fact, so far as plaintiff knew at the time, it made a personal loan to Mitchell, the company received and used the money to pay these agents.

There is no evidence plaintiff had knowledge of any defense the maker had to the note, and no evidence that it had actual knowledge of any defect in Mitchell's title. After Mitchell failed to pay his note, plaintiff had several interviews with Sethman about the payment of his note, and finally Sethman declared that it had been obtained by fraud, that there was a want of consideration, and that he would pay nothing upon it. Thereupon this action was instituted.

The Pleadings.

The complaint alleges that March 5, 1912, Sethman made and delivered his promissory note for \$10,002 to the Indemnity Company, payable 60 days after date; that the Indemnity Company indorsed in blank, negotiated, and delivered it to Mitchell, and on March 18, 1912, for value, he negotiated and delivered it to plaintiff who is the holder in due course. The answer pleads failure and want of consideration of which it is alleged plaintiff had notice, and also alleges a defect in the title of the person negotiating it to plaintiff of which it is alleged it had notice; that plaintiff did not take the note in good faith and is not a holder in due course; that plaintiff in making the loan advanced the money to the Indemnity Company to be used in paying obligations to its agents. The replication denies knowledge of any defense the maker had to the note; denies knowledge of any defect in the title of the person negotiating it; denies that plaintiff advanced the money to the Indemnity Company, and alleges as the transaction: That March 18, 1912, plaintiff loaned Mitchell \$3,000; that he made and delivered to it his promissory note therefor payable in 90 days, and as security deposited with plaintiff the Sethman note, and prays that its recovery be limited to the

amount due on the Mitchell note. July 20, 1914, after judgment entered and after the term of court had expired, without notice to plaintiff and without leave of court first had and obtained, defendant filed an answer, in which it is alleged that Mitchell had no authority to pledge the note; that he pledged it to plaintiff as collateral security for a loan plaintiff made to him personally, at a time when plaintiff knew he was treasurer of the company, and knew or should have known that he had no authority to pledge company property as security for his personal loan, and that his title was therefore defective.

The Statute.

Our Commercial Code, passed in 1897, provides:

"Sec. 34. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery."

"Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions * * * 3. That he took it in good faith and for value. 4. That at the time it was negotiated to him he had no notice of any * * * defect in the title of the person negotiating it."

"Sec. 55. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

"Sec. 56. To constitute notice of * * * defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of * * * the defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

"Sec. 57. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

"Sec. 58. In the hands of any holder, other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable. * * *

"Sec. 59. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

W. E. Richards, of Denver, for plaintiff in error. Milton Smith, Charles R. Brock, William H. Ferguson, and John P. Akolt, all of Denver, for defendant in error George H. Sethman.

GARRIGUES, J. (after stating the facts as above). 1. It is claimed plaintiff is not a holder in due course because: (a) It took the note with notice of the defense the maker had of want or failure of consideration; (b) it did not take the note in good faith; (c) that plaintiff took the note with notice of

defect in the title of the person negotiating it, Mitchell.

[1, 2] The defenses interposed are controlled entirely by the statute. There is not a particle of evidence that plaintiff had notice of want or failure of consideration; neither is there any evidence that it took the note in bad faith in fact. Bad means evil, something vicious. Bad faith in fact, or *mala fides*, is the opposite of good faith, and consists in guilty knowledge, or willful ignorance, showing a vicious or evil mind, evidence of which is totally lacking in this case. The evidence shows that plaintiff in making this loan and accepting the collateral acted in the utmost good faith. There is no evidence to the contrary. The court made no finding of actual bad faith or actual knowledge of a defective title, or that plaintiff possessed knowledge of any defense the maker had to the note. If it had, its action in doing so would have been arbitrary, unwarranted, and unsupported by any evidence, or the result of a mistake.

Plaintiff must be a holder in due course, and paragraph 4, section 52, is controlling as to when one is such a holder. If it took the instrument with actual or constructive notice of defect in the title of the person negotiating it, it is not a holder in due course. The statute removes any uncertainty or doubt as to what constitutes a defective title, and also what shall be notice thereof. Section 55 defines a defective title. We will assume, for the purpose of this branch of the case, that Mitchell negotiated the note under circumstances amounting to a fraud upon the Indemnity Company which made his title defective. But did plaintiff have notice of such defect? Section 56 provides that, to constitute notice of such defective title, the person to whom the note is negotiated must have actual knowledge of such defect or knowledge of such facts that his action in taking the instrument amounted to bad faith. There is no evidence of actual knowledge, and no such finding was made by the court. If plaintiff had no actual knowledge but had knowledge of "such facts" that its action in taking the note amounted to bad faith, it had constructive notice of Mitchell's defective title, and under the statute would not be a holder in due course, of which defendant could take advantage.

It is claimed by defendant that Mitchell in negotiating the security was appropriating property of the company to his own personal use. If true, this would amount to a fraud on the company, and his title, under section 55, would be defective. Assuming it was defective, it is as necessary that plaintiff should have notice of such defect as it is that the title should be defective. It is claimed plaintiff had knowledge of such facts that its action in taking the instrument amounted to bad faith, which constituted notice of the defective title. What were the facts proven on the trial, of which plaintiff had knowledge,

that made its action in taking the note amount to bad faith? The claim is: Because plaintiff knew that Mitchell was treasurer of the Indemnity Company. Mitchell exercised no function of this office in pledging the note. Bad faith is an inference drawn from the fact that he was treasurer of the company, but the evidence must warrant such an inference. The mere knowledge that Mitchell was treasurer was not knowledge of "such facts" under the undisputed evidence of this case as would justify the deduction that plaintiff's action in taking the note amounted to bad faith, and the court was not warranted, either as a matter of law or fact, in making such deduction. Whether its action in taking the note with such knowledge would warrant the inference of bad faith under section 56 is a question of law. Where, as here, there is no conflict in the evidence regarding knowledge of such facts, whether plaintiff's action in accepting the security amounted to bad faith rests upon a legal inference drawn from the knowledge that Mitchell was treasurer. Such knowledge does not constitute bad faith in fact, and it would be idle to contend that it constituted bad faith as a matter of law, or that it warranted, in this case, the inference of bad faith. The finding of the court was nothing more than a deduction as to the effect of the knowledge of "such facts," and this is a question of law. No doubt an inference of bad faith may be drawn, if warranted, as a deduction by the court or jury, and where there is sufficient evidence to warrant or justify it, the inference, when made, becomes proof as a fact of bad faith, and a court of review would not interfere with the finding; but there must be sufficient legal evidence to warrant such inference. There is no evidence of bad faith in fact, and because plaintiff knew that Mitchell was treasurer of the Indemnity Company was insufficient in law to warrant the inference of bad faith. *Merchants' Bank v. McClelland*, 9 Colo. 608-611, 13 Pac. 723; *Coors v. German Nat. Bank*, 14 Colo. 202-206, 23 Pac. 328, 7 L. R. A. 845; *Tourtelotte v. Brown*, 1 Colo. App. 408-417, 29 Pac. 130; *Solomon v. Brodie*, 10 Colo. App. 353, 359, 360, 50 Pac. 1045; *Wedge Co. v. Denver Bank*, 19 Colo. App. 182-189, 73 Pac. 873; *German-American Co. v. State Bank*, 26 Colo. App. 242, 142 Pac. 189; *Montvale v. People's Bank*, 74 N. J. Law, 464, 67 Atl. 67; *Fillebrown v. Hayward*, 190, Mass. 472-480, 77 N. E. 45; *Rockville Bank v. Citizens' Co.*, 72 Conn. 576, 582, 583, 45 Atl. 304; *Kaiser v. United States Bank*, 99 Ga. 258, 25 S. E. 620; *Doe v. N. W. C. & T. Co. (C. C.)* 78 Fed. 62, 68, 69; *Kaiser v. First Nat. Bank*, 78 Fed. 281-284, 24 C. C. A. 88; *Farmers' Co. v. Madison Co. (C. C.)* 153 Fed. 310-319.

2. That the rule of law contended for by defendant does not prevail in this state is shown by the citations. We have adopted and are following the federal rule in this regard. But even if the rule relied upon by

defendant prevailed here, the facts in this case do not bring it within the rule. In the class of cases supporting the rule contended for, the party accepting the security from the company officer for a personal loan could see upon the face of the transaction that the officer by exercising the function of his office was at the same time using the security belonging to the company for his own personal benefit; that is, that it was in connection with or by his act as an officer that he was appropriating company property to his own use. Using this case as an illustration, it would be the same as though Harrell, in his official capacity as president, indorsed the company's name on the Sethman note and offered it to plaintiff so indorsed as security in connection with his application for a personal loan, in which event plaintiff could see that the president and general manager, with power to indorse the company's name, was exercising a function of his office and at the same time using the security indorsed by him, for his individual purpose. This case is very different. The note had been regularly indorsed by the company by its president, authorized so to do by the by-laws, and delivered to Mitchell. Plaintiff found Mitchell in the possession of such indorsed paper. Mitchell did not exercise any official act in negotiating and delivering the note, and had nothing to do with the indorsement. It had already been indorsed by the company and delivered to him. Upon inquiry as to the president's right to indorse the company's name upon the note, plaintiff was shown the by-law giving the president entire control of the business affairs and management of the corporation, and was informed that the note had been delivered to Mitchell on account of commissions on the sale of stock. Mitchell exercised no function of his office as treasurer in connection with the loan.

[3] 3. The court based plaintiff's knowledge of such facts that its action in taking the note amounted to bad faith constituting notice of Mitchell's defective title, upon plaintiff's lack of diligence in making inquiry as to Mitchell's right to use the note; that is, that plaintiff was guilty of negligence in not making diligent inquiry, which amounted to bad faith under section 53, constituting such notice. Plaintiff was under no obligation to inquire of the maker of the note; if so, no one could ever purchase negotiable paper and be a holder in due course without first making inquiry of the maker. Inquiry, if necessary here, was as to the title of the person negotiating the instrument. The court found plaintiff failed to use due diligence in making such inquiry. This was in effect a finding of knowledge of facts amounting to

bad faith in taking the instrument, constituting notice of such defective title. There is no conflict in the evidence in this regard as to what was or was not done. Plaintiff did make inquiry. It went to the office of the company, where it found the president and general manager, and upon inquiry was shown the by-law passed by the board, which gave the president the entire charge and management of the affairs of the company. This showed ample authority to indorse the company's name upon the note, and there was evidence that Harrell had been exercising such authority. There is no evidence, or absence of evidence, upon which the court could properly base a finding of lack of diligence, unless it be that plaintiff failed to inquire of the board of directors. The court seems to have entertained the idea that it was plaintiff's duty to inquire of the board of directors as to Mitchell's right to use the indorsed note. We know of no such duty, and we think, under the evidence in this case, that plaintiff was charged with no such inquiry. Where the evidence is not conflicting in this particular and there is insufficient evidence to warrant a finding of lack of diligence in making such inquiry, a finding that plaintiff's action in taking the note amounted to bad faith cannot be sustained as a matter of law.

[4] 4. Defendant thought he was getting 3,334 shares of valuable stock for practically nothing. Instead of protecting himself in such adventure, he gave an ordinary 60-day negotiable note, with interest from date, and shortly thereafter the payee indorsed it in blank, negotiated and delivered it to Mitchell, who applied to plaintiff for a loan, and negotiated and delivered it to plaintiff as security. The evidence shows without conflict that plaintiff took the note in good faith for a valuable consideration before maturity, without notice of any defense the maker had, and without notice of any defect in the title of the person negotiating it. Defendant could easily have protected himself by a proper wording of the note. Instead of this, he made it possible for his negotiable paper to pass into the hands of an innocent purchaser, and he, instead of plaintiff, should suffer the loss.

The judgment is reversed, and the cause remanded to the lower court, with directions to enter a judgment in favor of plaintiff in accordance with the views herein expressed.

Reversed and remanded, with directions.

TELLER, J., not participating. HILL, C. J., dissents.

(25 Wyo. 467)

HAHN v. CITIZENS' STATE BANK et al.
(No. 922.)

(Supreme Court of Wyoming. April 1, 1918.)

1. APPEAL AND ERROR ⇨347(1)—TIME—ENTRY OF JUDGMENT.

Under Laws 1917, c. 32, § 2, providing appeal may be taken by serving and filing notice within ten days from the "entry" of the order or judgment appealed from, mere rendition of judgment is not enough.

2. APPEAL AND ERROR ⇨337(2)—PREMATURE APPEAL.

Appeal authorized by Laws 1917, c. 32, § 2, to be taken within ten days from entry of order or judgment being taken before entry, is premature.

3. JUDGMENT ⇨273(2)—JOURNAL ENTRY—DATE.

Judgment is properly entered on the journal as of the date of its rendition, though entry is made later.

4. APPEAL AND ERROR ⇨934(1)—PRESUMPTION—ENTRY OF JUDGMENT.

It will be presumed that entry of judgment was made on the date under which it appears on the journal, unless the contrary is shown by the entry itself, or by the record otherwise.

5. APPEAL AND ERROR ⇨645—RECORD—AMENDMENT.

If it be deemed important to show when the judgment appealed from was actually entered on the journal, if on a different date from that there appearing, it must be done by amendment of record.

6. APPEAL AND ERROR ⇨670(1)—RECORD—ORIGINAL AFFIDAVITS.

The appellate court in considering a case is confined to the record on appeal; and it may not, by affidavits filed in such court, be shown when the judgment was entered, or that it was or was not entered, thereby contradicting or supplementing the record.

7. APPEAL AND ERROR ⇨93—APPEALABLE ORDER—DIRECTION OF VERDICT—"FINAL ORDER."

Direction of verdict is not an appealable order, which must be a final order, defined by Comp. St. 1910, § 5107, as one affecting a substantial right in an action when it in effect determines the action and prevents a judgment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Order.]

8. APPEAL AND ERROR ⇨93—APPEALABLE "JUDGMENT"—DIRECTION OF VERDICT.

Direction of a verdict is not an appealable judgment; as though Comp. St. 1910, § 4606, defines a judgment as the final determination of the rights of the parties in an action, there are statutory provisions for entry of judgment on a verdict.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judgment.]

9. APPEAL AND ERROR ⇨635(1)—DISMISSAL—PREMATURE APPEAL.

Appeal must be dismissed for failure of record to show that when appeal was taken a judgment had been entered.

10. APPEAL AND ERROR ⇨744—SPECIFICATIONS OF ERROR—TIME OF—FILING AND SERVING.

Laws 1917, c. 32, § 8, providing for appellant within ten days after the record on appeal is prepared and filed, serving and filing specifications of error, in view of section 6 as to authentication covering whole record, including specifications of error, prescribes only the

limit of time beyond which they may not be filed or served.

Appeal from District Court, Sheridan County; E. C. Raymond, Judge.

Action by Herman L. Hahn against the Citizens' State Bank and another. Judgment for defendants, and plaintiff appeals. Appeal dismissed.

Rehearing denied 172 Pac. 705.

Robert P. Parker, of Sheridan, for appellant. Chas. A. Kutcher and Camplin & O'Marr, all of Sheridan, for respondents.

POTTER, C. J. This case is brought to this court under the statute providing for a so-called direct appeal from the district courts and prescribing the procedure therefor, enacted in 1917. Laws 1917, c. 32. That statute provides for the review by this court on appeal of any judgment or order theretofore reviewable by proceedings in error, but without repealing, modifying, or changing the statutory provisions for a review by that method. Section 15 of the act declares that its provisions are intended to provide for a direct appeal as a separate and independent method of reviewing civil and criminal causes in the Supreme Court, in addition to the provisions of law for reviewing such causes on proceedings in error. The case has been heard on a motion to dismiss the appeal, based on two grounds: (1) That no notice of appeal was filed or served within ten days from the entry of the judgment appealed from, as required by the statute. (2) That appellant did not serve upon the respondents or either of their attorneys the specifications of error within ten days after the record on appeal was prepared and filed.

The statute provides, in section 2, that an appeal may be taken by serving a notice in writing to such effect, signed by the appellant or his attorney, upon the opposing party or his attorney, "within ten days from the entry of the order or judgment appealed from," and that said notice of appeal shall be filed with the clerk of the district court "where the order or judgment appealed from is entered, within said ten days." The appeal was taken by the plaintiff in the court below who is here known as the appellant, the statute providing (section 3) that the party taking the appeal shall be known as the appellant, and the adverse party as the respondent, but that the order of the title of the action shall not be changed. The contention of respondents as to the notice of appeal is that it was served and filed prior to the entry of the judgment appealed from, and therefore prematurely.

It appears from the record on the appeal that there was a jury trial of the cause on June 14, 1917, resulting in a directed verdict for the defendants on that day, and that the notice of appeal was filed and served on June 23, 1917; the notice stating that the plaintiff desires to and will appeal to the Supreme

Court from the order and judgment entered in said cause in favor of the defendants and against the plaintiff on the 14th day of June, 1917, and from the whole thereof. The fact of the trial and the verdict, and that the latter was directed by the court, is shown in the record by a transcript of the journal entry thereof under the date "Thursday, June 14, 1917." The record does not contain a transcript of the journal entry of the judgment, but immediately following the entry aforesaid showing the trial and verdict is a paper entitled "Judgment," under the title of the cause, and signed by the judge who presided at the trial, which recites the fact of the trial and verdict, and concludes with a form of judgment upon the verdict in favor of the defendants, ordering and adjudging that the plaintiff take nothing by his action, and that the defendants recover costs. It is dated as follows: "Done in open court the 14th day of June, 1917." And it is indorsed by the clerk of the district court as filed on July 14, 1917.

The date or time of the entry of the judgment on the journal or whether it was ever so entered is not shown by the record. But attached to the motion to dismiss is an affidavit of the clerk to the effect that the judgment was actually filed for record in his office on July 14, 1917, and that it was entered and recorded in the records of the clerk's office some time between that date and July 16, 1917. And attached to appellant's brief in opposition to the motion is an affidavit of appellant's counsel to the effect that the civil appearance docket in the clerk's office shows the date of the entry of judgment, under the heading, "Date 1917," as follows: "June 13. To Judgment 3—7—639." Respondents, at the time of or prior to the hearing on the motion, filed another affidavit of the clerk explaining in effect that the date "June 13" on said appearance docket was an error, and should have been "July 14," the actual date of filing the judgment, and that the notation was later corrected by drawing a line around "June 13" and writing "July 14" above it. We find in the record a stipulation in the cause signed by counsel for both parties, dated June 20, 1917, reciting:

"It is hereby stipulated by and between the parties to the above-entitled action that the judgment in said cause may be signed by the presiding judge who tried the cause, the Hon. E. C. Raymond, at Newcastle, and then forwarded to the clerk of court for filing and record."

And that stipulation appears to have been filed on July 14, 1917, the date of filing the form of judgment aforesaid.

[1, 2] The distinction between the rendition and entry of a judgment (see *Black on Judg.* § 106; 15 R. C. L. 578-581; 18 Ency. Pl. & Pr. 450, 437-441; 23 Cyc. 835, 836; *Daley v. Anderson*, 7 Wyo. 1, 48 Pac. 839, 75 Am. St. Rep. 870) has been carried into our statutes. They refer in many places to a judgment "given" or "rendered," and also

to a judgment "entered" or the "entry" of a judgment. They provide that all judgments must be entered on the journal of the court. Comp. Stat. 1910, § 4627. That in case of a jury trial judgment must be entered by the clerk in conformity to the verdict, unless the verdict is special or the case is ordered reserved for future argument or consideration. Id. § 4622. That the court shall order what judgment shall be entered upon a special verdict, or where there is a special finding on particular questions of fact. Id. § 4628. That an index of all judgments shall be kept showing, among other things, the year and term when rendered, and the page of the journal on which it is entered. Id. § 4635. That decisions and orders made out of term or out of the county where the cause is pending shall be in writing signed by the judge, filed with the proper clerk, and by the latter entered upon the journal, whether it be an order, judgment, or decree. Id. §§ 4461, 4464. That a recognizance for stay of execution shall be written immediately following the entry of the judgment and signed by the bail. Id. § 4671. In the chapter of the Civil Code providing generally for the review of judgments and final orders on error, the time for commencing such proceedings is limited to one year after the rendition of the judgment, or the making of the final order complained of, with certain stated exceptions. Id. § 5122. And by the act of 1917 aforesaid providing for the so-called direct appeal, the appeal is required to be taken by filing and serving a notice within ten days from the "entry" of the judgment or order appealed from.

To what extent or for what purposes generally a judgment rendered or ordered may be complete and effective without an entry need not be considered. But it may be said that although a judgment, upon its rendition, may be final and valid as between the parties, effective for many purposes and even enforceable, the entry thereof is generally held a prerequisite to the right to appeal. 1 *Black on Judg.* § 106; 2 Ency. Pl. & Pr. 248; 3 C. J. 612; 14 *Standard Ency. Proc.* 991, 992; 2 *Tidd's Pr.* 931; 3 *Chitty's Prac.* (3d Ed.) 860; *Elliott's App. Proc.* § 118; *Puckett v. Gunther*, 137 Iowa, 647, 114 N. W. 34; *Sievertsen v. Chemical Co.*, 160 Iowa, 662, 133 N. W. 744, 142 N. W. 424; *Board, etc., v. Pabst*, 64 Wis. 244, 25 N. W. 11; *Edwards v. Evans*, 61 Ill. 492; *Gilpatrick v. Glidden*, 82 Me. 201, 19 Atl. 166; *Fauber v. Keim*, 84 Neb. 167, 120 N. W. 1019; *Exley v. Berryhill*, 36 Minn. 117, 30 N. W. 436; *Lisker v. O'Rourke*, 28 Mont. 129, 72 Pac. 416, 755; *Pittsburg Steel Co. v. Streety*, 60 Fla. 183, 53 South. 505; *Trotti v. Kinnear* (Tex. Civ. App.) 144 S. W. 328. A judgment does not, as a rule, become a permanent record of the court until it has been entered, and especially must this be true where the statute requires that all judgments shall be en-

tered on the journal, thus prescribing in effect what shall constitute the record evidence thereof. Where the statute requires an appeal to be taken within a stated period from or after the entry of the judgment, an appeal taken prior to the entry is held to be premature. 3 C. J. 1056, 1058; McLaughlin v. Doherty, 54 Cal. 519; Bell v. Staacke, 137 Cal. 307, 70 Pac. 171; In re More's Estate, 143 Cal. 493, 77 Pac. 407; Robinson v. Salt Lake City, 37 Utah, 520, 109 Pac. 817; Robertson v. Shine, 50 Wash. 433, 97 Pac. 497; State ex rel. v. Lamm, 9 S. D. 418, 69 N. W. 592; Daley v. Anderson, 7 Wyo. 1, 48 Pac. 839, 75 Am. St. Rep. 870. It was held in Hays v. Dennis, 11 Wash. 360, 39 Pac. 658, that a notice of appeal after announcement of the court's conclusion but before entry was sufficient. But in Robertson v. Shine, supra, where no formal judgment was entered, an appeal was dismissed on the ground that no appeal would lie from a mere oral announcement of the court's conclusion, and the case of Hays v. Dennis was distinguished because in that case the notice of appeal was followed by an entry of judgment, the court, however, seeming to doubt the soundness of that decision, saying:

"Conceding the case to be sound, it is not authority for an appeal in a case where no final judgment at all has been entered."

At common law, after verdict, a judgment having been signed by the master or prothonotary was required to be entered of record and docketed in order to charge the defendant in execution, or bind his lands, or to proceed against him by action of debt or scire facias on the judgment, or against his bail on their recognizance, or if a writ of error be brought. But execution might be issued before entry. 2 Tidd's Pr. 931. And the same rule is stated in Chitty's Practice (page 860) as follows:

"Although execution on a judgment may be issued before the judgment has been entered on the roll, yet it is necessary that such entry should be made, and the roll carried in and filed, in order to bring a writ of error on the judgment, or to proceed against bail on their recognizance, and for some other purposes."

It is said in Elliott's Appellate Procedure, § 118, that the general rule is that there must be an entry of the judgment before an appeal can be taken, and that, though there is some conflict in the decisions, it seems clear that the rule must be the correct one, "for until there is an entry of judgment there is no authentic record evidence of a final disposition of the case, and that there is a final judgment must, as a general rule, appear from the record." And the cases holding an appeal to be premature when taken before the entry of the judgment are usually based upon the principle that until its entry a judgment is not appealable.

If a judgment or order of the kind from which an appeal would lie should be appealable upon its rendition or when made, as those terms are generally understood with

reference to a judgment or order, and prior to a record entry thereof, then, in construing a statute requiring an appeal to be taken within a stated time from or after the entry, it might, perhaps, be proper to apply the rule of interpretation, well sustained by authority where the subject-matter permits its application, that such words of limitation are intended only as fixing the terminus ad quem, the limit beyond which the act may not be done or the notice may not be given, and not the terminus a quo, or the time at which the right to act or give notice commences. Davies v. Miller, 130 U. S. 284, 9 Sup. Ct. 560, 32 L. Ed. 932; Bellon v. Durand, 39 Utah, 532, 117 Pac. 798; Cary-Lombard L. Co. v. Fullenwider, 150 Ill. 629, 37 N. E. 899; Merchants' & Tr. Bank v. Mayor, 97 N. Y. 855; Chicago, S. F. & Cal. Ry. Co. v. Eubanks, 32 Mo. App. 184; Leader v. Plante, 95 Me. 339, 50 Atl. 184, 85 Am. St. Rep. 415; Atherton v. Corliss, 101 Mass. 40; Young v. The Orpheus, 119 Mass. 179; Levert v. Read, 54 Ala. 529; In re Wittkowsky's Land, 143 N. C. 247, 55 S. E. 617. But we cannot doubt that the entry of a judgment or appealable order, except such, if any, as are not required to be entered, is essential to the right of appeal, in view of the statutory provisions requiring judgments and orders to be entered on the journal. State ex rel. v. Seward, 16 Ohio Cir. Ct. R. 443. Such an entry is evidently intended by the statute fixing the time for taking an appeal by filing and serving notice within ten days from the entry of the order or judgment appealed from. It is referred to in other places in that statute. Section 4 provides that the appellant shall have seventy days after the entry of the judgment or order to prepare and file a record for the appeal, which time may be extended for good cause shown. And section 5 requires the transcript of the testimony, if such is desired, to be filed within seventy days from the date of the entry of the order or judgment, or within the time as extended. These several provisions, considered together, seem to contemplate that there shall be a record entry of the order or judgment appealed from before an appeal shall be taken. Clearly no record on appeal can show the fact or date of the entry before an entry has been made, nor can a proper record be prepared showing the judgment or order complained of, unless and until the same has been entered, for that should be shown by a transcript of the journal entry.

[3-5] We suppose it to be the custom to enter a judgment or order upon the journal as of the date or as a part of the proceedings of the day it was rendered or made or the decision or order was signed by the judge, notwithstanding that the entry is not actually made in the journal until after that date. And that we think is proper. Hoffman-Bruner Granite Co. v. Stark, 132 Iowa, 100, 108 N. W. 329; Puckett v. Gunther, 137 Iowa, 647, 114 N. W. 34. And it will be presumed

that an entry was made on the date under which it appears in the journal, unless the contrary is shown by the entry itself or by the record otherwise. If it is deemed necessary or important to show when the judgment or order was actually entered on the journal, if on a different date from that upon which it appears from the journal to have been entered, that must be done by an amendment of the record. See *Hoffman-Bruner Granite Co. v. Stark*, supra; *Thompson v. Great Western Accident Ass'n*, 136 Iowa, 557, 114 N. W. 31; *Puckett v. Gunther*, supra. In the cases cited it was held proper for the trial court to order an amendment of the judgment record by requiring the clerk to note thereon the date when it was entered.

[6] This court, in its consideration of the case, is confined to the record on appeal; and we do not think it competent to show merely by affidavits filed in this court the fact that the judgment or order appealed from was or was not entered or when the entry thereof was made, thereby contradicting or supplying a deficiency in the record in that respect. But affidavits may, no doubt, be proper in support of a motion to return the record for correction or to afford an opportunity for its correction or amendment in the district court.

The statute prescribes what shall constitute the record on appeal, and how it shall be prepared and authenticated. If it is desired by appellant to have rulings on the admission or exclusion of evidence, or to question the sufficiency of the evidence to sustain the verdict, finding, judgment, or decision, or if the verdict, finding, judgment, or decision is alleged to be contrary to law, the statute requires the appellant to procure a transcript of the testimony certified to by the official reporter as true and correct, and file the same with the clerk. Laws 1917, c. 32, § 5. Section 6 provides that the clerk shall prepare a record on appeal to consist of the original pleadings, motions, demurrers, instructions given or refused, orders, verdict, finding, decision or judgment, and the notice of appeal, or certified copies thereof, securely attached together in chronological order, and the transcript of the testimony if prepared and filed and brought up on the appeal, and that to the whole thereof shall be attached the specifications of error, "and when so prepared, the whole record shall be paged and numbered consecutively, and shall constitute the record on the appeal, and shall be certified to by the judge and clerk of the district court as true and correct." The record here is certified by the judge and clerk, respectively, "as a full, true, and correct transcript of all papers filed and proceedings had in said cause." If entries upon the appearance docket, not embraced in the record as thus certified, are deemed necessary or proper, or a showing not appearing in such record as to the fact of the entry of the judgment or when made, the omitted matters, to be considered

here, should be incorporated in the record by correction or amendment properly authenticated.

As previously stated, the record here does not contain a transcript of the journal entry of the judgment, or anything to show that it was entered. The only journal entry in the record ends with a recital and copy of the verdict. The statute, as above shown, authorizes the clerk to enter a judgment upon a general verdict without special findings, unless it is ordered reserved for future argument or consideration, though usually, we think, it is the custom here for the court to order a judgment upon such a verdict, and it may be customary for the clerk to wait for such an order before entering a judgment. It seems also to have become the practice for the judge not only to approve but sign orders and judgments prepared either by himself or counsel before they are entered on the journal. And the propriety of that practice is not to be doubted. Under some circumstances, as above stated, the statute requires an order or judgment or a direction that it be entered to be so signed and filed as well as entered on the journal. Comp. Stat. §§ 4461, 4464. But such a paper is not the record evidence of a judgment or order required to be entered on the journal. Except where required to be signed or signed and filed its purpose is to aid the clerk in entering the matter upon the journal record, though when approved by counsel it has the additional value of preventing disputes about what was directed or ordered and the objections or exceptions thereto. *Slevertsen v. Paxton-Eckman Chemical Co.*, 160 Iowa, 662, 133 N. W. 744, 142 N. W. 424; *Cockrell v. Schmitt*, 20 Okl. 207, 94 Pac. 521, 129 Am. St. Rep. 737; *State v. Linderholm*, 90 Kan. 489, 135 Pac. 564; *Boynnton v. Crockett*, 12 Okl. 57, 69 Pac. 869; *Locke v. Hubbard*, 9 S. D. 364, 69 N. W. 588. The signing and filing of a decision, order, or judgment pursuant to the statute when made out of term or by the judge in another county is intended, we think, as a substitute for an oral announcement or direction in open court, and to make clear and specific for entry on the journal the recitals and provisions of the order or judgment so made, rendered, or directed.

The record here fails not only to show an entry of the judgment, it fails also to show a rendition or ordering of judgment before the notice of appeal was filed and served. Although the paper signed by the judge entitled "judgment" recites, "Done in open court the 14th day of June, 1917," it was not filed until July 14th. The stipulation of counsel found in the record, dated June 20, 1917, that the judgment may be signed by the judge at Newcastle, and then forwarded to the clerk for filing and record, seems to indicate that the actual signing occurred after that date. The most that can be said of the order thus signed is that it was an order for judgment to be entered as of June 14, 1917, made

on the date when it was filed; there being nothing to show when it was actually signed. But by ordering judgment to be entered as of a prior date it certainly could not cut off or defeat an appeal within the statutory period after the actual entry of the judgment, nor can it be held to give effect to an appeal taken before any judgment was entered or ordered. 1 Black on Judg. § 136; 3 C. J. 1058, § 1058.

[7, 8] Appellant contends that the direction of the verdict was an appealable order and judgment, and that the appeal taken within ten days after such direction of the verdict was therefore not premature. It is at least doubtful whether the notice of appeal can be construed as an appeal from the ruling or action of the court in sustaining the motions of the defendants for a directed verdict in their favor respectively and directing a verdict accordingly. But that action or direction of the court was clearly not a judgment nor a final order as defined by statute. "A judgment is the final determination of the rights of the parties in action; and a direction of a court or judge, made or entered in writing, and not included in a judgment, is an order." Comp. Stat. 1910, § 4606. And, so far as this case is concerned, a final order is defined as "an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment." Id. § 5107. The action of the court in directing or refusing to direct a verdict or otherwise instructing the jury on the law of a case on trial may be reviewed on appeal from the judgment rendered in the action. But the appeal can only be taken from a final order. This court has held that an order sustaining a demurrer to the petition in an action is not a judgment or final order upon which a proceeding in error can be based. *Menardi v. Omalley*, 3 Wyo. 327, 23 Pac. 68; *Turner v. Hamilton*, 10 Wyo. 177, 67 Pac. 1117. Also that a finding by the court is not a final order or reviewable without a judgment rendered thereon. *Gramm v. Fisher*, 3 Wyo. 595, 29 Pac. 377. And in *School District v. Western Tube Co.*, 13 Wyo. 304, at page 327, 80 Pac. 155, 159, this court said:

"It is fundamental that a proceeding in error does not lie upon a verdict or mere findings. There must be a final judgment before a proceeding in error is authorized. The proceeding must be taken from a judgment or final order."

The statutory provisions for entering judgment upon a verdict are enough to show that neither the verdict nor any ruling or instruction on the trial preceding it is intended by the statutory definition of a judgment as a final determination of the rights of the parties. Although a verdict is general, and directed by the court, it may be ordered reserved for future argument or consideration. Comp. Stat. 1910, § 4622. And a judgment may be ordered

for the other party upon his motion for a new trial or for judgment notwithstanding the verdict, if upon the trial he moved for a directed verdict in his favor, or requested an instruction to that effect, and his motion or instruction was denied, should the court find that he was entitled to have a verdict directed in his favor. Laws 1915, c. 184. If the finding of the court in favor of one of the parties in a case tried without a jury, upon which a judgment would be authorized, is not a final order, or an order sustaining a demurrer to a petition, where the plaintiff refusing to plead further stands upon his petition, upon which also a judgment might be rendered, is not a final order, and we have no doubt of the correctness of the decisions to that effect, it is clear that the action of the court in directing a verdict, if properly called an order at all, is not a final order within the meaning of the statute defining that term. While the direction of a verdict may in a sense determine the action because requiring a verdict upon which a judgment may be ordered and entered, it is not a final determination of the action.

[9, 10] For the failure of the record to show that at the time the appeal was taken a judgment had been entered in the cause the appeal must be dismissed. And we might decline to consider the other ground of the motion relating to the serving of the specifications of error as unnecessary. But as the statute is new and its provisions concerning specifications of error appear in some respects to be inconsistent we think it not improper to explain our present views upon the question presented by the motion. It is not contended that specifications of error were not prepared and filed or served, or that they were filed or served later than the time granted therefor by the statute. The contention is that they were served prematurely or before the time such service was authorized; the averment of the motion that appellants did not serve the specifications within ten days after the record on appeal was prepared and filed being based on a provision of the statute limiting the time therefor.

The reason for holding a notice of appeal premature when filed or served before the entry of the order or judgment appealed from does not necessarily apply with the same force to the filing and serving of specifications of error. The purpose of an assignment or specification of errors is to point out the specific errors claimed to have been committed by the court below and relied on for a reversal, for the information of opposing counsel and the reviewing court. 3 C. J. 1329. If, under our statute, an appeal has been properly taken from a judgment or order duly entered, and within the time allowed, and the record is in such condition as will permit of the references thereto required by the statute or rules,

there would seem to be no substantial reason for denying the right to file and serve specifications of error before the record is filed, or for construing the statutory provision limiting the time for filing and serving the specifications as meaning anything more than limiting the time beyond which the specifications may not be filed or served. But while the statute provides in one section that the specifications shall be served and filed within ten days after the record on appeal is prepared and filed, it seems to provide in another section that such specifications shall be prepared and filed before the completion and filing of the record.

Section 8 of the act provides for filing and serving the specifications as follows:

"The appellant shall, within ten days after the record on appeal is prepared and filed, serve upon the adverse party, or his attorney, and file with the clerk of the district court the specifications of error relied upon for a reversal of the cause on appeal, which shall be consecutively numbered, and shall designate the page of the record on which the ruling, decision, finding, order, verdict, or judgment complained of is to be found, and if error be assigned on the ruling of the court in admitting or rejecting evidence, the specifications of error shall designate the number of the question to which the ruling of the court complained of, refers."

Provision is made in section 5 for procuring and filing, when necessary, a certified transcript of the testimony, with all rulings in the admission or exclusion of evidence, or in directing or refusing to direct a verdict, to be incorporated in the record on appeal. The record in civil causes is provided for in section 6 as follows:

"In civil causes appealed to the Supreme Court under the provisions of this act, the clerk of the district court shall prepare a record on the appeal which shall consist of the original pleadings, motions, demurrers, instructions given and refused, orders, verdict, finding, decision or judgment, and the notice of appeal in the cause, or certified copies thereof securely attached together in their chronological order, and if a transcript of the testimony is prepared and filed, and is brought up on an appeal, the transcript shall also form a part of the record on appeal, and to the whole thereof shall be attached the specifications of error, and, when so prepared, the whole record shall be pagged and numbered consecutively, and shall constitute the record on the appeal, and shall be certified to by the judge and clerk of the district court as true and correct."

Although that section does not expressly provide for filing the record in the clerk's office when completed, there are other provisions of the act clearly showing the intention that when completed and authenticated it shall be filed. But it cannot properly be filed as the record on the appeal until it has been authenticated by the required certificate or certificates of the judge and clerk. And that authentication is to cover the whole record including the specifications of error, as we understand the provisions of section 6. As the specifications of error must therefore be prepared and left with the

clerk, if not filed, before the record is fully prepared for authentication and filed, we fail to see any good reason for holding that the specifications may not then be properly filed and served, although before the record itself is or can be filed. In view of the purpose of the specifications of error, and the other provisions of the statute, the provision of section 8 that the specifications shall be filed and served within ten days after the record is prepared and filed should, in our opinion, be construed as prescribing only the limit of time beyond which such specifications may not be filed or served; following the rule for the interpretation of such a provision referred to above in discussing the provision limiting the time for taking an appeal. That seems to us to be the fair and reasonable interpretation of the words of the limitation in section 8 as applied to the subject-matter, viz. the filing and serving of specifications of error.

The record here contains a transcript of the testimony indorsed as filed on August 20, 1917, and the specifications of error with the filing indorsement of the clerk showing it to have been filed on August 22, 1917. The specifications of error were served on opposing counsel on August 22, 1917. And the entire record, including the specifications of error was certified by the judge and clerk respectively as true and correct on August 23, 1917. There is no indorsement showing the filing of the completed record, but, if necessary, it might be returned for correction by proper indorsement showing it to be filed as of the date when it was actually in the clerk's office for that purpose. While the motion to dismiss is not based upon the failure of the record to show that it was filed, counsel for respondents have called attention to the fact in their brief, and assume that it could not be filed or considered as filed until the date of the authentication certificates.

The appeal will be dismissed on the ground above stated that no judgment is shown to have been entered when the appeal was taken by filing and serving the notice aforesaid.

Appeal dismissed.

BEARD and BLYDENBURGH, JJ., concur.

(88 Or. 169)

HAMLIN v. THARP et ux.

(Supreme Court of Oregon. April 2, 1918.)

1. FRAUD \S 50 — FALSE REPRESENTATIONS — BURDEN OF PROOF.

In an action to foreclose a purchase-money mortgage, where defendants claimed damages by reason of false representations, the burden is on defendants to prove the false representations.

2. FRAUD \S 58(1) — FALSE REPRESENTATIONS — DAMAGES — EVIDENCE.

In action to foreclose a purchase-money mortgage, evidence held insufficient to show that

plaintiff made false representations concerning nature of land.

3. APPEAL AND ERROR \Leftrightarrow 1009(1)—REVIEWING EQUITY CASES—FINDINGS OF FACT.

In action to foreclose purchase-money mortgage, where defendant claimed damages from false representations, weight will be given a finding of the trial court that alleged representations were not made, where the trial judge saw the witnesses testify.

Department 1. Appeal from Circuit Court, Coos County; John S. Coke, Judge.

Action by Andrew J. Hamlin against Jeff D. Tharp and his wife, Leona Tharp, to foreclose a purchase-money mortgage. Decree for plaintiff, and defendants appeal. Affirmed.

The defendants appealed from a decree foreclosing a purchase-money mortgage. In November, 1913, the plaintiff, Andrew J. Hamlin, sold a 257-acre farm, together with certain personal property, to the defendants Jeff D. Tharp and his wife Leona Tharp for \$9,500. The defendants paid the plaintiff \$2,000 in cash, assumed and agreed to pay a note and mortgage held by the state land board, and gave their note for \$6,846 for the remainder of the purchase price. The note was payable on or before two years after November 29, 1913, its date, with interest, to the order of plaintiff, and was secured by a mortgage on the farm. No payments were made on the note, except the interest due on November 29, 1914. The plaintiff began this suit in February, 1916.

The defendants are attempting to abate the purchase price by claiming that they were damaged to the extent of \$6,500 by a fraudulent representation alleged to have been made by the plaintiff. It is averred by the defendants that a stranger to the premises could not by a mere view of the farm easily determine the number of acres of bottom land for the reason that it is broken up by a zigzagging creek and patches of timber and brush are scattered along on both sides of the creek. Bench lands are only worth from \$3 to \$6 an acre, while the bottom lands are valued at from \$100 to \$200 an acre. The farm embraces 36 acres of bottom land, while the remainder is bench land. The defendants alleged that the plaintiff fraudulently represented to them that the farm included 80 acres of bottom land, when in truth it only contained 36 acres of such land. The plaintiff denied that he made the alleged representation. The trial court found that the plaintiff did not "represent to defendants that said mortgaged ranch contained 80 acres of bottom land."

Claud H. Giles, of Myrtle Point (I. N. Miller, of Bandon, on the brief), for appellants. A. J. Sherwood, of Coquille, for respondent.

HARRIS, J. (after stating the facts as above). The defendants are not entitled to

a reduction of the amount due upon the face of the note unless the plaintiff made the alleged representation. Hamlin purchased the premises in 1901 for \$3,000. He made substantial improvements, including a house, a barn, and about five miles of fence. Four different witnesses testified concerning the worth of the farm and placed its market value at from \$9,000 to \$11,000. The defendant Jeff D. Tharp had owned and operated several different farms, and had been a dairyman and rancher "20 or 30 years, somewhere in there." He had, however, been engaged in the real estate business for a period of four or five months immediately preceding the purchase of the Hamlin farm. Jeff D. Tharp was on the premises during one day and over one night before consummating the purchase; and, although it is conceded by all the litigants that the value of such a farm depends upon the number of acres of the bottom land, Tharp nevertheless claims that he bought the place wholly on Hamlin's representation, and that he "never went to look at it at all with the idea of seeing whether there was any bottom land or hill land."

Each of the defendants says that the plaintiff represented that there were 80 acres of bottom land, while the plaintiff denies making such a statement. The plaintiff asserts that he told Jeff D. Tharp "there in the house that I bought it from Emmett for 60 acres, and I didn't know whether there was that much or not." The plaintiff is corroborated by his daughter-in-law Mable Hamlin and by his wife, Elba Hamlin. Further corroboration of the plaintiff's version is furnished by L. C. Paull, who testified that in the spring of 1914 Tharp told him that "he bought it for 60 acres of bottom land." Jacob Wanley worked for Tharp in the spring of 1915, and this witness stated that he and Tharp were going up the bottom one day, "and I says, 'How much bottom land have you?' and he says, '60 acres.'" In November, 1915, Jeff D. Tharp offered to sell the place to F. A. Meinhardt for \$10,000 and "said he had 60 acres" of bottom land. Jeff D. Tharp says that the first time he ever heard Hamlin say anything about 60 acres occurred about nine months after the sale when Hamlin "visited there" and when he told Hamlin that the latter had represented that the farm contained 80 acres of bottom land Hamlin immediately said "I bought it for 60, and I sold it to you for 60 acres," and the witness added "And I believe he was honest in it." The circumstance that Tharp believed that Hamlin honestly claimed that he had not told Tharp that there were 80 acres of bottom land is not without some significance.

[1-3] The burden of proof rested upon the defendants to show that the plaintiff made the representation alleged in the answer. The evidence is conflicting. The defendants tes-

tify that the plaintiff made the representation; the plaintiff says he did not. Three or four months before the sale to the defendants the plaintiff listed the place with a real estate agency conducted by one Carley and the defendant Jeff D. Tharp. Carley made an entry in a book reading thus: "80 acres of bottom finest of land." Hamlin testified that he never saw the book until the trial in July, 1916. This book entry affords one circumstance tending to corroborate the defendants, although it ceases to be a corroborating circumstance if all the testimony given by Hamlin concerning Carley is to be believed. A detailed account of the evidence would not serve any useful purpose. It is sufficient to say that the entire record has been carefully examined, and we find a situation where the testimony of the defendants is in irreconcilable conflict with the version of the plaintiff; and while there is some evidence corroborating the defendants, there are also circumstances corroborating the plaintiff. After weighing the mere paper record of the trial the scales appear to us to incline a little towards the version given by the plaintiff; and while not bound by the findings of the trial judge, yet in view of the record presented to us we do accord some weight to his finding that the plaintiff did not make the alleged representation, because the trial judge had the advantage of seeing the witnesses testify. *Goff v. Kelsey*, 78 Or. 337, 348, 153 Pac. 103; *Shane v. Gordon*, 84 Or. 627, 630, 165 Pac. 1167; *Tucker v. Kirkpatrick*, 86 Or. 677, 169 Pac. 117, 118. The defendants contend that they are entitled to a credit of \$6,500 on the note because they were damaged by representations made by plaintiff. In its final analysis this is equivalent to saying that for approximately \$3,000 paid by them the defendants claim the right to keep and retain, without making further payments, personal property worth \$500, together with a farm valued at from \$9,000 to \$11,000. The defendants have not made out a case entitling them to acquire \$9,000 or \$11,000 worth of property for \$3,000.

The evidence warrants us in affirming the judgment and decree of the circuit court, and it is so ordered.

McBRIDE, C. J., and BENSON and BURNETT, JJ., concur.

(88 Or. 174)

Ex parte MACK.

STATE v. SHAW et al.

(Supreme Court of Oregon. April 2, 1918.)
COURTS 160 — MUNICIPAL COURTS — STATUTES.

Laws 1913, p. 732, abolishing justice courts in the city of Portland, does not affect or withdraw the jurisdiction of a justice of the peace conferred on the municipal court by Portland City Charter 1903 (Sp. Laws 1903, p. 131) §

329, giving such court the authority of a justice of the peace.

Department 2. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Habeas corpus proceedings by Carl Mack to obtain the release from custody of George Shaw, who was convicted of vagrancy before the municipal judge of the city of Portland. From a judgment discharging the prisoner from custody, the State appeals. Reversed and remanded.

George Shaw was arraigned before the municipal judge of the city of Portland, sitting as an ex officio justice of the peace, upon a complaint charging him with the crime of vagrancy as defined in chapter 95, Laws 1911. Having entered a plea of not guilty, he was tried and, upon a judgment of conviction, was committed to the custody of the sheriff of Multnomah county under sentence of imprisonment in the county jail for a period of 180 days. His attorney, Carl Mack, then filed in the circuit court a petition for a writ of habeas corpus, wherein he assigns two grounds, upon which he contends that Shaw was unlawfully restrained of his liberty. These are: (1) That the act denouncing the offense charged against petitioner's client expressly gives exclusive jurisdiction thereof to circuit and justice's courts. That the Legislature abolished justice courts in the city of Portland by the act found in chapter 355, Laws 1913, and that therefore there can be no ex officio justice of the peace within the city. (2) That the complaint does not state facts sufficient to constitute an offense. Upon a hearing in the circuit court the prisoner was discharged from custody; the decision being based upon the insufficiency of the complaint. The state appeals.

George Mowry, Deputy Dist. Atty., of Portland (Walter H. Evans, Dist. Atty., and John A. Collier, Deputy Dist. Atty., both of Portland, on the brief) for the State. Carl Mack, of Portland, for respondents.

BENSON, J. (after stating the facts as above). Considering petitioner's contentions in the order in which he presents them, it may be said that in 1903 the Legislature enacted a charter for the city of Portland, of which section 329, in part, reads as follows:

"Said municipal court shall have jurisdiction of all crimes defined by ordinances of the city of Portland * * * and shall likewise have, within the city of Portland, the jurisdiction and authority of a justice of the peace and committing magistrate, and shall be subject to all the general laws of the state prescribing the duties of a justice of the peace and the mode of performing them, except as herein otherwise provided." Sp. Laws 1903, p. 131.

The jurisdiction thus conferred has never been withdrawn, and whatever may be the effect of the act of 1913 as to the abolition of justice courts, eo nomine, there is nothing in the act which is inconsistent with this grant

of jurisdiction, and petitioner's contention utterly fails.

As to the proposition that the complaint does not state facts constituting a crime, it suffices to say that in *Ex parte Stacey*, 45 Or. 85, 88, 75 Pac. 1060, 1061, this court, speaking through Mr. Justice Moore, says:

"The question whether the facts averred in the information render it vulnerable to a demurrer cannot be considered except on appeal, and, if any error was committed in this respect, the judgment was only voidable, and not void, and, this being so, habeas corpus will not lie to correct it."

The rule as here announced was reiterated in *Ex parte Foster*, 69 Or. 319, 138 Pac. 849. The judgment is therefore reversed, and the cause remanded for such further proceedings as may be deemed necessary and not inconsistent with this opinion.

McBRIDE, C. J., and MOORE and McCAMANT, JJ., concur.

(88 Or. 176)

MANLEY v. SMITH et al.

(Supreme Court of Oregon. April 2, 1918.)

1. REFORMATION OF INSTRUMENTS — 45(8) — EVIDENCE—SUFFICIENCY.

In suit to foreclose mortgage, where one defendant and mortgagor sought reformation for mistake in the mortgage rendering him liable for deficiency, evidence held insufficient to warrant reformation.

2. REFORMATION OF INSTRUMENTS — 43 — BURDEN OF PROOF.

In suit to foreclose mortgage, a mortgagor, who sought reformation to release him from liability for deficiency according to alleged agreement, had the burden to establish his contention by a preponderance of the evidence.

3. REFORMATION OF INSTRUMENTS — 43 — PRESUMPTIONS.

In suit to foreclose mortgage, where defendant sought reformation for mistake, assuming that plaintiff and defendant were of equal credibility, plaintiff was entitled to benefit of presumption, as stated in L. O. L. § 799, subd. 19, that the transaction was fair and regular.

4. REFORMATION OF INSTRUMENTS — 25 — NEGLIGENCE.

Where mortgagee accepted new mortgage and extended time, at reduced interest, a mortgagor, who had the mortgage prepared, but failed to read it, could not have reformation to express the alleged agreement that he should not be liable for a deficiency.

5. REFORMATION OF INSTRUMENTS — 19(1) — MISTAKE—MUTUALITY.

Where a mistake in a mortgage by which a mortgagor was, contrary to alleged agreement, rendered liable for deficiency was on his part only, the mortgage must stand, on the principle that the writing contained all the terms, in the absence of fraud or mistake.

6. REFORMATION OF INSTRUMENTS — 24 — MISTAKE—STATUS QUO.

Where defendant, having made, as he alleged, an agreement to give a mortgage without liability for a deficiency, tendered a mortgage making him personally liable, it was competent for the mortgagee's attorney to accept it, and it could not be reformed without placing the mortgagee in the status quo by restoring another mortgage, in discharge of which the mortgage sought to be reformed was given.

Department 1. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Suit by A. B. Manley against Alice Smith and others. Decree for defendant Thad Sweek, and plaintiff appeals. Reversed and rendered.

The plaintiff Manley, brought this suit to foreclose a mortgage executed by Milton W. Smith, Alice Smith, his wife, and Thad Sweek, to secure a note signed by the Smiths and Alex Sweek. The mortgage contained a covenant in these terms:

"And the said parties of the first part (the mortgagors) for their heirs, executors and administrators, do covenant and agree to pay to said party of the second part, his executors, administrators or assigns the said sum of money as above mentioned."

The only defendant answering is Thad Sweek, one of the mortgagors. The substance of his defense is that the quoted clause was inserted in the mortgage by the mutual mistake of Manley and the other parties to the transaction. He prays that the instrument be corrected by the elision of that clause, and that the mortgage as thus reformed be foreclosed. His averments in that behalf were denied by the reply. A decree was entered, reforming and foreclosing the mortgage according to the prayer of Thad Sweek, and the plaintiff appeals.

W. Y. Masters, of Portland (Brice & Masters, of Portland, on the brief), for appellant. J. F. Shelton, of Portland, for respondents.

BURNETT, J. (after stating the facts as above). Mrs. Smith is a sister of the Sweeks. According to the testimony, she and her husband were indebted to Manley in the sum of \$1,400 for money loaned to them on their note given previous to the one in suit. Her husband was declared a bankrupt, and about that time Manley began an action on the note he then held and attached real property of Mrs. Smith sufficient to satisfy his claim. At this juncture Alex Sweek approached Manley with a view to securing the claim, obtaining an extension of time and releasing the attachment. It seems that Mrs. Smith had one lot, and that Thad Sweek had another lot and a fraction adjoining, composing the realty described in the mortgage now in question. Both were incumbered by a previous mortgage. Alex Sweek testifies:

"So I went to Mr. Manley and told him I thought I could get a second mortgage on those two lots, or whatever it was, two lots and a fraction, for what was coming to him; that I would be willing to sign the note, and I was satisfied that Thad would sign the mortgage, so far as binding his lot was concerned, but he would not sign the note and would not become responsible, so we finally agreed upon that. Mr. Manley agreed to do that, and somebody prepared the mortgage; I don't know who, not me, but somebody prepared the mortgage. * * * My recollection is this: That after I talked to Mr. Manley, he was going away, and he turned the matter over to his attorney, W. Y. Masters,

but I am not sure about that. My recollection is that Mr. Manley was going out of town, and after we talked over and agreed upon the completion of the mortgage, as I remember, he went away; I may be wrong, but that is my recollection. It is a long time ago, and I haven't paid much attention to it."

On cross-examination he stated:

"There wasn't any talk about the promise to pay in the mortgage, so far as the talk was concerned, but it was understood that my brother Thad would not be responsible for the debt. There wasn't any talk about putting in a clause or striking out a clause. * * * No; but the understanding was that my brother Thad would not be responsible for the debt, if he would put in the lot."

He said, further, in substance, that he took up the matter with Mr. Manley and W. Y. Masters, but that he did not have any discussion with the latter that Thad was not to be bound. The only negotiation between Thad Sweek and Manley is detailed by the former in his testimony as follows:

"I met him (meaning Manley) in the entrance to the Board of Trade Building once, and he asked me what we were going to do about it. * * * In the first place, as it was presented to me one time, it was wrong. * * * The mortgage had no release clause in it, and in the copy of the note in the mortgage it had my name to it, and I wouldn't sign it. Q. You had not signed any note? A. No; I had not, and it was definitely understood that I should not; that I was putting up my property to assist in it, and it was all that I would do, and definitely understood at all times. Q. Now, you spoke about a release clause not being in the first mortgage. A. I mean the first copy of this mortgage here, not the first mortgage, but when this first draft of this was shown to me it was that way. Q. That is, there wasn't any release clause in it? A. No. I mean there was no provision releasing my lot when the first mortgage was put on, and also the copy of the note in the mortgage bore my signature to it, in the copy here as it was typewritten. Q. And, as I understand it, in that first draft of the mortgage there wasn't any release clause as it is now contained in the present mortgage, as follows: 'It is agreed that the mortgagee will release lot 3 and the south 5 feet of lot 2, whenever the existing mortgage of \$2,000.00 upon lot 4 is fully paid?' A. Yes. Q. That was not in the first draft of the mortgage? A. No; nothing about that. Q. And you refused to sign it for the reason that was left out, and for the further reason that in the copy of the note in the mortgage your name appeared upon it? A. It did; yes. Q. Now, was there anything said between you and Manley at that time that you were not to become personally liable? A. Well, I couldn't say that there was any specific agreement to that effect, but that was—the exact words that were said, but I indicated that to the best of my ability. Of course, it is a long time ago, and it is pretty hard to say just the exact words that were used between people in a casual meeting."

Nobody seems to know who actually prepared the mortgage, although it was introduced in evidence. It is in a printed form in which the blanks except signatures are filled in typewriting. Neither of the witnesses to its execution was called to testify. As stated by Thad Sweek, he objected to the first draft presented to him on account of the note having his name to it and because the instrument did not contain a clause releasing his lot and a fraction when the prior mortgage

on the property should be satisfied. Speaking of the mortgage in suit, Thad Sweek gave evidence as follows:

"Q. Did you look at the mortgage at that time, to ascertain whether or not the corrections that you had previously objected to had been made in the mortgage? A. Well, I looked at it to see that the release was in there—I remember distinctly, to see that this release provision was in there, and also that my name was not on the copy of the note in the mortgage. I looked at it that far, and I presume that I might have read more. I am not sure whether I did or not, but probably not, because my brother had telephoned to me—my brother Alex had telephoned to me that the mortgage was now proper—corrected and proper to be signed, and that Mr. Smith would take me to have it executed, or would bring it to me to have it executed, and Mr. Milton Smith went with me to this office in the Board of Trade Building, where the mortgage was executed, and, seeing that those provisions were in there, and he telling me that, I might have taken it for granted, without being very careful. I am not very sure just now about that. Q. Now, I will ask you this question, if you had read the mortgage over, and saw the clause in the mortgage to the following effect: 'And the said parties of the first part, for their heirs, executors and administrators, do covenant and agree to pay to said party of the second part, his executors, administrators or assigns, the said sum of money as above mentioned—would that have meant anything to yourself? A. No; I had always considered that in executing a mortgage that there would be no deficiency obtained against you, unless you had also signed the note. I find that I erred in that belief, but I had always thought so anyway, until this suit came up. That had been my firm belief at all times. I thought that there could not be a deficiency secured against you, unless you had actually signed the note."

On cross-examination he testified thus:

"Q. You say you read this clause in the mortgage referred to there by Mr. Shelton, where you agreed and promised to pay, and so forth? A. I don't know as I did, but if I had read it, it wouldn't have meant anything to me. Q. It wouldn't have meant anything to you? A. No. Q. You would have signed it just the same? A. Yes. Q. The reason that you would have signed it if you had seen that there, and known it was there, was because of the fact that you believed they could not get a deficiency judgment against you on the mortgage? A. I did believe it. Q. And that was your reason for signing it? A. Something might have called my attention to it. Q. Now, you say that you took this matter up with your brother Alex in his office, and you discussed this matter about your liability, with your brother, on the mortgage, and so forth? A. Well, there wasn't any great discussion. Q. And the first mortgage you refused to sign, because you thought you would be liable? A. Yes. Q. And your brother is an attorney, and he was acting for you and looking after your interests too, I presume? A. There were other reasons for not signing the first mortgage beside that."

Manley, as a witness for himself, narrates the original loan of money to the Smiths, the commencement of the action and attachment, and says:

"I was then busy, getting ready to leave the city for an extended trip, and Mr. Alex Sweek came into my office and spoke of this suit, and was very anxious to arrange whereby it might be dismissed, and wanted to know if I needed the money, and I said: 'No; I don't need the money now. I am going away in two or three days. I don't especially need the money, but

I want to be sure that I am going to get it.' 'Well,' he says, 'if we arrange to give you a note and mortgage on real estate, due in a year, good security, would you be willing to dismiss that case and accept new securities?' 'Well,' I says, 'if the securities are ample—if the security which you can give is ample to secure the note beyond any question'—I says, 'this note here I have sued on has been running for several years, and I am unable to collect it, and I don't care to release this attachment suit unless I can get ample security.' So he made some proposition to me about giving a mortgage on Mrs. Smith's lot and a lot that he said belonged to his brother Thad, and I listened to him—we only had a very few moments' talk—I listened to his proposition, and I said, 'Well, Alex, I don't know much about—I am not much acquainted with Mrs. Smith, and I am not much acquainted with Thad Sweek. I do know you. Will you sign this note as additional security, as a joint owner?' And he said he would. 'Now,' I says, 'I haven't got time to pass upon this property or examine it, or go into the matter at all.' I says, 'I am going to leave the city'—I think the next day, or within two or three days at the farthest, which I did, and I says, 'I will take this matter down to my attorneys who brought this suit, and give them instructions to release this attachment if you give ample security to secure the payment of the money at the end of a year,' and Mr. Sweek said that that could be arranged easily, and he seemed to be very much satisfied about it, and I says: 'I will tell you, Mr. Sweek, what I will do further. If you give security which is satisfactory and ample, I will reduce—instruct my attorneys to reduce the interest on that note to 7 per cent. instead of 8,' which was done."

He also states he instructed his attorney that he might release the attachment if the securities and everything which was offered to them for the new loan were ample and unquestionable; that he then left and was gone seven months and never saw the mortgage or the note until after he returned from Europe and knew nothing at all of the details of the transaction. He expressly denies that he had any agreement with Thad Sweek or with Alex Sweek that the former would not be liable to him on the mortgage, or that it would only be a lien on the lot or a second mortgage. He declares on cross-examination:

"I told Mr. Sweek positively that I didn't have time to go into the details and to examine the titles, or to look after the details of the transaction at all, or securities or mortgages or notes, or anything of that kind at all, because I was leaving right away and didn't expect to be back in a number of months. Now, this mortgage and this note—I never saw the note; was not in the city when it was executed. I had been away a number of days, and never saw it, and never even had a communication from my attorneys in relation to it, and knew nothing about the details of the transaction for over seven months, until my return."

Mr. Masters, the attorney who conducted the matter on behalf of plaintiff, testifies thus:

"Well, after the suit had been filed and attachment brought, Mr. Milton Smith and Judge Sweek came in to see me about the matter. They had been negotiating with Mr. Manley, I think, before they saw me, but I can recall one occasion that Mr. Smith and Mr. Sweek came in, and they proposed to give a mortgage, including another lot, I think, adjoining this property that Mr. Manley had a mortgage on,

or give a mortgage on the same lots and an additional lot belonging to Thad Sweek. Thad Sweek was going to guarantee the payment of the note, as I remember, * * * and some days after, I think, Mr. Smith came around and brought the note and mortgage into the office, covering this property. I do not now recall the lots and blocks. I had a memorandum at that time in the desk, and I checked it up and saw that it corresponded with what Mr. Manley had told about the matter in instructing me, and that note and mortgage was received in satisfaction of the suit pending, and the case was dismissed, as I remember now. Q. Did you ever see this mortgage before it was brought in to you? A. No; that was the first time I ever saw that mortgage, was when they brought it in to me signed. Q. You were the attorney that looked after this attachment suit, and the dismissing of it and accepting the new mortgage, weren't you? A. As I remember, I had the handling of the whole of that; yes. I think I brought the other action also. Q. Was this mortgage prepared in the office of Masters, Brice & Masters? A. It was not. Q. Was there anything said in the conversation you had with Judge Sweek or Mr. Smith relative to Thad Sweek not agreeing to pay or assume the obligation, but simply offering the lot as a lien? A. No; there wasn't any proposition of that kind. My understanding was that he was guaranteeing the note."

In rebuttal Alex Sweek denies Masters' version of the conversation, and says he told the latter that Thad Sweek put in the lot, but would not sign the note or become liable for the debt. Milton W. Smith was produced as a witness for the defendant, but did not state anything material to the decision of the issue. Mrs. Smith was not a witness. At the hearing it was agreed that the attachment covered lot 4 and the south 10 feet of lot 7 in block 113 and lots 5 and 6 in block 136 in Carruthers addition to South Portland. The mortgage in suit includes lots 3 and 4 and the south 5 feet of lot 2 in block 113, and the part to be released on payment of the previous mortgage was lot 3 and the south 5 feet of lot 2.

The degree of proof required to establish mistake is thus summarized in 10 R. C. L., p. 300, §§ 43 and 44:

"The exercise of the power to correct mistakes in written instruments trenches on the rule that parol evidence ought not to be admitted to vary that which is written, and therefore courts of equity act with caution in the matter. The rule in the courts of law is that the writing contains the true agreement of the parties, and that it, therefore, furnishes better evidence of the sense of the parties than any that can be supplied by parol. Equity, however, has a broader jurisdiction, and will open the written contract to let in matters arising from facts perfectly distinct from the sense and construction of the instrument itself, proceeding on the theory that the previous oral agreement subsists as a binding contract, notwithstanding the attempt to put it in writing; and on clear proof of its terms the court ought to make the writing conform to the actual agreement; but the mistake must be made out by the clearest evidence, according to the understanding of both parties, and on testimony exact and satisfactory. Slight suspicions, vague presumptions, bare possibilities, will not do, for, if parties understand an agreement differently, and neither of them makes known to the other his construction of it, and it is afterwards reduced to writing and duly executed, they are both bound, in

equity as well as at law, by the terms of the written instrument, which in such cases is to be construed by the court. * * * The general rule, subject to certain exceptions, is that in order to justify relief from a contract on the ground under consideration, the mistake must have been mutual. A mutual mistake in equity is a mistake reciprocal and common to all the parties to a contract or written instrument. It may arise in connection with the facts on which a contract is based, but usually it is a mistake where all alike labor under a misconception respecting the contents or the legal effect of the contract or instrument. Where each party to a deed misunderstands the understanding of the other in regard to land which is agreed to be conveyed, there may be a common, though not a mutual, mistake as to the subject-matter of the contract. But while mistakes in the intention of one only of the parties are not generally relievable in equity, this rule does not apply where one of the parties only is under such mistake, either of the facts or the stipulations of a contract, and such mistake has been occasioned by the fraud, concealment, misrepresentation, deceit or imposition in any form of the other."

The same volume on page 297, in speaking of the effect of negligence, sums up the doctrine thus:

"But ignorance of a stipulation in a contract is no ground for relief, where there is no evidence that he was deceived or misled by any misrepresentation or concealment thereof, and his mistake must be ascribed solely to his own carelessness or inattention, as, for instance, where he executes a written instrument without reading it or having it read to him. Also it is generally held that a party may have relief in equity from a judgment at law only when he has been deprived of a legal right by fraud, accident, or mistake, unmixed with negligence or fault on his part."

It is undisputed that the preparation of the instrument in question rested entirely with the answering defendant and his advisers. He says himself that his brother, an experienced attorney, advised him that the instrument was all right. Without contradiction the plaintiff states that he never saw either the note or the mortgage in question until some months after their execution, and knew nothing about the details of the matter until then. The attorney who conducted the matter for him declares that he never saw the instruments until they were completed and submitted to him for examination. Neither the plaintiff nor any one acting for him is shown to have any knowledge of the first draft of the mortgage or of Thad Sweek's objections to it. The immediate parties, Manley and Thad Sweek, are entirely at variance as to the negotiations. The latter spoke but once to Manley on the subject, and then only to tell him that he would sign the mortgage when it was fixed to suit him. He was represented from the beginning by his brother, who, of course, does not agree with Manley about the terms of the offer they made. The latter's understanding was that they proposed to give security, and on that basis he left the details both as to the form and the sufficiency of the collateral to his attorney, and so informed Alex Sweek. The matter was evidently left to the Sweeks and Smiths to prepare

the papers and submit them to the plaintiff's attorney for approval. There is no pretense that the plaintiff, or any one else for him, sought to influence the defendant as to the form or terms of the mortgage. It was entirely the act of Thad Sweek and his relatives that the tender of security was made in the form in which it appears.

[1-3] The evidence as to the terms of the negotiation is not of that clear and convincing sort required by the rules of equity to overturn the deliberate deed of the parties. Besides this we have Alex Sweek testifying one way and Manley another on that particular point. The burden of proof rests upon the answering defendant to establish his contention by the preponderance of the evidence. Conceding that Alex Sweek and Manley are of equal credibility, the latter is entitled to the presumption that the private transaction in dispute was fair and regular. L. O. L. § 790, subd. 19. This at least would leave the case between the parties at a balance on the weight of testimony, if not establishing a superiority of proof in favor of the plaintiff.

[4] Moreover, the answering defendant himself is at fault, or at least negligent in not perceiving and comprehending the terms of the instrument which he signed. The rule is thus stated in *Bibber v. Carville*, 101 Me. 59, 63 Atl. 303, 115 Am. St. Rep. 303:

"While a court of equity may decree the rescission of a contract for a mistake which is unilateral, the power should not be exercised against a party whose conduct has in no way contributed to or induced the mistake, and who will obtain no unconscionable advantage thereby. * * * Equity assists only the vigilant. It does not relieve against mistakes which ordinary care would have prevented. Conscience, good faith, and reasonable diligence are necessary to call a court of equity into activity."

In the instant case the form of the mortgage is the defendant's own doing, assisted by his brother. The plaintiff had nothing to do with it, either in person or by another. He obtains no unconscionable advantage. On the contrary, he waived the undoubted benefit of security by ample attachment, and extended the time of payment at a reduced rate of interest. He should not now be made to suffer on account of something with which he had nothing to do and for which he was not to blame. In *Powers v. Powers*, 46 Or. 479, 80 Pac. 1058, the effort of the plaintiff was to set aside a deed to the defendant which she claimed was induced by the fraud of the latter as to its form and legal effect. Mr. Justice Bean sums up the case thus:

"The plaintiff was in full possession of her mental faculties at the time the deed was executed, and fully competent to transact business. Her testimony in relation to the transaction is uncertain and indefinite, and is flatly contradicted by the defendant. Out of all the contradiction and confusion, however, stands the deed, solemnly executed by her, conveying the property in question to her son. From her own testimony she was negligent and careless in signing it without reading or having it read to her or making some inquiry as to its contents. There is no testimony that the defendant made any

representations to her at the time as to the nature or character of the instrument, or that he attempted or endeavored to deceive her in any way. There is no proof that he caused the instrument to be prepared, or that it was prepared at his suggestion."

The analogy between that case and the present is strong in its circumstances favoring the support of the instrument in question. That the instrument which a person in the possession of his faculties signs without reading or reads carelessly binds him is established by the following authorities: *Spitze v. B. & O. R. R. Co.*, 75 Md. 162, 23 Atl. 307, 32 Am. St. Rep. 378; *Hoeger v. Citizens' Street Ry. Co.*, 36 Ind. App. 662, 76 N. E. 328; *Atchison, etc., Ry. v. Vanordstrand*, 67 Kan. 386, 73 Pac. 113; *McNamara v. Boston Elevated Ry. Co.*, 197 Mass. 383, 83 N. E. 878; *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107; *Mateer v. M. P. Ry. Co.*, 105 Mo. 320, 16 S. W. 839; *Mo., K. & T. Ry. v. Craig*, 44 Tex. Civ. App. 583, 98 S. W. 907; *Watson v. Planters' Bank*, 22 La. Ann. 14; *Eldridge v. Dexter R. Co.*, 88 Me. 191, 33 Atl. 974; *Leslie v. Merrick*, 99 Ind. 180; *Hawkins v. Hawkins*, 50 Cal. 558; *Starr v. Bennett*, 5 Hill (N. Y.) 303; *Gibson v. Brown* (Tex. Civ. App.) 24 S. W. 574.

[5] Still further, the mistake is not shown to have been mutual between the parties. The evidence is clear that they did not understand the preliminary negotiations alike. Under such circumstances, the contract as executed must be allowed to stand on the principle that, when parties have reduced their covenants to writing, it must be held to contain all the terms, in the absence of fraud or mutuality of mistake. *Lewis v. Lewis*, 5 Or. 169; *Stephens v. Murton*, 6 Or. 193; *Epstein v. State Ins. Co.*, 21 Or. 179, 27 Pac. 1045; *Kleinsorge v. Rohse*, 25 Or. 51, 34 Pac. 874; *Mitchell v. Holman*, 30 Or. 280, 47 Pac. 616; *King v. Holbrook*, 38 Or. 452, 64 Pac. 659; *Stein v. Phillips*, 47 Or. 545, 84 Pac. 793; *Bower v. Bowser*, 49 Or. 182, 88 Pac. 1104; *Smith v. Interior Warehouse Co.*, 51 Or. 578, 94 Pac. 508, 95 Pac. 499; *Leonard v. Howard*, 67 Or. 203, 135 Pac. 549; *Sayre v. Moir*, 68 Or. 381, 137 Pac. 215; *Coates v. Smith*, 81 Or. 556, 160 Pac. 517.

[6] Finally, the defendants were offering the security. It was incumbent upon Thad Sweek to tender it in the proper form as he understood it. He was not bound to carry out the tentative agreement which he says was made with Manley by his brother. The way was open for him to offer different, or even better, collateral, and the attorney for the plaintiff had the right, under the discretion conferred upon him by his principal, to accept as such the security offered. By means of the mortgage as tendered, the answering defendant secured the release of the two lots in block 136 on behalf of his sister, thus making a material change to the disadvantage of the plaintiff. It would be inequitable now

to reform the instrument in suit unless the defendants should do equity by restoring the plaintiff to the position which he occupied at the time the mortgage was tendered. The defendant should not be allowed to take advantage of part of the transaction and escape from the remainder. The argument of the defendant that the contested clause does not operate to charge Thad Sweek with the debt, even if allowed to remain as part of the mortgage, is ingenious, but not convincing. In our judgment it binds him, and that seems to have been his opinion when he put in his answer.

In brief, the alleged mistake is not clearly and satisfactorily established by a preponderance of the testimony. Having the matter entirely in his own control, the answering defendant was negligent and inattentive to his own interest in allowing the instrument to go to execution in its present form. Induced by the securities offered, the plaintiff materially changed his position to his disadvantage by releasing the additional property attached. The defendant does not do equity, nor offer it, by restoring the plaintiff to his former situation. For these reasons the decree of the circuit court respecting the defendant Thad Sweek is reversed, and one here entered against him, not only foreclosing the mortgage, but granting recovery from him personally of the amount of the debt.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

(88 Or. 192)

WATTS v. SPOKANE, P. & S. RY. CO. et al. (Supreme Court of Oregon. April 2, 1918.)

1. TRIAL §165—MOTION FOR NONSUIT—CONSIDERATION.

In considering a motion for nonsuit, all the testimony on the part of the plaintiff is regarded as true, together with every intendment and reasonable inference which can arise therefrom.

2. CARRIERS §347(9) — PASSENGERS — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

In an action for injuries to a passenger while alighting from defendant's train, whether plaintiff was negligent held a question for the jury.

3. CARRIERS §303(4)—DISCHARGING PASSENGERS—LENGTH OF TIME FOR STOPPING.

A passenger is entitled to a reasonable time in which to leave the train when he reaches his destination, and if the train is started suddenly while he is in the act of alighting and he sustains injury thereby, the carrier is responsible for the negligence which produced the injury.

4. CARRIERS §326 — DISCHARGING PASSENGERS—CONTRIBUTORY NEGLIGENCE.

Contributory negligence in alighting from a train about to start, or starting, may depend on the mental and physical capacity of the passenger.

5. TRIAL §129—MISCONDUCT OF ATTORNEYS—RECRIMINATION.

Where attorneys on one side remarked concerning the veracity of an attorney on the other side reference by the latter to the Jewish general-

ogy of the witnesses produced by the former was not reversible error.

6. APPEAL AND ERROR ¶1060(1)—MISCONDUCT OF ATTORNEYS—WHERE REVERSIBLE.

Language and conduct of counsel will justify a reversal only when connected with some judicial error on the part of the trial judge.

7. APPEAL AND ERROR ¶1170(9)—HARMLESS ERROR—STATUTE—INSTRUCTIONS.

An instruction concerning duty of carrier to furnish a platform or stool to aid passengers in alighting, where the only material issue was as to whether a passenger fell off a moving train or jumped off, *held* not reversible, in view of Const. art. 7, § 3, where it did not change the result.

8. CARRIERS ¶303(8)—DISCHARGING DISABLED OR INFIRM PASSENGERS.

If a carrier knows of mental or physical disability of a passenger, by appearance or otherwise, it should give the passenger such assistance in alighting as the known condition renders necessary.

9. APPEAL AND ERROR ¶1004(1)—REVIEW—AMOUNT OF DAMAGES—QUESTION FOR JURY.

The range of power of the jury as to the amount of damages in a personal injury case is very large, and the verdict will not be reviewed where supported by the evidence.

10. CARRIERS ¶318(9)—INJURY TO ALIGHTING PASSENGER—LIABILITY OF CONDUCTOR.

Evidence *held* insufficient to warrant a finding that a conductor of a train was personally negligent as to a passenger injured while alighting.

McCamant, J., dissenting.

Department 2. Appeal from Circuit Court, Columbia County; J. A. Eakin, Judge.

Action by T. C. Watts, substituted for John W. Patrick, deceased, against the Spokane, Portland & Seattle Railway Company, a corporation, C. E. Chamberlain, and R. O. Burgess. Judgment for plaintiff, and defendants appeal. Affirmed in part, and reversed in part.

This is a personal injury case. The defendants appeal from a judgment rendered upon a verdict. The gist of the complaint as to the negligence is as follows: After the averments of the corporate and business character of the defendant company, and that C. E. Chamberlain was conductor and R. O. Burgess brakeman on the train of the railroad company, the pleading states that on April 9, 1915, plaintiff, John W. Patrick, a man 74 years of age, purchased a ticket and was a passenger on defendant company's train from Rainier, Or., to Goble, Or., where the train arrived at 8:37 p. m., about 15 minutes late; that in attempting to make up time the defendants negligently failed to allow the train to stop at Goble, plaintiff's destination, a sufficient length of time to permit him safely to alight therefrom, and carelessly started the train while he was attempting to leave it; that plaintiff was enfeebled in powers of locomotion, infirm, and in a weakened condition, which was obvious and plainly visible from his appearance and which was well known to defendants Chamberlain and Burgess, or might have been known to them

by the exercise of ordinary care and observation; that defendants carelessly and negligently failed and neglected to provide any platform, step, contrivance, means, or assistance to enable plaintiff safely to alight from the train; that when plaintiff was upon the platform of the car, which was rendered unsafe and dangerous by the premature starting of the train, defendant Burgess was on the platform of the adjoining car and was in a position to see the condition and danger of the position of plaintiff and with ordinary care and caution could have prevented the injury, but that he neglected to stop the train or do anything to prevent the injury; that when plaintiff, in attempting to leave the train, had reached the steps of the coach upon which he was riding, on account of the negligent starting and running of the train without giving him sufficient time to alight therefrom (here specifying the acts of negligence as above) he was forcibly and violently thrown from the train by its motion and jarring and was thereby seriously injured to his damage. By its answer the defendant company admits its incorporation; that plaintiff was a passenger on its train on the date alleged; and that while alighting therefrom at Goble he fell and sustained some injuries. It denies the other allegations of the complaint, and further alleges that plaintiff's own negligence caused or contributed to cause the accident. The separate answers of defendants Chamberlain and Burgess deny the main allegations of the complaint, and also allege contributory negligence. The replies controverted the new matter of the answers.

C. A. Hart, of Portland (Carey & Kerr, of Portland, on the brief), for appellant Ry. Co. G. C. Fulton, of Astoria (Oscar Furuset, of Portland, on the brief), for appellant Chamberlain. E. B. Tongue, of Hillsboro (Glen R. Metsker, of St. Helens, on the brief), for respondent.

BEAN, J. (after stating the facts as above). When plaintiff had introduced his evidence and rested his case, counsel for defendants moved the court for a judgment of nonsuit. This motion was denied, and the refusal is assigned as error. At the close of all the testimony defendants' counsel requested a directed verdict in favor of defendants, which was disallowed, and such ruling is also assigned as error. These assignments raise the same question.

[1] It is a well-established rule in this state that in the consideration of a motion for a nonsuit all the testimony on the part of plaintiff is to be regarded as true, together with every intendment and reasonable inference which can arise therefrom. Considering the same in this manner, if a difference of opinion may exist as to the conclusions of fact which may be drawn from the evidence,

the case should be submitted to the jury to pass upon the issues. Article 7, § 3, Const.; *Smitson v. S. P. Co.*, 37 Or. 74, 60 Pac. 907; *Consort v. Andrew*, 61 Or. 483, 123 Pac. 46; *Domurat v. O. W. R. & N. Co.*, 66 Or. 135, 134 Pac. 313; *Nelson v. St. Helens Timber Co.*, 66 Or. 570, 133 Pac. 1167, 135 Pac. 169; *Sigel v. P. Ry., L. & P. Co.*, 67 Or. 285, 135 Pac. 866; *Smith v. Badura*, 70 Or. 58, 139 Pac. 107; *Isaacson v. Beaver Logging Co.*, 73 Or. 28, 143 Pac. 938; *Johnson v. P. Ry., L. & P. Co.*, 79 Or. 403, 410, 155 Pac. 375. It is the contention of counsel for the defendants Spokane, Portland & Seattle Railway Company and Burgess that, conceding there was evidence of negligence on the part of defendants in failing to stop the train a sufficient length of time for plaintiff to alight therefrom in safety, plaintiff was guilty of negligence in stepping from a place of safety off the car when it was in motion, and that such act on his part intervened between the negligent failure to stop the train a sufficient length of time at the station and the injury of plaintiff, and was the proximate cause of the hurt.

It is the contention of counsel for plaintiff that he fell or was thrown off the car, and that he did not alight therefrom when it was in motion. The evidence on the part of the plaintiff tended to support his contention and the averments of the complaint. There was a sharp dispute as to whether plaintiff jumped or fell. The evidence of defendants tended to support the position of the company. The testimony in the record tended to show that on the day of the occurrence complained of Mr. Patrick and two companions, William H. Wagner and John M. Lindsay, went from Goble, Or., to Kalama, Wash., to celebrate the anniversary of the surrender of Lee at Appomattox Courthouse. Returning in the evening they boarded the train at Rainier, and when it arrived near Goble the brakeman Burgess called that station, and just before the train came to a stop the three men raised up from their seats in the smoking car, which were about two-thirds the length of the car from the rear, and proceeded towards that end of the car. Mr. Lindsay was ahead, and had not reached the end of the car when it stopped. Mr. Wagner was right behind him. Before Lindsay got off, the car started. Wagner was next, and when he got off the train was going so fast it was difficult for him to keep his feet. Mr. Patrick was behind Wagner and he stepped down to the lower step of the car holding onto the "grabirons." The train ran the length of a car or a car and a half when he fell off. The rate of speed was about four miles an hour when the train had gone only a few feet. Wagner testified in substance to the facts above narrated, and that after he alighted he was looking at Patrick and that "it looked like he fell off." Mr. Lindsay also testified in effect as above stated. The testimony also indicates that the train stopped

at Goble 10 or 12 seconds. It was dark at the time. The brakeman Burgess with a lantern in his hand assisted a woman with a baby to alight from the front part of the coach next to the smoker and two or three other men got off the train there. He then threw his stool up on the platform, signaled for the train to go ahead, and started up the steps of the smoker, and as Patrick fell he (the brakeman) pulled the bell cord and the train stopped. Ernest Archibald, a lad of 18 years, who with another boy was at the depot with Mr. Patrick's son, who came to meet his father, detailed the occurrence as follows:

"Q. Tell the jury what you saw from the time the train stopped until this occurred? A. Just as the train was coming to a stop I saw Mr. Lindsay and Mr. Wagner and Mr. Patrick get up and start for the back end of the coach, and when the train stopped the brakeman got off and put his stool on the ground, and I noticed a couple of women get off, and I don't know whether there was anybody else got off, and the conductor said, 'All right here' and the brakeman said, 'All right here,' and he said, 'All on board,' and he got up and threw his stool up and the train started, and Mr. Lindsay got off and Mr. Wagner got off, not as good as Mr. Lindsay did, and Mr. Patrick was down there hanging with his hand holding on that rod and his hand on the side of the car, and it looked like he was trying to get back, or something, and the brakeman in the meantime was standing there watching him, and just as I saw Mr. Patrick fall he jerked the string."

On cross-examination this witness said:

"He started to get off. He didn't get off."

The other two boys who were standing looking at the train at the time testified in corroboration of young Archibald.

In January, 1916, plaintiff left the hospital to attend the trial and testified in substance as follows:

"A. The 15th—my memory is awful bad. On the 15th of the month I went to—Wagner and myself went to Rainier and when we were coming back on the train we were on they threw me off—I fell off of the car; they threw me off of the car down and mashed me up; that is about as much as I can tell you."

[2] Under all the circumstances it was a question for the jury whether the plaintiff acted as a reasonably prudent and careful man would under the conditions prevailing at the time of the injury. From the evidence the jury evidently believed that when he descended the car steps the plaintiff was expecting that the train would be stopped in order for him to get off at his destination, and while he was endeavoring to get back onto the platform of the car the movement of the train threw him off to the ground.

[3] A passenger having reached his destination is entitled to a reasonable time in which to leave the train that has transported him. If the train is started suddenly while he is in the act of alighting, and he sustains injury thereby, the carrier is responsible for the negligence which produced the injury. *Smitson v. S. P. Co.*, 37 Or. 80, 60 Pac. 907, and cases there cited. We cannot say there

was no evidence to support the finding of the jury.

During the cross-examination of plaintiff's witnesses, counsel for the company appeared to recognize that the evidence purported to show that Mr. Patrick fell off the car instead of stepping off. In the cross-examination of the witness Archibald, after referring to the position of the train, the defendants' counsel inquired: " * * * When Mr. Patrick fell he was about 150 feet along the track?"

Where there is a dispute as to the facts, or if there is no dispute as to the facts, but yet there may reasonably be a difference of opinion as to the inferences and conclusions of fact which may be deduced therefrom, the question is for the determination of the jury. *Smitson v. S. P. Co.*, 37 Or. 74-77, 60 Pac. 907; *Shobert v. May*, 40 Or. 68, 66 Pac. 466, 55 L. R. A. 810, 91 Am. St. Rep. 453; *Hedin v. Railway Co.*, 26 Or. 155, 160, 37 Pac. 540; *Sullivan v. Wakefield*, 59 Or. 401, 117 Pac. 311; *Hartford Ins. Co. v. Central R. R.*, 74 Or. 144, 144 Pac. 417; *Delovage v. Oregon Creamery Co.*, 76 Or. 430, 147 Pac. 392, 149 Pac. 317. The court is justified in taking a case from the jury only when the presumption and evidence of negligence is overcome by undisputed testimony. *Caraduc v. Schanen-Blair Co.*, 66 Or. 310, 133 Pac. 636. It is unnecessary for us to consider the weight of the evidence. *Strickler v. P. Ry., L. & P. Co.*, 79 Or. 533, 144 Pac. 1193, 155 Pac. 1195; *Wasiljeff v. Hawley Paper Co.*, 68 Or. 487, 137 Pac. 755; *Saxton v. Barber*, 71 Or. 230, 139 Pac. 334. It evidently seemed to the jury that, as plaintiff and his comrade rode only between two stations, but little attention was paid to them, and that plaintiff was neglected, and was not afforded a reasonable time to alight from the train; that the brakeman, Mr. Burgess, was present, and ought to have seen him and assisted him, or stopped the train; that the failure to do so was occasioned by the lateness of the train; and that the plaintiff was not guilty of any negligence. The plaintiff's station was called for the purpose of warning him to leave the train. He proceeded to the platform as it was his right and duty to do. The train was stopped and the doors were opened as an additional invitation for him to make his exit.

[4] The jury would not be compelled to expect the same conduct on the part of plaintiff when he found that the train was in motion that would be looked for from a trainman accustomed to and skilled in such matters. Reasonable prudence and care under the circumstances would be what they would naturally require of plaintiff. The question of contributory negligence under the evidence in this case was one for the jury. *Sullivan v. Wakefield*, supra. What will constitute ordinary care on the part of the passenger may depend, however, on the mental and

physical capacity of the passenger himself. An act which might be negligent in a normal person may not be contributory negligence in view of the passenger's disability, such as will defeat his recovery for injury where the carrier has been negligent. 6 Cyc. 636, b (1). Contributory negligence is a question of law only where the facts are undisputed or where only one inference can be drawn from the evidence. *Greenwood v. Eastern Or. Power Co.*, 67 Or. 433, 136 Pac. 336. The question of contributory negligence is always one for the determination of the jury. *Sullivan v. Wakefield*, supra. The evidence does not bring the case within the rule announced in *Armstrong v. P. Ry. Co.*, 52 Or. 437, 97 Pac. 715. It has been said by this court in the case of *Wells v. Great Northern R. R. Co.*, 59 Or. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A. (N. S.) 818, 825, that the proximate cause "is any act or omission * * * which directly puts into operation another agency or force, or interposes an obstacle whereby injury is inflicted that would not have happened except for the original negligent act or omission."

The jury might reasonably conclude that the plaintiff would have continued on out of the train and off the same in perfect safety except for its being started. See *Manning v. Portland Ship Building Co.*, 52 Or. 101, 96 Pac. 545. There was no error in denying the motion for a nonsuit nor in refusing a directed verdict.

It is assigned as error and earnestly urged upon our attention that the court erred in permitting counsel for plaintiff in his opening argument to the jury, over the objection and exception of defendants, to make certain statements to the jury in reference to defendants' witnesses, in failing to instruct counsel to desist from such statements and in not instructing the jury to disregard the same. In order to pass upon the colloquy between counsel it will be necessary to notice the beginning thereof.

[5] It is the rule that, if crimination is granted, recrimination cannot be refused. If statements on one side are permitted, counter statements on the other cannot be denied. 1 *Thompson on Trials* (2d Ed.) § 971; *Boyd v. Portland Elec. Co.*, 37 Or. 567, 62 Pac. 378, 52 L. R. A. 509. It might be prefaced that there is a strong ring to every word spoken by the learned counsel for defendants, and it may be possible that there was a slight sting in some of his remarks. As we read the colloquy from cold type it was initiated at intervals during the taking of testimony about as follows: Two attorneys were witnesses for defendants. Interrogating one of them we find at page 67 of the transcript of testimony the following questions by defendants' counsel:

"Do you think you can tell the truth notwithstanding you are a lawyer? A. I will take a chance at it, as well as my friend here can (indicating). Mr. Metsker (one of counsel for

plaintiff): Whom do you mean as your friend, me? A. Yes, sir. Mr. Metsker: I take an exception to that."

In answer to the question, "But you do know that these three people got off?" this witness injected his opinion as follows: "I do because I made the remark, 'What a damn fool a man was to jump off of a moving train.'" Counsel for defendants advised Mr. Metsker, one of plaintiff's counsel, to "get a dictionary." At page 101 of the transcript in the cross-examination of Mr. Burgess, witness for defendants, we find the following:

"Q. You watch them do that and make no objection to it and it is quite customary? A. Yes, I have seen you do the same thing, for instance. Q. I do not doubt it at all; I can get on a pretty fast train. A. Suppose you got hurt, what would you do? Mr. Hart (counsel for defendants): Sue the company. Mr. Metsker: Maybe I would and maybe I would not—if I got a deal this old man got, I certainly would. Mr. Hart: Trust you. Mr. Metsker: You would try to job me like you did the plaintiff in this case with your Jew witnesses—"

In his argument to the jury Mr. Metsker referred to the genealogy of these witnesses for the defendants. Contending that the evidence was incorrect and contradictory of the evidence of the plaintiff, counsel for defendants objected to this statement and was allowed an exception by the court. As to a portion of the statements objected to the court said that it was going beyond the issues and admonished the counsel. Counsel for defendants made no request for any further ruling by the court or that the jury be instructed to disregard the comments of counsel for the plaintiff. The court asked counsel for defendants what he desired in the matter and he replied he was satisfied with the record. While many of the comments of counsel for plaintiff were improper, and should have been curtailed at an early stage, they were, we think, in answer to a direct challenge by the language of counsel for the defendants and by one of the attorneys who was a witness.

[6] The language and conduct of counsel will justify a reversal only when connected with some judicial error on the part of the trial judge. *Nelson v. Brown & McCabe*, 81 Or. 472, 159 Pac. 1163; *State v. Anderson*, 10 Or. 448; *Boyd v. Portland Gen. Elec. Co.*, supra; *State v. Blodgett*, 50 Or. 329, 344, 92 Pac. 820; *State v. Young*, 52 Or. 227, 234, 96 Pac. 1067, 18 L. R. A. (N. S.) 688, 132 Am. St. Rep. 689; *Madden v. Condon National Bank*, 76 Or. 363, 367, 149 Pac. 80. In the case of *Boyd v. Portland Gen. Elec. Co.*, supra, the court stated:

"It has been repeatedly held by this court that error must be predicated upon some decision of the trial court, and therefore, as a general rule, an objection to statements made by counsel during the argument presents no ground for review in the appellate court unless the trial court was requested to rule thereon, and did so adversely to the complaining party."

In *State v. Anderson*, supra, we find:

"Improper comments of counsel, either in a civil or criminal case, will not of themselves jus-

tify a reversal of judgment, under our system. They must be connected upon the record with error of the court to produce such a result. * * *

In *State v. Abrams*, 11 Or. 172, 8 Pac. 327, we find the following language:

"We have announced this principle before, * * * and we now lay it down as a rule to which there can be no exceptions, that no objection to proceedings in the court below can be heard in this court which is not based on alleged error in judicial action on the part of the lower court."

See, also, *State v. Lem Woon*, 57 Or. 494, 107 Pac. 974, 112 Pac. 427; *Watson v. S. Or. Co.*, 39 Or. 481, 65 Pac. 985. To justify reversal for misconduct of the counsel it must appear from the issues and from the state of the evidence that injury to the rights of the opposite party resulted. *State v. Morse*, 35 Or. 463, 57 Pac. 631; *State v. Birchard*, 35 Or. 484, 59 Pac. 468; *State v. Mims*, 36 Or. 315, 61 Pac. 888; *State v. McDaniel*, 39 Or. 161, 65 Pac. 520. We have too much confidence in the intelligence of a jury to believe that such a word war between counsel had any effect upon the result of their deliberations. Consumption of time is as much to be deplored as anything perhaps. Whether one of plaintiff's counsel struck back harder than the first verbal assault warranted is not required to be determined. The colloquy was in no way sanctioned by the trial court, and we find no ground for reversal on account thereof.

[7] At the time of the accident the train in question came to a halt so that the passengers would alight a little west of the front of the station. At this place there was planking between the rails about even therewith, but no raised platform. It does not appear from the record what the elevation of the platform immediately in front of the depot was. It will be remembered that, *inter alia*, a failure of defendants to furnish a platform or stool to enable plaintiff to alight safely was alleged. The stool used by the brakeman for the assistance of the woman in descending from the car was mentioned prominently in the testimony, but no stool was offered for plaintiff's use. Under these circumstances the court charged the jury as follows:

"I instruct you that, if you find that it was necessary and proper for the defendant railway company to have furnished a stool or step or platform for the plaintiff to have alighted from its train with safety, then it was the duty of this company to have furnished such appliance, and it was its duty further to see that the same was properly and safely placed; and if you find from the evidence that plaintiff was injured, as alleged, and you further find that the defendant railway company failed and neglected to furnish such stool or platform, and that such neglect and failure was the proximate cause of the injury, and that plaintiff was not guilty of negligence on his part which contributed to such injury, then the said defendants would be liable for the injuries, and your verdict should be for the plaintiff."

Defendants' counsel saved an exception to this part of the charge and contend that the

lack of the use of the stepping box obviously had no connection with the accident and that the giving of such instruction was reversible error. It is quite likely that if the trial court had had an opportunity to review and analyze all the testimony the charge in this respect would have been different, and it seems that the matter of the use of the stool was remote. After a careful reading of all the evidence which is contained in the record, we are forced to the conclusion that the instruction, although it be inapplicable, did not change the result of the case and was not reversible error. Under the mandate of our Constitution (article 7, § 3) the verdict should not be disturbed.

[8] The following part of the charge is criticized:

"If the defendant Burgess knew or could have known by the exercise of reasonable care that the plaintiff was in such dangerous situation, considering his age, experience and understanding that then it was their duty to slow up the train sufficiently to permit the plaintiff to leave the same in safety, if the same were in motion, and if the train had not been started, not to start the train until the plaintiff had gotten to a place of safety."

The rule with respect to the duty owing persons of advanced age or under disability is that they should be given such assistance as their appearance reasonably indicates is necessary; and the train employé is bound to consider only such facts with respect to the passenger's condition as are within his knowledge, or are made known to him through the passenger's appearance, or otherwise. 2 *Shearman & Redfield on Negligence* (5th Ed.) § 510. The instruction obviously related to the apparent familiarity and ability of the plaintiff in connection with his position on the car when he found it suddenly put in motion, and we see no reason for the same to be misunderstood by the jury. There was no error in giving it.

A consideration of the entire charge of the court to the jury convinces us that the issues were plainly and fairly submitted to it.

[9] The main question in this case is one of fact which the jury under its prerogative has passed upon. The amount of damages that should be awarded when the liability has been established is especially for its determination. The range of its power, within the limits imposed by the evidence, is very large. We cannot review the testimony for the purpose of substituting our judgment for the decision of the jury upon this issue of fact as to the damages to be allowed. We cannot by any means say there was no evidence to support the finding of the jury in this respect.

[10] The evidence of plaintiff shows that defendant Chamberlain was not present when the accident happened, and did not know when the train started that plaintiff was not off the train in safety. We find no

evidence tending to show that it was the duty of defendant Chamberlain to be at the car where the plaintiff and other passengers were to alight or to assist the plaintiff to make his exit, or that the conductor was responsible for the acts of the brakeman Mr. Burgess. He appeared to be there for the purpose of assisting the passengers, and he testified that it was his duty to discharge and receive passengers at the stations and to see that they got off the train. There was no contradiction of such evidence. It appears that at the time defendant Chamberlain was near where the baggage was being discharged at the station mentioned attending to his duties. In fact, but little, if any, attention was paid to the responsibility of this defendant during the trial. We find no evidence to support the verdict against the defendant Chamberlain.

The judgment against him should be reversed, and it is so ordered. With this exception, we find no reversible error in the record, and the judgment of the lower court in other respects is affirmed.

McBRIDE, C. J., and HARRIS, J., concur. McCAMANT, J., dissents.

(19 Ariz. 409)

ARIZONA EASTERN R. CO. v. STATE.
(No. 1554.)

(Supreme Court of Arizona. March 30, 1918.)

1. CONSTITUTIONAL LAW §15—VALIDITY OF STATUTES—CONSTRUCTION OF CONSTITUTION.

It will be presumed that no clause of the Constitution is without effect, and the constitutionality of a statute will be determined in the light of the whole Constitution.

2. RAILROADS §231—VALIDITY OF STATUTES—CORPORATION COMMISSION.

Under Const. art. 15, §§ 2, 3, 10, the exclusive power of control over railroads, particularly police power, is not given to the Corporation Commission, and the Legislature had power to pass Civ. Code 1913, pars. 2166, 2168, prohibiting and providing a penalty for railways running trains of more than 70 cars.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Action for penalty by the State of Arizona against the Arizona Eastern Railroad Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

G. P. Bullard, of Phoenix, and E. S. Ives, of Tucson, for appellant. Wiley E. Jones, Atty. Gen., and R. W. Kramer and George W. Harben, Asst. Atty. Gen., for the State.

FRANKLIN, C. J. [1] The Revised Statutes of Arizona (Civ. Code) 1913, provide as follows:

"Par. 2166. It shall be unlawful for any person, firm, company or corporation, operating any railroad in the state of Arizona, to run, or permit to be run, over his, their, or its line or road, or any portion thereof, any train consisting of more than seventy freight, or other cars, exclusive of caboose."

"Par. 2168. Any person, firm, association, company, or corporation, operating any railroad in the state of Arizona, who shall willfully violate any of the provisions of this act, shall be liable to the state of Arizona for a penalty of not less than one hundred dollars, nor more than one thousand dollars, for each offense; and such penalty shall be recovered, and suits therefor brought by the Attorney General, or under his direction, in the name of the state of Arizona, in any county through which such railway may be run or operated, provided, however, that this act shall not apply in cases of engine failures between terminals."

The Attorney General brought a suit in the name of the state of Arizona against the railroad company to recover a penalty under the statute. The complaint, in substance, charged the railroad company with willfully operating a train between certain terminals consisting of more than 70 freight cars exclusive of the caboose, which act in operating said train of cars was not the result of an engine failure or failures between terminals. The state had the judgment as prayed, from which the railroad company appeals. Paragraph 2168, supra, is not criticized as an improper subject for legislative action, but the want of power in the Legislature to enact the law is asserted as the defense of appellant to the suit; the contention being that under section 3 of article 15 of the Constitution the exercise of such governmental power vests in the Corporation Commission to the exclusion of any other agency of government.

In the case of *State v. Tucson Gas & Electric Company*, 15 Ariz. 294, 138 Pac. 781, this court had occasion to consider this provision of the Constitution with reference to the power to fix and prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected by public service corporations within the state for services rendered therein. It was there determined that such power was by the instrument vested exclusively in the Corporation Commission, but it is obvious that such a determination may not be a guide to the solution of the question presented in this record, and, in resting the argument upon the mere citation of that case; the appellant throws no light upon other provisions of the Constitution that must be determinative of the matter now before us. If it can be prevented, no clause, sentence, or word in the Constitution shall be superfluous, void, or insignificant; it being the duty of this court as an expositor to make a construction of all parts of the Constitution together, and not of one part only. It was observed by the great Chief Justice, in *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60, that it cannot be presumed that any clause in the Constitution is without effect, and a construction which would lead to such result is inadmissible, unless the language of the Constitution renders it imperative.

The appellant, Arizona Eastern Railroad Company, is a corporation for the trans-

portation of persons and property for profit. It is a railway heretofore constructed in this state. Section 10 of article 15 of the Constitution provides:

"Railways heretofore constructed, or that may hereafter be constructed, in this state, are hereby declared public highways, and all railroad, car, express, electric, transmission, telegraph, telephone, or pipe line corporations, for the transportation of persons, or of electricity, messages, water, oil, or other property for profit, are declared to be common carriers and subject to control by law."

It is seen that the appellant comes within the declaration of this section. Any one who contends that this provision is not to have its full measure of application must have a case that comes within some other section which cuts it down, or else that the section itself is so repugnant to the general purview of the Constitution that it can be given no rational meaning. In section 10, supra, no concealment of the meaning may possibly occur by reason of the language there employed. It is plain and unambiguous. Not a dubious word appears. The general intent and meaning of the section stands out in bold relief. A railway as a public highway and a railroad corporation within the enumeration of corporations classed as common carriers is subject to control by law. If there be a prohibition or limitation, then, upon the exercise of this control, we must find the particular clause which subjects it to a limitation or qualification. We have in this section a general intention expressed in the instrument, but if in any other parts we find a particular intention expressed which is incompatible with this general intention, the particular intention is to be considered in the nature of an exception. The particular intent incompatible with the general intent will be treated as an exception; the general intent being restrained to that extent only as may be imperatively necessary to the fitness of the matter contained in the exception.

In the *Tucson Gas & Electric Company* Case, we found a particular intent in the matter of prescribing classifications, rates, and charges to be made and collected by public service corporations contained in section 3 which was incompatible with the general intent found in section 10; that the authority of the Corporation Commission to prescribe classifications, rates, and charges under said section is exclusive. Construing the various sections of article 15 of the Constitution together, and looking at the language employed with a regard to the general purview of the instrument, no other construction is possible if its several provisions are to be harmonized and made into a workable instrumentality. But it by no means follows that such an interpretation calls for an expression that the people have surrendered all governmental power over all corporations as they are classified either as public service corporations, common carriers, or public

highways. Yet, if the view pressed upon this court by the appellant is to prevail, it naturally follows that the extent and elasticity of the power conferred upon the Corporation Commission in section 3 is subversive of all legislative control whatsoever, and this regardless of other provisions to be found in the Constitution bearing upon the matter; that, by construction, section 10 is so much Dead Sea fruit turning to ashes upon the lips. It is perfectly clear that no such meaning can be deduced from article 15 if it be articulated and a general purview of its provisions obtained. It will be observed by section 2 that corporations are classified as public service corporations:

"Sec. 2. All corporations other than municipal engaged in carrying persons or property for hire; or in furnishing gas, oil, or electricity for light, fuel or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations."

In section 3 follows an enumeration of the powers and duties of the Corporation Commission with reference to this class of corporations. In section 10, railways are declared to be public highways, and after this declaration follows an enumeration of certain corporations—a railroad corporation being included—which are declared to be common carriers and subject to control by law.

Compared with section 2, in section 10 different words are used. There is a different nomenclature used in placing these corporations in the different classes. The natural presumption would be that the difference in language and in nomenclature was intended to express different ideas; each class to be governed by a separate purpose and to promote a particular object in view. The change of the form of expression in the two sections, in view of the entire enactment in which they occur, can indicate nothing else than a purpose to differentiate or change the meaning of the two sections. It is reasonably apparent from a consideration of the language of sections 2 and 3 that the idea there prevailing is the public service corporation, with those functions of the corporation uppermost which are called into activity and pertinent to its contact with the public. In short, the transaction of its business with the public.

"Sec. 3. The Corporation Commission shall have full power to, and shall prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein, *and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regu-*

*lations, and orders for the convenience, comfort, and safety, and the preservation of the health of the employees and patrons of such corporation. * * **" (Italics ours.)

The language of the fore part of this section is mandatory and compelling. The after part is permissive and discretionary. To prescribe classifications, rates, and charges of public service corporations is the duty, and the exclusive duty, of the Corporation Commission. Following this expression of duty is the sentence "and make reasonable rules, regulations and orders by which such corporations shall be governed in the transaction of business within the state." If a man cannot be known from himself, we speak in the popular phrase, then he may be known from his associates. So with a word or sentence in the Constitution or statute; the meaning of such a word or phrase, if it be doubtful, may be ascertained by reference to the meaning of words or phrases associated with it. If such happen to be dubious, the meaning may be established by the context, or by comparing them with other words or sentences in the same instrument. The rules of interpretation furnish some fixed standard by which to measure these things, to measure power and to limit prohibition.

It is noted in the first part of section 3 that the full power given to the Corporation Commission to make reasonable rules, regulations, and orders by which public service corporations shall be governed in the transaction of business within the state is a grant in general terms, and is associated with and directly follows the full power to prescribe classifications, rates, and charges, which is a specific power granted in particular terms and directly related to the subject matter of the transaction of its business by a public service corporation. Whether, if there be doubt as to the extent of the power thereby granted in general terms, such doubt may be reasonably resolved by considering the two grants of power together, one specific and the other general, under the maxim *nosctur a sociis*, or within the rule governing the construction of statutes that general terms following particular ones must be tied to and made only to apply to such things as are *ejusdem generis* with those comprehended in the specifications, is a matter yet subject to conjecture. The case at bar requires no solution of the question whether this grant of general power covers more or less ground than is reasonably necessary and proper to effectuate the objects of, and give full effect and vitality to, the grant of specific power. We merely glance in at the door, because the facts of this case require no critical survey of the contents of the room. But we are clearly of the opinion that the general powers granted imperatively in the first part or section 3 have not the same meaning and purpose which is contained in the permissive power granted to the Corporation Commis-

sion to make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health of the employes and patrons of public service corporations, which grant of power is contained in the last part of the section. That these two grants of power not only admit of but demand two separate senses. If, by construction, the first general grant is made to cover all power whatsoever, and be exclusive of any other agency, then the specific exclusive power to prescribe classifications, rates, and charges is superfluous, as is also the permissive authority given to make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health of the employes and patrons of the public service corporations. It must likewise follow as a natural sequence that section 10 of article 15 of the Constitution is also a superfluity; that the words designating railways as public highways, and railroad corporations as common carriers, and subjecting them to the control of the law, are the mere skins of thought with no body or meaning whatsoever: that the entire section is an exotic incumbering the ground of the Constitution, and not a plant indigenous to its soil. We are not called upon, nor is this court permitted, to involve its provisions with an incongruity which must result in so manifest an absurdity. By comparing the commanding words employed in the first part of section 3 with the permissive words found in the last part thereof, and measuring them by the extent of power reserved in section 10 to the legislative branch of the government, we are thus afforded opportune and helpful indication that the grant of power contained in the first part of section 3 is not to be applied without some limitation. It is perfectly clear that neither by direct language, nor by any necessary implication, from the powers granted to the Corporation Commission in section 3, is the police power in this state over a railway as a public highway, or over a railroad corporation as common carrier, vested exclusively in the Corporation Commission. It is equally clear that this power of the state over a railway as a public highway, and over a railroad corporation as a common carrier, may, by a plain mandate, and in the emphatic language of the Constitution, be exercised by the lawmaking department of the government. This is the extent of the matter that must now be determined.

That the statute, in this case attacked for want of power in the Legislature to enact it, has a substantial relation to an object as to which the state is competent to legislate under its police power is not questioned, and the exercise of that power by the Legislature, being nowhere denied in the Constitution, but expressly sanctioned and reserved by the instrument to the legislative department, it follows that the judgment of the su-

perior court must be affirmed. It is so ordered.

ROSS, J., concurs.

CUNNINGHAM, J. (concurring specially). Paragraph 2166, Revised Statutes of Arizona (Civ. Code) 1913, attacked in this appeal on the grounds of constitutional invalidity owing to a lack of power in the Legislature to enact, is in effect, if valid, a restriction upon the charter rights granted the appellant by the general law of its organization. Subdivisions (12) and (14) of paragraph 2151 of chapter 4, title 9, of the Revised Statutes of Arizona (Civ. Code) 1913, grant to railroad corporations organized thereunder power:

(12) "To establish, execute and enforce all useful and proper rules and regulations for the management of their trains and business, and to secure the comfort, safety and good behavior of their passengers, employes and agents;" and (14) "such corporations shall have such further powers as may be necessary to enable them to exercise and enjoy, fully and completely, the powers granted by this title, and generally all such powers as are usually conferred upon, required and exercised by railroad companies."

Paragraph 2150, Id.:

" * * * And generally for the purpose of constructing and maintaining and operating said railroad * * * and carrying on their business, said corporations shall have and possess all the rights, powers, and privileges which are enjoyed by natural persons."

The matter of the number of cars making up a train moved over a railroad is a matter pertaining to the operation of trains, and principally concerns the corporation and its employes. The public interests are only remotely affected by the length of the trains moved. A natural person operating a railroad would certainly have the right, power, and privilege, unless restricted by law, to order made up a train consisting of any number of cars, and require such train to be moved over his railroad to the desired destination.

No pretense is made that the Corporation Commission is granted power under section 3 of article 15 of the Constitution to make rules, regulations, and orders which have the effect of altering, amending, or repealing the charter rights or powers of public service corporations. Section 2, article 14, State Constitution, reserves to the legislative power of the state the exclusive right to interfere with the charter powers of corporations formed under general law, as follows:

" * * * Laws relating to corporations may be altered, amended, or repealed at any time, and all corporations doing business in the state may, as to such business, be regulated, limited, and restrained by law."

Hence the charter rights of railroad corporations organized under the provisions of chapter 4 of title 9, Revised Statutes of Arizona 1913, to move trains composed of any number of cars, was subject to regulation, limitation, or restraint by law. The agency prescribing the "law" providing the regulation, limitation, or restraint to which the gen-

eral incorporating laws are subject, of which the corporation had notice at the time of its organization, is definitely ascertained by reference to section 14 of article 14, State Constitution, reading as follows:

"This article shall not be construed to deny the right of the legislative power to impose other conditions upon corporations than those herein contained."

Section 1, article 4, State Constitution, expressly confines the exercise of the legislative power of government to a Legislature, with a reserved power in the people to propose laws and amendments to the Constitution and to enact or reject such laws and amendments at the polls, independently of the Legislature. Hence the power of the Legislature to enact paragraphs 2166 and 2168, prescribing a regulation limiting the power of the appellant corporation in the operation of its freight trains with regard to the number of cars composing such trains, and prescribing a penalty for a violation of such regulation, is a valid exercise of legislative authority reserved in the government. This power is reserved to be exercised only by the legislative power of the government. The power is not reserved to be exercised by the Corporation Commission, but by the legislative power alone. The intimate relation of the public to the acts regulated by paragraphs 2166, which would bring the regulation within the police power to make, is absent from this case, but ample power is held in reserve by the constitutional provisions indicated to authorize, and does authorize, the enactments in question by the Legislature.

I concur in the order of the court, but I do not concur in placing the authority of the Legislature to enact the law upon the police power of government. I prefer to base the legislation upon the powers expressly reserved, and to hold the exercise of the powers so clearly falling within the constitutional reservations. The judgment should be affirmed.

(19 Ariz. 418)

McKEE'S CASH STORE v. OTERO et al.
(No. 1579.)

(Supreme Court of Arizona. March 30, 1918.)

1. CORPORATIONS §430 — PRINCIPAL AND AGENT—MUTUAL LIABILITIES—LEASE.

If lessee was acting for a corporation, but executed the instrument in his own name, covenanting personally to pay the rent as between him and the lessor, he is liable for rent, and the corporation, being the real principal, is also liable therefor, although its name does not appear upon the face of the instrument.

2. LANDLORD AND TENANT §208(1)—LIABILITY OF LESSEE FOR PAYMENT OF RENT—ASSIGNMENT.

Where lessee contracts individually and assigns the lease to a corporation, the liability of lessee for payment of rent rested on privity of contract which did not terminate on the assignment of lease which merely terminated the privity of estate, and it matters not that lessor accepted assignee and collected rent from it.

3. LANDLORD AND TENANT §225—LEASE—ACTIONS FOR RENT—JOINT LIABILITY OF ASSIGNEE AND LESSEE.

Where there is a joint liability of lessee and his assignee for the payment of rent under covenant of the lease, the lessor may pursue his remedy against both at the same time.

4. LANDLORD AND TENANT §208(2)—LEASE—ASSIGNMENT—LIABILITY OF ASSIGNEE FOR RENT.

The liability of the assignee of a lease is based upon the leasehold interest, and attaches by privity of estate, and continues not only during actual possession of premises, but until termination or reassignment of lease.

5. APPEAL AND ERROR §883—INVITED ERROR.

Where the trial judge was led into the error of submitting a question of law to the jury by stipulation between the attorneys, such error forms no basis for complaint by one of the parties to the stipulation.

Appeal from Superior Court, Maricopa County; F. H. Lyman, Judge.

Action by Maria O. Otero against McKee's Cash Store, a corporation, and another. Judgment for plaintiff, and defendant named appeals. Affirmed.

George J. Stoneman, of Phoenix, for appellant. C. F. Ainsworth and Fred Blair Townsend, both of Phoenix, for appellees.

FRANKLIN, C. J. The appellee Maria O. Otero brought this suit to recover of the appellant, McKee's Cash Store, and appellee C. W. McKee the rent for an unexpired term of a written lease, said lease being for a term of five years, from April 1, 1913, to April 1, 1918. The cause was tried to a court and jury, and at the close of the testimony the court, on its own motion, directed a verdict for the plaintiff against both defendants, and submitted to the jury, on the stipulation of the attorneys for the defendants, the question which of said defendants was primarily liable to the plaintiff for the payment of said judgment. The verdict of the jury being that McKee's Cash Store was primarily liable, the judgment was entered accordingly. McKee's Cash Store appeals. The question in this case is whether, as between the appellee Maria O. Otero and McKee's Cash Store, the latter is liable for the payment of the rent. The lease was in writing and purported on its face to be made by C. W. McKee with Maria O. Otero. It is a simple nonnegotiable contract. There is no covenant in the lease, nor is there any statutory provision restraining an assignment of the lease.

The uncontradicted testimony shows that McKee's Cash Store was a corporation engaged in carrying on a grocery business in the city of Phoenix. It occupied the Talbot Building at the corner of First avenue and Adams street. It was a family concern, consisting of a father and two sons. H. A. McKee, the father, was president, C. W. McKee vice president and general manager, and

C. E. McKee the secretary. C. W. McKee practically controlled the business. In the business transactions, the corporation sometimes used the corporate name and sometimes the name of C. W. McKee. The corporation had added other lines to its stock, and this enlarged business required additional space. Mrs. Otero owned a building on Adams street in the rear of the one the corporation occupied, and it decided to lease these adjoining premises from her. The negotiations for the lease, which finally resulted in the execution of the instrument upon which this suit is based, were carried on between Arthur M. Otero as agent for Mrs. Otero and C. W. McKee as agent for the McKee's Cash Store. It was known to the parties that McKee was contracting as agent for McKee's Cash Store.

After the execution of the lease on March 11, 1913, C. W. McKee in writing on the back of the instrument formally assigned the leasehold interest to McKee's Cash Store. The term commenced April 1, 1913, and on or about that day the corporation went into possession of the leased premises. This was done with the full knowledge of the circumstances on the part of all the directors and stockholders of the corporation. The corporation thereafter occupied the premises, with the exception of a certain portion which it sublet to another person. This sublease was made for the corporation in the name of C. W. McKee. At the stipulated times the corporation paid to Mrs. Otero the rent, and also collected and received for its own use the rental from the subtenant. This continued until February 1, 1916, when the McKee's Cash Store, without any reassignment, vacated and abandoned the premises and refused to pay rent thereafter. On July 31, 1914, A. D. Stewart bought some of the capital stock and became an officer of the corporation. After the premises were vacated the controversy arose as to who was bound by the lease because Mr. Stewart had not known what took place prior to July 31, 1914, when he became interested in the business.

[1] The complaint was drawn upon the theory that C. W. McKee leased the property individually, and thereafter assigned the leasehold estate to the McKee's Cash Store. Upon the facts of this case, however, the liability of the defendants is so plain in either of two aspects presented by the testimony that we should be astute to uphold the judgment of the superior court. If McKee, in executing the lease, was acting for and on behalf of the corporation, nevertheless he executed the instrument in his own name, covenanting personally to pay the rent, and as between him and the lessor he is liable for the payment of the rent. But, the corporation being the real principal and the party for whose benefit the contract was made, it is also liable for the rent. The

highly technical rule that those persons only can be charged who appear upon the face of the instrument to be parties to it does not obtain here. *Arizona Life Insurance Co. v. Lindell*, 15 Ariz. 471, 140 Pac. 60. Mr. Justice Holmes, in *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314, said:

"Whatever the original merits of the rule that a party not mentioned in a simple contract in writing may be charged as a principal upon oral evidence, even where the writing gives no indication of an intent to bind any other person than the signer, we cannot reopen it, for it is as well settled as any part of the law of agency."

Mechem says:

"For the purpose of identifying the principal, parol evidence may be admitted. It does not violate the principle which forbids the contradiction of a written agreement by parol evidence, nor that which forbids the discharging of a party by parol from the obligations of his written contract. The writing is not contradicted, nor is the agent discharged; the result is merely that an additional party is made liable." Paragraph 1733, Mechem on Agency.

See, also, *Tiffany, Landlord and Tenant*, par. 57b, and par. 181e.

"It is no contradiction of a contract which is silent as to the fact to prove that a party is acting therein not on his own behalf, but for another. 'This does not deny,' said Parke, B., 'that it is binding on those whom on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent in signing the agreement in pursuance of his authority is, in law, the act of the principal.'" Bish. Cont. par. 1084.

[2] In these circumstances there is a double obligation, although there can be but one satisfaction. In the other aspect of the case, if McKee contracted this lease individually and assigned the leasehold estate to the McKee's Cash Store, the liability of the defendants to plaintiff is not substantially different than if the lease had been executed in the name of C. W. McKee individually, but in fact for the McKee's Cash Store as principal.

Mr. Washburn sums up the doctrine in question as follows:

"There is an important distinction to be observed between express and implied covenants in a lease since one who enters into an express covenant remains bound by it, though the lease be assigned over, while such as are implied are co-extensive only with the occupation of the premises; the lessee, for instance, not being liable under his implied covenant for rent after his assignment to another, and the acceptance of rent by the lessor from the assignee. The lessee remains liable upon his express covenant to pay rent, notwithstanding his having assigned his lease with the lessor's assent, and the lessor may have accepted rent from the assignee. The lessor, in such case, may sue the lessee, or his assignee, or both, at his election and at the same time though he can have but one satisfaction. The lessee continues liable upon his personal covenant, in the nature of a surety for his assignee, who is ultimately liable to him for the amount paid by him. But the liability of a lessee upon the implied covenants in his lease continues only so long as he holds the estate, where he assigns with the consent of the lessor, and depends upon the privity of estate. This is true in respect to assignees, both as to express and implied covenants, and their liability ceases with the privity of estate between them and the lessors. Such assignee, therefore, is not liable for

any breach committed before he became assignee, nor for any such breach occurring after he has parted with the estate and possession to a new assignee, although he did this for the very purpose of escaping such liability, because by so doing he destroys the privity of estate on which it depends." Washburn on Real Property (4th Ed.) pp. 493, 494.

[3] The lease contained an express covenant to pay rent, and the liability of the lessee rests on privity of contract which did not terminate on the assignment of the lease. The assignment merely terminated the privity of estate, and, this being so, it matters not if the lessor accepted the assignee as such and collected the rents from it. There was a joint liability of the assignee and lessee, and the lessor had the right to pursue his remedy against both at the same time, though, of course, with but one satisfaction. See *McBee v. Sampson* (C. C.) 66 Fed. 416; *Whetstone v. McCartney*, 32 Mo. App. 430; *People v. German Bank*, 126 App. Div. 231, 110 N. Y. Supp. 291; *Schlesinger v. Perper*, 70 Misc. Rep. 250, 126 N. Y. Supp. 731.

[4] The liability of C. W. McKee attaches by privity of contract, and the assignment to McKee's Cash Store containing no express condition on its part to pay the rents reserved for the term, its liability attaches by privity of estate. The right to enjoy the leasehold interest as distinguished from the actual possession of the premises is the principle upon which rests the assignee's liability to the lessor. In *Moline v. Portland Brewing Co.*, 73 Or. 532, 144 Pac. 572, the court said:

"The assignee of the lease becomes liable for the rent by reason of the privity of estate, and not by reason of the occupancy of the premises; and by mere abandonment thereof he cannot escape liability."

See, also, *McLean v. Caldwell*, 107 Tenn. 138, 64 S. W. 16; *Chicago Attachment Co. v. Davis Sewing Machine Co.* (Ill.) 25 N. E. 669; *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151.

If the McKee's Cash Store, as assignee, wished its liability to pay rent to continue only during its actual possession of the premises, it should have reassigned the lease as well as abandoned the possession. By so doing the privity of estate would have terminated. If appellant had been in possession of the premises when the rent accrued, the

presumption would have been that it occupied under the lease. The rule being that when a person other than the lessee is in possession of leased premises when the rent accrues, or has occupied the whole of the unexpired term of the lease, in an action by the lessor to recover rent from such person, the presumption is that the occupancy is under an assignment of such lease. Such presumption, however, is rebuttable, and may be overthrown by showing a different relation exists between the occupant and lessee. One of the leading cases to this effect is *Redford v. Terhune*, 30 N. Y. 453, 86 Am. Dec. 394. See, also, *Leadbetter v. Pewtherer*, 61 Or. 168, 121 Pac. 799, Ann. Cas. 1914B, 464; *McAdam, Landlord and Tenant*, p. 554; 24 Cyc. 1181, 1222; 1 *Tiffany, Landlord and Tenant*, p. 950. While such a presumption would, perhaps, not exist under the facts of this case, the McKee's Cash Store having abandoned the premises before the rent in suit accrued, nevertheless the fact that the corporation went into possession of the premises at the beginning of the term, paid the rents to the lessor, and received the rents from a subtenant during its occupancy, would not detract from the positive testimony of C. W. McKee that he assigned the lease to the corporation and put it into possession of the property under the lease and its assignment, but rather tend to corroborate his testimony.

We can entertain no doubt that on either of the grounds stated the uncontradicted testimony showed a liability on the part of both defendants to appellant. A contrary verdict would find no substantial support in the evidence. As between the defendants C. W. McKee and the McKee's Cash Store, the liability of McKee was in the nature of a surety for the corporation; the latter being ultimately liable to McKee for any amount paid by him, whether as agent for his principal or as assignor for his assignee.

[5] The trial judge was led into the error of submitting a pure question of law to the jury by stipulation between the attorneys for the defendants. If in doing this error was committed, it affords no basis for complaint by one of the parties to the stipulation.

Upon the whole case, the judgment is right, and ought to be affirmed. It is so ordered.

ROSS and CUNNINGHAM, JJ., concur.

(102 Kan. 307, 563)

STUART v. KANSAS CITY. (No. 21247.)

(Supreme Court of Kansas. Jan. 12, 1918.

On Rehearing, April 12, 1918.)

(Syllabus by the Court.)

1. MASTER AND SERVANT \S 373—WORKMEN'S COMPENSATION ACT—"INJURY BY ACCIDENT ARISING OUT OF EMPLOYMENT."

An employé was injured by having mortar playfully or wantonly thrown into his eye by a fellow workman. The injured employé was at the time engaged in his regular work of mixing and carrying mortar. The fellow workman was in the habit of playing pranks or jokes on the other workmen, and that habit was known to the immediate superiors of the injured employé. The employment was governed by the Workmen's Compensation Act (Gen. St. 1915, \S 5896-5942). *Held*, that the injured employé is entitled to compensation under that act for the injuries inflicted on him; and further *held* that the mere fact that an injury to an employé is occasioned by the sportive or malicious act of a fellow employé does not, of itself, establish that the injury arose out of the employment.

2. MASTER AND SERVANT \S 378—WORKMEN'S COMPENSATION ACT—INJURIES—COMPENSATION.

Under the Workmen's Compensation Act, a workman, who is injured by accident arising out of and in the course of the performance of his labor is entitled to compensation, although he cannot explain how the accident occurred.

3. MASTER AND SERVANT \S 385(19)—WORKMEN'S COMPENSATION LAW—EXCESSIVE AWARD.

The amount of compensation fixed by the judgment does not appear to be excessive.

On Rehearing.

(Additional Syllabus by Editorial Staff.)

4. MASTER AND SERVANT \S 408—WORKMEN'S COMPENSATION ACT—CAUSE OF INJURY—QUESTION FOR JURY.

In an action for compensation under the Workmen's Compensation Act *held*, on the evidence, that whether plaintiff was injured by mortar thrown by a fellow servant in sport, whether the fellow servant habitually indulged in dangerous play, and, if so, whether such habit was known to defendant were questions for the jury.

Appeal from District Court, Wyandotte County.

Action by Clayton L. Stuart against the City of Kansas City, Kan. Judgment awarding compensation under Workmen's Compensation Act, and defendant appeals. Reversed, and new trial directed upon particular questions.

Lee Judy, of Kansas City, Kan., Hogsett & Boyle, of Kansas City, Mo., and T. F. Railsback, Thomas M. Van Cleave, and H. J. Smith, all of Kansas City, Kan., for appellant. Emerson & Smith, of Kansas City, Kan., for appellee.

MARSHALL, J. The plaintiff recovered judgment under the Workmen's Compensation Act for \$1,690, and the defendant appeals.

The plaintiff was employed by the defendant as a laborer in the defendant's water

and light department, and, at the time of the injury which is the basis of this action, was engaged in mixing and carrying mortar to other workmen, who were repairing boilers in the defendant's plant. The other workmen were working about 20 feet above the ground. After mixing the mortar, the plaintiff carried it in a bucket to a hook on the end of a rope and attached the bucket thereto, and William Deeds, one of the workmen, elevated the mortar and delivered it to other workmen who were laying brick. Just before he was injured, the plaintiff had taken a bucket of mortar and attached it to the rope, and had then stepped back about 25 feet and looked up toward William Deeds to see when the bucket was returned, and to ascertain if he wanted anything. While thus standing, a piece of green mortar made of lime, sand, and cement fell or was thrown into the plaintiff's eye, which was thereby seriously injured.

On the trial, the plaintiff, in substance, testified that he supposed, but did not know, that Deeds threw the mortar. The plaintiff testified, in part, as follows:

"Q. Did you see Mr. Deeds just before you were hit? A. Yes, sir. Q. What was he doing? A. Standing upon this platform. Q. Was he making motions of any kind? A. No. Q. Had he made any? A. Well, just before this for [fell] in my eye, he got down on his hands and knees and looked under the platform and made circular swing with his right arm as though reaching for something; might have tossed something out of his hand, I couldn't say. Q. Did you see any mortar leave his hand? A. No, sir. Q. Did you see any in it? A. I didn't see any in it. Q. You thought at the time he did throw it, did you? A. Yes, I thought at the time he threw it."

There was abundant evidence, largely in the nature of admissions made by the plaintiff, to show that Deeds had playfully thrown the mortar. There was evidence to show that Deeds was playful, sportive, and inclined to play pranks or jokes on his fellow workmen, and that this was known by his immediate superiors at the plant.

The jury answered special questions as follows:

"Question 1: Did the injury to the plaintiff arise out of and in the course of his employment? Answer: Yes.

"Question 2: How many weeks has the plaintiff been totally incapacitated for labor beyond a period of two weeks next succeeding the date of the injury, if any? Answer: Seventeen weeks.

"Question 3: Will the plaintiff continue to be totally incapacitated for labor in the future, and, if so, for how many weeks do you find such total incapacity will, in all probability, continue? Answer: Not totally incapacitated.

"Question 4: How many weeks in all do you find the plaintiff has been and will in all probability be partially incapacitated in the future, beyond the period for which you allow him for total incapacity, if any? Answer: 397 weeks.

"Question 5: What is the average weekly wages received by plaintiff in his employment for 52 weeks next prior to the date of the injury? Answer: \$12.00 per week.

"Question 6: If you find the plaintiff is partially incapacitated from labor by his injury,

state what he would probably be able to earn on an average per week at any suitable employment during the period of such partial incapacity, which period must not extend beyond eight years after the date of the injury. Answer: \$4.00 per week."

[1] 1. The defendant's argument is principally based on the theory that Deeds, in a spirit of sport, threw the mortar at the plaintiff, and that the mortar hit the plaintiff in the eye. The defendant contends that it is not liable for an injury inflicted on one of its workmen by another workman when the latter injures the former by some prank, sport, or play, or even by an assault. The matter now complained of was presented to the trial court in a number of forms. (1) At the close of the plaintiff's evidence, the defendant asked that the jury be instructed to return a verdict in favor of the defendant. The request was refused. (2) At the close of all the evidence, the defendant again asked that the jury be instructed to return a verdict in favor of the defendant. The request was again refused. (3) The defendant requested an instruction, substantially, that if the plaintiff's injury was caused by a fellow employé throwing mortar at the plaintiff, either maliciously or in sport, the plaintiff could not recover for the resulting injury. No such instruction was given. The court instructed the jury as follows:

"You are further instructed that before the plaintiff is entitled to recover he must show by a preponderance of the evidence that the accident complained of is one which arose out of and in the course of his employment, and in this connection you are instructed that, if you find from the evidence that one Deeds, a fellow workman of the plaintiff, engaged in the same line of employment, and while so engaged either intentionally or accidentally struck the plaintiff in the eye with a piece of mortar, injuring him, you must find that the injury arose out of and in the course of the employment of the plaintiff, and if such injury resulted in incapacity to perform labor for a period beyond two weeks from the date of such injury he would be entitled to compensation."

This instruction did not correctly state the law.

The first section of the Employers' Liability Act, section 5806 of the General Statutes of 1915, reads, in part, as follows:

"If in any employment to which this act applies, personal injury by accident arising out of and in the course of employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation to the workman in accordance with this act."

A clear and concise statement of the law governing compensation for injuries to employes caused by play is found in Workmen's Compensation Acts, a corpus juris treatise by Donald J. Kiser, p. 79, and is as follows:

"An employé is not entitled to compensation for an injury which was the result of sportive acts of coemployes, or horseplay or skylarking, whether it is instigated by the employé, or whether the employé takes no part in it. If an employé is assaulted by a fellow workman, whether in anger or in play, an injury so sustained does not arise 'out of the employment,' and the employé is not entitled to compensation

therefor, unless in a case where the employer knows that the habits of the guilty servant are such that it is unsafe for him to work with other employes."

The rule there declared is supported by *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398; *McNicol's Case*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306; *Scott v. Payne Bros.*, 85 N. J. Law, 446, 89 Atl. 927; *In re Loper* (Ind. App.) 116 N. E. 324; *Clayton v. Hardwick Colliery Co.*, 85 L. J. K. C. 292.

Under these authorities the rule is that where a workman, known by his master to be in the habit of indulging in dangerous play with his fellow workmen, is retained in the master's employ, the danger of injury from such play becomes an incident of the employment of the other workmen, and injury to any of the other workmen, while performing his regular work, caused by such play, comes within the provisions of the Workmen's Compensation Act.

[2] 2. Another matter urged by the defendant is that the plaintiff is not entitled to recover under his theory that he did not know whether the mortar was thrown at him by Deeds, or whether the mortar, by some accident, fell from above. In his brief, the plaintiff says:

"It was one of the very few disputed facts in this case as to whether the mortar which hit the plaintiff in the eye and inflicted the injury upon him was thrown by Mr. Deeds from the elevated platform or not. The plaintiff did not admit that Deeds threw it although he stated that it was his opinion at the time that it had been thrown by Deeds. He, nevertheless, stated that he did not see any mortar in Deeds' hands or see any mortar coming from Deeds towards him, and the defendant's attorney, in his opening statement, said that he thought Deeds denied having thrown the mortar."

On this phase of the case, the defendant requested the following instruction:

"The court instructs the jury that the burden is upon the plaintiff to show that his injury resulted from an accident which arose out of and in the course of his employment, and, if you are unable to determine from the testimony whether or not the accident in question was one which arose out of and in the course of his employment, then under no circumstances is plaintiff entitled to recover and your verdict shall be for defendant."

This instruction was not given.

The defendant's position is not tenable. The plaintiff was engaged in the performance of his labor. If Deeds did not throw the mortar, it fell from the place at which Deeds and the masons were working. It follows then that the plaintiff was injured by accident arising out of and in the course of his employment. This brings the injury to the plaintiff within the provisions of the statute, and renders the defendant liable for compensation in this action.

[3] 3. The defendant insists that the verdict was excessive. Why or wherein it was excessive is not shown. The jury found the period of total incapacity, the period of partial incapacity, and the wages that the plain-

tiff will probably be able to earn in some suitable employment during the period of his partial incapacity. If these facts are taken, and the rules for calculating the amount of compensation as given in sections 5905 and 5906 of the General Statutes of 1915 are followed, it will be found that the amount of compensation fixed by the judgment was correct.

Because of the error in the instructions, the judgment is reversed, and a new trial is granted. All the Justices concurring.

On Rehearing.

In an opinion rendered on January 12, 1918, the judgment of the district court was reversed, and a new trial was granted.

[4] The plaintiff has filed an application for a rehearing, and, in that application, asks that, if a rehearing is denied and the judgment stands reversed, the new trial be directed on the proposition on which the judgment was reversed. The judgment was reversed on the ground that an instruction was erroneous because it did not submit to the jury the question of the defendant's knowledge of the dangerously playful habits of William Deeds, a fellow workman with whom the plaintiff was working at the time of his injury.

The judgment of reversal is adhered to, and a new trial is granted on the following questions: Was the plaintiff injured by William Deeds, accidentally or in sport? If the plaintiff was injured by William Deeds in sport, was William Deeds in the habit of indulging in dangerous play with his fellow workmen? If William Deeds was in the habit of indulging in dangerous play with his fellow workmen, did the defendant have notice or knowledge of that habit?

After these facts have been ascertained, judgment will be rendered by the trial court in accordance with the facts so found and in obedience to the law declared in the former opinion. All the Justices concurring.

(101 Kan. 764)

DOBISH v. CUDAHY PACKING CO. (No. 21349.)

(Supreme Court of Kansas. Nov. 10, 1917.
Rehearing Denied April 12, 1918.)

(Syllabus by the Court.)

MASTER AND SERVANT §405(1), 410, 417(8)
—TRIAL—WORKMEN'S COMPENSATION ACT—
NEGLIGENCE OF EMPLOYÉ—EVIDENCE—IN-
STRUCTIONS—HARMLESS ERROR.

In an action under the Workmen's Compensation Act (Gen. St. 1915, §§ 5896-5942), the defense relied upon was that plaintiff's injuries were the result of his own negligence in failing to procure proper medical attention. *Held*, that there was no substantial basis in the evidence for this claim, and, further, that the instructions upon this issue were not prejudicial to the defendant.

Appeal from District Court, Wyandotte County.

Action under the Workmen's Compensation Act by Frank Dobish against the Cudahy Packing Company. Verdict awarding compensation, motion for new trial overruled, and defendant appeals. Affirmed.

McFadden & Clafin, of Kansas City, for appellant. Thompson, McCanles & Gorsuch, of Kansas City, for appellee.

PORTER, J. This is an action under the Workmen's Compensation Act. The jury returned a verdict for the plaintiff and special findings to the effect that the plaintiff was injured by an accident arising out of and in the course of his employment, and was thereby totally incapacitated for a period of 416 weeks. They awarded compensation in the sum of \$2,484, which is the amount provided for by the statute based on the wages earned by the plaintiff. The court overruled a motion for a new trial, and defendant appeals.

The principal defense urged at the trial was that the plaintiff's injuries resulted from his negligence in not procuring proper medical attention.

The plaintiff is a foreigner, unable to speak the English language, and his testimony was given through an interpreter. The testimony shows that he was injured on the 6th day of April, 1916. He was at work pulling hams from a barrel by means of a hook held in his right hand. While lifting one of the hams, the hook accidentally struck his left hand, penetrating the skin near the base of the thumb. A fellow workman took a clean rag and wrapped the thumb, and the plaintiff continued to work for the few hours that remained that day. He did not consider the injury to be of any consequence, and returned to work the next day, but about 4 o'clock in the afternoon his hand pained him, and he went to the office of Dr. Lewis, who was the physician at the defendant's plant. The doctor administered treatment cleansing the wound, put on an antiseptic dressing, and told him to return the next day. The plaintiff's testimony was that the doctor told him to put the hand in hot water, and that he followed these directions, but did not return the next day because his hand was paining him so that he was unable to leave his bed; that he had his landlord call for Dr. Lewis by phone, but failed to get the doctor; then had the druggist in the neighborhood phone for him. The druggist testified that he called by phone three times for the doctor's office, and talked with the timekeeper at the packing house, but failed to reach Dr. Lewis. The plaintiff then called Dr. Smith, a reputable physician, who came to the house and treated him for two days. The plaintiff's condition became more

serious, and on some one's advice he called another physician, Dr. Brown, also shown to be a reputable physician, who gave him treatment during four days. Some days afterward Dr. Lewis called at the house and had the plaintiff removed to a hospital, where he remained for three weeks, and where Dr. Lewis operated upon the arm and hand. Dr. Lewis testified that he first saw the patient on April 7th, at his office; that at that time "he had a slight laceration on the palmar surface of the thumb of the left hand. I administered treatment, thoroughly cleansed the wound with bichloride solution and used iodine, put on an antiseptic dressing. The wound was not very deep, just a slight laceration." He further testified that when he next saw the plaintiff, about two weeks after the injury, he found an infection of the hand, wrist, and forearm, and that the arm was somewhat red and inflamed; that he found no bandages of any sort on the arm. "He was just lying there in bed with his arm exposed from the shoulder down; no dressings on it whatever. Iodine had been put on the arm, and there was some discoloration, due to either iodine or iodo-miller. The original wound had entirely healed up." He took the plaintiff to the hospital and prepared him for an operation, made several incisions on his arm, wrist, and hand, and drained it. "I continued to treat him thereafter. He was at the hospital about three weeks." When Dobish first came to him, he washed the thumb thoroughly with bichloride solution, and sterilized it with tincture of iodine, then put a bichloride of mercury pack on it. The doctor testified there was at that time no infection, and that keeping the hand in hot water would have been a good plan for Dobish to have followed.

As usual in cases involving the question of proper medical treatment, there was some conflict in the testimony of physicians called on behalf of one party and those who testified for the other, but the conflict was very slight, and all the physicians agreed that iodine and antiseptics were properly used at first, and that drainage is usually not resorted to in cases of this kind until after the wound becomes infected.

The errors complained of relate to the instructions. In stating to the jury the issues involved, the court gave this instruction:

"2. The defendant, for answer to plaintiff's petition, denies each and every allegation therein contained."

It is claimed this was prejudicial error because the defendant had filed an answer setting up as a special defense that the disability complained of "is not the result of any injury he may have received in the course of his employment, but is the result of his negligence in not procuring and having proper medical attention." The defendant's first answer, however, consisted of a general de-

nial, and during the progress of the trial the defendant filed an amended answer setting up the special defense above referred to, which fact was doubtless overlooked by the court in preparing the instructions. The defendant could not have been prejudiced in the slightest, because the court in instruction No. 5 submitted the special defense raised by the amended answer, and the amended answer did contain a general denial of each and every allegation of the petition.

Complaint is made, however, of the language used in instruction No. 5. In this instruction the court, after charging that the right to recover under the compensation act is based upon an accident arising out of and in the course of the workman's employment, further instructed as follows:

"The amount of recovery cannot be augmented by a cause separate and independent of the injury, the consequences of which admit of definite ascertainment, and in this case if the jury find from the evidence that the injury which the plaintiff received was of comparatively little importance and from which he would normally have recovered without any serious consequences, but that by reason of his own acts in failing, neglecting, or refusing to call proper medical aid, if you find that he did so fail, neglect, and refuse, said injury became infected, and you can determine from the evidence with reasonable certainty how much the injury was augmented by reason of said wound becoming infected, then you are instructed that the plaintiff would only be entitled to recover in this action compensation for the injury which was caused by the accident, and would not be entitled to recover for any augmentation of said injury occasioned by said infection; but if you find from the evidence that said infection occurred at the time the plaintiff received the injury or that it occurred subsequent to said time, but that the plaintiff in either event used reasonable and ordinary care to obtain competent and proper medical and surgical aid, then you are instructed that he would be entitled to recover full compensation for the results of said injury, although you may believe from the evidence that the injurious results were augmented and caused in great part by its being infected."

It is complained that the instruction placed the burden of proof upon defendant, that it is ambiguous and its meaning vague and obscure, that even though the jury believed the injury was augmented by reason of plaintiff's own conduct, yet if they could not determine the extent to which his injury was thus affected, they were justified in concluding that his present condition resulted from the original injury.

As applied to the facts disclosed by the evidence, we think it cannot be said the instruction prejudiced the defendant. Some of the language used is open to the criticism that it is somewhat ambiguous, but the important issue was kept before the jury, and they were given to understand that plaintiff was not entitled to recover for any augmentation of his injury by reason of the wound becoming infected, if that resulted from his neglect to procure proper medical attention. Nor is the instruction open to the objection that it placed the burden of proof upon the defend-

ant. It did not attempt to treat of that question. In another instruction the court properly charged that the burden of proof was upon the plaintiff to prove by preponderance of the evidence every material allegation of his petition.

Moreover, we are not disposed to attach importance to the language of the instruction for the reason that an examination of the record satisfies us that there was no substantial basis in the evidence for the claim that the plaintiff was negligent in procuring proper medical attention. There is no dispute as to what occurred. He went promptly enough to the defendant's doctor, who gave him all the treatment deemed necessary; when he found himself unable to leave his bed the following day, he certainly used reasonable efforts to procure the attendance of Dr. Lewis, and, failing in that, immediately called in a competent physician. When he failed to get relief, he discharged that physician and called another. It would be a strange doctrine to hold that this man, unable to speak our language, is to be held guilty of negligence because doctors called as expert witnesses failed to agree as to what was the proper medical treatment for his injury. The mere fact that Dr. Lewis found him in bed several days after the injury with no dressing or bandage upon his hand and arm does not tend to show that the plaintiff was negligent in procuring proper medical attention. Three physicians had failed to bring him relief, and it is not strange that in his suffering he was found with no bandages or dressing upon his arm. We conclude that the defendant was not prejudiced by the instructions. There is some complaint that the amount of compensation is excessive, but we are unable to say that it is not supported by some substantial evidence.

The judgment is affirmed. All the Justices concurring.

MODERN ORDER OF PRÆTORIANS v. BLOOM. (No. 8329.)

(Supreme Court of Oklahoma. March 26, 1918.)

(Syllabus by the Court.)

1. INSURANCE §688—FRATERNAL BENEFICIARY ASSOCIATION—STATUTE.

An association cannot establish its status as a fraternal beneficiary association under article 19, § 3, Const., chapter 38, Rev. Laws 1910, and chapter 205, Laws 1915, by merely showing that it has a ritual, local lodges, and a representative form of government; but the character of the business transacted, and not the mere formal workings of the organization, will fix its true status.

2. INSURANCE §688—FRATERNAL BENEFICIARY ASSOCIATION—CHARACTER OF BUSINESS—CERTIFICATES OR POLICIES.

In determining the character of business transacted by an association under article 19, § 3, of the Constitution, chapter 38, Rev. Laws 1910, and chapter 205, Laws 1915, it is not

error to take into consideration certificates or policies issued by the association other than the one sued on.

3. INSURANCE §688—"FRATERNAL BENEFICIARY ASSOCIATION"—EXEMPTIONS—STATUTE.

An association engaged in the business of writing 20-payment life, 10-payment life, 15-payment life, 20-year renewable term, old age benefit, 20-year installment certificates, whole life 20-year installment, and 20-payment life, policies or certificates of insurance, although having a ritual, local lodges, and a representative form of government, is not a fraternal beneficiary association, within the purview of the Constitution and statutes of this state, and is not entitled to exemption from the provisions of the insurance laws.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fraternal Association.]

(Additional Syllabus by Editorial Staff.)

4. INSURANCE §688—EXEMPTIONS—ORDERS—"MUTUAL"—"UNIFORM."

Under Const. art. 19, § 3, providing that the revenue and tax provisions of the Constitution shall not include, but that the state shall provide for insurance companies not organized for profit and insuring only their own members, including fraternal life, health, and accident insurance in fraternal orders in which the interests of the members of each respectively shall be uniform and mutual, the word "mutual" denotes a common interest, and "uniform" means conformity to one pattern; sameness.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mutual; Uniform.]

Commissioners' Opinion, Division No. 2. Error from District Court, Choctaw County; C. E. Dudley, Judge.

Action by Emma Bloom against the Modern Order of Prætorians to recover on three certain certificates of life insurance. Judgment for plaintiff, and defendant brings error. Affirmed.

Gordon & McInnis, of McAlester, and Works & Copping, of Hugo, for plaintiff in error. J. M. Willis, of Ardmore, and G. Earl Shaffer, of Tulsa, for defendant in error.

POPE, C. In the briefs and argument, distinguished by marked ability on both sides of the case, it is contended by the plaintiff in error that certain alleged false statements in the applications for the insurance preclude a recovery. The defendant in error, relying on the fact that the applications are merely referred to in the certificates and not attached thereto, insists that the applications cannot be admitted in evidence; the theory being that the Prætorians are writing old line and not fraternal insurance.

[1, 2] If the plaintiff is right in its insistence as to the character of business being transacted by the Prætorians, then there is an end to this case. By statute, so plain that there can be no mistake in construction, is fixed a rule that an application for life insurance, although referred to in the policy, is not admissible in evidence unless a true copy thereof is attached to and made a part of the policy; a rule having no ap-

plication to certificates of fraternal benefit insurance. R. L. 1910, §§ 3467-3476, and chapter 38, art. 3, Rev. Laws 1910. It follows, therefore that the decisive question is whether the Prætorians are engaged in writing old line insurance or merely writing fraternal benefit insurance; whether it is a life insurance company or a fraternal beneficiary association; and this must be determined from the character of the business transacted. The order cannot establish its status as a fraternal beneficiary association by merely showing that it has a ritual, local lodges, and a representative form of government, and that each of these things has more than a mere paper existence. It is true that a fraternal beneficiary association must have and operate a ritual and local lodges and a representative form of government. R. L. 1910, § 3486. Yet it is the character of the business transacted, and not the mere formal working of the organization, which will fix the true status of the order. *National Union v. Marlow*, 74 Fed. 775, 21 C. C. A. 89.

At the very outset comes the preliminary question, What may be considered? It is contended that only the certificates sued on can be looked to in order to determine the character of the business, and that the other certificates which it issues must be put out of view.

Whatever construction may otherwise be placed on article 19, § 3, of the state Constitution, it is clear that there must be a certain mutuality and uniformity in fraternal beneficial certificates; that they cannot be issued with entire disregard of class, mutuality, and uniformity. If there must be mutuality and uniformity even in the slightest degree, then a comparison of certificates is the only way by which uniformity or the lack of it may be determined. The similarity or dissimilarity of two objects cannot be determined by an inspection limited to one only. There may be cases where it will not be found in the mouth of the insurer to deny that it is of a character indicated by the policy which it has written, but it cannot claim that its status must be determined by any one contract.

It appears that the constitution of the plaintiff company authorizes eight different classes of certificates, and that it is issuing seven of these classes, to wit, 20-payment life, 15-payment life, 10-payment life, 20-year renewable term, old age benefit, whole life 20-year installment, and 20-year installment benefit.

In this case two types of certificates are presented, the 20-year renewable term and the 20-payment 20-year installment benefit. A highly significant fact is that no one of the seven certificates issued by the Prætorians is of the type usually issued by fraternal associations, to wit, the ordinary life. Both in the Constitution and the statutes of this state are fraternal insurance and

old line insurance sharply differentiated, not by any complete and differentiating definitions of the two kinds of insurance, but by a distinct code of laws applicable thereto. Const. art. 19, § 3; R. L. 1910, § 3486; Laws 1915, c. 205. Said section of the Constitution is as follows:

"The revenue and tax provisions of this Constitution shall not include, but the state shall provide for, the following classes of insurance organizations not conducted for profit, and insuring only their own members: First, farm companies insuring farm property and products thereon; second, trades insurance companies insuring the property and interest of one line of business; third, fraternal life, health, and accident insurance in fraternal and civic orders, and in all of which the interests of the members of each respectively shall be uniform and mutual."

This section of the Constitution clearly recognizes that the two different kinds of insurance exist, leaving the courts to find the facts which differentiate the one from the other; and the line of demarcation is not easily expressed. The problem is primarily one of fact. In the written law, however, will be found several guides. There is little here of the salient features of old line insurance, but certain boundaries which prescribe the fraternal benefit insurance. This kind of insurance can only be written by associations having a ritual, local lodges, and a representative form of government. R. L. 1910, § 3486; Laws of 1915, c. 205. The organization must not be for profit, meaning, of course, that there must be no profit except that coming to the insured, and the right of every member permitted by the Constitution must be uniform and mutual. The law in fixing these boundaries beyond which the fraternal beneficiary association must not transgress was merely stating the limitations which had ever been self-imposed by these organizations, leaving the written law out of view.

Certain well-defined distinctions have always been manifested between the two kinds of insurance. It is a matter of common knowledge that life insurance as written by the old line company, both stock and mutual, is highly complicated and involves innumerable variations of policy, form, and privileges—every gradation possible. In the combination of insurance and investment, and while any single life policy may be simple, the business as a whole is characterized by variety, complexity, and inequality and want of conformity. Fraternal benefit insurance has never taken such character; simplicity—oneness—is the dominant idea; a common association of men for a common benefit in everything, characterized with such simplicity that there is entire mutuality in interest and uniformity of right. The character of these organizations has placed same in the early types; the fraternal associations have never passed far beyond these original types. An association of men all combined to carry

the same identical benefit to each and every member when distress and disaster come was and still is the dominant idea; the premortem assessment followed by the post mortem; the level premium plan and the reserve fund came in, but never had the idea of simplicity—oneness—in rights and obligations been far departed from; over and against the complexity, variety, and inequality and want of uniformity of the old line life insurance stands the simplicity, the uniformity, mutuality, and oneness of the fraternal benefit type of insurance, and this differentiating test has been carried into our Constitution in language which clearly recognizes a difference between the old line and fraternal insurance and recognizes the several different classes of such organizations. The farm mutuals, trade mutuals, and the fraternal command that the interest of the members of each respectively shall be uniform and mutual; thus in the paramount law of the state is the mandate that the fraternal shall continue to observe the fundamental ideas of uniformity and mutuality which have always characterized such organizations.

To this test, the Order of Prætorians set its multiplied variety of certificates, omitting even the common form of such certificate, the ordinary life, does not conform, and by its own acts has taken away the right to claim any of the special privileges given to fraternal beneficiary associations. Neither by usage, right, or law is an organization warranted in transacting the usual life insurance business of the old line company in the guise of a fraternal beneficiary association. It is true that the fraternal beneficiary association can engage in old line insurance, but when it does the day of its special privileges is gone, nor does the order meet the requirements that the fraternal association must be conducted without profit. Each of the certificates sued on provides for fixed, certain, and invariable premium payments and provides for a fixed, certain, and invariable benefit. *Haydel v. Association*, 104 Fed. 718, 44 C. C. A. 169; *Mrs. Knott v. Insurance Co.*, 161 Mo. App. 579, 144 S. W. 178.

No provision is made in this certificate for participation of the insured in the profits, and each has the character of a profit-making contract; each is to endure for 20 years, unless insured die within the term. Certainly it requires no argument to show that a contract of this description, requiring certain fixed and unalterable premium payments and providing a certain fixed and unalterable benefit mentioned, yielded a profit or loss. The necessary result is that if the rate is adequate there must be a profit. All mutual life old line policies and many stock companies meet this uniformity of written law by incorporating a participating feature, in which particular they are more fair and equitable than the contracts sued on. The Prætorians

certainly will not admit that they are operating at a loss, and if the contract sued on will yield a profit, where does the profit go? The insured does not participate, so that the inevitable conclusion is that the profit either will go to the more favored members of the order or to a reserve fund for the future members of the order. In either case, there is a profit to some one other than the insured, in clear violation of the constitutional requirements of mutuality and uniformity. *National Protective Legion v. O'Brien*, 102 Minn. 15, 112 N. W. 1050.

The plaintiff in error devotes much space to the construction of article 19, § 3, of the Oklahoma Constitution, and obviously it must play an important part in this and all other cases involving the distinction between old line and fraternal benefit insurance. It is contended on behalf of plaintiff in error that this provision of the Constitution merely exempts fraternal beneficiary associations from certain burdens imposed on insurance companies, and in no way restricts fraternal beneficiary associations in writing various kinds and classes of certificates. The acceptance of this construction would make the provision violative of the Fourteenth Amendment of the federal Constitution and void. Equal protection of the law guaranteed by this amendment does not permit of imposition of burdens on one class of persons engaged in a certain business and allow the exception of others engaged in precisely the same kind of business. While classification is not prohibited, it is only permissible when based on some reasonable ground; some difference which bears a just and proper relation to the classification, and not a mere arbitrary selection (*Magoun v. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *McPherson v. Blocker*, 146 U. S. 1, 13 Sup. Ct. 3, 36 L. Ed. 869); and on this principle it has been held that a statute which imposes obligations on old line insurance companies which are not imposed on fraternal beneficiary associations is a violation of that section of the federal Constitution, if it enables both to write precisely the same policy of insurance (*State v. Vandiver*, 213 Mo. 187, 111 S. W. 911, 15 Ann. Cas. 283).

There is no great difficulty in reaching the true meaning of article 19, § 3, of the Constitution, because by its clear effect of exempting fraternal beneficiary associations from certain burdens imposed on old line insurance companies, it recognizes the fact that old line and fraternal insurance are essentially different, and requires the state to provide for the fraternal company, divides the insurance of the latter character in certain definite classes, prohibits profit, and requires the rights of the members of every class to be mutual and uniform. Not only does this provision require the fraternal

companies to conform to certain rules not in conflict with the classifications and the policies attempted by the Prætorians, but in itself the Constitution classifies the fraternal, and in so doing fixes the limit of the classifications, beyond which these associations must not go. The reading of this provision of the Constitution shows that the state recognizes three classes of insurance organizations not conducted for profit. In the case under consideration we are concerned with the class which is specified as third, and this third class does not authorize all kinds of life, accident, and health insurance, but only fraternal life, health, and accident insurance, and it is then provided that in all of them the interest of members of each respectively shall be uniform and mutual; another characteristic of fraternal insurance. The Constitution makes the classification, and the right of further classification by the fraternity is usually denied. *Thomas v. Achilles*, 16 Barb. (N. Y.) 401; *Walker v. Giddings*, 103 Mich. 344, 61 N. W. 512; *National Protective Legion v. O'Brien*, 102 Minn. 15, 112 N. W. 1050.

[3,4] While uniformity and mutuality is not required between the life, health, and accident, it is expressly required when any further classification is attempted of either of the three constitutional classes. It is at this point that the plaintiff in error seems to fall. The order in its various certificates is attempting to make a classification beyond the Constitution, and doing so in the face of the constitutional requirement of uniformity and mutuality, for its life certificates do not give the required mutuality and uniformity of interest.

The word "mutual" in this connection denotes a common interest. *Robison v. Wolf*, 27 Ind. App. 683, 62 N. E. 74. Uniformity has been said to indicate sameness, a conformity to one pattern. *McConihe v. State*, 17 Fla. 238; *Town v. State*, 29 Fla. 128, 10 South. 740. Clearly it is a violation of the essential ideas to attribute uniformity and mutuality of interest as a result of 10 and 20 year certificates of insurance. In the one case, the insured is only interested in the integrity and solvency of the insurer for a period of 10 years; in the other, the interest is more extended, and it is still further extended when renewable term and annuity benefit contracts come into comparison. We can conceive of circumstances which would make the interest of the several classes of certificate holders positively hostile, and the members impelled by self-interest to oppose one another. The conclusion, we think, is that the plaintiff in error is not writing fraternal benefit insurance within the meaning of the Constitution and statutes of this state, but engaged in a life insurance business which is not fraternal in character, and is not entitled to any of the privileges applied

to fraternal beneficiary associations. The rights given it must be measured by the general insurance law, and, as that law precludes the reception in evidence of application and medical examination referred to in the policy unless true copy is attached thereto, judgment of the lower court is therefore affirmed.

PER CURIAM. Adopted in whole.

GAMEL v. HYND'S et al. (No. 6071.)
(Supreme Court of Oklahoma. Jan. 29, 1918.
Rehearing Denied March 28, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 1063—EQUITY \S 377, 381—ADVISORY JURY—ADOPTION OF JURY'S CONCLUSIONS—INSTRUCTIONS.

In cases of equitable cognizance, the judge may call a jury or consent to one for the purpose of advising him on questions of fact, and he may adopt or reject their conclusions; and instructions offered by the parties furnish no ground of error on appeal.

2. APPEAL AND ERROR \S 1060—EQUITY \S 389 — JUDGMENT BASED ON FINDINGS OF JURY.

It is not only the right but the duty of the court in such cases to finally determine all questions of fact as well as of law, and, where the record shows that the court did not adopt the findings of the jury but especially disagreed therewith, a judgment of the court based on the findings of the jury must be reversed.

3. EVIDENCE \S 158(8) — SECONDARY EVIDENCE—FOREIGN JUDGMENT.

Parol evidence is inadmissible to prove the existence of a foreign judgment.

Commissioners' Opinion, Division No. 3. Error from District Court, Pontotoc County; J. W. Bolen, Judge.

Suit by J. C. Hynds and another against J. A. Gamel. Judgment for plaintiffs, and defendant brings error. Reversed, and remanded for new trial.

J. F. McKeel, of Ada, for plaintiff in error. Robert Wimbish, B. H. Epperson, and Tom D. McKeown, all of Ada, for defendants in error.

HOOKER, C. This suit was instituted in the lower court by Gamel against J. C. and Agnes Hynds to recover a personal judgment upon three promissory notes for \$800 each with 8 per cent. interest from the date, August 17, 1906, and to establish and foreclose a vendor's lien upon certain real estate described here. And it was alleged that said notes had been executed to N. B. Breckinridge as a part of the purchase price for real estate conveyed by Breckinridge to Hynds, and that said notes had been assigned and transferred before maturity for a valuable consideration to the plaintiff in error who upon default and maturity thereof instituted this action.

N. B. Breckinridge, on his application, was made a party defendant to this action in the court below, and he filed an answer in

his own behalf which admitted the execution of said notes to him and his transfer thereof to Gamel, but he alleged that, after the execution and delivery of said notes and the conveyance of the property for which they were given as a part of the purchase price, he removed from the state of Oklahoma to the republic of Mexico, and while he was there that he was induced by Gamel to purchase an interest in a certain corporation organized by Gamel for the purpose of manufacturing and selling ice and soda water, and that he was induced to take stock in said corporation by means of false and fraudulent representations made by Gamel to him as to the value of the said stock, and that relying upon these representations, he had executed his note for \$5,000 to the plaintiff, Gamel, and in order to secure the payment thereof had deposited with Gamel as collateral security the three notes involved in this action; that there was no other consideration for said note other than this worthless stock, and that plaintiff knew at the time he made said representations that they were false and were made by Gamel for the purpose of defrauding him, which it did. As a further defense the said Breckinridge alleged that suit had been filed upon the \$5,000 note against him in the court at Saltillo, Mexico, and that a judgment of the court had been rendered there in his favor to the effect that said note was void and without consideration, and that judgment was relied upon by Breckinridge in bar to any recovery here. It was further asserted by Breckinridge that there was no consideration for the notes executed by Hynds to him.

To the answer of Breckinridge the plaintiff, Gamel, filed a reply, and upon the issues as presented the cause was tried and a judgment had in favor of the defendants in error, from which an appeal is had to this court.

[1; 2] It will be noticed that this is an action of equitable cognizance, as the plaintiff below sought the foreclosure of a vendor's lien upon the property involved. The defendant, Breckinridge, asked that the notes be canceled, that the vendor's lien on said real estate be released, and that his deed to Hynds be canceled and held for naught, and that the court decree the title to said property to him, and the judgment of the court so did. The trial court submitted these issues to the jury under instructions, and a verdict was rendered in favor of the defendants in error. The court below evidently failed to recall that the verdict of the jury was only advisory, and that as the trial court he had the right to disregard the verdict of the jury if same did not meet with his own views as to what the equities of the case demanded. From the record before us the verdict of this jury did not meet with the approval of the trial judge, for in the or-

der of the court overruling the motion for a new trial we find the following:

"This question was submitted to the jury, and the jury found that there was evidence of fraud; however, the court is not fully satisfied on that question. It further appears to the court that there were two law propositions that should have been presented to the jury in the court's instructions. * * * The court is of the opinion that if those propositions of the law had been submitted to the jury, as the evidence warranted, the verdict of the jury might have been different. * * * The court is frank to say that this would not be the judgment of the court if it was left entirely with the court; while under the rules of law the court is of the opinion that the motion for a new trial should be overruled, which is hereby ordered."

This court has often-times held that even in a common-law action it is the duty of the trial court to weigh the evidence and to approve or disapprove the verdict, and if the verdict is such that in the opinion of the trial court it should not be permitted to stand, and it is such that he cannot conscientiously approve it, and he believes it should have been for the opposite party, it is his duty to set it aside and grant a new trial. See *White v. Dougal*, 159 Pac. 907; *Rison v. Harris*, 151 Pac. 584.

In the instant case the trial court had the right to disregard the verdict of the jury, if in his judgment the same failed to speak the truth, and to reach his own conclusions upon the merits of the cause irrespective of the verdict. This he did not do, as it plainly appears by the record, and the trial court's disapproval of the verdict of the jury under the state of this record, if it were a common-law action, would be sufficient to reverse this case. This being an equitable case, however, and one wherein the trial court had a right to reach conclusions of his own irrespective of the verdict of the jury, a judgment of the court not sustained by the evidence, and one which he himself does not approve, but being based upon a verdict of the jury with which he does not agree, cannot be permitted to stand.

It is unnecessary to consider the instruction presented to the jury, for this court has often held that a case of this character will not be reversed on account of improper instructions, where the trial court has the right to disregard the verdict of the jury and reach his own conclusions as to the merits of the cause. This court in *Crump v. Lanham et al.*, 168 Pac. 43, said:

"In cases of equitable cognizance the judge may call a jury, or consent to one, for the purpose of advising him on questions of fact, and he may adopt or reject their conclusions, as he sees fit, and instructions offered by the parties furnish no ground of error on appeal. It is not only the right, but the duty, of the court in such cases to finally determine all questions of fact as well as of law."

The errors complained of in the instructions will not be considered here, but it was the duty of the trial court to have determined all questions of fact. This he did not do. While we have the right, under repeated

decisions of this court, to consider this evidence and render or cause a judgment as we deem proper in the premises, yet, as this evidence is conflicting, the trial court is in a better position to determine the correctness of this controversy than we are.

We think the evidence here shows that Gammel is the owner of this \$5,000 note, and the record fails to satisfy our minds by any competent evidence that any judgment has been rendered thereon which would bar a recovery here. If Breckinridge had any such evidence, he should have presented it to the trial court. This he did not do, although this case has been pending since February, 1909.

[3] Certain parol evidence was introduced here as to the rendition of that judgment in the Mexico courts, and as to its contents, but that evidence is far from satisfying and is incompetent.

R. C. L. vol. 10, p. 1121, says:

"Mode of Proof—Copies.—A judgment and the proceedings in the cause in which it has been rendered properly are proved by the record itself or by certified copy. Indeed, except in case of the loss or destruction of the record, it cannot be proved otherwise than by the original or by a duly authenticated copy. In most of the states there are statutes providing for the introduction of certified copies of judicial as well as nonjudicial records. * * * So a judgment cannot be proved by the testimony of a witness that while he was clerk of the court certain papers shown to him were issued and filed by him, and he believes they are the records of the court. * * *"

Other authorities supporting this rule are: *Lyon v. Bolling*, 14 Ala. 753, 48 Am. Dec. 122; *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598; *Eyler v. Crabbs*, 2 Md. 137, 56 Am. Dec. 711; *Tuttle v. Jackson*, 6 Wend. (N. Y.) 213, 21 Am. Dec. 306.

This cause is reversed, and remanded for a new trial.

PER CURIAM. Adopted in whole.

(68 Okl. 92)

NATIONAL SURETY CO. v. SCALES.
(No. 8611.)

(Supreme Court of Oklahoma. March 26, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐1231—SUPERSEDEAS BOND—RIGHT OF ACTION.

Grace Scales, a minor, recovered a judgment in the sum of \$1,177 against the Missouri, Oklahoma & Gulf Railway Company, as payment for right of way through her land in Hughes county. From this judgment the railway company appealed to the Supreme Court, and for the purpose of superseding the judgment executed a supersedeas bond with the National Surety Company as surety thereon. Pending the appeal negotiations for a settlement of the judgment were entered into between the attorneys for Grace Scales and the attorneys for the railroad company, but were never completed, and pending the negotiations the case was dismissed in the Supreme Court upon stipulation signed by the attorneys for the respective parties. *Held*, that in an action by the plaintiff

against the surety company on the supersedeas bond the evidence established the above facts, and that the same did not constitute a defense to the action.

2. APPEAL AND ERROR ⇐1231—DISMISSAL BY STIPULATION—LIABILITY OF SURETY ON APPEAL BOND.

Where an appeal is dismissed in the Supreme Court upon the written stipulations of the attorneys for the plaintiff in error and the attorney for the defendant in error, such dismissal does not release the surety from liability on the appeal bond.

Error from District Court, Hughes County; Tom D. McKeown, Judge.

Action by Grace Scales against the National Surety Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Maxey & Brown, of Muskogee, for plaintiff in error. W. T. Anglin, of Holdenville, for defendant in error.

RAINEY, J. The facts necessary to a determination of the questions involved in this case are substantially as follows: In March, 1911, Grace Scales, plaintiff in this action, secured a judgment in the district court of Hughes county against the Missouri, Oklahoma & Gulf Railway Company in the sum of \$1,177, as payment for a right of way through her land in said county. From this judgment the railroad company appealed to the Supreme Court of this state, and, for the purpose of superseding the judgment and staying execution, executed a supersedeas bond in the sum of \$2,345, with the National Surety Company, defendant herein, as surety thereon. On the 10th day of September, 1913, the appeal was dismissed by the Supreme Court, pursuant to the following stipulation:

"Stipulation for Dismissal.

"It is hereby stipulated and agreed by and between the parties hereto that the above and foregoing appeal may be dismissed with prejudice to future action at the cost of plaintiff in error."

The judgment not having been paid by the railroad company, Grace Scales instituted the instant action to recover against the National Surety Company on the supersedeas bond. The defense alleged in the answer of the surety company is that after the appeal was timely filed in the Supreme Court, and in the latter part of the year 1912, and in the early part of the year 1913, negotiations were entered into between Grace Scales, the plaintiff, and the Missouri, Oklahoma & Gulf Railway Company, for a compromise of the judgment, as a result of which an agreement of settlement was reached between the said Grace Scales and the Missouri, Oklahoma & Gulf Railway Company, whereby the railroad company paid to Grace Scales the sum of \$150 cash and gave its duly executed note for the sum of \$877.14; that said note was delivered to the plaintiff and the cash paid was accepted

by her in full satisfaction of the judgment; that the plaintiff had entered into the stipulation above recited for a dismissal of the suit pending in the Supreme Court; and that the said acts were without the knowledge or consent of the surety company.

The evidence discloses that Warren & Miller and Ralph P. Welch, attorneys of Holdenville, Okl., represented Grace Scales in the condemnation proceedings and in the negotiations for the settlement of the judgment after the case was appealed to the Supreme Court, and that the railroad company was represented by its attorneys, J. O. Wilhoit and E. R. Jones. On October 15, 1912, the attorneys for the railroad company wrote Warren & Miller as follows:

"Re Grace Scales v. M., O. & G.

"Some time ago your Mr. Miller talked with me with reference to the settlement of the condemnation case of Grace Scales. The amount of the judgment was \$1,177. I suggested to him that if they would accept a long time not [note] we might effect a settlement and get rid of it. I would be glad to hear from you and see if we cannot get it wiped off. If we cannot make settlement will you kindly sign the inclosed stipulation extending time within which to serve brief."

On October 16, 1912, Warren & Miller replied to this letter, stating that Mr. Welch, who was associated with them in the case, had informed them that he was authorized by Mr. Scales, father of Grace Scales, who was a minor, to accept a note bearing interest at 8 per cent., due in one year, provided the \$150 was paid at once; that the \$150 was their fee; and that they would like to have that paid and a note given for the balance. On October 25th Mr. Jones wrote Warren & Miller asking if they could not persuade their client to take 6 per cent. interest on the note they proposed in settlement of the judgment in the case. On October 31st Warren & Miller wrote Mr. Jones as follows:

"In the Scales matter, we have seen our client and he agrees to accept a note bearing 7 per cent. interest for the balance due after the payment of \$150 in cash, the note to be for one year. This is the very best that he will do and we trust that you will execute the note and send same to us with a check for \$150 by return mail; otherwise we are directed to push the case in the Supreme Court to as early a determination as possible. Mr. Scales has refused to allow us to stipulate for a continuance of time for filing brief; and he says that unless this offer of his is accepted at once, you may consider it withdrawn." (Italics ours.)

On November 3d, in reply, Mr. Jones wrote Warren & Miller that the railroad company would accept their proposition and that he would send the \$150 voucher and the note down the first of the week, as soon as Mr. Dewar returned to the city. Nothing further was done until April 29, 1913, when the attorneys for the railroad company wrote Warren & Miller, inclosing voucher for the \$150 and a note, dated April 1, 1913, in the sum of \$877.14, due in one year, with interest at 7 per cent. in favor

of Grace Scales, and in the same letter inclosed the stipulation for dismissal of the case in the Supreme Court, and requested two signed copies of the stipulation for dismissal and receipt for the voucher and note. On May 14, 1913, Warren & Miller wrote Mr. Jones as follows:

"In the matter of the Scales condemnation case, we have been unable as yet to get any word from Mr. Scales, directing us to settle the case and accept the note sent us. We are writing him again and when we hear from him will let you know. Pursuant to our talk with Mr. Wilhoit, Sunday, we have cashed the voucher for \$150, which was to be credited on the amount and used by us as a payment of our fee. This was satisfactory to our coattorney, Mr. Welch, and we divided the fee with him. If Mr. Scales agrees to accept the note in settlement of the suit we will sign the stipulations and return to you. If he does not accept the proposition, we will return the note to you, and this sum of \$150 can be credited on the judgment when the case is finally disposed of in the Supreme Court. This arrangement enables us to collect and use our fee now, which is very satisfactory to us, as we do not think we ought to be compelled to wait on Scales until the close of the litigation."

On August 13th Mr. Jones wrote Warren & Miller as follows:

"I hand you herewith a copy of resolution passed by the executive committee of the board of directors of the railway company on the 11th inst. I take it that this is what you have been looking for for many a day, and I take it further that it will satisfy you in the matter of the acceptance of the note we gave in satisfaction of the Grace Scales judgment, and that you may now dispose of that case in the Supreme Court."

On August 15th Warren & Miller wrote Mr. Jones acknowledging receipt of the resolutions of the board of directors in the Scales matter, and that they had been unable to get any answer to letters written to Mr. Scales about the settlement of the case, and that they were holding the papers sent them in hopes that he would some time decide to accept the note, and in the meantime they supposed it was just as well to let matters drift. On August 16, 1913, Mr. Jones, in answer to the letter stated:

"I was under the impression that Mr. Scales had agreed to this settlement and that he agreed to it before we executed the note. The only thing that I care about is that I want the case in the Supreme Court dismissed and don't care to write a brief in the matter and I don't care to have them make an order of dismissal against us. I would rather stipulate for the dismissal." (Italics ours.)

On August 30th Warren & Miller wrote Mr. Jones as follows:

"We are in receipt of yours of the 29th in reference to the Scales matter and have submitted same to Mr. Welch. We have signed the stipulation for dismissal with two changes, as you will note. We thought that the stipulation should be for the dismissal of the appeal, instead of the cause. We do not see the necessity for stating in the stipulation that the cause has been settled. As a matter of fact we have never been able to get Mr. Scales to answer our letters in regard to the settlement, consequently we have stricken out that part of the stipulation, which recites that a settlement has been

made. We believe the amended stipulation as signed will answer the purpose."

In addition to the correspondence above mentioned, Mr. C. W. Miller and Mr. Ralph P. Welch testified positively that neither they nor Mr. Welch ever agreed to accept the note dated April 29, 1913. A part of Mr. Miller's testimony is as follows:

"The object of the negotiation was looking forward to a final settlement by the execution and acceptance of this note. The delivery of the note to us by the Missouri, Oklahoma & Gulf was not accepted by us as a delivery to Mr. Scales or as an acceptance of settlement of that judgment, but was accepted by us with the understanding that we submit the matter to Mr. Scales, and if he agreed to accept the note in satisfaction of the judgment, then it would be accepted by us for him, but Mr. Scales didn't accept it."

The conversation with reference to cashing the \$150 voucher, as testified to by the witnesses for the plaintiff, was that Mr. Wilhoit had advised them to cash the check for \$150, and that, in the event Mr. Scales did not accept the note, the \$150 could be credited on the judgment which was done.

Mr. Wilhoit did not recall the substance of the conversation, but stated that he probably made the statement testified to by the attorneys for the plaintiff, since at that time the attorneys for the railroad company were in default of their brief in the Supreme Court and were practically out of the Supreme Court anyway; that at the time of the conversation he was in serious doubt as to whether the Supreme Court would grant the attorneys for the railroad company permission to file a brief, inasmuch as they had obtained continuances two or three times; that they would probably have made some effort to brief the case in the Supreme Court rather than have had the court dismiss it; but that they were very desirous of getting the stipulation for dismissal, as they did not want to write a brief, especially in view of the fact that there was not much chance of reversing the case, and they did not want the Supreme Court to dismiss it for their failure to file brief. Mr. Wilhoit further testified that the attorneys for the railroad company believed the settlement had been consummated, or that they never would have gone to the trouble of securing the note.

[1, 2] As a ground for reversal, the surety company contends that the district court erred in holding that the facts proven at the trial did not constitute a compromise and settlement of the plaintiff's judgment after the case had been appealed to the Supreme Court. We have examined the evidence, which is substantially as above stated, and are of the opinion that the court would not have been authorized by the evidence to have made any other finding. It will be noted that the only acceptance by the attorneys for the plaintiff of the proposition for settlement was in the letter dated October 31, 1912, in which letter the attorneys stated that Mr. Scales had agreed to accept a note due in

one year, and "unless this offer of his is accepted at once, you may consider it withdrawn." The note was not executed until April 1, 1913, and was sent to plaintiff's attorneys on April 29, 1913. After the delivery of the note to the attorneys for the plaintiff, neither they nor Mr. Scales accepted the note in settlement of the judgment. If the plaintiff's attorneys had agreed to the proposed settlement, it would not have been binding on the plaintiff, for it is well established that an attorney cannot compromise his client's cause of action without his client's consent. 2 Ruling Case Law, § 75, p. 995; *Turner v. Fleming et al.*, 37 Okl. 75, 130 Pac. 551, 45 L. R. A. (N. S.) 265, Ann. Cas. 1915B, 831, *Hamberger v. White*, 154 Pac. 576.

It is urged that the signing of the stipulation for the dismissal of the appeal had the effect of discharging the surety on the appeal bond. We do not think so, in the light of the facts as disclosed by the record in this case. It appears from the testimony of defendant's own witnesses that the railroad company was practically out of court, and that the company was extremely anxious to have the case dismissed on stipulation, as is evidenced by the letter of August 16, 1913, wherein Mr. Jones stated: "The only thing I care about is that I want the case in the Supreme Court dismissed." We do not think the cases holding that where the obligee puts it out of the power of the obligor to perform the conditions of the bond no recovery can be had on the bond are in point, as the logical deduction to be drawn from the letters and other evidence in this case is that the railroad company in effect procured the dismissal of the appeal and had practically abandoned the case in the Supreme Court.

In the case of *Callbreath et al. v. Coyne*, 48 Colo. 199, 109 Pac. 428, it is held that the liability of a surety on an appeal bond is fixed by the dismissal of the appeal, and that is also the holding of this court in the case of *Croft-Knapp Co. v. Weber et al.* (No. 4843) 167 Pac. 464, not yet officially reported, wherein in the syllabus we said:

"After the time has expired for appeal, and the judgment has become final, and not paid, or otherwise stayed, an action will lie on a statutory supersedeas bond, conditioned for the payment of the condemnation money and costs, in case of [the] judgment or final order shall be adjudged against it, even though the appeal has not been perfected, or fails for want of prosecution."

See also, *McClain v. Starr*, 150 Pac. 666, and *Peck et al. v. Curlee Clothing Co.*, 162 Pac. 735.

In the case of *James A. Chase v. Louis Beraud & Jean Garraud*, 29 Cal. 133, the Supreme Court of California held that where an appeal was dismissed on motion of respondent, based upon the written consent of the appellant, the dismissal operated as an affirmation of the judgment and bound the sureties on the appeal bond.

The following quotation from Ann. Cas.

1914A, p. 1149, is pertinent to the question under consideration:

"In accord with the reported case it is generally held that the affirmance of an appeal pursuant to an agreement entered into in good faith by the litigants does not work a release of the obligation of the surety on the appeal bond, although the agreement is made without his knowledge or consent. *Drake v. Smythe*, 44 Iowa, 410; *Ammons v. Whitehead*, 31 Miss. 99; *Howell v. Alma Milling Co.*, 36 Neb. 80, 54 N. W. 126, 38 Am. St. Rep. 694; *Krall v. Libbey*, 53 Wis. 292, 10 N. W. 386; *Ingersoll v. Seatoff*, 102 Wis. 476, 78 N. W. 576, 72 Am. St. Rep. 892. See, also, *Comegys v. Cox*, 1 Stew. (Ala.) 262, 18 Am. Dec. 45. Thus in *Drake v. Smythe*, supra, it was held that the sureties were not released by an agreement between the parties, entered into without the knowledge or consent of the sureties, to affirm the judgment and to extend the time of payment and to stay execution. The court said: 'By the execution of the bond the sureties enabled the defendants to supersede the judgment. The sureties became parties to the record, and were liable to any judgment rendered in the cause within the limit of their obligation. Their relation to the action was not such as gave them any control thereof; they could not dictate to defendant the course he should pursue in the case; he had the full right to do whatever the law authorized in a case where no sureties are concerned. Their position in the case was one of obligation for debts, not of rights in conflict with defendant's rights. They were bound for the judgment which should be rendered against defendant in the progress of the suit. That defendant had the right to stipulate for time upon the rendition of the judgment cannot be questioned. The sureties, then, are bound by that agreement, and are liable upon the judgment.' To the same effect is *Ammons v. Whitehead*, supra. In *Comegys v. Cox*, supra, the court said that, while it was not necessary to decide whether the agreement of affirmance destroyed the liability of the securities, it was strongly inclined to think that the agreement had no such effect."

The judgment of the trial court is affirmed. All the Justices concur.

Ex parte HOLDEN et al. (No. A-3310.)
(Criminal Court of Appeals of Oklahoma.)
April 12, 1918.)

(Syllabus by the Court.)

BAIL — 42—APPLICATION FOR BAIL.

Evidence on an application for bail considered, and held sufficient to justify refusal of bail to each of the petitioners, the court being of the opinion, after an examination of the transcript of the testimony taken upon the preliminary examination upon which testimony application for bail was submitted, that the proof is evident and the presumption great of the guilt of each applicant, and that petitioners are not entitled to bail as a matter of legal right, and that this is not such a case in which the court should exercise its discretion and grant the applicants bail. The writ is therefore denied, and bail refused.

Application by Charles Holden and E. R. Bryce for a writ of habeas corpus to be let to bail. Writ denied, and bail refused.

Moman Pruett and Victor A. Sniggs, both of Oklahoma City, for petitioners. S. P. Freeling, Atty. Gen., R. E. Wood, Asst. Atty. Gen., and L. A. Pelley, Co. Atty., of Altus, for respondent.

MATSON, J. The petitioners, Charles Holden and E. R. Bryce, have presented to this court a verified petition, wherein they allege that they are each unlawfully and illegally restrained of their liberty by Sheriff Ford of Jackson county, Okl.; that the cause or pretence of their confinement is that the petitioners are charged in the district court of Jackson county, Okl., by information filed therein by the county attorney of said county, with the murder of one Dan Coffee, alleged to have been committed in said county on or about the 15th day of February, 1918. Petitioners further state that they have been given a preliminary hearing, at which hearing the testimony was taken in shorthand and is transcribed, and a copy of which is attached to the petition and made a part thereof and marked "Exhibit A." Petitioners further allege that their restraint is illegal and unlawful because they are not guilty of said murder or any other crime, and that the proof of their guilt is not evident nor the presumption great as shown by the testimony taken in the preliminary examination; that they have presented a petition for a writ of habeas corpus to be allowed to bail to Hon. Frank Matthews, district judge within and for Jackson county, but that said judge refused bail. A response to said petition has been filed on behalf of J. C. Ford, sheriff of Jackson county, wherein he admits that he is holding said petitioners on a commitment duly and legally issued, wherein they are charged with the crime of murder of one Dan Coffee as alleged in the petition, but said respondent denies that the cause of their restraint is illegal, and alleges the facts to be that the proof of their guilt of said murder is evident and the presumption thereof great, and for such reason petitioners should be held without bail. The hearing on said application was had on the 11th day of April, 1918, at which time the matter was orally argued on behalf of the petitioners by Hon. Moman Pruett, their attorney, and on behalf of the respondent by Hon. L. A. Pelley, county attorney of Jackson county.

It is unnecessary to enter into a discussion of the facts in this case. To discuss the facts before trial is had, where the writ is denied, might become prejudicial to the applicants. Therefore we think the proper course to pursue is to avoid any discussion which might become in any way prejudicial to either the applicants or the state. We deem it sufficient, therefore, to say that we have carefully examined the evidence in support of the application, and are of the opinion that there is a failure to prove that

either of the petitioners is entitled to be admitted to bail as a matter of legal right. The testimony on the part of the state is evidence of their guilt of the crime of murder.

It is therefore considered and adjudged by the court that the writ be denied, and that bail be refused to both applicants.

DOYLE, P. J., and ARMSTRONG, J.,
concur.

(54 Mont. 489)

CHEALEY v. PURDY et al. (No. 3876.)

(Supreme Court of Montana. March 21, 1918.)

1. CONTRACTS \S 346(9) — MATTERS PUT IN
ISSUE BY GENERAL DENIAL.

In an action for work done and materials furnished in drilling a well under an oral contract, defendants under their general denial could show as a defense that the contract as made was different in substantial particulars from that alleged in complaint.

2. PLEADING \S 2 — STATUTES — APPLICABILITY.

The provisions of Rev. Codes, \S 6532, 6540, as to essentials of complaint and answer apply to all actions whatever their nature, and furnish the exclusive guide as to what pleadings are required or permitted.

3. CONTRACTS \S 332(2) — ACTION ON ORAL
CONTRACT—COMPLAINT.

In an action for work done and materials furnished in drilling a well under an oral contract, plaintiff must allege (1) the contract upon which he seeks to recover; (2) a substantial performance thereof; and (3) facts showing the amount to which he is entitled, in view of Rev. Codes, \S 6532, as to what complaint shall contain.

4. CONTRACTS \S 346(9), 348 — ACTION ON
ORAL CONTRACT—BURDEN OF PROOF.

In an action for work and materials furnished in drilling a well under an oral contract, defendants' general denial put in issue all essential allegations of plaintiff's complaint, and cast on plaintiff the burden of establishing all of them, in view of Rev. Codes, \S 6540, providing that the answer may be a general denial.

5. APPEAL AND ERROR \S 1056(2)—EXCLUDING
TESTIMONY—HARMLESS ERROR.

In an action for work done and materials furnished in drilling a well under an oral contract, excluding testimony as to whether a witness had stated that the well was not a good one, and as to whether defendant or his brothers and sisters used the well, was without prejudice, as such testimony would have no value as proof that contract was not as alleged.

6. APPEAL AND ERROR \S 1051(3)—ADMISSION
OF HEARSAY TESTIMONY—HARMLESS ERROR.

Permitting plaintiff to testify that defendants with whom he first had a conversation about drilling a well said that they were acting for all defendants was erroneous, but without prejudice to defendants whose counterclaim alleged that they were copartners.

7. CONTRACTS \S 346(15) — ACTIONS — "VARIANCE" AND "FAILURE OF PROOF."

That a complaint in an action on contract alleges a joint contract with several defendants, and the evidence discloses a separate contract with some of them, is not a variance amounting to a failure of proof within Rev. Codes, \S 6587, in view of sections 6711, 6712, providing that judgment may be for or against one of

the parties and the action proceed as to the other.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Variance; Second Series, Failure of Proof.]

Appeal from District Court, Hill County; William A. Clark, Judge.

Action by W. T. Chealey against B. D. Purdy and others. From a judgment for plaintiff and from an order denying motion for new trial, defendants appeal. Affirmed.

H. S. Kline and O. B. Elwell, both of Havre, for appellants. Nelson & Turcotte, of Havre, for respondent.

BRANTLY, C. J. This action was brought against four defendants, B. D., E. L., W. W., and Edythe Purdy, as copartners under the firm name of Purdy Bros., to recover of them the value of work done and material furnished by plaintiff in drilling a well for them under an oral contract. The complaint alleges that the plaintiff agreed on his part to drill the well at a place designated by defendants upon their land, or that of some one of them, for the purpose of obtaining water. It then alleges the terms of the contract, how and when payment was to be made, and that the plaintiff has fully performed the contract according to its terms, except in so far as he was prevented from doing so by the act of the defendants. It demands judgment for \$591.50, less the sum of \$21.49, which defendants have paid. The record does not disclose whether the defendants W. W. and Edythe Purdy interposed any defense, or whether the action was discontinued as to them. They are not in any wise interested in these appeals. The defendants B. D. and E. L. Purdy joined in an answer which, besides specifically denying the existence of the partnership, denies generally all the allegations of the complaint "except as hereinafter specifically admitted, modified, qualified, or denied," and then interposed a counterclaim for \$186.36 for services, team hire, etc., performed and furnished to plaintiff by them as copartners. Upon this counterclaim plaintiff joined issue by reply. The trial resulted in a verdict and judgment for plaintiff in the sum of \$503.11 and costs. Defendants have appealed from the judgment and an order denying their motion for a new trial.

[1] 1. The first contention made is that the court erred to the prejudice of defendants in ruling that it was not competent for them, under their general denial, to show as a defense that the contract as made by the parties was different in substantial particulars from that alleged in the complaint, and in excluding evidence offered for that purpose. They have presented an elaborate argument, with a citation of numerous authorities, to maintain their position. Technically, the denial as made is not a general denial. O'Donnell v. City of Butte, 44 Mont. 97, 119 Pac.

281. Since, however, counsel assume that it is, for the purposes of these appeals we accept their assumption as correct. As an abstract proposition there can be no doubt, either on principle or authority, of the soundness of the rule invoked by counsel. Whatever may be the nature of the cause of action upon which a plaintiff seeks to recover, he must allege in his complaint facts disclosing the presence of all the elements necessary to make it out. Rev. Codes, § 6532; *Ellinghouse v. Ajax Live Stock Co.*, 51 Mont. 275, 152 Pac. 481, L. R. A. 1916D, 836. The answer may be a general denial (Rev. Codes, § 6540), the effect of which is to put in issue every material allegation constituting the cause of action alleged, and thus to cast upon the plaintiff the burden of establishing by his evidence, *prima facie* at least, the presence of every element of it, and hence his right to recover. If at the close of his evidence he has failed to do this, there is a total failure of proof and he is properly nonsuited. It logically follows that under his general denial the defendant may introduce any evidence which tends to controvert any fact material to plaintiff's case, and if he is successful in overcoming the *prima facie* case disclosed by plaintiff's evidence, as a whole, or in any particular, or in establishing an equipolse in the proof, he is entitled to a verdict. 1 Ency. Pl. & Pr. 817; *De Sandro v. Missoula L. & W. Co.*, 48 Mont. 226, 136 Pac. 711; *Stephens v. Conley*, 48 Mont. 352, 138 Pac. 189, Ann. Cas. 1915D, 958.

[2-4] These rules apply to all actions, whatever their nature, for the provisions of the Codes on the subject of pleadings cited *supra* furnish the exclusive guide as to what pleadings are required or are permitted in this jurisdiction. As applied to an action on a contract resting in parol, the plaintiff must allege the contract upon which he seeks to recover, a substantial performance of it according to its terms, a breach by the defendant, and the facts showing the amount he is entitled to recover. A general denial by defendant puts in issue all of these allegations. The burden is then cast upon the plaintiff to establish all of them by substantial evidence. If, for instance, he fails to establish the contract alleged, he fails to make out a cause of action (*KallsPELL Liquor Co. v. McGovern*, 33 Mont. 394, 84 Pac. 709), and the defendant is entitled to a nonsuit. So the defendant, under his general denial, may introduce any evidence which tends to show that he did not enter into the contract, or that he made a contract different in one or more substantial particulars from that alleged, or that the plaintiff has failed to fulfill the obligations assumed by him therein according to its terms, or any other fact which tends to destroy, not to avoid, the cause of action alleged.

[5] The authorities cited by counsel fully

sustain their contention; but they have no application to any ruling made by the court during the trial in this case. Counsel offered no evidence which tended in any way to show that the contract differed in any of its terms from those alleged. Of the several rulings of which they complain, a brief notice of two will be sufficient to show that none of them involved the principle contended for by counsel. Martin Lyden, a witness who had been employed by plaintiff, described somewhat in detail the construction of the well, the measurements of it, the depth to which the water rose in it after it was finished, the kind of casing installed in it, etc. After stating in substance, in reply to questions put to him on cross-examination, that he knew nothing of the terms of the contract, he was asked:

"Didn't you tell Miss Purdy the day before you came over to put the casing in the well, or the night before, or some few days after the drill bit was lost, these words: That it was not a good well, that Chealey was going to claim it was, and that he was a hard man to run up against?"

Upon objection by counsel for plaintiff that the question called for evidence that was incompetent and immaterial under any issue made by the pleadings, the witness was not permitted to answer. On direct examination, the defendant B. D. Purdy was asked:

"Have you or your brothers or sisters used this well at any time?"

The witnesses was not permitted to answer. There was no prejudice. Neither an affirmative nor a negative answer to either of these questions would have had any value as proof that the contract contained any stipulation other than those alleged in the complaint.

[6] 2. The plaintiff testified that he had first had a conversation about drilling the well with B. D. and E. L. Purdy, and had afterward made the contract with B. D. Purdy. He was then permitted to testify over the objection of counsel:

"They said they were acting for all of them (defendants); they were digging it together."

Counsel now contend that this was error on the ground that the evidence was hearsay. The ruling was erroneous (*Nyhart v. Pennington*, 20 Mont. 158, 50 Pac. 413), but could not have prejudiced these defendants. It was alleged by them in their counterclaim that they were copartners. Both admitted in their testimony that they were. The other two defendants who alone could allege prejudice are not parties to these appeals.

[7] 3. The last contention is that the evidence is insufficient to sustain the verdict. The argument is that, since the complaint alleges a contract with all four of the Purdys, proof of a contract with B. D. and E. L. Purdy only was such a variance between the allegations of the complaint and the proof that the verdict cannot be sustained. The contention is without merit. It is true, as

counsel say, a recovery cannot be sustained against any of several defendants when the contract proven differs substantially from that alleged (*Kallispell Liquor Co. v. McGovern*, supra); but the fact that a complaint in an action on a contract alleges a joint contract with several defendants and the evidence discloses a separate contract with some of them is not a variance amounting to a failure of proof within the meaning of section 6587, Revised Codes. *Logan v. Billings & Northern R. Co.*, 40 Mont. 467, 107 Pac. 415; Rev. Codes, §§ 6711, 6712.

The judgment and order are affirmed.
Affirmed.

SANNER and HOLLOWAY, JJ., concur.

(54 Mont. 488)

TJETJEN v. HEBERLEIN. (No. 3873.)

(Supreme Court of Montana. March 18, 1918.)

1. LIMITATION OF ACTIONS ⇐28(1)—OBLIGATIONS NOT FOUNDED ON WRITTEN INSTRUMENT.

Where one as executor paid succession tax for another, action for recovery must be brought within three years, under Rev. Codes, § 6447, subd. 3, relating to obligations not founded upon an instrument in writing.

2. LIMITATION OF ACTIONS ⇐130(5)—COMMENCEMENT OF ACTION—"VOLUNTARY DISMISSAL."

That plaintiff commenced an action and then dismissed "without prejudice" did not extend the statute of limitations under Rev. Codes, § 6464, providing that where action is terminated in any other manner than by voluntary discontinuance, the plaintiff may commence a new action after the expiration of limitations and within one year after such termination.

Appeal from District Court, Lewis & Clark County; J. M. Clements, Judge.

Action by August Tietjen against Lena Heberlein. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed and remanded.

Wight & Pew, of Helena, for appellant. O. W. McConnell, of Helena, for respondent.

HOLLOWAY, J. This action was brought to recover the amount of a succession tax required by the laws of British Columbia. Plaintiff is one of the executors of the last will of William Tietjen, deceased, and the residuary legatee under the will. Defendant is also a beneficiary under the will. Plaintiff alleges that on June 6, 1911, he paid the succession tax, as he was required by law to do, that the payment was made for the use and benefit of defendant, and that no part of the tax has been repaid. This action was commenced on July 22, 1914. Among other defenses interposed was the plea of the bar of the statute of limitations. Plaintiff prevailed in the lower court, and defendant appealed from the judgment and from an order denying her a new trial.

Discussion of the character of this action is foreclosed by the decision in *Schaeffer v. Miller*, 41 Mont. 417, 109 Pac. 970, 137 Am. St. Rep. 746. See, also, 9 Cyc. 243; 27 Cyc. 833.

[1] The action is upon an obligation not founded upon an instrument in writing, and since it was not commenced within three years from the time the tax was paid, it is barred by subdivision 3, § 6447, Revised Codes, unless some proceeding intervened to toll the statute.

[2] To avoid the defense of the statute of limitations plaintiff alleged in his reply that in June, 1913, he commenced an action against the defendant to recover upon this same cause of action; that on June 16, 1914, he "dismissed his action without prejudice," and thereafter, on the 22d day of July, 1914, filed "his complaint in this case." Section 6464, Revised Codes, provides:

"If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, * * * the plaintiff * * * may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination."

A provision of this character is in the nature of an exception to the general statute of limitations and is intended to apply to every case wherein an action has been commenced and without plaintiff's fault there has been a failure to reach a determination of the merits and the period of limitations becomes complete during the pendency of such action. *Coffin v. Cottle*, 16 Pick. (Mass.) 383; 25 Cyc. 1314. Since plaintiff seeks to avail himself of the benefit conferred by this statute, it is incumbent upon him to disclose affirmatively that the discontinuance of the prior action was not voluntary. The word "voluntary" is here employed in the ordinary sense of the term and means: Proceeding from the will; produced in or by an act of choice; free; without compulsion. Webster's International Dictionary. The use of the term "without prejudice" is not significant in this connection. The dismissal of the prior action was voluntary or it was not. The allegation of the reply is that plaintiff dismissed the prior action. The minute entry of the court is:

"In this cause, on motion of counsel for plaintiff, the court this day ordered that the above-entitled action be dismissed without prejudice."

Neither the allegation of the reply nor the minute entry is susceptible of two constructions. The dismissal was effected at the instance and request of plaintiff, and amounted to a voluntary discontinuance. Since this action was not commenced within three years after the tax was paid, it was barred by the provisions of section 6447.

The judgment and order are reversed, and the cause is remanded to the district court,

with directions to enter judgment dismissing the complaint, and for defendant's costs.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

(54 Mont. 479)

HILL et al. v. LEWIS AND CLARK COUNTY. (No. 3892.)

(Supreme Court of Montana. March 16, 1918.)

1. TAXATION §345 — UNDISTRIBUTED PROPERTY—STATUTE.

The purpose of Rev. Codes, § 2522, providing that undistributed property of deceased may be assessed to the heirs, etc., is to assure that notice shall be given of taxes to some interested person.

2. TAXATION §345—PROPERTY OF DECEDENT—DIRECTORY STATUTE—"MAY."

Rev. Codes, § 2522, providing that undistributed property of deceased "may" be assessed to the heirs, etc., is permissive and directory, rather than mandatory.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, May.]

3. TAXATION §363—PROPERTY OF DECEDENT—CONSTRUCTIVE NOTICE OF TAX.

An assessment made otherwise than as provided by Rev. Codes, § 2522, as to assessment of undistributed property of estate to heirs, would not of itself be notice, and would be voidable if the party sought to be charged had no notice.

4. TAXATION §542 — TAXES PAID UNDER PROTEST—RECOVERY.

Under Rev. Codes, § 2522, providing that undistributed property of deceased persons may be assessed to the heirs, guardians, executors, or administrators, and that a payment of taxes made by either binds all the parties in interest for their equal proportions, an assessment of undistributed property of H.'s estate was tantamount to an assessment to the heirs or executors, and where the property was subject to taxation in the amount imposed, executors, who took cognizance of the assessment and paid the tax to which the county was justly entitled, cannot recover the tax, although payment was made under protest.

5. TAXATION §542 — TAXES PAID UNDER PROTEST—RECOVERY

Assuming that under Rev. Codes, § 2542, as to assessment of property discovered to have escaped assessment, the assessor was powerless to assess undistributed property of estate, not listed by executors after assessment roll had passed out of his hands, where the executors took cognizance of the tax thus imposed and paid the same, though under protest, they cannot recover; the property being subject to taxation in amount imposed, so that there was nothing to contest before board of equalization in view of sections 2742 and 2743, as amended by Laws 1909, c. 135, as to recovery of taxes paid under protest, and as to notice of added or changed assessments.

6. TAXATION §363 — CHANGING OR ADDING ASSESSMENT—NOTICE.

Rev. Codes, § 2742, as amended by Laws 1909, c. 135, requiring notice where assessment has been added to or changed, is available only to the person who has delivered to the assessor a sworn statement of all his property subject to taxation with the estimated value thereof.

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

Action by George H. Hill and others, execu-

tors of the last will of Samuel T. Hauser, deceased, against the County of Lewis and Clark. Judgment for plaintiffs and defendant appeals. Reversed and remanded.

S. C. Ford, of Helena, and Frank Woody, of Missoula, for appellant. Ashburn K. Barbour and A. P. Heywood, both of Helena, for respondents.

SANNER, J. The respondents, as executors of the last will of S. T. Hauser, deceased, filed their complaint against the county of Lewis and Clark, alleging:

"That on the first Monday in March, 1915, there was embraced in the assets of and was owned by the said estate of Samuel T. Hauser, deceased, within the county of Lewis and Clark, certain real and personal property of the appraised value of \$19,055," which property was thereafter by said executors listed for assessment, and was in due course assessed by the assessor of said county, taxed at \$420.27, and the taxes duly paid; that on December 8, 1915, "the said assessor of Lewis and Clark county claimed to have discovered certain other additional personal property as belonging to and being part of the assets of said estate of Samuel T. Hauser as omitted property," which he appraised at \$37,505 and added or attempted to add to "the assessment aforesaid against the said estate"; that said change and addition were made by the assessor "long after the assessment books of said county had passed from under his jurisdiction" and without notice thereof to the respondents and without any opportunity given to them to contest or oppose the same before the board of equalization or elsewhere; "that the said personal property so entered upon said assessment book as an addition to the assessment against said estate was a part and portion of the undistributed property of said estate of Samuel T. Hauser, deceased, and said assessment was made to or against said 'S. T. Hauser estate,' and not to the heirs, or the executors of said estate, as prescribed by law;" that the additional taxes thus and thereby imposed amounted to \$326.99, which the respondents paid under protest; wherefore judgment is demanded for the recovery of the sum so paid, with interest and costs.

To this complaint the county of Lewis and Clark interposed a general demurrer, which was overruled, and the county, declining to plead further, suffered the judgment from which this appeal is taken.

The propositions submitted by the respondents as explanatory of the judgment and as ample to sustain it are: (1) That the assessment is void because made to "S. T. Hauser estate"; and (2) that the assessment is void because made by the assessor long after the assessment roll had passed out of his hands and long after the board of equalization had adjourned. In support of these propositions are cited thirty-four decisions, three of which are by this court, and one by the federal court for this district; the remainder are from other jurisdictions. In an abstract way they furnish such support; but in truth none of them is a precedent for this case. The Montana decisions which involve raises without notice were in suits to recover taxes paid under protest, and are thus the only

citations procedurally in point (*Western Ranches v. Custer County*, 28 Mont. 278, 72 Pac. 659; *Matador L. & C. Co. v. Custer County*, 28 Mont. 286, 72 Pac. 662; *Western Ranches v. Custer County* [C. C.] 80 Fed. 577); and it is notable that in all of them great care was taken to allege and prove that the party aggrieved did not own the property so additionally listed or that it was not of the value placed upon it, and therefore the taxes sought to be recovered back were not justly or lawfully collectable.

According to this complaint, the property originally assessed was "embraced in," that is to say, was not all, the assets of the Hauser estate taxable in Lewis and Clark county; the property which the assessor "claimed" to discover was discoverable because it was in fact "a part of the undistributed property of said estate," and there is no suggestion that it was not taxable as such; this property the executors had not listed, though it was their duty to do so; no complaint is made of the amount levied; the executors took cognizance of the assessment and paid the tax; they do not claim that any injustice was done to them or their trust; and no wrong is charged save the naked procedural defects above asserted. That such a case differs materially from those cited to support it, wherein the taxing power sought to enforce rights based upon void assessments, or sales of the property to pay void taxes were threatened, or tax titles to property based on void assessments were involved, or statutory proceedings were had before payment to annul assessments, or unjust and excessive assessments without notice were presented, is perfectly clear; and the question is whether such a case presents a right to the return of moneys honestly payable merely because of defects in the mode by which payment was induced.

[1-3] 1. As we understand the purpose of section 2522, Revised Codes, it is: To assure that notice to some interested person shall be given of the charge for taxes upon property still in course of administration, and to provide that payment, when made by heirs, guardians, executors or administrators, as the case may be, shall bind all the parties in interest, in proportion to their interest. The statute is by its terms permissive and directory rather than mandatory, and in this respect it differs from sections 2510 and 2517, Revised Codes, applied in *Birney v. Warren*, 28 Mont. 64, 72 Pac. 293; hence an assessment made otherwise than as directed by section 2522 would not of itself be notice, and would be voidable if, as a consequence, the party sought to be charged had no notice of it.

[4] But to adopt the rigid construction here urged would be to void an assessment to administrators if as a matter of fact the estate was in charge of executors, and would convert the section from a statute to aid, into a

statute to defeat, the raising of public revenue. Of course, no such construction as this was intended by the Legislature; on the contrary, and notwithstanding the cases cited from other jurisdictions, we think an assessment to the "estate of A." is tantamount to an assessment to the heirs, guardians of heirs, executors of the will, or administrators of the estate of A., as the case may be, if they have actual notice of it. So it eventuates here that respondents' first proposition would have value if it appeared that because of the assessment to "S. T. Hauser estate" no notice of it had come to any of the persons to whom in technical precision the property should have been assessed, and thus it had become delinquent, subject to penalty and threatened with sale. Such, however, is not the situation. The respondents, as executors, persons in control of the juridical entity called the S. T. Hauser estate, took cognizance of the assessment and paid the tax, and if, as the complaint itself shows, the property assessed was in fact "undistributed property of the estate of S. T. Hauser, deceased," if it was subject to taxation in the amount imposed, it seems a refinement to say that the county, justly entitled to the money, must now refund it merely because of a misprision that hardly amounts to a misnomer.

[5] 2. The same considerations make for avoidance of respondents' second proposition. The authority for the assessment asserted by the appellant is section 2542, Revised Codes, to wit:

"Any property discovered by the assessor to have escaped assessment may be assessed at any time, if such property is in the ownership or under the control of the same person who owned or controlled it at the time it should have been assessed."

Let it be assumed for present purposes that this section does not mean what it says, that the assessor is powerless to do anything after the roll comes into the hands of the treasurer, and that, if one is clever enough to conceal his taxable property until that event, he may escape taxation upon it and thrust the burden which he ought to bear upon the shoulders of others; the facts nevertheless remain that according to the complaint this property was taxable. It stood charged with that debt to the county, and the executors could have properly paid it without any formal assessment. Had they done so, neither they nor their trust would have suffered any actionable wrong. If this be true, what is the actionable wrong in the present instance? Certainly not that the respondents have fairly met a just demand. The asserted wrong is that this just demand, fairly met, was not properly formulated; its collection was not preceded by certain modal requirements designed to benefit persons who might be injured by the absence of them. But the absence of them was of no consequence to these respondents or to their trust, because there was nothing for them "to contest or oppose

before the board of equalization or elsewhere." That under these circumstances the tax was not illegal so as to authorize a recovery in this kind of an action may be gathered from the very sections invoked to sustain it (Rev. Codes, §§ 2742, 2743, as amended by chapter 135, Session Laws 1909).

[8] The provision found in section 2743 that, "if the assessment * * * has been added to or changed, either by the assessor or by the county board of equalization, and such person has not been notified thereof and given an opportunity to contest the same before the county board of equalization, the tax of such increased value or added property shall * * * be adjudged by the court to be void," is, by its terms, available only to the "person who has delivered to the assessor a sworn statement of his property subject to taxation" with "the estimated value" thereof. This means all of his taxable property, according to his best knowledge and belief, and the fact that, notwithstanding such list, the assessor or board may increase the value or add other property, implies that an honest controversy must exist between the public and the taxpayer as to what property should have been taxed, or what value should have been placed upon it.

The judgment is reversed, and the cause remanded, with directions to sustain the demurrer.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(177 Cal. 704)

CHAMBERS, State Controller, v. GALLAGHER. (S. F. 7899.)

(Supreme Court of California. March 12, 1918.
Rehearing Denied April 11, 1918.)

1. TAXATION ~~§~~905(1)—INHERITANCE TAXES—LIMITATIONS.

Inheritance Tax Law 1893 (St. 1893, p. 193) provided for appraisement and computation of the tax by the probate court. Section 14 provided that the court should cite persons owning the property to show cause why the tax should not be paid, and that hearing, judgment, and its enforcement should proceed in the manner prescribed by Code Civ. Proc. §§ 1704-1724, inclusive. Section 15 provided that if the tax was unpaid, the district attorney, on notice from the county treasurer, should prosecute the proceedings authorized by the previous section. *Held*, that an executor proceeded against by petition for the collection of the tax may demur to the petition, and thereby present the question of the statute of limitations.

2. LIMITATION OF ACTIONS ~~§~~34(7)—INHERITANCE TAXES.

Inheritance Tax Law of 1893 provided for appraisement and computation of the tax by the probate court. Section 4, as it existed in 1902, provided that, if the tax was not paid within 18 months, interest should be charged thereon. Section 6 provided that the executor should deduct the tax on distribution, or collect the same before property was distributed. Section 1 provided that administrators, executors, etc., should

be liable for all taxes not collected. Section 8 provided that moneys retained by an executor for any such tax shall be paid by him within 30 days thereafter to the county treasurer. The amendment of 1913 (St. 1913, p. 1068) to section 4 provided that the provisions of the Code of Civil Procedure relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, or collect inheritance taxes. Code Civ. Proc. § 338, subd. 1, prescribes a limitation of 3 years for actions upon liability created by statute. Defendant's intestate died January 27, 1902, and his will was duly probated and the estate administered in the same year. More than 12 years after the decree of final distribution, the state controller filed a petition for the collection of such tax. *Held*, that the proceeding was barred by the statute of limitation at the time the amendment of 1913 to section 4 was enacted.

3. TAXATION ~~§~~859(7)—INHERITANCE TAXES—LIMITATIONS.

Inheritance Tax Act, § 4, as amended in 1913 (St. 1913, p. 1068), making inapplicable to suits thereunder the provisions of the Code of Civil Procedure relative to the limitation of time for enforcing a civil remedy, is inoperative as to suits to enforce payment of inheritance taxes which were barred at the time of its passage.

Department 1. Appeal from Superior Court, Fresno County; George E. Church, Judge.

Petition by John S. Chambers, State Controller, against James Gallagher, executor of the estate of Richard Hedinger, deceased, for the collection of an inheritance tax. From a judgment based on an order sustaining defendant's demurrer, plaintiff appeals. Affirmed.

Robert A. Waring and J. Paul Miller, both of Sacramento, for appellant. James Gallagher, of Fresno, in pro. per.

SHAW, J. The plaintiff appeals from a judgment in favor of the defendant.

The petition of the plaintiff shows the following facts: Richard Hedinger died on January 27, 1902. His will was duly probated, the executor appointed, the estate administered, and on July 29, 1902, a decree was duly made, distributing to August. Hedinger, the residuary legatee and devisee, the property remaining in the estate after the payment of \$1,500 in charitable bequests. On September 25, 1914, more than 12 years after said decree of final distribution, the state controller filed a petition in the court which made said decree, alleging that no inheritance tax had been paid on the property so distributed to Augustus Hedinger, and praying that the court appoint an appraiser to appraise said property and ascertain the amount of such tax; that a citation be issued to the executor to appear before such appraiser and be examined, under oath, and show cause why he should not be held chargeable for the payment of said tax, and for judgment that the executor be declared liable for the payment, and be directed to pay such tax to the treasurer of the county.

To this petition the executor filed a demurrer, based upon the ground that the proceeding was barred by the statute prescribing 3 years as a limitation for actions upon a liability created by statute. Code Civ. Proc. § 338, subd. 1. The demurrer was sustained, and thereupon the judgment was given for the defendant.

[1] The inheritance tax act in force at the death of Hedinger in 1902 was the act of 1893 (St. 1893, p. 193). Some amendments thereto were made prior to 1902, but they do not affect the questions arising in this case. The act provided for an appraisal of the property subject to such tax, and that the court in which the administration of the estate was pending should therefrom compute the tax to be paid. Section 14 provided that when it appeared to the court that such tax had not been paid within the time allowed, it should cite the persons owning the property to show cause why the tax should not be paid, and that the hearing, the judgment of the court, and its enforcement, should proceed in the manner prescribed in the chapter of the Code of Civil Procedure embracing sections 1704 to 1724, inclusive. Section 15, as amended in 1895 (St. 1895, p. 33), provided that if the tax became due and was unpaid, the district attorney of the county, on notice of that fact from the county treasurer, should prosecute the proceeding authorized by section 14, as aforesaid, for the enforcement and collection of such tax. The sections of the Code referred to provide for a citation to the parties proceeded against, its personal service and return, the trial of the issues found in the proceedings, for judgment thereon, and for its enforcement by execution, and that the rules of practice prescribed in ordinary civil actions should be followed except as otherwise provided. It follows that the parties proceeded against, following the practice in civil actions, may demur to the petition filed against them, as provided in the Code (section 430, Code Civ. Proc.), and that the question of the statute of limitations was properly presented by the demurrer.

The appellant claims: First, that the provisions of the inheritance tax act in force at the death of the testator operated to continue the liability of the executor indefinitely and beyond the statutory period of limitation: and, second, that even if the statute would otherwise apply, that a provision in section 4 of the revised inheritance tax act of 1913 (Stats. 1913, p. 1068) removes the bar of the statute of limitations with respect to taxes which were barred at the time of this enactment.

Section 4 of the act, as it existed in 1902, provided that the tax imposed thereby should be due and payable at the death of the decedent; that, if not paid within 18 months thereafter, interest should be charged thereon at the rate of 10 per cent. per annum from the time of such death, and that there-

upon such executor should give a bond for the payment of such tax and interest. Section 6 provided that the executor should deduct the tax from any money to be paid on distribution, or, if the property distributed was not money, should collect the tax thereon from the person to whom it was distributed, before such distribution, and that "he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have collected the tax thereon." Section 1 provided that:

"All administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid, as hereinafter directed."

Section 8 provided that moneys retained by an executor for any such tax "shall be paid by him, within thirty days thereafter, to the treasurer of the county in which the probate proceedings are pending"; that the treasurer should transmit the money to the state controller, who should receipt therefor under seal; and that "an executor, administrator, or trustee shall not be entitled to credit in his accounts, nor be discharged from liability for such tax, nor shall said estate be distributed unless he shall produce a receipt so sealed and countersigned by the controller, or a copy thereof, certified by him." Prior to 1913 the inheritance tax was not declared to be a lien upon property. The amendment to section 4, enacted in that year and here relied on, is as follows:

"The provisions of the Code of Civil Procedure relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine, or enforce the collection of any tax or penalty prescribed by this article, and this section shall be construed as having been in effect as of date of the original enactment of the inheritance tax law."

[2] 1. We do not think the provisions of the act as it stood prior to 1913 show an intent to prevent the running of the statute of limitations in favor of the executor after the distribution of the estate. The scheme of the act was that the executor should see that the taxes were paid before he had made final settlement of his estate, or within 30 days thereafter. His obligation became matured at the expiration of such 30 days at all events. The intention was that the court having charge of the administration should not order the settlement of the estate or the discharge of the executor until such tax had been paid. Nothing is said in the law regarding the operation of the statute of limitations or purporting to prevent it from running against such demand, or to differentiate it from any other matured obligation to the state. The act of 1913, expressly declaring such intent, is a strong indication that the Legislature itself did not suppose that it had previously done so. Doubtless the liability of the executor, under the terms of the act, continued after the settlement of

the estate, if the tax was not previously paid, and could be enforced in a proper proceeding by the district attorney for that purpose under the provisions of the act. But there is nothing in the language of the act which declares that the statute does not run against such liability, as in other cases. It is the duty of every person to pay his debts, but the existence of that duty does not prevent the running of the statute of limitations in his favor, upon his failure to pay them when due. The duty to pay this tax is no greater than the duty of every citizen to pay his ordinary taxes on property. It is, perhaps, even less burdensome, since the inheritance tax at the time in question was not a lien upon property, as in the case of ordinary taxes. Pol. Code, § 3716. In cases where the law also allowed a personal action to be maintained for the recovery of such taxes, we have uniformly held that the statute of limitations applies to such actions; that such tax is a liability created by statute, which, under section 338, subdivision 1, aforesaid, is barred after the expiration of 3 years from the time when the right of action accrued. *San Diego v. Higgins*, 115 Cal. 170, 46 Pac. 923; *Los Angeles v. Ballerino*, 99 Cal. 595, 32 Pac. 581, 34 Pac. 329; *San Francisco v. Luning*, 73 Cal. 610, 15 Pac. 311; *Lewis v. Rothchild*, 92 Cal. 625, 28 Pac. 805; *Dranga v. Rowe*, 127 Cal. 506, 59 Pac. 944; *Clark v. San Diego*, 144 Cal. 361, 77 Pac. 973. The same principle applies to a demand for inheritance tax under the act of 1893, and its amendments prior to 1902. This proceeding to enforce the personal liability of the executor for the payment of the tax in question was therefore barred by the statute at the time the amendment of 1913 was enacted.

[3] 2. We are also satisfied that the appellant is wrong in his contention that the act of 1913, purporting to take away the defense of the statute of limitations with respect to proceedings to enforce payment of inheritance taxes which were barred at that time, is constitutional, and operates to deprive the executor in this case of that defense. Mr. Wood, in his treatise on the statute of limitations, states the law on this subject as follows:

"Statutes of limitation relate only to the remedy, and may be altered or repealed before the statutory bar has become complete, but not after, so as to defeat the effect of the statute in extinguishing the rights of action. * * * It has been held in a case decided by a majority of the Supreme Court of the United States (*Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483), that, in actions upon debt, contract, or any class of actions in which a party does not become invested with the title to property by the statute of limitations, the Legislature may by a repeal of the statute of limitations, even after the right of action thereon is barred, restore to the plaintiff his remedy thereon, and divest the other party of the statutory bar. The doctrine of this case is undoubtedly technically correct, and was suggested in the first edition

of this work. It is, however, opposed to the great weight of authority in this country, and to the policy of these statutes. There can be no question that the Legislatures of the several states by the passage of the statute of limitations intended a permanent divestment of a right of action in all matters to which the statute relates, when it had run against them, and they had thereby become barred. And while it may be, as already suggested, that the reasoning of the court is correct, yet the wisdom of the doctrine announced is questionable." Wood on Limitations (4th Ed.) § 11, p. 46.

This proposition is supported by the almost universal course of decision in the United States. The courts of Arkansas, Colorado, Florida, Iowa, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, New Hampshire, New Jersey, Tennessee, Utah, Virginia, Washington, and Wisconsin, all adhere to the doctrine. *Couch v. McKee*, 6 Ark. 492; *Willoughby v. George*, 5 Colo. 80; *Bradford v. Shine's Administrator*, 13 Fla. 393, 7 Am. Rep. 239; *Board of Education v. Blodgett*, 155 Ill. 441, 445, 40 N. E. 1025, 31 L. R. A. 70, 46 Am. St. Rep. 348; *Stipp v. Brown*, 2 Ind. 647; *Bowman v. Cockrill*, 6 Kan. 205; *Lawrence v. Louisville*, 96 Ky. 600, 29 S. W. 450, 27 L. R. A. 560, 49 Am. St. Rep. 309; *Norris v. Slaughter*, 3 G. Greene (Iowa) 116; *Bigelow v. Bemis*, 2 Allen (84 Mass.) 496; *Atkinson v. Dunlap*, 50 Me. 111; *Whittier v. Village of Farmington*, 115 Minn. 187, 131 N. W. 1079; *Davis v. Minor*, 1 How. (Miss.) 188, 28 Am. Dec. 325; *Rockport v. Walden*, 54 N. H. 173, 20 Am. Rep. 181; *Ryder v. Wilson's Ex'rs*, 41 N. J. Law, 10; *Girdner v. Stephens*, 1 Helsk. (48 Tenn.) 280, 2 Am. Rep. 700; *Ireland v. Mackintosh*, 22 Utah, 296, 61 Pac. 901; *Kesterson v. Hill*, 101 Va. 739; *City of Seattle v. De Wolfe*, 17 Wash. 349, 49 Pac. 553; *Eingartner v. Illinois Steel Co.*, 103 Wis. 373, 79 N. W. 433, 74 Am. St. Rep. 871.

The same doctrine has been announced in this state and applied to cases where rights of specific property were involved. *Peiser v. Griffin*, 125 Cal. 14, 57 Pac. 600. It has been stated in other cases where the precise question was not involved. *Allen v. Allen*, 95 Cal. 197, 30 Pac. 213, 16 L. R. A. 646; *Swamp Land Dist. v. Glide*, 112 Cal. 90, 44 Pac. 451; *Weldon v. Rogers*, 151 Cal. 432, 90 Pac. 1062. The question as applied to actions to enforce personal obligations has not heretofore arisen in this state, but upon the authority of the cases we have cited, and the practically universal rule on the subject, we feel no hesitancy in adhering to the doctrine as stated by Mr. Wood. The act of 1913 is therefore inoperative to revive the right of action of the controller which had become barred long before that time. It follows that the demurrer to the petition was properly sustained.

The judgment is affirmed.

We concur: SLOSS, J.; RICHARDS, Judge, pro tem.

(178 Cal. 1)

O'MELVENY et al. v. GRIFFITH et al.
(L. A. 4165.)(Supreme Court of California. March 21,
1918.)**1. MUNICIPAL CORPORATIONS —210—PARKS
—ORDINANCE ACCEPTING GIFT—VALIDITY.**

Los Angeles City Charter (St. 1911, p. 2051 et seq.) § 118, subsecs. (c), (d), and section 119, fully vest in the board of park commissioners the management of the park system of the city, and of all real and personal property devoted to that use, as well as the erection and maintenance of all buildings thereon. Section 12 vests all legislative power of the city in the council and mayor, but excepts to the board of park commissioners the power to accept gifts for parks on and in behalf of the city, to erect buildings thereon, and to manage and control their erection and their maintenance thereafter. Section 2, subd. 16, gives the city power to receive gifts and donations of all kinds of property in fee simple or in trust for charitable purposes, and do all things and acts necessary to carry out the purposes of such gifts and donations. *Held*, that ordinances of the city accepting gift to erect, in a certain park, two structures, and appoint, in accordance with the terms of the gift, three citizens to supervise the erection and manage and control the structures, were void.

**2. MUNICIPAL CORPORATIONS —992—TAX-
PAYERS' SUIT—ENJOINING ENFORCEMENT OF
ORDINANCE.**

Plaintiffs, taxpayers, citizens, and members of the board of park commissioners of Los Angeles, had capacity to sue defendant commissioners claiming to act as officers of the city, under the ordinances as to said gift, from carrying out the provisions of such ordinances, and from interfering with plaintiffs' duties as park commissioners, and the remedy by injunction was proper, the ordinances requiring the furnishing, for the erection of the buildings by the city, free light, power, water, rocks, and gravel.

Department 2. Appeal from Superior Court, Los Angeles County; Louis M. Myers, Judge.

Suit by Henry W. O'Melveny and others against Griffith J. Griffith and others. Judgment for defendants on demurrer, and plaintiffs appeal. Reversed.

O'Melveny, Stevens & Millikin, of Los Angeles, for appellants. Albert Lee Stephens, City Atty., and Charles S. Burnell, Asst. City Atty., both of Los Angeles, for respondents.

WILBUR, J. [1] This is an appeal from a judgment in favor of defendants on demurrer. Plaintiffs sue as citizens and taxpayers, and also as members of the board of park commissioners of the city of Los Angeles, to enjoin the defendants, claiming to act as officers of the city under certain ordinances, from carrying out the provisions of such ordinances and from interfering with the powers and duties of the park commissioners. The defendant Griffith J. Griffith has offered to erect, at his own expense, for the city of Los Angeles, to become the property of the city, two structures, one a "Greek theater," costing not less than \$50,000, in Vermont Canyon; the other a "Hall of Science and Observatory," costing not less than \$150,000,

on Mt. Hollywood both in a certain public park of the city of Los Angeles, known as "Griffith Park." The donor proposed that the plans for said buildings were to be furnished by him, subject to the approval of the city council and mayor, or a committee, and the structures were to be erected under the supervision of three citizens appointed for that purpose by the mayor of the city, thereto authorized by ordinance. The city was to furnish the light, power, and water necessary in the construction of said buildings from its supply of each. Rock and gravel in the park were also to be used in the construction of said buildings and the necessary trails and roadways constructed to make the same accessible. After the erection of said structures they were to be managed and controlled by the said appointees of the mayor. No point is made in the case as to the desirability of the acceptance of the gift, nor to the public character of the improvements proposed; nor is there any contention that the conditions attached to the gift are unreasonable, or in any way improper, save only in so far as they may interfere with the prerogatives of the plaintiffs as park commissioners. The city council passed an ordinance accepting the donor's gift, and in compliance with the conditions thereof established a board of three commissioners to erect and manage such structures. The respondents were appointed by the mayor as such commission, and appellants seek to enjoin them from carrying out the proposed plan, on the ground that the ordinance in question is in conflict with the charter powers of the appellants. The powers of the board of park commissioners and of the city council are derived from the charter of the city of Los Angeles and the several amendments thereto. The powers and duties of the park commission are, in part, defined as follows:

"(c) To purchase and lease property for park purposes, or for the use and benefit of the park department, and to have general supervision, control, care and custody of all real and personal property owned by the city of Los Angeles and used in and about the parks or park system of said city, and generally to do any and all things that may be necessary to carry out the spirit and intent of this charter in establishing, maintaining, operating, improving and enlarging the public parks and park system of the city of Los Angeles; and

"(d) Subject to such ordinances as may from time to time be adopted by the council, to have and exercise charge, superintendence and control of the design, location, construction, maintenance and use of all buildings, pavilions and other structures, and all fountains, statues, sculptures, monuments, arches or other structures in such park, pertaining to park purposes, and intended for the convenience of the public, or for the ornamentation of such parks." Section 118, subds. (c) and (d).

"The board of park commissioners may, for and on behalf of the city of Los Angeles, receive donations, legacies or bequests for the improvement or maintenance of said parks or park system, or for the acquisition of new parks, and all moneys that may be derived from

such donations, legacies or bequests, shall, unless otherwise provided by the terms of such donation, legacy or bequest, be deposited in the treasury of the city of Los Angeles, to the credit of the park fund. * * * As to all such property, the board of park commissioners shall be deemed and considered a special trustee thereof for the city of Los Angeles." Section 119, Stats. 1911, p. 2051 et seq.

It will be observed, therefore, that the management and control of the park system of the city, and of all real and personal property devoted to that use, as well as the erection and maintenance of all buildings thereon, is very fully vested in the board of park commissioners. It is provided, with reference to the erection and control of buildings, that the same shall be "subject to such ordinances as may from time to time be enacted by the council." Section 118, subd. (d), supra. But here we do not have a case where the council sought by ordinance to direct the board of park commissioners as to the manner in which they should act in the location, maintenance, or use of buildings in a public park, but an ordinance by which it is sought to take from the board of park commissioners control over such improvements during erection and after they have been completed, and by which it is sought to make a contract with a private individual for the creation of public officers to have control thereover in accordance with his proposal for the erection and maintenance of the building. We have an acceptance by the city council for and on behalf of the city of a gift, the consideration for which moving from the city is a surrender by the city council of some of the powers of the board of park commissioners vested in them, not by the city council, a creature of the charter, but by the charter itself. That is to say, one of the boards created by the people seeks to take from another board, also created by the people through its charter, a power expressly vested by the people in the latter board. To justify this result two provisions of the charter are called to our attention—one, the provision that the city is given power to "receive gifts and donations of all kinds of property, in fee simple, or in trust, for charitable or other purposes; and to do all things and acts necessary to carry out the purposes of such bequests, gifts and donations, with power to manage, sell, lease, or otherwise handle and dispose of the same, in accordance with the terms of the bequest, gift or donation" (Charter, § 2, subd. 16); the other that the charter vests all the legislative power of the city, "except as hereinafter otherwise provided," in the council and mayor. If we consider that the acceptance of a gift in behalf of the city and a compliance with the terms of such gift is a legislative function, and therefore vested in the city council, and that for that reason and upon that basis the city council was empowered to accept the gift and comply with the conditions thereof,

we are met with the express reservation of section 12 with reference to legislative powers, namely, that where "hereinafter otherwise provided" the city council have not such legislative power. Among the things "hereinafter otherwise provided" is that the board of park commissioners has power to accept gifts for the park for and on behalf of the city, to erect buildings thereon, to manage and control their erection and their maintenance thereafter. We are constrained to hold, therefore, that Mr. Griffith in his proposal to the city of Los Angeles imposes as a condition of his gift requirements which are violative of the fundamental law of the city and opposed to the wishes of the people thereof as declared in the fundamental law of said city; that the ordinances attempting to comply therewith are void as being in violation of the fundamental law of the city.

[2] One of the points raised by the demurrer in the court below was that the plaintiffs did not have the capacity to sue. They allege that they are citizens and taxpayers. The ordinance in question required the furnishing for the erection of the buildings by the city of free light, power, water, rock, and gravel. Inasmuch, therefore, as the property of the city was to be used in the proposed buildings, and for the further reason that the members of the board of park commissioners charged with the erection of buildings in the public parks is specially interested in the question, we hold that they had the capacity to sue in this case, and that the remedy by injunction was proper. *Wheeler v. Herbert*, 152 Cal. 224, 92 Pac. 353.

The judgment and order sustaining the demurrer are reversed; defendants to have 30 days after notice of filing of remittitur in the lower court in which to answer.

We concur: VICTOR E. SHAW, Judge pro tem.; MELVIN, J.

(177 Cal. 771)

EMPLOYERS' LIABILITY ASSUR. CORP., LIMITED, OF LONDON, ENGLAND, v. INDUSTRIAL ACCIDENT COMMISSION. (S. F. 8517.)

(Supreme Court of California. March 20, 1918. Rehearing Denied April 16, 1918.)

1. MASTER AND SERVANT §361—MARITIME CONTRACTS—EMPLOYER'S LIABILITY—JURISDICTION.

The exclusive maritime jurisdiction of the United States does not extend to claims arising out of work done on vessels prior to launching, and where parties stipulated facts under Workmen's Compensation Law (St. 1913, p. 279) of the state, the commission had jurisdiction.

2. MASTER AND SERVANT §383—INDUSTRIAL ACCIDENT COMMISSION—POWERS.

While the jurisdiction of the Industrial Accident Commission is limited to settlement of disputes arising under legislation contemplated by Const. art. 20, § 21, to create and enforce liability of employers to compensate for injuries, it may determine the question of breach

of warranty of insurance policy arising in proceedings for compensation.

3. INSURANCE \Leftrightarrow 288(1)—**AVOIDANCE OF POLICY—MISREPRESENTATIONS BY INSURED.**

A statement of insured, neither included in policy nor made a part of it under Civ. Code, § 2605, as to existence or cancellation of other insurance, if false, will not avoid insurance under section 2611, unless the statement be material.

4. MASTER AND SERVANT \Leftrightarrow 416—**WORKMEN'S COMPENSATION—FINDINGS OF COMMISSION.**

An express finding that representation by insured was immaterial was not required, where such issue was not presented by insurer, and the Industrial Accident Commission found the policy of insurance was in full force and effect at time of injury.

In *Bank. Charles F. Mann*, while at work as ship joiner, sustained injuries resulting in death. Upon application of his widow, the Industrial Accident Commission made an award of compensation against his employer, J. A. Johnson, and the Employers' Liability Assurance Corporation, Limited, of London, England, as insurance carrier. The Employers' Liability Assurance Corporation brought certiorari. Award affirmed.

Redman & Alexander, of San Francisco, for petitioner. *Christopher M. Bradley*, of San Francisco, for respondent.

SLOSS, J. While working as a ship joiner, Charles F. Mann sustained injuries which resulted in his death. Upon the application of his widow, the Industrial Accident Commission made an award of compensation against J. A. Johnson, as employer, and Employers' Liability Assurance Corporation, as insurance carrier. Upon the petition of the insurance company, a writ of certiorari was issued to review the award.

At the hearing the parties stipulated, among other things:

"(2) That the employment that said employé was engaged in * * * was such as to subject both the employer and the employé to the compensation provisions of the Workmen's Compensation, Insurance, and Safety Act and to the jurisdiction of this commission; (3) that on March 9, 1917, Charles F. Mann met with injuries on the Oakland estuary in Alameda county, Cal., and that said Charles F. Mann died on May 14, 1917."

The application alleged that at the time of his injury Mann was engaged in work on a ship.

[1] By its petition to the commission for rehearing the petitioner advanced, for the first time, the contention that the claim of the applicant was maritime in character, and that, under the decision of the United States Supreme Court in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, Ann. Cas. 1917E, 900, handed down while the proceeding was pending, the commission was without jurisdiction. A rehearing was denied, and the point is again presented here. But the record does not disclose a state of facts to which the rule invoked is

applicable. The maritime jurisdiction does not extend to claims arising out of work done (prior, at least, to the launching of the hull) in the construction of vessels. *Olsen v. Birch & Co.*, 133 Cal. 479, 65 Pac. 1032, 85 Am. St. Rep. 215. While it appears that Mann was injured while working on a ship, the stipulation and the evidence are entirely consistent with the possibility that the ship may have been in course of construction, and not yet launched. The statement in the stipulation that Mann met with injuries "on the Oakland estuary" does not necessarily mean that the ship on which he was working was floating on the water. The language was not inappropriate to describe a position on the bank of the estuary. Since the parties expressly conceded the jurisdiction of the commission, the specific facts admitted or proven should, so far as can reasonably be done, be interpreted so as to support the concession. It is recognized, of course, that jurisdiction of the subject-matter cannot be conferred by consent. But the parties may stipulate to the existence of facts which bring a case within the jurisdiction of the commission, and we think the stipulation in this case is fairly to be read as an agreement that such facts existed.

[2] The insurance carrier set up in its answer the defense that there had been a breach, on the part of Johnson, the employer, of certain warranties contained in the policy, and that upon learning of such breach the insurance company had canceled the policy. It is argued that the issues involved in this defense were such as could be determined only by a court of law in an action upon the policy, and that the commission was without jurisdiction to pass upon them. We do not agree to this contention. The Industrial Accident Commission is, no doubt, a tribunal of limited jurisdiction. Its powers do not extend beyond the "settlement of any disputes arising under the legislation contemplated by" section 21 of article 20 of the Constitution. *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 410, 156 Pac. 491, Ann. Cas. 1917E, 390. That section authorizes the Legislature to "create and enforce a liability on the part of all employers to compensate their employes for any injury incurred by the said employes in the course of their employment. * * *" This court is committed to the view that the language just quoted is to be read in the light of a liberal interpretation. A scheme of insurance for the protection both of the employer and the employé has been a part of virtually every workmen's compensation statute enacted in other jurisdictions prior to the adoption of our own constitutional provision. To permit the employer to limit his obligation by procuring an insurer—private or governmental—to assume the burden of payment, and at the same time to give the workman a direct right of recov-

ery against the insurer, is, we think, a mode of defining the extent of the employer's liability, and therefore embraced within the power to "create and enforce" such liability. The insurer, assuming the risk voluntarily, is in privity with the employer, and stands in his place. An adjudication of liability under the policy is a settlement of a dispute arising out of the liability of the employer to his employé. The right of the commission to make an award against the insurer, where the validity of the policy is conceded, has never been questioned. If the commission may, in any case, make an award against one who has agreed to stand in the employer's place and protect him against claims by his employés, it must have the power to determine all questions of law and fact upon which the liability of the alleged insurance carrier depends. To hold that the mere denial of the binding force of a policy deprives the commission of jurisdiction would introduce endless and unnecessary complications and difficulties into the administration of the law.

[3] The petitioner argues, finally, that, granting the commission's jurisdiction, the facts were such as to force the conclusion that the policy was not binding. In the application or "statement of particulars" furnished to the insurer, it was stated that no company had canceled or refused to issue workmen's compensation insurance in connection with the risk during the past three years, and that no company had insured the risk except the Hartford Company. It appeared that these statements were not true, in that a policy had been issued by the New Amsterdam Casualty Company, and had been canceled by said company shortly before application made to the petitioner. We may assume that any defense available to the insurance company as against Johnson, the employer, would be equally available against the employé or his dependents. The statement with reference to the existence or cancellation of other insurance did not constitute a warranty. It was not contained in the policy itself, nor was it in "another instrument signed by the insured and referred to in the policy, as making a part of it." Civ. Code, § 2605. There was no declaration in the policy that the violation of this provision should avoid it, and the breach therefore would not affect the validity of the insurance unless the statement or representation was material. Civ. Code, § 2611.

The evidence on the subject of materiality was somewhat vague. Certain correspondence was introduced, indicating that the New Amsterdam Company, in notifying the insured of the cancellation of the policy issued by it, had attributed its action to a ground which would probably have made the fact of cancellation immaterial, so far as it might affect another company to which ap-

plication might subsequently be made. It may be, as petitioner contends, that the statement made by the New Amsterdam Company to Johnson was not evidence of the true ground which induced the cancellation. But it seems to be settled that the burden of proving the materiality of an alleged representation is upon the insurer. 2 Cooley, Briefs on Insurance, 1182. The petitioner did not meet the burden, and the commission was therefore authorized to find against it.

[4] It is objected that there was no express finding that the representation was immaterial. But no such issue was presented by the answer of the insurance company. The commission found that the policy of insurance was in full force and effect at the time of the injury, and we think this finding was sufficient for all purposes. We may, for the purposes of this proceeding, agree with the petitioner that the further finding that the policy had not been validly rescinded is not material, and does not of itself dispose of the defense attempted to be set up. But the answer alleged rescission, and the fact that an unnecessary finding was made does not impair the sufficiency of the findings made. The award is affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J., WILBUR, J.; VICTOR E. SHAW, Judge pro tem.; RICHARDS, Judge pro tem.

(177 Cal. 781)

Ex parte WEINBERG. (Cr. 2142.)

(Supreme Court of California. March 21, 1918.)

BAIL § 42—MURDER—EVIDENCE.

Where petitioner was indicted for murder upon eight counts for participating in a bomb explosion during a preparedness parade, and was tried and acquitted on one count and on another ordered admitted to bail, and the prosecution urged delay of trial, and no claim was made that there was testimony other than that on which he was acquitted on the one count, held that under Const. art. 1, § 6, petitioner was entitled to bail.

In Bank. Petition by Israel Weinberg for writ of habeas corpus for admission to bail. Writ allowed.

See, also, 171 Pac. 110.

Maxwell McNutt and E. V. McKenzie, both of San Francisco, for petitioner. C. M. Fickert and Louis Ferrari, both of San Francisco, for respondent.

PER CURIAM. The petitioner, against whom eight indictments were returned August 2, 1916, for the crime of murder, and who is in custody under such of the indictments as have not been dismissed and one upon which he was tried and acquitted, instituted this proceeding for the purpose of obtaining his admission to bail. He is alleged to have been one of the participants in

the bomb outrage in connection with the preparedness parade on July 22, 1916, described in our opinion in the case of *People v. Mooney*, 171 Pac. 690, and by the indictments he was charged with the murder of various persons killed thereby. He has been in custody ever since August 2, 1916. The indictments against him were assigned to three different departments of the superior court of the city and county of San Francisco. As to the indictments pending in two of the departments he was, after his trial and acquittal on one of the indictments hereinafter noted, ordered admitted to bail by one of the judges thereof. In one of these departments the indictments there pending against him have since been dismissed by the court. In the other of these departments the district attorney declares himself not ready to proceed immediately with the trial of the charge against him. In the third department admission to bail is denied, and it is claimed by petitioner that he is refused a speedy trial therein. Petitioner has been regularly tried upon one of the indictments, and the trial resulted, on November 27, 1917, in a verdict of not guilty. A transcript of the testimony given on this trial was submitted to us upon this application. No claim was made that the district attorney has any other testimony upon which he expects to rely upon another trial.

Under the Constitution all persons accused of crime are entitled to bail, "unless for capital offenses when the proof is evident or the presumption great." Const. art. 1, § 6. The provision has been interpreted in this court to mean that bail should be refused in a capital case when the evidence is such that a verdict of guilty based upon it would be sustained by a court. *Ex parte Troia*, 64 Cal. 152, 28 Pac. 231; *Ex parte Curtis*, 92 Cal. 188, 28 Pac. 223. In the cases just cited the application for bail was made before the accused had been put on trial before a jury. Where, however, there has been a trial, upon which the jury has disagreed, this is a circumstance which, while not conclusive, is entitled to weight in determining whether the prisoner should be admitted to bail. 3 Am. & Eng. Ency. of Law (2d Ed.) 670; *Ex parte McLaughlin*, 41 Cal. 220, 10 Am. Rep. 272; *Alexander's Petition*, 59 Mo. 598, 21 Am. Rep. 393. More persuasive, though still not controlling, is the acquittal of the prisoner on a trial of one of several indictments where, as is conceded to be the case here, all are founded upon a single transaction. *State v. Summons*, 19 Ohio, 139. See, also, *Green v. Commonwealth*, 11 Leigh (Va.) 677.

Upon a consideration of the evidence which has been presented against the petitioner, coupled with the fact that a verdict of acquittal has been rendered by a trial jury upon that evidence, and in view of the other

circumstances set forth above, we think the application for bail should be granted.

It is ordered that petitioner be admitted to bail upon the indictments still pending against him, in the sum of \$7,500 on each indictment, the bond to be approved in each case by the judge of the superior court in whose department the same is pending.

(177 Cal. 755)

SEYMOUR v. SALSBERY et al.

(S. F. 7906.)

(Supreme Court of California. March 19, 1918.)

1. CORPORATIONS §123(1, 4) — TRANSFER OF STOCK—PLEDGES.

A pledgee of corporate stock is not bound to give notice of transfer to himself to the corporation, and transfer upon the books of the corporation is not essential to create a valid pledge.

2. CORPORATIONS §128(10)—PLEDGES—ENFORCEMENT.

Where a valid pledge of corporate stock has been made the pledgee may claim the property so pledged from third persons by suit unless such persons establish a superior right thereto.

3. CORPORATIONS §123(24)—PLEDGED STOCK—EVIDENCE.

Evidence held to show that defendant, as agent of pledgor and at his request, bid in such stock when sold for assessment, holding same in trust for pledgor.

4. PRINCIPAL AND AGENT §69(7) — RIGHTS OF AGENT AND PRINCIPAL.

An agent, bidding in his principal's corporate stock sold for assessment, could acquire no right superior to that of his principal.

5. CORPORATIONS §109 — ASSESSMENTS ON STOCK—SALE.

Evidence held to show that defendant had purchased corporate stock under sale to enforce an assessment on the stock, under an understanding preventing competitive bids and in bad faith, for much less than real value.

Department 2. Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by George N. Seymour against John Salsberry and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

J. P. O'Brien, of San Francisco, for appellant. Willard P. Smith and B. B. Blake, both of San Francisco, for respondent.

MELVIN, J. Defendant Salsberry appeals from an adverse judgment and from an order denying his motion for a new trial.

Defendant Sward, against whom judgment by default was entered, owned on November 27, 1909, 10,000 shares of the stock of the International Eucalyptus Association of California standing in his name upon the books of that corporation. On that day he pledged the stock by indorsement and delivery of the certificates, representing it to plaintiff Seymour as security for the payment of a note of even date. By the terms of the indorsement upon the certificates the transaction was nominally a sale, assignment, and transfer of the stock. No transfer of the stock to plaintiff was made on the cor-

poration's books, and no notice of any sort was given regarding the hypothecation of the shares. In May, 1912, an assessment of one cent a share was levied upon the capital stock of the corporation, and the shares owned by Sward were sold to John Salsberry, appellant herein, on August 6, 1912, at a delinquent sale for nonpayment of this assessment.

It appears that Sward, absent from the state of California, learning of the assessment, sent to Salsberry the following telegram:

"Chicago, Ill. Aug. 5th-12. John Salsberry, care Hotel Sacramento, Sacramento, Calif. Oakes stock has assessment one cent share payable tomorrow. Go fifty cents. Will you pay James Warrack secretary hundred ninety dollars assessment stock my name and Geo. Albert will send check full amount. Please wire today. John W. Sward. 4 p. m."

Salsberry did not reply to this communication, but he went to Sacramento admittedly for the purpose of buying certain shares known as the "Oakes Stock," and also with the intention of paying the assessment on the stock, owned by Sward; but on August 6, 1912, at a delinquent sale, he purchased Sward's stock which was accordingly transferred to him on the books of the corporation. It is admitted by the appellant that at the time of said sale there was a friendly understanding amongst the bidders present that Salsberry would bid in the Sward stock and the others would bid in the rest of the stock sold. But appellant's counsel say that no binding agreement was entered into having this effect, and none of the parties was bound by any such agreement. The following year another assessment was levied on the 10,000 shares, amounting to \$125, and was paid by Salsberry.

On May 13, 1914, plaintiff tendered to Salsberry the aggregate of the amount paid at the delinquent sale and upon the subsequent assessment and also a sum asserted to be the equivalent for interests and costs, and demanded that Salsberry transfer the stock to him. Compliance with this demand being refused, plaintiff sued to compel such delivery and to require the corporation to reissue the stock to said plaintiff in his own name.

The findings and judgment were in favor of the plaintiff. Appellant contends that the evidence is insufficient to justify the court's determination that the defendant Sward directed or employed him to pay the delinquent assessment upon the stock, and that appellant promised to do so; that an agreement was made between the bidders at the delinquent sale to depress the price paid for the stock, and that such agreement amounted to fraudulent conduct which would vitiate the sale; and that Salsberry had notice, implied or otherwise, of Seymour's interest in the stock and of the invalidity of the sale under the assessment.

[1, 2] Preliminary to these objections, however, is the suggestion on the part of appel-

lant's counsel that respondent's title to the stock is not good because of his failure to give notice of its transfer to him, but undoubtedly it is the rule that such a transfer as was here made of stock of a corporation is good as against all subsequent claimants except purchasers in good faith for value and without notice of the equities. For the operation of this rule it is not necessary that an entry of the transaction be made on the books of the corporation. *Brown v. San Francisco Gaslight Company*, 58 Cal. 426. The case of *National Bank of the Pacific v. Western Pacific Railway Co.*, 157 Cal. 573, 108 Pac. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, is authority also for this rule as applicable to pledges. It follows as a logical consequence of this rule that, the transaction having effected a valid pledge as between the parties, the pledgee may claim the property so pledged from third persons by suit, if necessary, unless they have a higher equity or other superior right to his own. *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143, 31 Cyc. 842. As was said in *Spreckels v. Nevada Bank of San Francisco*, 113 Cal. 272, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348, by Mr. Justice Henshaw, who delivered the opinion of the court, in commenting upon the effect of section 324 of the Civil Code with reference to the necessity for an entry of a transfer of stock upon the books of a corporation:

"Even without entry upon the books of the corporation, such a transfer is valid as against all but innocent purchasers, and transferees in good faith, for value, and without notice."

And in the same opinion he used the following language:

"It is not the law of this state, nor is it the law generally, that a transfer upon the books of the corporation is essential to the creation of a valid pledge. Civ. Code, § 324; *Graves v. Mono Lake, etc., Min. Co.*, 81 Cal. 303, 325 [22 Pac. 665]; *National Bank v. Watson Bank*, 105 U. S. 217 [28 L. Ed. 1039]; *Cook on Stocks and Stockholders*, § 465."

Therefore, if respondent proved a superior equity in the stock to that possessed by appellant, the judgment must stand.

[3] Turning now to the first finding attacked, we are of the opinion that it is amply supported by the evidence adduced at the trial.

From the testimony of appellant himself it appears that he met Sward in the fall or winter of 1911 and 1912, and that they were very friendly toward the latter part of their association. Sward proposed to Salsberry that the latter should furnish the money to purchase certain interests in the International Eucalyptus Association, which Sward believed he could get for a very small price. Speaking of their relations with reference to this matter the appellant, when on the witness stand, said:

"He had to make a trip East, and on his return, why, I was going to take this proposition up with him of buying the stock, putting up the money, and we were to share alike in the profits

after I had received my interest and principal back. But somehow or another he was a little longer in the East than he had anticipated, and he sent me these wires. So I went over to Sacramento and purchased the Oak stock."

One of the telegrams to which appellant referred was the one from Sward quoted above. It also appears from Salsberry's testimony that the telegram was the first intimation which he had of the contemplated sale of Sward's stock for the delinquent assessment. The telegram, he said, was the inducement which caused him to stay over in Sacramento, where he had gone to buy shares at the sale of Oakes' property on August 5, 1912. He remained there until the following day in order to pay Sward's assessment or bid at the sale. Regarding his attendance at the sale on the 6th, he said:

"I went over to pay, as you call it, the assessment on the Sward stock, but, in the meantime, I had found I was in bad with Sward. So in place of leaving the stock stand in Sward's name, I bought it outright."

Mr. Ennis, who was present at the sale, testified that Mr. Salsberry said he was in Sacramento "to act for Mr. Sward." To another witness appellant said, according to the testimony, that he originally intended to pay the assessment when he received the message from Sward.

Appellant's counsel contend that this evidence falls far short of proving that Salsberry in purchasing the stock constituted himself a trustee for Sward. Regarding the telegram they assert that it was "a mere request from Sward, not accepted by Salsberry." We cannot assent to this view. That there had been negotiations between Sward and Salsberry regarding the purchase of stock of this very corporation was the statement of appellant himself. True, there was no written agreement between them, but there was an understanding. Asked to explain this understanding, Mr. Salsberry said:

"The idea was for me to give the money; that I was to purchase the stock and get my money at plus 6 per cent., and half of the profits. That was all that was said outside of an alluring proposition to me."

It is argued by appellant's counsel that the mere receipt of the telegram by their client and his action upon it did not create an agency. But there was here present more than a mere request from a stranger for a favor. It related to the very stock about which there was an agreement that Salsberry would "take up the proposition of buying" it for their common benefit. Coupled with this request was another with reference to the payment of the assessment on Sward's shares. Under the circumstances, considering the relations between the parties, the prompt compliance with the part of the request which related to paying the indebtedness, coupled with the fact that there was no refusal to assent to the other part of the importunity, namely, that the payment should be for Sward's benefit—all of these

things justified the court in holding that a constructive trust was created in favor of the sender of the telegram. True, there was no formal consent on Salsberry's part to act for Sward in compliance with the telegram. But this was a case where two homely maxims may be justly applied, namely, "Actions speak louder than words," and, "Silence gives consent." Salsberry's agreement to pay the assessment for the man with whom he had been negotiating was implied from the admitted facts of the case. Upon receipt of Sward's telegram it was his duty either to pay the assessment or to notify Sward that he declined to do so. Section 2224, Civ. Code; *Frost v. Perfield*, 44 Wash. 185, 87 Pac. 117; *Samonset v. Mesnager*, 108 Cal. 354, 41 Pac. 337. In *Frost v. Perfield* the essential facts were as follows: One of the plaintiffs had written from Alaska to the defendant in Washington to look up and pay her taxes upon certain property in Pierce county. The defendant went to Tacoma, and was informed that the property had been sold to the county for delinquent taxes. He did not answer plaintiff's letter; she again wrote to him the following year, making the same request, whereupon he again made inquiry and learned that the property would be sold by the county soon after. He then wrote to Mrs. Frost, telling her that he intended bidding in the property if it did not sell too high. He did bid in the property, taking it in his own name. Upon being tendered the amount which he had laid out, he claimed to hold the property in his own right. The court held, however, that by acting upon the information which he received from the plaintiff the defendant constituted himself her agent, and could not acquire interest in the land adverse to her. The language of the court is peculiarly applicable to the case at bar:

"When he received that letter, it was optional with him whether he would comply with their request or not. He could have declined to do anything in the matter, or he could have written and told them to secure the services of some other person. Instead of doing this, he complied with the request to the extent of going to Tacoma and making inquiries at the county treasurer's office relative to these taxes. When he did this, he constituted himself the agent of appellants. Upon receiving the second letter, he again visited the treasurer's office and ascertained the condition of the property with relation to the taxes. When he wrote to Mrs. Frost and told her the condition in which he found the property, it was in answer to her letter, requesting him to investigate the matter, and she had a right to suppose that he was acting, not only at her request, but in her behalf. In view of the relationship existing between the parties, and of all the circumstances, we think that he was not justified in buying in the property for himself without plainly informing the appellants of that intention."

The relationship referred to in the above quotation was that of landlord and tenant, but it does not appear that it was any closer than the relationship existing between Sward and Salsberry.

[4] As Sward's agent Salsberry could acquire no superior right to that of Sward. Sward could not have acquired any interest in the property adverse to Seymour, and Salsberry, having accepted the duty of acting for Sward, could not obtain any such right. *Smith v. Goethe*, 147 Cal. 725, 82 Pac. 334.

[5] Our conclusion on this branch of the case makes it unnecessary to indulge in any extended discussion of the other two objections made by appellant to the sufficiency of the evidence. Indeed, as Salsberry purchased and held the stock here involved as trustee for Sward, it makes no real difference whether or not there was an agreement by the people present at the sale not to bid one against another. However, there was abundant evidence of such an understanding. Mr. Henderson, one of the witnesses, testified that he told Mr. Salsberry that people had come to the sale prepared to bid on the stock. Mr. Salsberry said that he would get the stock even if he had to take a mere hundred shares for the hundred dollar assessment, and that he would rather have the stock remain in Mr. Sward's hands than allow some of the others interested in it to purchase the stock. After some further talk, in which Mr. Salsberry said that he merely wanted to protect himself in view of the fact that he had already bought the stock formerly owned by Oakes, Mr. Henderson said that by suggesting that purpose to the people present, he thought he could prevent them from bidding on Sward's stock. "He finally decided that was pretty fair," said the witness. And, describing the result of the understanding established among the people present at the sale he said:

"I bid on the parcels other than the Sward stock, and the stock was sold to me for the amount of the assessment, plus the accrued costs."

And speaking of appellant's benefit by the arrangement, he also testified:

"When the 10,000 shares of stock belonging to Mr. J. W. Sward were put up for sale, Mr. Salsberry bid them in at the cost of the assessment, plus the accrued costs."

Appellant's story of the sale corroborates that of Henderson. He tells of mutual threats to engage in competitive bidding, but, finally, to use his own language, "We got together and compromised." There was also testimony to the effect that some one other than Henderson or appellant bid on some of the stock offered, but withdrew his bid "after everything was arranged." We are of the opinion that the evidence justified the court's conclusion that the arrangement to refrain from competitive bidding was collusive and inequitable. Equity will not permit parties to such a transaction to retain the fruits thereof. 2 *Perry on Trusts*, § 828; *Scott v. Sierra Lumber Co.*, 67 Cal. 71, 7 Pac. 131.

There was a conflict of testimony regarding the value of the stock, but sufficient basis appears in the evidence for the finding that the price paid by Salsberry was grossly inadequate to the real value.

The finding that Salsberry was charged with knowledge of respondent's title to the stock standing in Sward's name is not essential to the judgment, and therefore need not be discussed. Since appellant was not a purchaser of the stock in good faith and for value, he may not retain it as against respondent.

The judgment and order are affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 742)

PEOPLE ex rel. BRADFORD v. LAINE et al.
(Sac. 2789.)

(Supreme Court of California. March 19, 1918.)

1. NUISANCE — 87 — ABATEMENT — APPEAL — SUPERSEDEAS — STATUTES.

Red Light Abatement Law (St. 1913, p. 22) § 9, providing that if the owner of the building being free from contempt appears and pays costs, fees, and allowances, which are a lien on it, and files bond to immediately abate any such nuisance that may exist there, the court may order the premises, closed under the order of abatement, delivered to him, and the order of abatement canceled, so far as it may relate to said property, but that such release of the property shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law, applies only to one who concedes the regularity of the judgment, and pays the costs, and has nothing to do with a defendant appealing from a judgment of abatement, contending, of course, that he had been improperly found guilty of maintaining a nuisance, and so does not furnish a process by which he may secure a supersedeas from the trial court.

2. APPEAL AND ERROR — 488(2) — SUPERSEDEAS — ABATEMENT OF NUISANCE — MANDATORY PROVISIONS.

While the part of the judgment enjoining use of the premises for purposes of lewdness amounts to a prohibitory injunction, which is not stayed by appeal, the part directing removal of the tenants and property and sale of the chattels is mandatory, and stayed by appeal.

3. APPEAL AND ERROR — 488(2) — SUPERSEDEAS — ABATEMENT OF NUISANCE — BOND.

Under Code Civ. Proc. §§ 941c, 949, right to stay of the mandatory part of the judgment of one appealing, by the new method, from a judgment enjoining the use of premises for purposes of lewdness, and directing removal of tenants and chattels and sale of chattels, is statutory, and no bond is required.

In Bank. Original application for supersedeas by Charles F. Gibney, the appealing defendant in a proceeding by the People, on the relation of Hugh B. Bradford, against Laura E. Laine and another. Demurrer to petition overruled, and writ granted.

Butler & Van Dyke, of Sacramento, for petitioner. J. R. Hughes and H. B. Bradford, both of Sacramento, for relator and respondent.

MELVIN, J. Petitioner was one of two defendants in an action brought by the people of the state of California upon the relation of the district attorney of the county of Sacramento, which resulted in a judgment perpetually enjoining the defendants from conducting or maintaining or using for purposes of lewdness certain described real property. By the judgment the sheriff of Sacramento county was directed forthwith to remove all occupants from the property, to keep the building closed for the period of one year, and immediately upon the entry of judgment to remove all furniture, fixtures, musical instruments, and other movable property situate in said building from the premises, and to sell the same in the manner provided for the sale of chattels under execution.

After judgment was rendered Charles F. Gibney, defendant in said action (petitioner here) appealed therefrom, and the appeal is still pending and undecided. The proper authorities having announced their intention of carrying out all of the provisions of the judgment on the theory that the appeal did not operate as a stay, Gibney petitioned this court for a writ of supersedeas. An order was made requiring respondents to show cause why a writ should not issue, and pending hearing and decision thereon all of the judgment was stayed except that part requiring petitioner to refrain from using the premises for immoral purposes. A general demurrer to the petition has been filed, and as the questions involved are of purely legal cognizance, there being no contest regarding the facts, we shall decide the essential questions involved by ruling on the demurrer.

The action was instituted under the statute commonly known as the "Red Light Abatement Law" (St. 1913, p. 20). Petitioner contends that, having appealed from the judgment by the "new method," that is having given notice of appeal under section 941b of the Code of Civil Procedure, the filing of such notice stays all proceedings appealed from except that part of the judgment which amounts to a prohibition against using the premises for purposes of lewdness.

[1] Respondents do not contend that a bond would be required to stay the judgment in an ordinary action wherein the judgment directs the disposal of personal property, but the point is made that the act itself provides for a method whereby the appellant may invoke the discretion of the superior court to suspend the operation of parts of the judgment pending appeal. It is argued that before petitioner may, in any view of the law on the subject, ask for a writ of supersedeas he must show that he has unsuccessfully pursued the statutory method of endeavoring to secure a stay of execution. The part of the statute to which

the demurring party refers is section 9, which is as follows:

"If the owner of the building or place has not been guilty of any contempt of court in the proceedings, and appears and pays all costs, fees and allowances which are a lien on the building or place and files a bond in the full value of the property, to be ascertained by the court, with sureties, to be approved by the court or judge, conditioned that he will immediately abate any such nuisance that may exist at such building or place and prevent the same from being established or kept thereat within a period of one year thereafter, the court, or judge thereof, may, if satisfied of his good faith, order the premises, closed under the order of abatement, to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty or liability to which it may be subject by law."

It will appear at a glance that, while this section does apply to requested relief from that part of the judgment enjoining the use of the premises for the purpose of acts of lewdness and that portion requiring the sheriff to remove all persons therefrom, it does not, in terms at least, empower the trial court to restrain the sale of the personal property during appeal upon the giving of a proper bond. Nor does it in substance, as respondents contend, amount to a process by which one who appeals from a judgment of abatement may secure a supersedeas from the trial court. Indeed, the statute has nothing to do with an appealing defendant who contends, of course, that he has been improperly and unjustly found guilty of maintaining a nuisance. The application provided in the act may only be made by one who concedes the regularity of the judgment and pays the costs. There is no force, therefore, in the contention of the demurring party that petitioner has no standing here because he failed to ask for relief in the court below under section 9 of the abatement act.

[2, 3] The only other point made by respondents is that the judgment amounts to a prohibitory injunction, an appeal from which does not stay its force. That this is true of that part of the injunctive relief prohibiting the maintenance of the premises for lewd purposes is conceded by petitioner. Indeed, he insists that he never has maintained the property for immoral uses, and that is why he is appealing from the judgment. As we have had occasion to state in the preceding discussion, there were three parts to the judgment; one enjoining the use of the premises for the purpose of acts of lewdness, another directing the sheriff to remove persons and property from the premises, and a third placing upon the sheriff the obligation of removing and selling furniture, fixtures, etc. Clearly the second and third parts of the judgment direct affirmative acts which would operate to the irreparable injury of appellant if he should be successful in his appeal. That part of

the decree which directs the removal of tenants and property and the sale of chattels is mandatory, and is stayed by operation of the appeal. *Dewey v. Superior Court*, 81 Cal. 64, 22 Pac. 333; *Dulin v. Pacific W. & C. Co.*, 98 Cal. 304, 33 Pac. 123; *Stewart v. Superior Court*, 100 Cal. 543, 35 Pac. 156, 563; *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580; *United Railroads of San Francisco v. Superior Court*, 172 Cal. 80, 155 Pac. 463.

If the sheriff should be permitted to sell the personal property, and if on appeal the judgment should be reversed, that result would be an ineffectual victory for petitioner. It is only just and proper that in such a case the personal property should be preserved to petitioner pending his appeal. To hold otherwise would work irreparable injury in those cases where the judgment of the lower court should be reversed on appeal.

The conclusion may not be escaped that under sections 941c and 949 of the Code of Civil Procedure petitioner's right to a stay is statutory and that no bond is required.

The demurrer is overruled. Let the writ issue as prayed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 762)

BLOCHMAN COMMERCIAL & SAVINGS BANK v. F. G. INVESTMENT CO.
et al. (L. A. 4149, 4150.)

(Supreme Court of California. March 19, 1918.)

1. BANKS AND BANKING §176 — EXCESSIVE LOAN.

St. 1911, p. 1014, § 13, amending Act March 1, 1909 (St. 1909, p. 87), regulating the business of banking, so that section 80 provides that no commercial bank shall make any loans to any person, company, corporation, or firm to an amount exceeding one-tenth part of the capital stock of such bank actually paid in and surplus, etc., does not render void and unenforceable a loan by a commercial bank in excess of the permitted amount.

2. MORTGAGES §486 — GUARANTOR — PERSONAL JUDGMENT — EXHAUSTION OF SECURITY.

Decree foreclosing mortgages directing entry of judgment for any deficiency which might exist after the sale of the mortgaged premises against the mortgagor company, and separately stating there was a personal judgment for the full amount of the two notes, with interest and costs against the individual guarantor of the notes, was not erroneous as permitting the collection of the whole amount of the two notes, interest, and costs from the individual guarantor without resort to the security.

Department 2. Appeals from Superior Court, San Diego County; T. J. Lewis, Judge.

Action by the Blochman Commercial & Savings Bank, a corporation, against the F. G. Investment Company, a corporation, Rex

B. Clark, Pioneer Trust Company, a corporation, John Doe Company, a corporation, John Doe, Richard Roe, Mary Grab, Susan Keep, and Minna Brenner. From certain judgments, defendants appeal. Judgment affirmed on each appeal.

A. J. Morganstern and C. A. A. McGee, both of San Diego, for appellants. Sam Ferry Smith, of San Diego, for respondent.

MELVIN, J. The appeals of F. G. Investment Company, a corporation, and of Rex B. Clark are based upon records which are identical, and may therefore be considered in a single opinion. The action was one to foreclose two mortgages and to enforce the liability of Rex B. Clark as a guarantor on two notes. The corporation, defendant, appeals from the judgment against it, which resulted in a decree of foreclosure, and defendant Clark takes an appeal from a personal judgment against him.

On October 10, 1912, the F. G. Investment Company made and executed two certain promissory notes, each secured by a mortgage on real property in San Diego county. One note was payable to Rex B. Clark, who immediately indorsed it to the Blochman Banking Company, and guaranteed the payment thereof, and one direct to the Blochman Banking Company. This was also guaranteed by Rex B. Clark, so that the F. G. Investment Company was the maker and Rex B. Clark was the guarantor of both notes. The aggregate amount of the two notes is \$17,500 and the money was paid by the bank to the F. G. Investment Company with the knowledge and consent of the defendant Clark. At that time the Blochman Banking Company was a banking copartnership with a capital of not exceeding \$50,000 and a surplus not to exceed \$7,000. Subsequently the Blochman Commercial & Savings Bank, a corporation, plaintiff in this action, acquired the notes and mortgages in question. This action was brought to foreclose both mortgages, and to enforce the defendant Clark's liability. The banking act in force at the time of this transaction (Stats. 1911, p. 1014, § 13) provides:

"No commercial bank shall make any loans to any person, company, corporation or firm to an amount exceeding one tenth part of the capital stock of such bank actually paid in and surplus, excepting that no commercial bank shall be prohibited by this act from loaning to any person, company, corporation or firm any sum not exceeding five thousand dollars without security: Provided, however, that a bank may loan to any person, company, corporation or firm a sum not exceeding twenty-five per centum of its capital stock actually paid in and surplus upon security worth at least fifteen per centum more than the amount of its loans."

[1] Appellants contend that the loan being in excess of the amount permitted by law, the obligation based thereon is void and may not be enforced. They cite sections 1667 and 1607 of the Civil Code and authorities, of

which *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31, *Moore v. Moore*, 130 Cal. 110, 62 Pac. 294, 80 Am. St. Rep. 78, and *Howell v. City of Hamburg Co.*, 165 Cal. 172, 131 Pac. 130, are types. In the first of these cases it was held that a contract between a city and one of its officers which was expressly prohibited by law was void; in the second, that an agreement based upon the completion of a fraudulent homestead entry would not be enforced; and in the third that a lease on a building maintained in violation of a municipal ordinance is invalid.

The cited Code sections are general expressions of common-law rules, but they have no application to the case at bar. Nor do the authorities to which appellants call our attention support their contention. There is a vital distinction between contracts based upon fraud or made in violation of laws passed for the benefit of one of the contracting parties and those made in violation of statutes designed to aid the sovereign power in the regulation of certain kinds of business. The act which, according to the contention of appellants, was violated by plaintiff's assignor in making the loan does not declare such a loan a void obligation. A penalty for the violation may be inflicted under certain circumstances by the superintendent of banks, but no part of the penalty in any way inures to the borrower of the excess. It is not denied that the money was loaned, and that the notes and mortgages were executed to secure its repayment. In principle this case is quite similar to *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58, wherein it was held that the provisions of section 578 of the Civil Code that no director of a savings bank shall borrow its funds, and that for so doing his office shall become vacant, cannot be invoked to defeat a pledge made by such director for money borrowed from the bank. Commenting upon the transaction whereby the director and the bank violated this statute, the court said:

"This, however, is of no advantage to the appellant, as the violation of the provision in question could only be availed of at the instance of the state or sovereign power. *Jones v. Guaranty, etc., Co.*, 101 U. S. 628 [25 L. Ed. 1030]; *National Bank v. Matthews*, 98 U. S. 621 [25 L. Ed. 188]."

See, also, *People's Trust Co. v. Pabst*, 113 App. Div. 375, 98 N. Y. Supp. 1045; *Id.*, 190 N. Y. 534, 83 N. E. 1130.

In *Gold-Mining Co. v. National Bank*, 96 U. S. 640, 24 L. Ed. 648, it was held that a defendant sued by a national bank for moneys loaned to him cannot set up as a bar the circumstance that the corporation in violation of statutes exceeded in the amount of the loan one-tenth of its capital stock actually paid in. After citing *Harris v. Runnels*, 12 How. 79, 13 L. Ed. 991, which holds that when a statute prohibits an act or annexes a penalty for the commission of such act it does not follow that the unlawfulness

of the act was meant to avoid a contract made in contravention of it, and after a review of some of the leading cases Mr. Justice Hunt, who delivered the opinion of the court, said:

"We do not think that public policy requires or that Congress intended that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of the money actually received by him. This would be to injure the interests of creditors, stockholders, and all who have an interest in the safety and prosperity of the bank."

The Supreme Court of Illinois, commenting upon a similar contention under a like statute, held that the purpose of the enactment was to protect the interests of depositors and stockholders, and that, in the absence of an express declaration that loans in excess of the statutory limitation shall not be collectible, to hold in accordance with the appellant's contention would be to defeat the very legislative purpose underlying the law. *Murry Nelson & Co. v. Leiter*, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142.

The Supreme Court of Pennsylvania, dealing with the same sort of question, held that the excess of indebtedness over one-tenth of the paid-in capital was a matter aside from the loan, not entering into its terms, and therefore collateral. *O'Hare v. Second National Bank of Titusville*, 77 Pa. 96. This subject was very ably discussed in *Beach & Weld v. Wakefield*, 107 Iowa, 567, 76 N. W. 888, 78 N. W. 197. In the opinion a citation is made to another Iowa case (*Twiss v. Guaranty Life Association*, 87 Iowa, 733, 55 N. W. 8, 43 Am. St. Rep. 418) to support the general rule that the doctrine of want of power to contract may not be invoked to aid any one in the perpetration of wrong and injustice. The opinion is also valuable because of the many authorities collected and cited. Undoubtedly the overwhelming weight of authority is against the contention which the appellants make in this case.

[2] Appellants also make the contention that the court erred in pronouncing a personal judgment before exhausting the security under the mortgage. Among the conclusions of law was one to the effect that plaintiff was entitled to judgment against both defendants for the amounts of the notes, and that defendants were and each of them was personally liable for said sums. But there was also a finding that the plaintiff was entitled to have the mortgages enforced and foreclosed, the premises sold, and the proceeds applied to the payment of the debt. These conclusions were carried substantially into the decree. The proper form of judgment was entered in accordance with the practice in this state. Section 726, Code Civ. Proc.; *Leviston v. Swan*, 33 Cal. 480; *Sichler v. Look*, 93 Cal. 600, 610, 29 Pac. 220.

It is true that there is a direction in the decree for the entry of any deficiency which may exist after the sale of the mortgaged premises against the F. G. Investment Com-

pany, and separately stated there is a personal judgment for the full amount of the two notes with interest and costs against defendant Clark. But this does not mean that the whole amount of the two notes, interest, and costs might be collected under the judgment from Clark without resort to the security. As was said in *Sichler v. Look*, *supra*:

"In the ordinary action of foreclosure, the judgment need only determine the amount of the debt, the defendant who is personally liable therefor, and direct a sale of the mortgaged lands and an application of their proceeds to satisfy this amount, with such provision for the rights of the defendants between themselves as may be presented in the case."

In each appeal the judgment is affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 730)

HODGKINS v. PEOPLE'S WATER CO.
(S. F. 7546.)

(Supreme Court of California. March 18, 1918.)

1. ADVERSE POSSESSION §51 — JUDGMENT PLAINTIFF—EXECUTION.

Code Civ. Proc. § 865, authorizing the issuance of a writ of execution for possession upon judgment in ejectment after lapse of five years from entry on leave of court, does not bar judgment defendant from in the meantime gaining title to the land by adverse possession against the judgment plaintiff.

2. ADVERSE POSSESSION §51—STIPULATIONS §14(2)—OPERATION—EXECUTION.

Stipulation in ejectment suit between plaintiff's predecessor, purchaser of possessory claim, and defendant's predecessor, that no execution would be taken out on the judgment pending the motion for new trial, and that occupants of land held by consent of the successful plaintiff ceased to have any effect where motion for new trial was abandoned, so that possession of plaintiff's predecessor assumed its hostile character, and where no further proceedings were had until 15 years after rendition of judgment, and other elements of adverse possession were present, plaintiff procured title by adverse possession in view of Code Civ. Proc. §§ 322-325, as to possession under title founded on written instrument, and as to possession not founded on written instrument.

In Bank. Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Harriet Hodgkins against the People's Water Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Tom M. Bradley and Harry E. Leach, both of Oakland, for appellant. Milton S. Hamilton, of San Francisco, Herbert L. Breed, of Oakland, and J. P. O'Brien, of San Francisco, for respondent.

SHAW, J. This case was transferred to the District Court of Appeal of the First District for consideration and decision, and in due time that court rendered its decision affirming the judgment, upon an opinion by Mr. Justice Kerrigan. Upon petition of ap-

pellant to this court that decision was vacated and the case was transferred here for a rehearing. After further consideration we have reached the conclusion that the opinion of Mr. Justice Kerrigan and the judgment of the District Court thereon was correct.

[1] The principal point urged in the petition for rehearing was that, inasmuch as section 685 of the Code of Civil Procedure authorizes the superior court to issue a writ of execution for possession upon a judgment in ejectment after the lapse of 5 years from its entry, it must of necessity follow that the defendant in such judgment cannot, in the meantime, gain a title to the land by adverse possession against the judgment plaintiff. This conclusion does not necessarily follow. An adverse claim of title to the land may be asserted by the defendant as well against the plaintiff in such judgment as against any other person. The essence of an adverse claim of title is that it is made against the whole world, and there is nothing in the rule which exempts the plaintiff in ejectment from its operation, provided the claim is made against him as well as others. The provision of section 685 allowing execution to issue after 5 years has no bearing upon the question whether or not the defendant against whom the execution is to be issued has or has not in the meantime acquired a new title to the property which is good against the plaintiff. As stated in the opinion of the District Court, that question cannot be litigated upon the motion for execution. This does not mean that such title cannot be acquired, either by a conveyance from a true owner of a title paramount to both the parties in a judgment suit, or by an adverse possession initiated after the entry of the judgment. The opinion of the District Court is hereby approved and adopted. It is as follows:

This is an appeal by defendant from a judgment in an action to quiet title which awarded a part of the land sued for to the plaintiff. The facts are briefly as follows:

In the year 1880 John Hodgkins purchased a possessory claim to the land described in the amended complaint from one John H. Scott, and took the title to same in the name of Joe Hodgkins, his son, who, with his father and mother, went into immediate possession. In 1896 the Central Pacific Railway Company, defendant's predecessor in interest, claiming legal title to said land, commenced suit against Joe Hodgkins and May Hodgkins, his wife, to recover its possession. Thereafter, and prior to the trial of said action, Joe Hodgkins made a deed, conveying to his mother, Harriet Hodgkins, plaintiff herein, a part of said property designated in the record herein as parcel A, and she at once went into possession of that parcel. On August 25, 1897, after trial, judgment was entered in said suit against Joe Hodgkins declaring that the Central Pacific Railway Company was entitled to possession of the premises. On August 28, 1897, he, together with his wife, served and filed notice of their intention to move for a new trial in that action, whereupon the parties entered into stipulation by which the Central Pacific Railway Company agreed not

to take out execution, pending the hearing and determination of the motion for a new trial. Said motion, however, was never brought on for hearing, no appeal from the judgment was taken, and no further proceedings were had in the case until 15 years after rendition of the judgment, when, in May, 1913, upon motion the stipulation referred to was set aside, the motion for a new trial was dismissed and a writ of possession issued, pursuant to which the sheriff ejected all persons from the land, and this defendant was put in possession as successor in interest of the Central Pacific Railroad Company. On May 26, 1913, Joe Hodgkins conveyed to plaintiff herein the land described in parcel B. Subsequently Harriet Hodgkins, plaintiff herein, brought this action to quiet title, claiming title to parcel A by prescription and also by virtue of the deed from her son Joe, made after the commencement of the former action and prior to its hearing and determination; and to the part of the land known as parcel B by deed to her from her son made after the ejectment in May, 1913.

From the record it further appears that the plaintiff and her grantors and predecessors in interest, for more than 15 years prior to May, 1915, were in the peaceable, visible, and uninterrupted possession of the property described in the findings; that while so in possession she and her son Joe erected on the respective parcels of land A and B barns, outhouses, and other improvements, inclosed portions of said land with substantial fences, which at all times thereafter they maintained and kept in good order and repair; that they cultivated the land, raising crops and pasturing stock thereon, and generally using the land for the purposes for which it was adapted and for their ordinary purposes; that during the entire period they paid all taxes levied and assessed thereon each year.

Upon these facts the court found that the plaintiff was the owner and entitled to a portion of the two parcels of land embraced within the description set forth in the amended complaint. It is from that portion of the judgment in favor of the plaintiff that the defendant prosecutes this appeal.

[2] The Central Pacific Railway Company in the original action failed to file a lis pendens; and the plaintiff in the present action claims that she had no notice, actual or constructive, of the pendency of the suit, and that therefore her claim to parcel A is unaffected by the judgment in that case. Under all the evidence in this case such claim is clearly untenable, and her right to either parcel A or B depends upon the circumstances of the possession thereof after the judgment in the ejectment suit.

The evidence supports the findings of the court that the possession of both parcels by the plaintiff and her grantors and predecessors was not only open, peaceable, and notorious for the period of over 15 years, but that it was also adverse and hostile. The character of the possession of the property as hereinbefore described raised the presumption that it was held adversely (Code Civ. Proc. §§ 322 to 325; *Wheatley v. San Pedro, etc., Ry. Co.*, 169 Cal. 505, 515, 147 Pac. 135; *Gray v. Walker*, 157 Cal. 381-385, 108 Pac. 278; *Gurnsey v. Antelope, etc., Co.*, 6 Cal. App. 387, 391, 92 Pac. 326), which presumption it cannot be held was successfully rebutted by the stipulation entered into by the parties in the ejectment suit staying execution on the judgment. That stipulation was to the effect that pending the making and determination of a motion for a new trial the occupation of the land by the defendants therein was by consent of the plaintiff; but when the motion was abandoned—as it was when the moving parties failed to take the necessary steps to perfect it—it ceased to have any such operative force and effect, and the possession thereafter resumed its hostile character.

The only point seriously relied upon by the defendant for a reversal of the judgment is the claim that the plaintiff could not have obtained title by adverse possession between the time of the entry of judgment in the former action and the issuance of execution thereon. In other words, defendant asserts that the running of the statute of limitations was suspended from the filing of the action or the entry of judgment therein up to the time when an execution might rightfully be issued. Of course, it is conceded that title to real property cannot be litigated upon an application for a writ of possession (*Landregan v. Peppin*, 94 Cal. 465, 29 Pac. 771; *Kirsch v. Kirsch*, 113 Cal. 56, 45 Pac. 164; *Fox v. Stubenrauch*, 2 Cal. App. 88, 93, 83 Pac. 82); so the action of the court in the ejectment suit in issuing the writ of possession more than 10 years after the defendant was entitled to the same as a matter of right has no bearing upon the question now under discussion. We do not think, as defendant contends, that the judgment in the former action arrested the running of the statute of limitations until the writ of possession actually issued. The judgment in that action merely gave to the plaintiff therein the right to re-enter the property, but did not prevent actual occupants thereof from obtaining title to the land by adverse possession after the judgment became final, which it did in February, 1898. Persons not parties to the action might after judgment have acquired title to the property by adverse possession; and we fail to see any good reason why one who is a defendant in an action to recover property may not acquire title by adverse possession against a plaintiff who for more than 5 years after the judgment therein becomes final fails to exercise his right to re-enter the property. A grantor may acquire title by prescription against his grantee. *Baker v. Clark*, 128 Cal. 181, 60 Pac. 877. In the case of *Carpenter v. Natoma M. & W. Co.*, 63 Cal. 616, it was expressly held that a judgment in ejectment does not create a new estate or vest a new title in the plaintiff so as to interrupt the running of the statute of limitations, but that an actual entry is necessary to effect that object. That case was approved in *Gould v. Carr*, 33 Fla. 533, 15 South. 262, 24 L. R. A. 130. The Court of Appeals of Texas, in *Pendleton v. McMains*, 32 Tex. Civ. App. 575, 75 S. W. 349, decided that adverse possession of land for 10 years after the rendition of judgment in an ejectment suit where no writ of possession was issued established a title against the plaintiff independent of and subsequent to the right of possession adjudicated in the ejectment suit. That was an action of trespass to try title to land, and was based upon a judgment rendered in a former suit decreeing that the plaintiffs therein were entitled to possession. The decision contains a recital that "a writ of possession and execution for costs were awarded, but it was not shown that either had ever been issued." In its opinion the court assumes that no writ upon the former judgment was ever issued. 32 Tex. Civ. App. 575, 75 S. W. at page 349 of the opinion the court says: "It was established by uncontroverted evidence that the land in controversy has been inclosed by a fence since 1881, and defendants in error have been in the peaceful, continuous, open, and adverse possession of the same, cultivating a portion of it, and using the other portion as a pasture, for more than 10 years after the judgment was obtained by W. W. Sloan and others, and before this suit was instituted. The judgment obtained by Sloan and others against defendants in error in 1888 divested them of all title owned by them in the land in controversy at that time, but did not prevent them from obtaining title to it again by adverse possession after that time. More than 13 years had elapsed after the rendition of the judgment before this suit was instituted, and during all those

years defendants in error had been in possession of the land, and claiming title to it against the world. There is no peculiar sacredness in a title to land obtained through a judgment that lifts it out of the scope and purview of statutes of limitation, and, if the possession be adverse for 10 years, whether it be by the defendant in the judgment or any one else, it will perfect a title. * * *

In *Mabary v. Dollarhide*, 98 Mo. 198, 204 [11 S. W. 611], 14 Am. St. Rep. 639, the court said: "We cannot see how the mere recovery of a judgment in an action of ejectment can suspend the running of the statute of limitations. To have that effect there must be possession under it, or something done to make the defendant's possession subordinate to the plaintiff's title." And in *Smith v. Trabue*, 1 McLean, 87 [Fed. Cas. No. 13,116], the court declared: "A judgment in an action of ejectment against a defendant who holds adversely does not of itself suspend the statute of limitations. To do this, there must be a change of possession. It is true, the judgment fixes the right of entry in the lessor of the plaintiff, if he can make entry without force, but if he fail to make his entry, either with or without a writ of possession, the statute of limitations will continue to operate against the right. * * * Nothing short of this will stop the statute." See, also, *Dupont v. Charleston, etc., Bridge Co.*, 65 S. C. 524, 44 S. E. 86, and note to *Snell v. Harrison* (Mo.) 52 Am. St. Rep. 648.

Here the court did not find that the property was held by consent of the owner of the legal title nor in subordination to the judgment in the former action; but upon sufficient evidence it found that the property was held adversely to and in denial of the title of the defendant for more than the full statutory period after the judgment became final. We therefore hold that the statute is a complete bar to defendant's claim, and that plaintiff's prescriptive title was fully established.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; WILBUR, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 752)

WILCOX v. HARDISTY et al. (Sac. 2814.)
(Supreme Court of California. March 19, 1918.
Rehearing Denied April 16, 1918.)

1. APPEAL AND ERROR ⇐2—APPEALABLE ORDERS—DENIAL OF NEW TRIAL—STATUTES.

Code Civ. Proc. § 963, in which is incorporated amendment St. 1915, p. 209, impliedly abolishing appeals from order denying new trial, is applicable to proceedings for new trial pending when the amendment took effect.

2. APPEAL AND ERROR ⇐2—ORDER DENYING NEW TRIAL—TIME FOR APPEAL—EFFECT OF STATUTES.

Under Code Civ. Proc. § 939, providing that if proceedings for new trial are pending time for appeal from judgment shall not expire until 30 days after order determining motion, section 956, authorizing review of orders on motion for new trial on appeal from judgment, and section 963, impliedly abolishing appeals from orders denying new trial, where a cause was pending on a motion for new trial and time had elapsed for appeal from judgment as law stood before amendments (St. 1915, pp. 205, 209, 328) incorporated in above Code provisions, it was intent of Legislature that on denial of such motion an appeal could be taken from the judgment within 30 days from the order, limited in

scope to that of former appeals from orders denying new trial.

In Bank. Action by Ida I. Wilcox against Etta Hardisty and others. Motion to dismiss an appeal from the judgment and from order denying a new trial. Appeal from order denying new trial dismissed; motion to dismiss appeal from judgment denied.

Robt. L. Beardslee and Nutter & Hancock, all of Stockton, for appellants. Snyder & Snyder, of Stockton, for respondent.

ANGELLOTTI, C. J. This is a motion to dismiss an appeal from a judgment and an order denying a new trial, on the ground, as to the appeal from the judgment, that the appeal was taken too late, and, as to the order denying a motion for a new trial, that the same is not an appealable order.

[1] The order denying a new trial was made December 1, 1917, and in view of the law as it then existed it must be held that no appeal lay therefrom. *Woodruff v. Colyear*, 172 Cal. 440, 156 Pac. 475.

[2] As to the appeal from the judgment: The judgment was entered April 27, 1911. The appeal therefrom was not taken until December 21, 1917. At the time of the entry of the judgment and until August 8, 1915, the time within which an appeal might be taken from a judgment was limited to six months. Therefore on August 8, 1915, the time for appeal from the judgment had long since elapsed. There was, however, pending at that time a proceeding on motion for a new trial which had been duly instituted, and the law up to that time provided for an appeal from any order that might be made denying or granting the motion. On December 1, 1917, the bill of exceptions to be used on said motion for a new trial was settled, and on the same day the motion for a new trial was heard and denied, and the appeal was taken within thirty days thereafter. At its session in 1915, the Legislature so changed our law as to abolish the right of appeal from an order denying a motion for a new trial and to provide that such order might be reviewed on an appeal from the judgment, and to further provide in regard to the time within which appeals from the judgment might be taken that:

"If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion." Sections 939, 956, 963, Code Civ. Proc.

This change became effective August 8, 1915, at a time when the appellant's right to appeal from the judgment had long since lapsed. We think it was the clear intent of the Legislature, as indicated by this statutory provision, in taking away the right of appeal from the order denying a motion for a new trial, to provide for a review of all

matters that might be considered on such an appeal on an appeal from the judgment, and that the plain purpose of the provision that we have quoted was to give to the party an opportunity for such a review in any and every case in lieu of the review previously afforded. Although there was no appeal from the judgment in this case within the time allowed by law, there was initiated in due time and pending until after the change in the law a proceeding on motion for a new trial. By failing to appeal from the judgment and relying entirely on the proceeding on motion for new trial the appellants waived all right to attack the judgment on any other ground than such as was afforded by their new trial proceeding, and the judgment had become final and immune from attack except in such respects as it might be affected by the determination of the new trial proceeding. With the change in the law the Legislature took away all right of appeal from the order that might be made in such new trial proceeding, but in taking away that right we think, in view of the statute, that it was the intention to give the party substantially the same review on appeal that he would have had on the appeal from the order. It did this by giving in such a case a right of appeal from the judgment within the specified time after the order on the new trial proceedings. It was given as we have heretofore expressly held for the purpose of allowing the action of the court on the motion for new trial to be reviewed on an appeal from the judgment. It was simply a change in the method of review. It follows that the appeal from the judgment was taken within the time allowed by law.

The appeal from the order denying a new trial is dismissed. As to the appeal from the judgment, the motion to dismiss is denied.

We concur: WILBUR, J.; MELVIN, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 777)

BENSON v. SOUTHERN PAC. CO. et al.
(S. F. 7299.)

(Supreme Court of California. March 20, 1918.
Rehearing Denied April 16, 1918.)

1. RAILROADS §392—ACTION FOR INJURIES—
— GROUNDS OF LIABILITY — "JOINT TORT-
FEASORS."

If the train of defendant company was, without its express direction, operated by defendant motorneer at an excessive speed, in a crowded thoroughfare, the employer would be liable only under the rule of respondent superior; defendants being in no sense "joint tortfeasors."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Joint Tort-Feasors.]

2. RAILROADS §266—JOINT TORT-FEASORS—
— LIABILITY.

If the negligent speed of the train was maintained by the express direction of defendant employer, it would be negligent, and its negligence would concur with that of defendant motorneer who obeyed the instruction, and the right to recover against defendants would be joint.

3. APPEAL AND ERROR §1070(1)—FAILURE
— TO FIND AGAINST JOINT TORT-FEASORS—
— PREJUDICIAL ERROR.

In a suit for damages for death of a child caused by defendant company's train operated by defendant motorneer, if the verdict was based on the fact that the responsibility of defendants was joint, defendant company would not be prejudiced by failure of the jury to find against defendant motorneer; a verdict in favor of one of two joint defendants not being a verdict in favor of the other.

4. APPEAL AND ERROR §930(4)—VERDICT—
— INTENDMENTS IN FAVOR OF.

All intendments being in favor of the verdict, it must be assumed on appeal that the jury based the same on a finding of joint liability, unless there is something in the record which prevents that conclusion; the verdict being against defendant employer and no reference made therein to its servant and codefendant.

5. TRIAL §328—VERDICT—JOINT LIABILITY
— OF MASTER AND SERVANT.

If the jury determined that defendant employé was negligent in operating a train at an excessive speed in obedience to the orders of defendant master, then under the instruction that the jury could not find for plaintiff against the employer, unless they found that the employé was negligent, the verdict can stand, although there was a failure to find a verdict against the employé.

6. TRIAL §426—VERDICT—CODEFENDANTS—
— FAILURE TO OBJECT—WAIVER.

Where the attention of the court was not called to the jury's failure to bring in a verdict for or against defendant employé, at the time when verdict against defendant employer was returned, defendants waived the error, if any.

Department 2. Appeal from Superior Court, Alameda County; W. H. Waste, Judge.

Action by Susie Benson against the Southern Pacific Company and another. From a judgment for plaintiff and from an order denying motion for new trial, defendants appeal. Affirmed.

A. A. Moore and Stanley Moore, both of San Francisco, for appellants. R. L. Leatherwood, of Daly City, and Aitken & Aitken, of San Francisco, for respondent.

WILBUR, J. This is an appeal from judgment and motion denying a new trial. Plaintiff sued the defendant company and its motorneer to recover damages for the death of her infant child, caused by a train of the defendant company, operated by the defendant motorneer. The verdict in the case was against the defendant Southern Pacific Company, and no reference was made therein to the other defendant, the motorneer. The defendants appeal, and it is claimed that the judgment and order must be reversed because

of the failure to find upon the issue of liability of the defendant motorneer.

[1-4] It has been held in this state that a verdict of the jury in favor of one of two defendants is not a verdict in favor of the other defendant (*Rankin v. Central Pacific*, 73 Cal. 93, 15 Pac. 57; *Benjamin v. Stewart*, 61 Cal. 605), but as to him is merely a failure of the jury to find upon the issues. Appellants' claim of error is based upon the contention that the only liability alleged in the complaint or shown on the trial on the part of the defendant company is the liability for the negligence of its motorneer upon the rule of respondeat superior, and that if the jury were unable to agree that the motorneer was guilty of negligence, it could not properly hold his employer liable. The defendant company bases its claim that the error was prejudicial, in part, upon the doctrine that where it is held responsible for the negligence of its employé it has an action over against the employé to indemnify itself for such loss, and is therefore interested in the determination of that question. As is well stated in appellants' brief:

"The initial premise to be established by the appellant is that the two defendants herein sued are not joint tort-feasors in the generally accepted sense. Where the liability of one defendant is occasioned solely by the operation of law, and where this defendant is not an active participant in the actionable negligence alleged in the complaint, but is held under the doctrine of respondeat superior for the acts of its servants, such defendants are in no sense joint tort-feasors."

The complaint in this case is obviously framed in part upon the negligence of the defendant employé, and the responsibility of the employer therefor. It is, however, alleged in the complaint that the defendants were negligent in operating the train at an excessive speed in a crowded thoroughfare. In so far as this was done without express direction of the employer it would be liable therefor only on the rule of respondeat superior. If, however, the negligent speed was maintained by the express direction of the employer, the latter would, on that account, be negligent, and its negligence would concur with that of the employé who obeyed the instruction by operating at such negligent speed and the right to recover against them would be joint. In *Chesapeake & Ohio R. R. Co. v. Dixon*, 179 U. S. 131, 139, 21 Sup. Ct. 67, 71 (45 L. Ed. 121), the court, in passing upon a somewhat similar question, said:

"The negligence may have consisted in that the train was run at too great speed, and in that proper signals of its approach were not given; and, if the speed was permitted by the company's rules, or not forbidden, though dangerous, the negligence in that particular and in the omission of signals would be concurrent."

In the case of *Bradley v. Rosenthal*, 154 Cal. 420, 97 Pac. 875, 129 Am. St. Rep. 171, where the verdict was in favor of the employé and against the employer, the judgment

was reversed, but the opinion makes it clear that the court was dealing with an act of an agent "which the principal did not direct and in which he did not participate, where, thus, his responsibility is simply the responsibility cast upon him by law by reason of his relationship to his agent," and cites with approval the statement in *Cooley on Torts* (3d Ed.) vol. 1, p. 255, in which the distinction between negligent acts of the servant done by direction of the principal, and on his own initiative, is clearly pointed out. In the instant case evidence was introduced on the trial tending to prove that the train was being operated on schedule time and at a rate of speed predetermined by the defendant corporation. If the verdict was based upon that view of the case, the responsibility of the parties defendant being joint, the defendant company would not be prejudiced by the failure to find against its codefendant. All intendments being in favor of the verdict, it must be considered that the jury based the same upon a finding of joint liability, unless there is something in the record which prevents that conclusion.

[5] Appellants point out that instructions were given by the court to the effect that the jury could not find in favor of the plaintiff and against the railroad company unless they found that the defendant employé was guilty of negligence. If, however, the jury determined that the defendant employé was guilty of negligence in operating the train at an excessive speed, in obedience to the orders of the defendant company, then, under the instructions, the verdict can stand, although there was a failure to find a verdict against the defendant employé.

[6] Respondent claims that if the defendants desired to take advantage of the jury's failure to bring in a verdict for or against the defendant employé, the attention of the court should have been called to the matter at the time when the verdict was returned, in order that it might have been corrected before the jury was discharged. The Code expressly provides for the sending out of the jury where the verdict announced fails to determine the issue submitted. In the case of *Van Damme v. McGilvray Stone Co.*, 22 Cal. App. 191, 133 Pac. 995, the jury brought in a general verdict against the defendant, but "the jury declined to answer" the question specially submitted as to whether or not the employés, for whose negligence the plaintiff sought to hold the defendant, were negligent. It was held that the error was waived by a failure to request that the jury be directed to find on that issue. For the same reason it must be held that the defendants waived the error, if any, committed here.

Judgment and ordered affirmed.

We concur: MELVIN, J.; VICTOR M. SHAW, Judge pro tem.

(177 Cal. 746)

Ex parte RALEIGH. (Cr. 2116.)(Supreme Court of California. March 19, 1918.
Rehearing Denied April 16, 1918.)**STATUTES §81—SPECIAL LEGISLATION—EX-
EMPTIONS—REAL ESTATE BROKERS.**

Act June 1, 1917 (St. 1917, p. 1579), defining and providing for regulation and licensing of real estate brokers, by reason of the exemption therefrom of persons who have secured from the insurance commissioner or the bureau of building and loan supervision a certificate or license to do business, amounting to substantial discrimination, with no reasonable basis for the classification, is invalid as special legislation.

In Bank. Original application by L. A. Raleigh for writ of habeas corpus. Writ upheld, and petitioner discharged.

Fred W. Fry and O. R. Wood, both of Oakland, for petitioner. W. H. L. Hynes, of Oakland, and U. S. Webb, of San Francisco, for respondent.

RICHARDS, Judge pro tem. This is an application for a writ of habeas corpus wherein the petitioner seeks to test the validity of the act of the Legislature approved June 1, 1917 (St. 1917, p. 1579), entitled "An act to define real estate brokers, agents, salesmen, solicitors; to provide for the regulation, supervision and licensing thereof; to create the office of real estate commissioner and make an appropriation therefor." The act in question makes it unlawful for any person, copartnership, or corporation to engage in the business or act in the capacity of a real estate broker or real estate salesman within this state without first obtaining a license therefor. It proceeds to define who are to be considered such brokers or salesmen within the meaning of the act. These definitions are followed by the proviso that the act shall not apply to certain designated classes of persons, copartnerships, or corporations performing any of the acts enumerated in the aforesaid definitions of brokers or salesmen. The act proceeds to create a state real estate commissioner's department, the chief officer of which shall be a commissioner appointed by the Governor, who shall hold office at his pleasure, with his office at Sacramento, with an annual salary of \$5,000, payable out of the state treasury, with power to appoint such clerks and deputies as may be necessary for the proper discharge of the duties of his office, and with an annual allowance from the state treasury of a sum not to exceed \$50,000 a year for the expenses of the department. All persons, copartnerships, or corporations other than those exempted from the requirements of the act, seeking to do business in this state as real estate brokers or salesmen, are required to first obtain a license from the real estate commissioner so to do, by making an application therefor in the manner and with the credentials speci-

fied in the act, and by the giving by real estate brokers of a bond payable to the people of the state of California, with sufficient surety or sureties, to be approved by the commissioner, in the sum of \$1,000, conditioned for the faithful performance by such brokers of their duties as defined in the act. An annual license fee of \$10 is also required of brokers, and of \$2 from salesmen and solicitors. The commissioner is given power to temporarily suspend or permanently revoke these licenses after hearing upon charges presented against the holders thereof for any violation of their duties as defined in the act; and from the decision of the commissioner in respect to these matters a method of appeal is sought to be provided to the superior court. Real estate brokers are also required to have and maintain offices for the transaction of business.

The first assault which the petitioner makes upon the validity of this act relates to the exemptions of certain classes of persons, copartnerships, and corporations from its terms, which, according to the contention of the petitioner, are based upon no proper distinctions or classifications, and which therefore take away from the act its necessary quality as a general law. The provisions of the act thus assailed read as follows:

"The provisions of this act shall not apply to any person, copartnership or corporation who shall perform any of the acts aforesaid with reference to the buying, selling or exchanging of property owned by such person, copartnership or corporation, or renting, collecting rents, or negotiating a loan on such property; nor shall the provisions of this act apply to salaried employees other than salesmen or solicitors of a licensed real estate broker: And provided, further, that the provisions of this act shall not apply to persons holding a duly executed power of attorney from the owner for the sale of real estate, nor shall this act be construed to interfere in any way with services rendered by an attorney-at-law, nor shall it be held to include a receiver, trustee in bankruptcy, or any person selling real estate under order of any court, nor to a trustee selling under a deed of trust, nor apply to any corporations, associations, copartnerships, companies, firms and individuals now or hereafter subject to the jurisdiction or authority of the railroad commission, nor to corporations now or hereafter organized under the laws of this state for the purpose of conducting the business of banking within this state, nor to corporations, associations, copartnerships, companies, firms and individuals after they have secured from the insurance commissioner or the bureau of building and loan supervision a certificate of authority or license to do business within this state, nor to corporations, associations, copartnerships or companies, subject to federal regulation or not organized for profit, nor to mutual water companies and irrigation districts."

It is conceded by the petitioner that some of the foregoing exemptions from the operation of the act are based upon easily discerned distinctions and proper classifications, as for instance, that of persons, copartnerships, or corporations buying, selling, exchanging,

renting, and negotiating loans upon their own property, also that of receivers or trustees in bankruptcy, or other persons selling real estate under orders of court; but as to certain other classes of those exempted from its terms, the petitioner insists that the absence of any real basis for classification is so clear, and the want of an equal distribution of the burdens imposed by the act so obvious and wide-spread in its application, as to render the statute void. The clause in the foregoing provision of the act which appears to be most obnoxious to this criticism is that which provides for the exemption from its terms of "corporations, associations, copartnerships, companies, firms and individuals, after they have secured from the insurance commissioner or the bureau of building and loan supervision a certificate of authority or license to do business within this state." The very general terms in which this exemption is phrased give it application to everybody, whether corporation, association, firm, or individual, who holds from the insurance commissioner of the state a license to engage in any form or kind of insurance business, whether as insurance companies issuing policies of insurance of any kind, or insurance agents of such companies doing an insurance business as such, or as insurance brokers soliciting and placing business with such agents or companies. It is therefore broad enough in its terms to provide that whoever holds in any of these capacities any form of license from the insurance commissioner is, by virtue of the holding of such license, exempted from the provisions of the act under review when engaged in the performance of any of the acts relating to the buying, selling, exchanging, leasing, or incumbering of real estate, for the doing of which identical acts real estate brokers and salesmen not being also the holders of licenses as insurance companies, brokers, or agents, must be licensed under and must conform to the provisions of this act. When the laws relating to the procurement of licenses of insurance companies, agents, or brokers are consulted it is found that their requirements for the obtaining of licenses from the insurance commissioner are much more simple and far less burdensome than those which, by the terms of the act in question, are imposed upon real estate brokers and salesmen. Had these burdens been equal or in any degree equivalent, had the safeguards cast about the business of insurance agents or brokers to insure honesty of character and fair dealing in business been the same as or similar to those which this act requires of real estate brokers or salesmen, it might well be argued that the possession by a corporation, firm, or individual of a license to engage in any form or department of the insurance business would suffice as an acceptable substitute for the license, bond, recommendations, and other safeguards provided for in the real estate agent's act.

But such is not the case. The Statutes of 1917, either in the form of amendments to sections 596 and 633 of the Political Code (St. 1917, pp. 147, 1617), or in the form of the addition of section 633a (St. 1917, p. 1615) to said Code, embrace the requirements for obtaining from the insurance commissioner certificates of authority or licenses to do the business of insurance companies, agents, brokers, or solicitors within this state. Section 633 of said Code, as amended, and section 633a thereof, as newly enacted, have special reference to insurance brokers and agents, and to the licenses to be obtained by each. In neither of said provisions is there to be found any requirement that the person seeking such license must produce recommendations of other persons as to his character or fitness in point of moral qualification for the business he desires to engage in; nor is there any requirement as to the giving of bonds in any amount to insure his fidelity therein—both of which requirements are made of real estate brokers seeking licenses under the act herein assailed. Neither are insurance brokers or agents required to maintain offices for the transaction of business, as are real estate brokers under this act. In other important particulars the burdens cast upon these respective classes of persons are unequal, the inequality resting most onerously upon those not being insurance brokers or agents, who seek to engage in the business of real estate brokers or salesmen. We can discover no reason, and we are given none by those attempting to uphold this act, for this obvious discrimination, nor for the exemption of insurance brokers and agents engaging in the real estate business, from the provisions of the act under review. It is a matter of common knowledge that the business of insurance broker or agent, and the business of real estate broker or agent, are combined and conducted by the same person, firm, or corporation, quite generally, and hence that the aforesaid exemption of such persons, firms, or corporations, so combining these two forms of business, from the provisions of this act, would have such a wide-spread effect as to not only render the act obnoxious to the claim that it was not a general law, but also to create a discrimination so sweeping in its scope and effect as to compel the conclusion that the act would not have secured its passage by the Legislature, save for the inclusion in it of this exemption; and hence, of necessity, that if such exemption is invalid the entire act must fail. We can perceive no escape from these conclusions. The foregoing reasoning and conclusions also apply to persons, firms, or corporations holding certificates of authority or licenses from the bureau of building and loan supervision, in so far as this act purports to exempt such persons, firms, or corporations from these provisions in case they or any of them engaged in the business of dealing in

real estate in the capacity of brokers or salesmen, as defined in this act. The law is well settled that a statute which contains exemptions amounting to substantial discriminations between those attempted to be classified, where no reasonable basis for the classification exists, is violative of the provisions of the Constitution requiring the passage of general laws and forbidding special legislation in all cases where general laws can be made applicable. *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *Ex parte Bohen*, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618; *Rauer v. Williams*, 118 Cal. 407, 50 Pac. 691; *Ex parte Sohneke*, 148 Cal. 262, 82 Pac. 956, 2 L. R. A. (N. S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475.

The petitioner herein assails certain other of the exemptions found in the provisions of this act above set forth. But one of these requires brief notice, namely, the clause relating to the exemption of attorneys at law. The language of the clause in question is as follows: "Nor shall this act be construed to interfere in any way with the services rendered by an attorney at law." In view of the fact that this clause occurs in the midst of a provision having relation to the exemption of persons performing the several acts of dealing in or with real estate, for which real estate brokers or salesmen, not being attorneys at law, must procure licenses, its purpose is, to say the least of it, obscure; and since the act itself is penal in its requirements that all persons not in the exempted classes who undertake to engage in the real estate business as brokers and salesmen shall possess licenses, and in its penalties to be imposed upon those not having licenses so to do, it might plausibly be argued that attorneys at law conducting transactions in relation to real estate in the capacity of salesmen, brokers, agents, or mortgagees or rent collectors, are by virtue of the above-quoted clause exempted from the provisions of the act. We do not, however, deem it necessary to finally pass upon this question, in view of what has been said of the clearer invalidity of the act upon the former ground; nor do we deem it necessary to discuss the other exemptions in the act which the petitioner herein assails, nor in fact to consider the other points of attack made by him upon the constitutionality of the act. If it is not in its present form a general law, then the question as to whether or not a general law dealing with the same subject-matter would be a valid exercise of legislative power is not at present before this court.

It is ordered that the writ be upheld, and the petitioner discharged.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. App. 722)

FRINIER v. C. J. KUBACH CO.
(L. A. 4064.)

(Supreme Court of California. March 18, 1918.)

1. MASTER AND SERVANT ⇨258(10)—INJURIES TO SERVANT—CONSTRUCTING BUILDINGS—MAINTAINING FLOORS—PLEADING—SUFFICIENCY.

Complaint alleging that plaintiff was removing beams and lumber from third floor of a building under construction, that he stepped upon an imperfect plank and fell to the floor below, and that the accident was caused by the gross negligence of defendant in failing to provide a safe place to work, sufficiently calls defendant's attention to the question of the sufficiency of the floor under St. 1911, p. 1112, requiring temporary floors in buildings under construction.

2. MASTER AND SERVANT ⇨293(6)—INJURIES TO SERVANT—CONSTRUCTING BUILDINGS—MAINTAINING FLOORS—QUESTIONS FOR JURY.

Under such complaint, and evidence that the plank which broke was 10 inches wide, that the planks were 10 inches apart, and that when the plank broke plaintiff fell through a 3-foot opening, and that work was being done on the floor above the one on which plaintiff was working, it was the duty of the court to instruct the jury as to the terms and effect of St. 1911, p. 1112, requiring temporary floors in buildings under construction.

3. MASTER AND SERVANT ⇨296(3)—INJURIES TO SERVANT—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

Where the servant's complaint charged violation of St. 1911, p. 1112, requiring temporary floors in buildings under construction, instruction on contributory negligence was properly refused in view of St. 1911, p. 796, creating the conclusive presumption that the employe was not guilty of contributory negligence if violation of statute contributed to the injury.

4. APPEAL AND ERROR ⇨1051(2)—HARMLESS ERROR.

Admission of opinion testimony showing that the platform on which servant was working was not strong enough to carry weight of lumber piled thereon, if error, was not prejudicial to master in view of the uncontested fact that the floor was sagging.

5. MASTER AND SERVANT ⇨264(4)—INJURIES TO SERVANT—CONSTRUCTING BUILDINGS—MAINTAINING FLOORS—EVIDENCE—ADMISSIBILITY.

In servant's action for injuries when a plank broke and he fell to the floor below, it was not error to admit evidence that no floor was maintained, as required by St. 1911, p. 1112, though not alleged, since such violation contributed to the injury, because plaintiff could not have fallen, though a plank broke, had the floor been tight.

6. MASTER AND SERVANT ⇨115(3)—INJURIES TO SERVANT—CONSTRUCTION OF BUILDINGS—MAINTAINING FLOORS—STATUTES—CONSTRUCTION.

St. 1911, p. 1112, providing that any building more than two stories high in the course of construction shall have the joints, beams, or girders of each and every floor below the floor or level where any work is being done, or about to be done, covered by flooring laid close together, or with other suitable material to protect workmen engaged in such building from falling through joists or girders, clearly contemplates that when in construction of a building a floor level has been reached, and the

joists and beams installed upon which a floor is to be laid, they shall be "covered with flooring laid close together," before a continuance of work above the level of such floor.

7. STATUTES §190—CONSTRUCTION.

When intent is given expression in plain and unambiguous language, courts cannot add to or subtract from the act, unless in order to obviate impracticable or absurd results.

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Oliver P. Frinier against the C. J. Kubach Company. Judgment for plaintiff, and defendant appealed, and the judgment was affirmed in department, and hearing in bank was granted. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellant. Leo V. Youngworth, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. Appellant, claiming that in the opinion of the department filed herein the court had erroneously held the statute found at page 1112 of the Statutes of 1911 applicable to the facts of the case, and that by reason thereof the court properly instructed the jury, as provided in the Roseberry Act, that if they found that defendant's violation of said act of 1911 contributed to plaintiff's injury, his contributory negligence was not a ground of defense, filed its petition for a hearing in bank. The application was granted, and upon further consideration given the claim of appellant we are satisfied with the decision made in department.

The opinion follows:

"This is an action brought by an employé to recover for injuries received September 30, 1913, in the course of his employment, by falling through the third floor and onto the second floor of a building under construction by his employer. It is required by statute (Stats. 1911, p. 1112) that, 'Any building more than two stories high in the course of construction shall have the joists, beams or girders of each and every floor below the floor or level where any work is being done, or about to be done, covered by flooring laid close together, or with other suitable material to protect workmen engaged in such building from falling through joists or girders,' etc. 'Such flooring shall not be removed until the same is replaced by the permanent flooring in such building.' This requires all floors below any floor under construction to be so covered. The main question in the case is whether or not the pleadings raised issues which justified the court in instructing the jury as to the duty of the employer under said law. The plaintiff's complaint alleges that he stepped upon a defective plank which broke, and that he was thereby precipitated from the third to the second floor of the building. It will be observed that while the complaint specifically points out the breaking of a defective plank, it also alleges a falling through a floor and onto a lower floor. Plaintiff alleges that he was engaged in removing beams and other lumber from a landing on the third floor of said building; that in so doing he was obliged to step

upon the plank on said floor provided for the purpose, extending from girder to girder; that said plank was weak and defective, was knotty, cross-grained, and imperfect; that when plaintiff stepped upon the plank it suddenly broke 'and he was precipitated a distance of 15 feet to the floor below'; 'that the accident was caused by the gross negligence of the defendant in failing to provide a safe place to work, and failing to provide safe appliances.' In its answer the defendant admits the breaking of the plank and the fall of the plaintiff as aforesaid, but alleges that plaintiff either knew or should have known of said defects, if any, and should have known of the insufficiency of the plank to sustain the load placed upon it. It denies that the accident was caused by a failure to provide plaintiff a safe place to work. The complaint nowhere alleges that work was being done on the floor above the floor in question, and therefore defendant claims that it was not sufficiently advised by the allegations of the complaint that plaintiff would rely upon a violation of said statute; but the real issue in the case was as to the sufficiency of the floor upon which the plaintiff was working at the time he fell.

[1-3] "The attention of the defendant was sufficiently drawn by the pleading to that fact. If that question, under the law, depended upon whether or not the floor above was one 'where work is being done or about to be done,' that was a matter of evidence to be submitted to the jury with all other evidence concerning the sufficiency of the floor to support the plaintiff. The evidence shows that the plank that broke was 10 inches in width; that there was an interval of 10 or more inches between planks; that when this plank broke there was a space of about 2½ feet or 3 feet, through which the plaintiff fell; and that work was being done on the floor above the one on which plaintiff was working. Defendant's counsel stated on the trial that he would not rebut the above evidence as to the character of the construction of the platform. Under the issues and upon this proof it was the duty of the court to instruct the jury as to the terms and effect of the statute in question. Certain of defendant's instructions were refused, but each of them was based upon the theory that contributory negligence was a complete defense. But the Roseberry Act provides that 'it shall be conclusively presumed that such employé was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employes contributed to such employé's injury (Stats. 1911, p. 796), and therefore defendant's instructions were properly refused. For the same reason the modification of defendant's instructions, complained of, on the subject of contributory negligence and assumption of risk, was proper. Stats. 1911, pp. 796, 1112.

[4] "The only other error complained of is that of permitting a witness to state his opinion that the platform on which plaintiff was working was not strong enough to pile a weight of 1,200 or 1,400 pounds upon it. This evidence bore upon the sagging of the floor on which the lumber removed by plaintiff was piled. The evidence could not have prejudiced the defendant, in view of the uncontested fact that the floor was sagging, and that it was for this reason that plaintiff was directed to remove such lumber."

[5] In its petition for rehearing appellant insists that since the violation of the act (Stats. 1911, p. 1112) was not alleged, all testimony tending to establish such fact should have been excluded, and further, that notwithstanding the act (section 1) required that the "joists, beams or girders of each and

every floor below the floor or level where any work is being done" shall be "covered with flooring laid close together * * * to protect workmen engaged in such building from falling through joists or girders," it should, where one falls through such joists as in the instant case, be construed as having reference to the floor next below. As to the first proposition the cause of action is based upon the specific act of negligence alleged in the complaint, and which, notwithstanding the violation of the statute, it was necessary to prove as a contributing cause of the injury. The action was not based upon defendant's failure to comply with the statute, but defendant's act in supplying this defective plank upon which plaintiff was required to walk. Defendant's failure to comply with the statute is important only in that by reason of such fact it, in the opinion of the jury, contributed proximately to plaintiff's injury, and hence, as provided in the Roseberry Act, deprived defendant of the right which, but for such violation, it had to urge contributory negligence on the part of plaintiff as a defense to the action.

[6, 7] As to the second proposition, the purpose of the statute was clearly to prevent just such injuries as that sustained by plaintiff, and which, presumably, had the planks been laid close together as required by the statute, would not have occurred, even though this plank 10 inches in width had broken. The act clearly contemplates that when, in the construction of a building, a floor level has been reached, and the joists and beams installed upon which a floor is to be laid, they shall be "covered with flooring laid close together," before a continuance of work above the level of such floor, to protect all workmen engaged in the building. "Where the intent is given expression in plain and unambiguous language, the courts cannot add to or subtract from the act unless forced to do so in order to obviate impractical or absurd results." *Estate of McDonald*, 118 Cal. 277, 50 Pac. 399. It would be absurd to hold that the law had reference to the floor, not upon which the employé was at work and through which he fell, but to that next below, thus permitting him to fall the distance of one story. Hence in this action to recover damages due to the negligence of the employer where the failure to comply with the provision contributed proximately to the injury, no defense could be based upon the employé's contributory negligence for the reason that under the Employers' Liability Act, as then existing, such negligence afforded the employer no defense. *Crabbe v. Mammoth Channel G. Min. Co.*, 168 Cal. 504, 143 Pac. 714.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; MELVIN, J.

(177 Cal. 737)

WALKER v. INDUSTRIAL ACCIDENT COMMISSION. (Sac. 2713.)

(Supreme Court of California. March 19, 1918.)

1. MASTER AND SERVANT §417(7)—WORKMEN'S COMPENSATION ACT—REVIEW OF COMMISSION'S FINDINGS.

The Industrial Accident Commission's conclusions on questions of fact are conclusive on the Supreme Court, except when without any evidence to support them.

2. MASTER AND SERVANT §405(4)—WORKMEN'S COMPENSATION ACT—USUAL "COURSE OF BUSINESS OF EMPLOYER."

Within Workmen's Compensation Act (St. 1913, p. 279) § 14, excluding from its benefits one whose employment is "both" casual, "and not" in the usual course of business of the employer, testimony that the keeper of a lodging house was in the habit of employing some one off and on to help out the chambermaid, by taking up carpets and matting and cleaning walls, transoms, windows, and curtains, held to warrant conclusion that employment of one so engaged was in the usual course of business of the employer; "course of business of employer" covering the normal operations which form part of the ordinary business carried on, and not including incidental and occasional operations having for their purpose the preservation of the premises or the appliances used in the business.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Business.]

In Bank. Application by Pearl P. Walker for writ of review against the Industrial Accident Commission. Award affirmed.

Webster, Webster & Blewett, of Stockton, for petitioner. Christopher M. Bradley, of San Francisco (Warren H. Pillsbury, of Oakland, of counsel), for respondent. Max Grimm, of Stockton, for Louis J. Robinson.

SLOSS, J. Certiorari to review an award of the Industrial Accident Commission. The petitioner, Pearl P. Walker, conducted at Stockton a lodging house containing 17 rooms. The applicant, Louis J. Robinson, was employed by Miss Walker to do certain work in cleaning the house, and while so occupied met with an accidental injury which destroyed the sight of one of his eyes.

Section 14 of the Workmen's Compensation Act excludes from the benefits of the law any person "whose employment is both casual and not in the usual course of the trade, business, profession or occupation of his employer." The commission found that Robinson's employment was casual, but that it was in the usual course of the business or occupation of the petitioner. It is contended, and this is the sole point made, that there was no evidence to support the latter part of this finding.

[1] Our authority, with respect to the commission's conclusions on questions of fact, goes no further than to permit the annulment of an award where the commission's

finding of a fact is without any evidence whatever to support it. Where there is a conflict in the testimony, or where opposing inferences may reasonably be drawn, the commission is the final arbiter.

[2] The evidence embodied in the record indicates that it was a necessary part of petitioner's business to keep the rooms and hallways of her lodging house in a state of cleanliness and good order. A chambermaid was employed continuously. The maid was, however, not able to do all the work, and her efforts had to be supplemented by a man called in from time to time. The work for which Robinson was engaged was the taking up of carpets or matting, and the cleaning of walls, transoms, windows, and curtains. Miss Walker herself testified that she was in the habit of employing some one to do that kind of work occasionally, and the chambermaid stated that ever since Robinson's injury another man had been doing similar work off and on. This testimony warranted the conclusion that the employment of Robinson was in the "usual course of the business" of the petitioner. The case is not like those cited by petitioner, in which occasional repairs or overhauling were held not to be covered by this phrase. Various cases of this kind, involving a construction of the English act, were reviewed by us in *London & Lancashire G. & A. Co.*, 173 Cal. 642, 161 Pac. 2, and we there said:

"In cases arising under that act the expression ['course of business of the employer'] is held to cover the normal operations which form part of the ordinary business carried on, and not to include incidental and occasional operations having for their purpose the preservation of the premises or the appliances used in the business."

It would not be questioned that the chambermaid, in doing the cleaning which fell within her province, was engaged in normal operations forming part of the employer's ordinary business. There was no essential difference in character between her work and that done by Robinson. One was as necessary in the conduct of the business as the other, and neither was incidental, in the sense in which that term was used in the passage just quoted. The only distinction is that the maid's work was done daily, while that of the man was called for at intervals. But the intermittent character of the employment is not of itself sufficient to exclude it from the purview of the statute. Section 14 does not except employments that are casual simply, but those that are both casual, and not in the usual course of the business.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.; RICHARDS, Judge pro tem.

(177 Cal. 740)

RAWLINGS v. FUSTER. (L. A. 4131.)
(Supreme Court of California. March 19, 1918.)

1. APPEAL AND ERROR §1011(1)—FINDINGS OF FACT—CONFLICTING EVIDENCE.

There being ample evidence to support finding that injury to rider of motorcycle in collision with auto was caused by negligence in operation of auto, it cannot be disturbed on appeal, for conflicting evidence.

2. APPEAL AND ERROR §1071(6)—HARMLESS ERROR—ABSENCE OF FINDING.

Failure to find on the issue of plaintiff having paid out money for medical attendance, as alleged in complaint, there being no evidence in support thereof, could not prejudice defendant.

3. APPEAL AND ERROR §1050(1)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admission, in the case of collision of motorcycle and auto in a city, of county traffic ordinances, was not prejudicial; their provisions being substantially the same as those of the motor vehicle act.

Department 2. Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by Carroll Rawlings, a minor, by Mary Peck, his guardian ad litem, against Jos. Fuster. From adverse judgment and order, defendant appeals. Affirmed.

J. L. Fleming and W. S. Knott, both of Los Angeles, for appellant. J. Walter Hanby, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. Action to recover damages for personal injuries alleged to have been sustained by reason of defendant's negligence in operating an automobile with which plaintiff's motorcycle collided. Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant appeals.

[1] The appeal is wholly without merit. As usual in such cases, there is a sharp conflict of evidence. That of plaintiff, in accordance with which the court made its findings, clearly tends to show that the accident, in the absence of any negligence on the part of plaintiff, was due to defendant's act in negligently operating his car on the wrong side of the highway contrary to the provisions of the motor vehicle act. Since we cannot weigh conflicting evidence, it would be an idle task to review the same. Suffice it to say there is ample testimony to support the finding that the injury was, as alleged in the complaint, caused by defendant's negligence in operating his car, and that plaintiff was not chargeable with any negligent act contributing to his injury.

The court fixed the damage sustained by plaintiff at the sum of \$1,000. The injuries sustained by plaintiff appear to have been of a serious and permanent nature, and, other than the bare suggestion of appellant, there is nothing in the record to indicate that the sum so awarded is excessive.

[2] While plaintiff alleged that he paid out \$50 for medical attendance, no evidence was

offered in support thereof; hence the failure of the court to find upon such issue could in no event prejudice the rights of defendant.

[3] Conceding, as claimed by appellant, that since the accident occurred in the city of Burbank the court erred in admitting in evidence parts of certain traffic ordinances of the county of Los Angeles, nevertheless no prejudice resulted therefrom, for the reason that the provisions of the ordinance so received in evidence related to matters covered by the motor vehicle act and as to which the provisions are substantially the same.

The judgment and order are affirmed.

We concur: WILBUR, J.; MELVIN, J.

(177 Cal. 728)

HOUSEL v. PACIFIC ELECTRIC RY. CO.
THOMSON v. SAME.

(L. A. 4147, 4148.)

(Supreme Court of California. March 18, 1918.)

APPEAL AND ERROR \S 1008(2)—REVIEW—FINDINGS OF NEGLIGENCE.

Whether the motorneer of a car, passengers in which were injured by its collision with a wagon, was negligent in proceeding, rather than standing still or retreating, when confronted with meeting a heavily loaded runaway team on a steep grade, was a question for the court trying the case without a jury; its finding on which cannot be disturbed, it being impossible to say it is not supported by substantial evidence.

Department 2. Appeals from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Actions, one by Dora R. Housel, the other by Lydia A. Thomson, against the Pacific Electric Railway Company. From adverse judgments and orders, defendant appeals. Affirmed.

Frank Karr, R. C. Gortner, A. W. Ashburn, and W. R. Millar, all of Los Angeles, for appellant. F. McD. Spencer, Thomson & Spencer, Hickcox & Crenshaw, and Foster C. Wright, all of Los Angeles, for respondents.

WILBUR, J. The plaintiffs were injured in a collision between a runaway hay wagon and the street car of the defendant corporation, upon which they were riding as passengers. The cases were tried before the court without a jury; judgment was rendered for the plaintiff in each case, and the matter is before us on appeal from the judgments and orders denying motions for a new trial. These cases have been before this court on a previous appeal, and the facts are stated at some length in the opinion on that appeal. Housel v. Pacific Electric Ry. Co., 167 Cal. 245, 139 Pac. 73, 51 L. R. A. (N. S.) 1105, Ann. Cas. 1915C, 865. See, also, Thomson v. Pacific Electric Ry. Co., 167 Cal. 795, 139 Pac. 75.

The car upon which the plaintiffs were riding was proceeding easterly along Temple

street, Los Angeles, up a 9 per cent. grade from Fremont street. A wagon loaded with 9,600 pounds of baled hay was coming down the hill on the left-hand side of the street. The brake of the wagon broke, the horses ran down hill, the wheel horse on the left-hand side fell, the wagon then swerved to the left toward the street car track upon which defendant's car was approaching, a collision occurred, and plaintiffs were thrown from the car and injured. As we held upon the former appeal, there was, under the circumstances, a prima facie presumption of negligence against the carrier. The findings state in great detail the evidentiary facts. It is argued that certain of these "findings" are not supported by the evidence; that if we consider what the court did find with reference to certain of the evidentiary facts as true, and hold, as appellant claims we should, that other findings of the trial court were erroneous because unsupported by the evidence, then the case must be reversed. The ultimate question in the case was as to whether or not the defendant was negligent. The court found that it was negligent. If specific findings made by the court were in conflict with that general finding, the question would be different from that presented here. The defendant's motorneer, confronted with the fact that he was compelled to meet a runaway team with nearly five tons of hay, on a steep grade, could have done one of three things—go ahead, stand still, or retreat down hill. He decided to go ahead. The trial court held that if he had not gone ahead, but had stood still, plaintiffs would have escaped injury, and therefore held that he was negligent. Appellant claims that it can be mathematically demonstrated that this is incorrect, and that if the car had stopped as soon as possible after the horse fell and the wagon began to swing to the left, it would have been hit anyway, and that therefore the accident was inevitable. The question whether or not the motorneer was negligent in adopting the course that he did was for the trial court. We cannot say that its conclusion is not supported by substantial evidence. An analysis of the testimony would serve no useful purpose.

The judgments and orders are affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 690)

BRANDON v. ANGLO-CALIFORNIA
TRUST CO. et al. (S. F. 7654.)

(Supreme Court of California. March 12, 1918.
Rehearing Denied April 11, 1918.)

BUILDING AND LOAN ASSOCIATIONS \S 42(16)
—LIQUIDATION BY COMMISSIONER—COMPEN-
SATION OF CUSTODIAN.

St. 1911 (Ex. Sess.) p. 8, under which the building and loan commissioner is empowered to

act, after defining his duties as to an association deemed unsafe, and providing for a judgment approving or disapproving his action, provides that if the court shall approve and affirm his action, it shall operate as a permanent injunction against further prosecution of its business followed by liquidation until completed, but that if his action be disapproved, he shall cause expenses incurred during his occupancy or possession, including a per diem compensation of the custodian, to be paid from such association's funds. Code Civ. Proc. § 1049, provides that an action shall be deemed pending until final determination on appeal. *Held*, that the custodian's cause of action for compensation did not accrue till a judgment of disapproval became final on determination of an appeal therefrom, and that action therefor pending appeal was prematurely commenced.

Department 2. Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Amanda C. Brandon, administratrix of the estate of Franc J. Brandon, against the Anglo-California Trust Company and others. From a judgment for plaintiff, and from an order denying motion for new trial, the Trust Company and another defendant appeal. Reversed.

Gavin McNab and R. P. Henshall, both of San Francisco, for appellants. Leon Martin, U. S. Webb, and Robert W. Harrison, all of San Francisco, for respondents.

MELVIN, J. Two of the defendants, Anglo-California Trust Company and Continental Building & Loan Association (corporations), appeal from the judgment and an order denying their motion for a new trial.

The facts, which are undisputed, are as follows: On the 8th day of August, 1912, following a report made to him dealing with the status of the Continental Building & Loan Association, the building and loan commissioner of California made an examination of the affairs, business, and condition of that corporation, and found and determined that it was conducting its business and affairs in an unsafe manner, so as to render its further proceedings hazardous to the public and to those doing business with it and to those having funds in its custody. This determination was made under the authority of section 9 of an act of Legislature, found in the Statutes of 1911 at page 607, as amended, Extra Session 1911, p. 6. In further attempted compliance with the act the commissioner appointed Franc J. Brandon—who was the original plaintiff in this action, but who has since died and is here represented by the administratrix of his estate—custodian of all the property and assets of the building and loan association. Thereafter the Attorney General, pursuant to the statute, commenced and conducted a proceeding for approval and confirmation of the action of the commissioner. The result after trial was a judgment and decree disapproving of the action of the commissioner in taking

possession of the business and affairs of the building and loan association.

The custodian claimed, and this is a suit to recover, compensation for 93 days during which he had controlled the property, at the rate of \$8 per day, which was the amount fixed by the commissioner. This, after deducting a credit of \$20 collected and retained by the custodian, amounted to \$724. The court gave judgment for this sum, and it was further found that while the commissioner was in possession of the Continental Building & Loan Association he deposited with the Anglo-California Trust Company certain funds of the said Continental Building & Loan Association; that he gave an order in writing that said Anglo-California Trust Company pay to plaintiff from said funds the sum of \$724, but that the trust company refused to comply with said order.

Both appellants contend that the judgment and order are erroneous because: (1) The fees claimed cannot be due until the judgment of the superior court disapproving the action of the commissioner has become final; (2) because the act under which plaintiff's predecessor was appointed is unconstitutional in that it permits the taking of property without due process of law, and in that it is a legislative exercise of judicial functions; and (3) because if any cause of action for the recovery of fees exist it is vested not in the custodian or in his representative, but in the commissioner.

The statute under which the building and loan commissioner is empowered to act, after defining his duties subsequent to taking possession of the affairs of a building and loan association deemed unsafe, and after providing that the judgment of a court shall be invoked for the approval or disapproval of his action, contains the following provisions:

"If the court shall approve and confirm the action of the commissioner, such approval and confirmation shall operate as a permanent injunction against the further prosecution of business by such association, corporation or society, and the commissioner shall proceed immediately to liquidate the business and affairs thereof, and so continue until such liquidation has been completed. If the action of the commissioner shall be disapproved by the court, the commissioner shall cause all reasonable expenses incurred by him during his occupancy or possession including not exceeding eight dollars per diem, for each business day, as the compensation of the custodian, to be paid from the funds of such association, corporation or society, and immediately restore the balance of the property and assets thereof to the possession of the proper officers." Stats. 1911 (Extra Sess.) p. 8.

When the action at bar was instituted an appeal from the judgment of disapproval had been taken and was and still is pending. Appellant insists that until a final judgment in that proceeding the respondent here has no standing, because in the event of a reversal of that judgment now on appeal any possible cause of action which plaintiff might otherwise have will be vitiated. The very basis of the claim of the custodian, say ap-

pellants, is a judgment of the court disapproving the action of the commissioner. Without such a judgment, they say, the commissioner has no power under the law to order payments for the custodian's services.

Section 1049 of the Code of Civil Procedure provides that an action shall be deemed pending until its final determination on appeal. Accordingly it has been held that a cause of action upon a judgment does not accrue until the judgment becomes final and admissible in evidence. *Feeney v. Hinckley*, 134 Cal. 467, 66 Pac. 580, 86 Am. St. Rep. 290. An action will not lie upon the bond of a guardian until the order settling his account becomes final either by lapse of time for appeal or determination of the appeal, if one be taken (*Cook v. Ceas*, 143 Cal. 221, 77 Pac. 65), nor upon the bond of an administrator prior to an order of the probate court determining his liability (*Nickals v. Stanley*, 146 Cal. 724, 81 Pac. 117). It has even been held that a deposition de bene esse may be taken after trial and before determination of the appeal. *San Francisco Gas & Electric Company v. Superior Court*, 155 Cal. 30, 99 Pac. 359, 17 Ann. Cas. 933. The same principle is illustrated in such cases as *Bruce v. Bruce*, 160 Cal. 28, 116 Pac. 66, and *Dunphy v. Dunphy*, 161 Cal. 87, 118 Pac. 445. We can see no escape from the conclusion supported by the foregoing authorities and the cited section of the Code of Civil Procedure that the custodian would have no ripened cause of action until the judgment of disapproval should become final.

The clear purpose of the statute is to provide that if the action of the commissioner be approved by the court, he shall liquidate the affairs of the corporation. He is in effect the receiver acting in pursuance of the injunction against the further prosecution of business by the corporation, and after liquidation he must submit his report thereof for final approval by the court. As an officer of the court he acts in such case under the supervision of that tribunal, but if his action be disapproved by the court he is given the right under certain restrictions contained in the act itself to compensate the custodian. His powers respecting payment of that functionary are entirely different under a judgment approving and one disapproving of his assumption of control of the corporation's affairs. Hence it follows that his direction for payment of funds made without order of the court is only finally enforceable when there has been a final decision that his original exercise of authority was disapproved.

Respondents' counsel say that were it true that a judgment is effective for no purpose and inadmissible in evidence until it has become final, a judgment creditor would be unable to recover by action the judgment debtor's property in the hands of a fraudu-

lent transferee, until the ultimate decision of the original case on appeal. Such action, they say, may be commenced immediately upon the entry of the original judgment, citing *Sewell v. Johnson*, 165 Cal. 762, 134 Pac. 704, Ann. Cas. 1915B, 645, and *Jenner v. Murphy*, 6 Cal. App. 434, 92 Pac. 405. But those cases and other authorities along the same line are not in point. This is not an action by a party to enforce a judgment in his favor or to protect his rights as a creditor from spoliation by a fraudulent transfer of the debtor's property. Plaintiff here is suing to enforce the order of the commissioner for the payment of money to him—an order which the commissioner had the power under the statute to make only in the event of a certain sort of judgment being entered in the proceeding provided by the act in question. If another sort of judgment should be entered the commissioner would be powerless to order the payment of any of the expenses of his management of the corporation's business except by approval of the court having supervision of the proceedings for liquidation. Until the judgment becomes final the powers of the commissioner are undefined.

As we are persuaded that the action has been prematurely commenced, it is not necessary for us to discuss the other points made by counsel in their briefs.

The judgment and order are reversed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 690)

Ex parte LEE. (Cr. 2126.)

(Supreme Court of California. March 8, 1918.)

1. CONSTITUTIONAL LAW §55—INDETERMINATE SENTENCE—VALIDITY OF STATUTES.

Pen. Code, § 1168, providing for indeterminate sentences in offenses punishable by imprisonment in a reformatory or in a state prison, and giving the reformatory or prison authorities power to determine after expiration of the minimum term what length of time such prisoner shall be confined, does not violate Const. art. 3, § 1, providing for the division of the state into the executive, legislative, and judicial departments, and prohibiting the exercise of the powers of one department by either of the others; such act constituting neither a delegation of legislative nor judicial functions.

2. CONSTITUTIONAL LAW §203—CRIMINAL LAW §1206(3)—INDETERMINATE SENTENCES—EX POST FACTO LAWS.

Such provision is ex post facto as to a person convicted for a crime committed prior to its enactment, since it substitutes the discretion of the board of prison directors for the statutory right formerly existing to credits for good behavior during imprisonment.

3. CRIMINAL LAW §1184—INDETERMINATE SENTENCES—RESENTENCE.

Pen. Code, § 1168, effective July 27, 1917, provides for the imposition of indeterminate sentences. Sections 12 and 13 provide that the term of imprisonment shall be fixed by the court. Section 1588 provides deductions from the terms so fixed of credits for good conduct

when earned. Defendant was convicted and given an indeterminate sentence for a crime committed prior to the passage of section 1168, which therefore was *ex post facto* as to him. *Held* that, section 1168 not repealing sections 12, 13, and 1588 by implication, as to him, defendant might be sentenced thereunder as though no sentence under the indeterminate sentence law had been imposed.

In Bank. Petition by Charles Lee for writ of habeas corpus. Petition denied.

See, also, 172 Pac. 153.

W. D. L. Held, of Ukiah, and Fred S. Howell, of Petaluma (Edwin V. McKenzie and Hyman Levin and William F. Herron, all of San Francisco, amici curiæ), for petitioner. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for respondent.

WILBUR, J. On October 5, 1917, the petitioner was sentenced after verdict for manslaughter committed May 16, 1917. This sentence is what is known as an indeterminate sentence, and was that the petitioner be punished by imprisonment "in the state prison at San Quentin for the term of from one to ten years." This sentence was obviously imposed under the provisions of section 1168 of the Penal Code (Stats. 1917, p. 666), approved May 18, 1917, and which went into effect July 27, 1917, providing that:

"Every person convicted of a public offense, for which public offense punishment by imprisonment in any reformatory or the state prison is now prescribed by law, if such convicted person shall not be placed on probation, a new trial granted, or imposing of sentence suspended, shall be sentenced to be confined in the state prison, but the court in imposing such sentence shall not fix the term or duration of the period of imprisonment."

"(b) It is hereby made the duty of the warden of the state prison to receive such person, who shall be confined until duly released as provided for in this act; provided, that the period of such confinement shall not exceed the maximum or be less than the minimum term of imprisonment provided by law for the public offense of which such person was convicted. * * *

"(d) The governing authority of the reformatory or prison in which such person may be confined, or any board or commission that may be hereafter given authority so to do, shall determine after the expiration of the minimum term of imprisonment has expired, what length of time, if any, such person shall be confined, unless the sentence be sooner terminated by commutation or pardon by the Governor of the state; and if it be determined that such person so sentenced be released before the expiration of the maximum period for which he is sentenced, then such person shall be released at such time as the governing board, commission or other authority may determine.

"(e) The state board of prison directors shall make all necessary rules and regulations to carry out the provisions of this act not inconsistent therewith," etc.

[1] Petitioner's first contention is that this statute is violative of article 3, § 1, of the Constitution of California, providing for the division of the state government into three separate departments, executive, legislative and judicial, and prohibiting the exercise of the powers of one of these departments by either of the others. In determining this

question and the other questions raised by the petitioner it is necessary to consider the nature and purposes of the indeterminate sentence law. It is generally recognized by the courts and by modern penologists that the purpose of the indeterminate sentence law, like other modern laws in relation to the administration of the criminal law, is to mitigate the punishment which would otherwise be imposed upon the offender. These laws place emphasis upon the reformation of the offender. They seek to make the punishment fit the criminal rather than the crime. They endeavor to put before the prisoner great incentive to well-doing in order that his will to do well should be strengthened and confirmed by the habit of well-doing. Instead of trying to break the will of the offender and make him submissive, the purpose is to strengthen his will to do right and lessen his temptation to do wrong. If the purpose of the law is to mitigate the punishment, the law is not *ex post facto*, unless it can clearly be seen that, notwithstanding the beneficence of the law, it may result in the individual case in depriving the prisoner of some well-defined right. It has uniformly been held that the indeterminate sentence is in legal effect a sentence for the maximum term. It is on this basis that such sentences have been held to be certain and definite, and therefore not void for uncertainty. *State v. Perkins*, 143 Iowa, 55, 60, 120 N. W. 62, 21 L. R. A. (N. S.) 931, 20 Ann. Cas. 1217, and cases there cited; *State v. Tyree*, 70 Kan. 203, 209, 78 Pac. 525, 3 Ann. Cas. 1020; *Woods v. State*, 130 Tenn. 100, 113, 169 S. W. 558, L. R. A. 1915F, 531; *Commonwealth v. Kalck*, 239 Pa. 533, 542, 87 Atl. 61, and cases there cited. In answering the claim that the authority vested by the indeterminate sentence law in the board of prison directors is a delegation of either legislative or judicial powers to an executive body, it is pointed out that the legislative function is filled by providing the sentence which is to be imposed by the judicial branch upon the determination of the guilt of the offender. This is done by the enactment of the indeterminate sentence law. The judicial branch of the government is intrusted with the function of determining the guilt of the individual and of imposing the sentence provided by law for the offense of which the individual has been found guilty. The actual carrying out of the sentence and the application of the various provisions for ameliorating the same are administrative in character, and properly exercised by an administrative body. In answering the contention that the indeterminate sentence law delegated judicial authority to the prison directors, the Supreme Court of New Jersey said:

"The foundation underlying the argument is palpably unsound. The pronouncing of a sentence is, undoubtedly, a judicial act. But the punishment which the sentence pronounces comes from the law itself. As Blackstone truly expressed it, under the head of 'Judgment and Its Consequences,' 'the court must pronounce

that judgment which the law hath annexed to the crime." State v. Dugan, 84 N. J. Law, 603, 609, 89 Atl. 691, 694.

The Supreme Court of the state of Tennessee in answering the contention that the indeterminate sentence law delegated the legislative authority to the board of prison directors said:

"The powers conferred are in no sense a delegation of legislative authority. The act does not attempt to confer on the board the power to fix the punishment that any given crime shall bear. The act itself, in effect, becomes a part of every judgment, and the board only one of a series of agencies for the execution of the judgment. The Legislature declared by previous statutes that the period of confinement, aside from certain crimes not pertinent here, should lie between a maximum and a minimum; the ascertainment of the exact period between the two being left for the jury in each case. Under the present statute the punishment is fixed at a maximum, subject to diminution below that number of years, after the minimum shall have been served, through the operation of a certain discretion vested in the board of prison commissioners. * * * It is impossible to see any element of legislation in the power so to be exercised by the commissioners. There is a striking similarity between the powers here conferred on the board and the authority granted to prison officials under good time statutes, which have generally been held constitutional. It is true the Legislature of our state fixes the terms on which the prisoner is entitled to good time, and how much good time shall be allowed each year (Acts of 1897, c. 125, § 24), and it has been held to be a right which cannot be denied him; but still there may be a deduction from good time earned for subsequent bad conduct, and there is a discretion in the officers, depending on their judgment as to whether he has obeyed the rules of the prison."

For the foregoing reasons the weight of authority is to the effect that indeterminate sentence laws do not violate constitutional provisions such as ours (article 3, § 1) providing for a segregation of governmental powers into the three departments, legislative, executive and judicial. Territory of Hawaii v. Armstrong, 22 Hawaii, 526; Kansas v. Page, 60 Kan. 664, 57 Pac. 514; State v. Dugan, supra; Woods v. State, supra; George v. People, 167 Ill. 647, 47 N. E. 741; State of Iowa v. Duff, 144 Iowa, 142, 122 N. W. 829, 24 L. R. A. (N. S.) 625, 138 Am. St. Rep. 269; People v. Adams, 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406, 98 Am. St. Rep. 675. These decisions were rendered before the enactment of the law in California, and this fact should be considered in determining whether the statute is so clear a violation of this general provision in regard to the division of the government into departments as to require us to hold it to be unconstitutional. For the foregoing reasons we hold that the provisions of section 1168 of the Penal Code do not violate article 3, § 1, of the Constitution.

[2] Petitioner claims that the indeterminate sentence law (section 1168, Pen. Code) is unconstitutional as to him for the reason that it is ex post facto. This contention is based upon the fact that at the time the offense was committed section 1588 of the

Penal Code provided for a reduction from the full term of the sentence imposed by the court of certain credits for good behavior during imprisonment, which, in the case of the petitioner, would reduce the maximum term of imprisonment from ten years to six years and five months in the event that he earned full credit for good behavior. The question resolves itself into this, Does the indeterminate sentence law substitute the will and discretion of the board of prison directors as to the time when the prisoner is to be released for the fixed right to a deduction from his term for good conduct? If it substitutes the discretion of the board of prison directors for the statutory right, then we must hold the law ex post facto, even though the board of prison directors in the exercise of their discretion might deal more favorably with the prisoner than he would be entitled to under the law giving him definite credits for good conduct. We are satisfied that it was the intention of the Legislature in adopting the plan of indeterminate sentence to do away with the legislative plan theretofore in force, by which certain fixed credits for good conduct were given. This law provides that:

"The governing authority of the * * * prison * * * shall determine * * * what length of time * * * such person shall be confined, unless the sentence be sooner terminated by commutation or pardon by the Governor of the state; and if it be determined that such person so sentenced be released before the expiration of the maximum period for which he is sentenced, then such person shall be released at such time as the governing board, commission or other authority may determine."

If the board of the prison does not fix the length of time which the prisoner is to serve until the time they are ready to grant him his discharge, there is obviously no opportunity for the operation of the good credit system, for the prisoner is immediately and completely released. On the other hand, if they fix a future time for his release, if the law concerning credit for good conduct applies, then the prisoner will not be released "at such time as the governing board may determine," but at some time before that time has arrived. Subdivision "f" provides for a release in any event "on serving the maximum punishment provided by law for the offense of which such person was convicted." This law then provides that the prisoner shall serve the maximum term unless before that time the board fixes a shorter time and grants a release. For this reason the law is unconstitutional and ex post facto as to the petitioner, whose offense was committed before the enactment of the law. Murphy v. Commonwealth, 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154, 70 Am. St. Rep. 266; State v. Tyree, supra.

[3] It does not follow, however, that the petitioner is entitled to his discharge, for if, as we hold, the indeterminate sentence law is not applicable to him because ex post facto,

there remains ample provision for his sentence and imprisonment under the law as it stood at the time of the commission of the crime. Sections 12 and 13 of the Penal Code provide that the term of the imprisonment shall be fixed by the court. Section 1191 et seq., Penal Code, provide the method and manner of imposing sentence, and section 1588 of the Penal Code provides deductions from the term so fixed by the court of credits for good conduct when earned. None of these sections is expressly repealed by section 1168, Penal Code, and they are repealed by implication only so far as section 1168 is inconsistent therewith. As we hold that this latter section does not apply to persons convicted of offenses committed previous to its enactment, because *ex post facto* as to them, it follows that as to such persons there is no repeal by implication of sections 12, 13, and 1588. Having been tried and found guilty of the crime of manslaughter, as appears from the return to the writ, the petitioner is not entitled to an absolute discharge, but must be returned to the superior court of Mendocino county for sentence. Section 1493, Pen. Code. Section 1202, Penal Code, providing that a new trial should be granted unless judgment is pronounced within the time limited in section 1191, Penal Code, has no application to a case of this kind, in which a sentence has been imposed.

It is ordered that the warden of the state prison at San Quentin deliver the petitioner to the sheriff of the county of Mendocino, to whose custody he is remanded, for judgment by the superior court upon the conviction.

We concur: ANGELLOTTI, O. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; RICHARDS, Judge pro tem.

(177 Cal. 783)

LALLY v. KUSTER. (L. A. 4129.)

(Supreme Court of California. March 21, 1918.)

1. ATTORNEY AND CLIENT §108—DUTIES OF ATTORNEY—INSTRUCTIONS OF CLIENTS.

It is the duty of an attorney to follow the specific instructions of his client, except in mere matters of detail in conduct of suit; and he is liable for loss from failure to follow such instructions with a reasonable promptness and care.

2. ATTORNEY AND CLIENT §112 — DUTIES AND LIABILITIES OF ATTORNEY — ACTIONS FOR NEGLIGENCE—FINDINGS.

That an attorney, instructed by his client to push a suit to judgment as quickly as possible, delayed the same more than four years, the suit being dismissed for lack of diligent prosecution, establishes negligence, making the attorney liable for attending loss.

3. ATTORNEY AND CLIENT §129(2)—LIABILITY OF ATTORNEY—ACTIONS FOR NEGLIGENCE—PLEADING AND EVIDENCE.

The burden rests upon a client, suing his attorney for negligent failure to collect a mortgage, to allege and prove every fact necessary to establish such liability, including proof of

successful termination of foreclosure suit and collection of judgment, but for attorney's negligence.

4. ATTORNEY AND CLIENT §129(2)—LIABILITY OF ATTORNEY TO CLIENT—ACTIONS FOR NEGLIGENCE—DAMAGES.

Evidence, in suit by client against attorney for negligence in permitting a foreclosure suit to be dismissed for want of prosecution, held insufficient to sustain a finding that plaintiff could not have secured judgment of foreclosure.

5. ATTORNEY AND CLIENT §129(2)—LIABILITY OF CLIENT—ACTION FOR NEGLIGENCE—DEFENSE.

In an action by client for attorney's negligence in permitting dismissal of foreclosure suit for want of prosecution, the defense that the proximate cause of loss was client's failure to appeal from dismissal is not sustained, where such dismissal was proper.

6. MORTGAGES §475—FORECLOSURE—DISMISSAL FOR WANT OF PROSECUTION.

It is proper for the court, upon motion to dismiss foreclosure suit for want of prosecution, to consider that delay may have been for unfair advantage, and to consider the merits.

7. DAMAGES §62(4)—DUTY TO PREVENT OR REDUCE ATTORNEY'S NEGLIGENCE.

A client, asking damages from attorney for negligent dismissal of foreclosure suit for want of prosecution, was not bound to bring a new foreclosure suit in hope of avoiding statute of limitations and being successful.

8. ATTORNEY AND CLIENT §129(4)—LIABILITY OF ATTORNEY TO CLIENT—ACTIONS FOR NEGLIGENCE—MEASURE OF DAMAGES.

The measure of damages to client for loss caused by attorney's negligence in permitting dismissal of foreclosure suit is the amount that could have been recovered, less the actual value, if any, to the client of the note and mortgage barred by limitations, to be determined from the evidence.

Department 2. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Marie Lally, formerly Marie Fleming Everest Brown Eastes, against Edward G. Kuster. Judgment for defendant, and plaintiff appeals. Reversed.

Sidney J. Parsons, of Los Angeles, for appellant. Edward G. Kuster, Gilbert A. McElroy, and H. M. Young, all of Los Angeles, and G. W. Butterworth, for respondent.

WILBUR, J. This is an appeal from a judgment in favor of the defendant. The action was brought by the plaintiff to recover damages for neglect by said respondent as appellant's attorney in the collection of a note and mortgage. Two questions are presented by the appeal: Was the respondent guilty of neglect, and, if so, was the appellant damaged thereby? These issues having been determined by the lower court in favor of the respondent, we are to determine whether or not there is substantial evidence to support its findings.

[1, 2] On June 10, 1907, appellant employed respondent to collect an overdue note and mortgage for \$1,767.38, against which the statute of limitations would run, unless suit was brought, October 16, 1907. This note and

mortgage were placed in respondent's hands July 20, 1907. Suit was begun on October 16, 1907. Defendant therein demurred to an amended complaint June 17, 1909; the demurrer was never presented to the court, and defendant was never required to answer. Four years and seven months after suit brought, on May 16, 1912, the suit was dismissed by the superior court for lack of diligence in the prosecution thereof, and for lack of merit. During all this time the appellant was pressing respondent to bring said case to a determination, on April 7, 1908, writing: "I wish you would push the case and get judgment as soon as possible."

On June 2, 1909, Mr. Tomlinson wrote respondent:

"Both Mr. and Mrs. Eastes [now Lally, appellant] are exceedingly anxious to have this case brought to an early trial. Of course they desire to win it, but the main point is to get a decision."

"An attorney's duty, where he is specially instructed, is to follow the instructions of his client, except as to matter of detail connected with the conduct of the suit, and he is liable for all losses resulting from its failure to follow such instructions with reasonable promptness and care." 6 Corpus Juris, p. 204, § 234.

Respondent's position is that in his best judgment as an attorney at law, the policy of delay was deliberately adopted, owing to the strength of an anticipated defense, herein-after stated at length, and the prospect that the defendant therein, her own principal witness in the case, would die, and that thereafter the suit could be prosecuted with a better prospect of success, and that such policy of delay was adhered to with deliberate purpose, notwithstanding the ever-growing prospect of a dismissal for lack of diligent prosecution; that his judgment was fairly exercised and reasonably skillful, and that he is not therefore chargeable with negligence. Respondent relies upon the rule that:

"Where an attorney is given full discretion to pursue any such course to secure the collection of a debt as he may deem best, he is not liable for adopting a course that he may consider proper under the circumstances, although the debt may be thereby lost, unless it is shown that his error of judgment was due to a lack of knowledge of plain and elementary principles which every attorney should know." 6 Corpus Juris, p. 701.

Respondent also relies upon the rule that:

"An attorney must be held to undertake to use a reasonable degree of care and skill, and to possess to a reasonable extent the knowledge requisite to a proper performance of the duties of his profession. If injury results to the client as a proximate consequence of the want of such knowledge or skill, or from the failure to exercise such care, he must respond in damages to the extent of the injury sustained by his client. * * * An attorney, however, is not liable for every mistake that may occur in practice. If he is fairly capacitated to discharge the duties ordinarily incumbent upon one of his profession, and acts with a proper degree of attention, with reasonable care, and to the best of his skill and knowledge," he will not be responsible for a mere error of judgment when he consults his client, and the latter, after being informed of the legal status of the case, approves

the course the attorney proposes to pursue. 6 Corpus Juris, pp. 696, 697.

Without attempting to analyze in detail the voluminous correspondence between the parties, it seems sufficient to say that respondent fully disclosed his plan of delay to appellant in a letter of May 27, 1909, and also fully and fairly presented the hazard of such a course, and, if appellant had acquiesced in that position, or left it to respondent's judgment, we would unhesitatingly affirm the lower court. Instead of such approval, Mr. Tomlinson wrote the above-quoted letter of June 2, 1909, in addition stating therein:

"I trust you will leave no stone unturned to get a very early decision, and above all, no time should be lost in getting service on Mrs. Brown" (the defendant in the foreclosure suit).

Respondent apparently acquiesced in these instructions, and on January 13, 1910, wrote, advising appellant not to pay taxes payable in April (1910), "before which time I hope this case will be tried and decided." On January 31, 1910, respondent wrote that he would try to get Mrs. Brown's attorney to file an answer. "Thereupon I will have it set for trial at the earliest possible date." Nothing was done in court for more than two years thereafter, when, in response to respondent's motion to restore the demurrer to the calendar, the defendant, Mrs. Brown, succeeded in having the case dismissed. We have here, then, a direct loss due to disobedience of the client's instructions, for which respondent is liable. We have not quoted respondent's testimony nor other evidence concerning the wisdom of his course. The appellant sought a decision of the court on the merits of the case; with the best of motives no doubt, this was prevented by respondent's course. The lower court was in error in deciding against the appellant on this undisputed testimony.

[3] As to damages. The lower court found appellant's mortgage was uncollectible, as it had been paid. In considering the evidence on that subject, it is necessary to bear in mind the rule as to the burden of proof.

"In a suit by a client against an attorney for negligence in conducting the collection of a claim, whereby the debt was lost, the burden rests on the former to allege and prove every fact essential to establish such liability. He must allege and prove that the claim was turned over to the attorney for collection; that there was a failure to collect; that this failure was due to the culpable neglect of the attorney; and that, but for such negligence, the debt could, or would, have been collected. Hence, where a claim is alleged to have been lost by an attorney's negligence, in order to recover more than nominal damages it must be shown that it was a valid subsisting debt, and that the debtor was solvent." 6 Corpus Juris, p. 710, § 260, cited as authority in *Vooth v. McEachen*, 181 N. Y. 28, 73 N. E. 488, 2 Ann. Cas. 601.

[4] The question here, then, is whether or not there was substantial evidence to justify the trial court in holding that there was no debt which could have been collected by the respondent, and therefore that the appellant

was not injured by the conduct of the respondent. In determining this matter, in view of the decision of the trial court against the validity of the claim, the question being a mixed one of law and fact, we are bound to take the view of the evidence most strongly against the appellant. This view of the evidence tends to show the following state of facts: That Mrs. Brown, the defendant in the foreclosure suit, had known one George Brown, appellant's deceased husband; had been present at his birth; at his mother's death; had from time to time cared for him, and had maintained such friendly relations with him that he addressed her as "mother"; that during the last few years of his life he came to her home in Los Angeles and lived with her as a boarder in her home upon the premises secured by the mortgage sought to be foreclosed by the appellant; that he never paid his board bill, although he had agreed to do so; that, learning that she was being pressed by the holder of a mortgage upon her premises, he told her that he would take care of the matter and see that it was paid off. For that purpose he requested that she deed the property to him; that he accepted the deed and later reconveyed the same to her, with the information that she would never be troubled by the mortgage again. He had in fact secured the release of the mortgage in question by making the renewal mortgage upon the premises, later assigned to and sought to be foreclosed by appellant, his widow. Upon the deed reconveying the property to her being delivered, she discovered that it provided that she "assumed and agreed to pay" a mortgage of \$1,767.38, the mortgage here in question. She therefore corresponded with George Brown, who had left her home and married the appellant, asking him to do something for her, and finally received information from him that it had been paid. In order to explain what had actually occurred it will be necessary to give some of the details concerning the source from which the mortgage was "paid." George Brown's father had died, leaving him property in trust to three trustees, one of whom, his stepmother, having married a man named Johnson, after the death of the father of George Brown, was named Sarah Johnson. By the terms of the trust the property was to be held for George Brown until he was 30 years old, during which period, after arriving at the age of 25, he was to receive the income therefrom, and upon attaining the age of 30 years it was to be turned over to him, or if he died before that age it was to be turned over to his surviving wife. The trustees, upon the request of George Brown, paid out from this trust fund the face value of the mortgage and interest, and took an assignment thereof from the mortgagee to themselves as trustees. It was undoubtedly the expectation of all concerned that upon George attaining 30 years of age, the mort-

gage would be turned over to him, he would satisfy the same of record, and the whole matter would be disposed of. No collection of interest was made from Mrs. Brown, the defendant in the foreclosure proceeding. George Brown died at the age of 28. In pursuance of the above-mentioned will and trust thereunder the trustees turned over all the balance of the property held by them in trust for the deceased and his surviving wife to the appellant herein, his surviving wife, including, among other assets, the mortgage in question. The plaintiff, of course, secured no greater rights against Mrs. Brown, the defendant in the foreclosure suit, than the trustees had; but the mortgage note was not extinguished by payment thereof or by operation of law. George Brown, as against the appellant, was entitled to the interest on the fund represented by his mortgage note, and to that extent the interest may be considered as paid or extinguished, but he had no right to the principal fund invested in said note unless he lived to be 30 years of age. Upon his death it belonged to his surviving wife. The trustees accepted and treated the mortgage as an asset in their hands, and accounted for the same to the court in the trustee's proceedings. So far as the defendant in the foreclosure proceedings, Mrs. Brown, was concerned, she was not entitled to complain of the failure of George Brown to make her a gift. It was not claimed that he owed her the amount of the mortgage. We cannot assume in this case that the court in the trial of the mortgage foreclosure proceeding would have come to an erroneous conclusion because of sympathy for the defendant, Mrs. Brown. The utmost that we can assume on the appeal of the instant case is that the most favorable decree she could have secured would have been one based upon the truth of her testimony and all the inferences properly deducible from that testimony. On this appeal this court is substantially in the situation that it would be in reviewing the decision of the trial court in the mortgage foreclosure proceeding had the evidence offered here been introduced in that case and the decision therein been favorable to the defendant, Mrs. Brown.

[5-7] Respondent claims that the judgment of dismissal for lack of diligence was erroneous; that he was prepared to seek a rehearing upon that matter, and in case of failure thereon to appeal from the order. He contends that such an appeal would have been successful, and that therefore the proximate cause of the loss to the appellant was the failure to take such an appeal. He also claims that appellant should have brought a new suit to foreclose the mortgage in question, and should not rest upon the proposition that the mortgage was barred by the statute of limitation; that until she had actually been defeated in a new proceeding to foreclose by a plea of the statute of lim-

itation she cannot be heard to say that a loss had actually accrued to her.

[8] With regard to the failure to appeal from the judgment of dismissal: The appellant abandoned the appeal after being advised by the respondent that, in his judgment, the appeal would be successful, but, even if successful, that she would ultimately lose the case and that she consented thereto. In support of the judgment of the trial court we must accept the testimony of the respondent on this matter and consider the effect of such abandonment, and whether or not the loss resulted therefrom. Respondent contends, and it is true, that the merits of a case ought not to be decided on a motion to dismiss. But it is proper for the court upon a motion to dismiss for lack of diligence in prosecution to take into consideration the fact that the delay may have been intentional and to secure an unfair advantage. In that view of the case it was proper for the trial court to consider the nature and character of the case and the nature of the proposed defense, and the probability or possibility of such defense being successful. We hold that the judgment of dismissal in that case was proper. Was the applicant bound to bring a new action of foreclosure in order to have it formally adjudicated that her claim was barred, or in the hope that the defendant therein would not plead the statute? In this connection it may be noted that the respondent is relying upon two entirely inconsistent defenses: One, the statute of limitations, on which he claims that appellant's right of action against him accrued at the time of the first disobedience of the orders of his client in 1907 or 1908; and the other, that it never accrued, as, he contends, appellant was bound to await the result of a second foreclosure suit. Neither question is free from difficulty, and yet where the disobedience complained of consists in delay only, the cause of action cannot be said to arise until such delay has resulted in some injury, as it did when the court dismissed the case because of the delay. The question then is, What damage accrued to the appellant at the time of the dismissal of her suit to foreclose the mortgage? If we assume, as respondent contends we should, that there was a possibility that the defendant in the new foreclosure proceedings might not plead the statute of limitations, and that therefore the suit might be successful, or if we assume that the cloud upon the record title, due to the recordation of the mortgage, was of some value, it does not follow that the appellant would have to wait until it was finally determined in court that these rights were valueless; for at the time her right of action accrued she would be entitled to recover whatever damages she had then suffered. The measure of damages then accruing to the appellant would be the loss caused by the

dismissal, which would be the amount that could have been recovered in foreclosure proceedings, less the actual value, if any, in the barred note and mortgage to the appellant. This value was to be determined by the trial court from the evidence on that subject before it.

Judgment and order reversed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

(38 Cal. App. 358)

RATTRAY v. WICKERSHEIM IMPLEMENT CO. (Civ. 2034.)

(District Court of Appeal, Second District, California. Feb. 11, 1913.)

1. APPEAL AND ERROR §757(1) — BRIEF — TYPEWRITTEN RECORD—EXTENT OF REVIEW.

Where the only record on appeal consists of a typewritten transcript, the court need go no further than to those portions of the record which have been printed in the briefs, since it is presumed that by their briefs counsel have submitted all portions of record which they desire to call to attention of court, in view of Code Civ. Proc. § 953c, providing that on such appeal the parties must print in their briefs such portions of the record as they desire to call to the attention of the court.

2. APPEAL AND ERROR §927(3) — REVIEW — MOTION FOR NONSUIT—PRESUMPTION.

To determine whether the case presented was sufficient to defeat motion for nonsuit, the court on appeal must allow plaintiff the benefit of all facts admitted by the answer, together with all other facts which the evidence tends to prove.

3. CORPORATIONS §300—EMPLOYING AGENT TO SELL STOCK—AUTHORITY OF PRESIDENT.

That W. was president and manager of defendant corporation did not authorize him to sell shares of stock, to determine the price for which they should be sold, or to employ an agent to find purchasers.

4. CORPORATIONS §432(12)—SALE OF STOCK AT LESS THAN PAR — AUTHORITY OF PRESIDENT.

That after president of defendant corporation had employed plaintiff to sell corporate stock, and before plaintiff had found a purchaser, the board of directors authorized the president to sell the stock at par, does not tend to establish the president's authority to accept offer made by such purchaser to buy stock at less than par.

5. BROKERS §49(3) — VARIANCE BETWEEN CONTRACTS TENDERED AND AUTHORIZED.

To entitle plaintiff to commission in accordance with an alleged oral agreement to procure a purchaser of stock, it was necessary to show that defendant corporation had given authority to sell stock at a price corresponding to the offer made by the purchasers procured by plaintiff.

6. BROKERS §49(3) — ACTION FOR COMMISSION—PROOF.

Where purchaser's offer was to purchase stock at less than par, and the proof failed to show that defendant corporation ever offered to sell stock at less than par, the defect in plaintiff's case was not cured by answer which stated that defendant entered into negotiations for sale of stock to such purchaser, but that he failed to purchase.

7. BROKERS — 49(3) — ACTION FOR COMMISSION—ESTOPPEL.

Neither the admissions in defendant's answer that defendant corporation entered into negotiations with purchaser of stock procured by plaintiff nor the knowledge of the president or secretary that plaintiff was endeavoring to procure investors in the corporation are sufficient to estop defendant from relying upon defense that plaintiff was not authorized to procure a purchaser at the price which the purchaser procured proposed to pay.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by W. S. Rattray against the Wickersheim Implement Company. Judgment for defendant, and plaintiff appeals. Affirmed.

James E. Mahon and Alfred H. McAdoo, both of Los Angeles, for appellant. Head & Marks, of Fullerton, for respondent.

CONREY, P. J. At the trial of this action the court granted the defendant's motion for a nonsuit. Plaintiff's appeal is from the judgment.

By his action the plaintiff seeks to recover commissions in accordance with an alleged oral agreement. William J. Wickersheim was the president and general manager of defendant company. A condensed statement of the plaintiff's testimony is as follows:

"In August, 1914, Mr. Wickersheim came to my office and asked me if I could get him a man who would invest some money in his company. He said if I would put him in touch with a party who was able and willing to invest some money, he agreed he would give me 5 per cent. He preferred to get a man who would put in \$10,000."

Thereafter Mr. Wickersheim sent to the plaintiff a letter, which the plaintiff received on March 26, 1915, as follows:

"This is to confirm our verbal agreement in which we agreed to pay you 5 per cent. on \$10,000 or more, if you are successful in securing an investment with this amount for our business."

This letter was signed "Wickersheim Implement Company, by Wm. J. Wickersheim." The plaintiff introduced to Wickersheim one F. S. Moore, who, on March 23, 1915, submitted to Wickersheim a written offer to purchase 150 shares of capital stock of defendant company for the consideration of \$10,000. In response to that offer Wickersheim signed an acceptance in which it was stated that:

"In consideration of the agreement by F. S. Moore, made this 23d day of March, I hereby agree to deliver him, upon fulfillment of the agreement, 150 shares of the capital stock of the Wickersheim Implement Company (and until such stock is issued and delivered I will deposit the same number of shares of my stock in the company in lieu of said stock)."

This acceptance was signed "Wm. J. Wickersheim, Pres. Wickersheim Implement Company." William J. Wickersheim, called as a witness for the plaintiff, testified that at the time above mentioned he owned 344 or 346 shares of the 440 shares of stock of the corporation at that time issued. On March 29,

1915, a letter was sent to the plaintiff, signed by the company by Wickersheim, as follows:

"I herewith cancel our verbal agreement in which we agreed to pay you 5 per cent. on the sale of \$10,000 worth or more of our stock, with or without services, and which was confirmed in our letter of March 25, 1915."

S. J. Laporte was the secretary of defendant company. In connection with the testimony of Laporte, called as a witness for the plaintiff, the plaintiff introduced in evidence a record, which we will assume was part of the minutes of the board of directors, although that fact does not distinctly and positively appear. Those minutes show that on February 15, 1915, a motion was adopted to the effect that the president, Wickersheim, was authorized to sell the treasury stock of the corporation at the par value of \$100 per share. Laporte testified that none of the directors except Wickersheim and himself, knew of the Moore transaction.

The motion for nonsuit was based upon the grounds, first, that the plaintiff failed to show any authority on behalf of the corporation to authorize the employment of an agent, or the sale of stock, or the authorization by the corporation of the contract upon which the plaintiff bases his action; second, that the plaintiff failed to show that Moore was at any time able to make any investment in the corporation or to perform his alleged contract.

The complaint counted upon an oral contract made between the plaintiff and the defendant by the terms of which it was covenanted and agreed that, in the event that plaintiff would procure an investor or investors with \$10,000 or more to invest in the business of the defendant, the defendant would pay to the plaintiff for said services 5 per cent. on the amount so procured. It was alleged that pursuant to that contract plaintiff procured Moore as such investor, who was ready, willing, and able to invest the sum of \$10,000 in said business of the defendant, "which said investment was, on or about the 23d day of March, 1915, accepted by the defendant herein." There were other counts in the complaint which we omit to describe, since they cannot affect the merits of this appeal.

The answer of defendant denied that plaintiff and defendant entered into the contract stated in the complaint, and denied—

"that defendant agreed to pay any sum as commission or bonus or any payment for the services of the plaintiff in securing an investor or investors to invest in the business of defendant, except that defendant agreed with plaintiff to pay plaintiff a commission of 5 per cent. upon the stock of defendant sold by plaintiff, providing that plaintiff sold treasury stock of the defendant corporation in a total amount of \$10,000 or more."

The answer denied that the plaintiff procured Moore to invest \$10,000 or any other sum in the business of defendant, and denied

that Moore or any person was willing, ready, or able to invest in the said business of defendant the sum of \$10,000 or any other sum. The answer alleged that said Moore and defendant entered into negotiations for the sale of certain stock of defendant to said Moore, but that Moore failed and refused to purchase any stock of defendant corporation or invest any money with it. The answer further alleged that, after the 1st day of September, 1914, and before the commencement of this action, it was agreed between plaintiff and defendant that if the plaintiff sold treasury stock of the defendant corporation in a total amount of \$10,000 or more, defendant would pay plaintiff a commission of 5 per cent. on all stock so sold by the plaintiff, providing said sales aggregated an amount of \$10,000 or more.

[1] The only record on appeal consists of a typewritten transcript. The foregoing statement of facts and of the issues presented in the case is a substantially complete statement of all of those portions of the record which have been printed in the briefs. We need not go further, since it is presumed that by their briefs counsel have submitted to us all portions of the record which they desire to call to our attention. Code Civ. Proc. § 953c.

[2-4] In order to determine whether the case presented was sufficient to defeat a motion for nonsuit upon the grounds stated, we must allow to the plaintiff the benefit of all facts admitted by the answer, together with all other facts which the evidence tended to prove. The fact that Wickersheim was president and general manager of the corporation did not authorize Wickersheim to sell shares of stock or to determine the price for which they would be sold, or to employ an agent to find purchasers for stock. Such transactions are not within the scope of the business which either a president or a general manager is, by virtue of his office, qualified to transact for the corporation. *Northwestern Packing Co. v. Whitney*, 5 Cal. App. 105, 89 Pac. 981. The fact that afterward, and before the plaintiff had found Mr. Moore, the board of directors authorized the president to sell the treasury stock at par, does not tend to establish the president's authority to accept the offer made by Moore, for that was a proposition to buy stock at less than par.

In order to make even a plausible argument, appellant finds it necessary to resort to facts admitted in defendant's answer. These admitted facts were, that defendant agreed to pay plaintiff a commission of 5 per cent. upon the stock of defendant sold by plaintiff, if plaintiff sold treasury stock of defendant corporation in the total amount of \$10,000 or more. Since the evidence shows

that in all of the negotiations Wickersheim was the only person who acted for defendant, the answer may fairly be understood as admitting that he was authorized to make the agreement with plaintiff as it was admitted that it was made. But it should also be understood from the pleading and proof thus made that the plaintiff would not be deemed to have "sold" stock until he produced a purchaser who was able, ready, and willing to buy the stock on terms of sale authorized by the corporation.

[5-7] To establish complete performance on the part of plaintiff, it was necessary to show that the corporation had given authority to sell the stock at a price corresponding to the offer made by Moore. That offer was to pay for the stock only two-thirds of its par value. There is no admission in the answer, nor is there any evidence, that the corporation ever offered to sell stock at less than par, or that it authorized Wickersheim to arrange for a sale at less than par. This defect in the plaintiff's case is not cured by the statement which was made in the answer that Moore and the defendant entered into negotiations for the sale of certain stock of defendant to Moore, but that he had failed and refused to invest any money in the corporation or purchase any of its stock. Neither these facts admitted by the answer, nor the knowledge by Wickersheim and by the secretary of the corporation that the plaintiff was endeavoring to secure investors in the corporation, are sufficient to estop the corporation from relying upon its defense that it was not shown to have authorized the plaintiff to secure a purchaser of stock at the price which Moore proposed to pay. It is directly established by the evidence that a majority of the board of directors did not know of the Moore transaction. It does not appear that the board of directors, or that any of its directors other than Wickersheim and Laporte, knew that any effort was being made to sell stock at a price less than its par value. We agree with the rule to which counsel direct our attention that:

"Where the special character of the agency is not known and the principal has clothed the agent with apparent powers, strangers in dealing with the agent may assume that such apparent powers are possessed. The principal cannot by private communications with his agent limit the authority which he allows the agent to assume." *Eddy v. American Amusement Co.*, 21 Cal. App. 487, 132 Pac. 83.

This doctrine of ostensible agency is fully recognized, but we think that it is not illustrated by the facts of the case before us. The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

(36 Cal. App. 225)

SKINKLE v. AMERICAN NAT. BANK OF SAN FRANCISCO. (Civ. 2189.)

(District Court of Appeal, First District, California. Feb. 8, 1918.)

1. GUARANTY \S 36(8)—**CONSTRUCTION—SEPARATE INSTRUMENTS.**

Where a landlord assigned lease with rents due thereunder to his grantee, and a third person guaranteed payment of all rents, the guaranty by express terms operating prospectively only, it applied only to rentals thereafter accruing, though the contemporaneous assignment expressly included prior due rents.

2. APPEAL AND ERROR \S 704(2)—**REVIEW — FINDINGS.**

On an appeal on the judgment roll alone, where the court found that the guaranty was to secure payment of rent accruing after its date, the court on appeal must accept such finding in the absence of attack as conclusive and final.

3. GUARANTY \S 107—**RIGHTS OF GUARANTOR — DEPOSITS AS SURETY — WRONGFUL PAYMENT.**

Where payment of rentals to become due was guaranteed and the money deposited to secure payment, the bank, which on demand paid out money for rent accruing prior to guaranty, was liable to the guarantor, since the doctrine of strictissimi juris applied.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by A. Skinkle against the American National Bank of San Francisco. From the judgment rendered, the defendant appeals on the judgment roll. Affirmed.

Carter P. Pomeroy, of San Francisco, for appellant. Houghton & Houghton, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from the judgment rendered herein on the judgment roll alone. The sole question involved is the proper construction of a guaranty agreement.

The facts as disclosed by the pleadings and findings are as follows: On the 3d day of August, 1915, one Thomas W. Butcher, being then the owner of certain real property situated in the city and county of San Francisco, conveyed the same on said day to the Cutting Packing Company, a corporation. At the time of the conveyance the property was subject to a lease for a period of five years from the 1st day of December, 1914, and the rent thereunder at the time of the conveyance and until the expiration thereof was \$500 a month. By a written instrument executed at the same time as the deed, Butcher formally assigned to his grantee the rents due under the lease that had accrued subsequent to July 1, 1915. On the date of the sale and assignment installments of rent accruing on the 1st day of July and on the 1st day of August, 1915, aggregating the sum of \$1,000, were due and unpaid and the right thereto passed by the assignment to the grantee named.

Contemporaneously with the execution of these instruments, one George Downing, the assignor of the plaintiff herein executed and delivered to the Cutting Packing Company a written guaranty in respect to certain rents due under this lease. This instrument recited at length the terms of the lease and the assignment thereof, the extent of the liability thereunder, and also provided for the deposit of the sum of \$8,000 with the American National Bank as security for the fulfillment of its terms, and authorized the bank, upon receiving written notice from the lessor that any installment of rent was due from the lessees, to pay the same out of the moneys so deposited with it. Thereafter, on the 3d day of November, 1915, the Cutting Packing Company notified the bank by a written communication that the installments of rent due under the lease for the months of July, August, September, and October, 1915, were in default, and demanded payment of the same out of the said sum of \$8,000 so deposited with it, and the bank thereupon paid the amount to the packing company. The present action was brought by the plaintiff as assignee of Downing, the guarantor, against the bank, to recover \$1,000 being a portion of the amount so paid by the bank on account of the installments of rent for the months of July and August, 1915.

[1] The action proceeds on the theory that the guaranty by its terms was only intended to cover installments of rent that might become in default under the terms of the said lease subsequent to the 3d day of August, 1915, the day of the execution of the guaranty, and that the bank in paying the installments for the months of July and August exceeded its authority, and, consequently, was liable to plaintiff for the amount of such payment. The trial court so construed the guaranty, and gave judgment to the plaintiff for the amount sued for. We are of the opinion that the conclusion reached by the trial court was correct. By its express terms the guaranty operated prospectively only. Counsel for the appellant insists, however, that the guaranty agreement should be read in connection with the assignment of lease, and that the two documents should be construed together. Whether the guaranty agreement be so read or not, it is plain that the intention of the parties was that the guaranty should operate prospectively, and no other effect can be given to its terms and provisions. The assignment of the lease contains express provisions which operate retroactively and prospectively so as to comprehend within its terms monthly rentals from the 1st day of July, 1915, which passed to the packing company. On the other hand, the guaranty agreement, drawn and executed contemporaneously with the assign-

ment, though between different parties, contains express provisions which operate prospectively alone. If the parties intended that the guaranty agreement was to extend to arrears in rent, they certainly would have adopted the same explicit language as they used in the assignment, namely, "all and singular the rents that have or may accrue under and by reason of the terms of said lease or of any part thereof." The difference in the phraseology of the two instruments, considering the circumstances of their execution, shows that the parties had the subject in mind, and affords almost conclusive evidence that it was not the intention to have the guaranty agreement operate retroactively. Therefore, giving the two instruments the construction asked for affords appellant no relief; and, standing alone, the language of the guaranty agreement is plain and unambiguous, and is prospective merely in its operation. In either case, the contract is susceptible of but one construction, and we fail to see how the trial court could have come to a different conclusion upon the subject.

[2] Aside from this, the findings of the court are to the effect that the guaranty was "to secure the payment of rentals to thereafter become due." This appeal is on the judgment roll alone, and we cannot know upon what evidence, aside from the lease and assignment, the finding may be based, and we must upon this appeal accept such finding, in the absence of attack, as conclusive and final.

[3] It is further argued that, irrespective of the construction that may be given to the guaranty agreement, the bank cannot be held liable for making payment of the installments of rent in question, for the reason that its action in so doing was based upon a mere misapprehension of the proper legal effect of the guaranty, the instructions in which, it is claimed, were ambiguous. As we have before stated, the terms of the guaranty agreement, upon which alone the bank was authorized to act, were clear and explicit and free from ambiguity. It bound the guarantor to pay rentals that "shall become in default" under the lease upon the amount deposited, and did not purport to guarantee the payment of all rentals therein reserved. The only interpretation permissible by the bank in respect to this provision was that the rentals to be paid were those accruing after the date of the guaranty of August 3, 1915, the date as to which that agreement speaks. The doctrine of strictissimi juris applies.

Again, it is contended that the bank was absolved from liability for making the disputed payment by the express terms of the guaranty. What we have already said applies with equal force to this objection:

The July installment was due and payable on July 1, 1915, and was in default upon the expiration of that day; the August installment was in default upon the expiration of August 1, 1915. Both these defaults were suffered prior to the guaranty agreement becoming operative, and the bank had no authority to make the payment, nor was it absolved in so doing by the agreement.

For the reasons given, the judgment is affirmed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

(36 Cal. App. 233)

BASHORE v. LAMBERSON. (Civ. 1789.)

(District Court of Appeal, Third District, California. Feb. 9, 1918.)

1. APPEAL AND ERROR §429—NOTICE OF APPEAL—DEFECTS—WAIVER.

Where service of notice of appeal was acknowledged by respondent's attorney, the appeal is properly before the court, although notice was signed by attorney in fact; acknowledgment of service being a waiver of objection that notice of substitution of attorney had not been served.

2. APPEAL AND ERROR §195—MATTERS NOT RAISED IN COURT BELOW—PARTIES.

Objection as to change of parties plaintiff and that leave of court was not obtained to file amended complaints cannot be raised for the first time on appeal.

3. TRUSTS §61(3)—TERMINATION.

Under trust agreement whereby defendant trustee was to convey land when plaintiff paid amount due trustee, the trust relation ceased when, having procured judgment against plaintiff and wife, defendant caused an execution to be levied on the land to satisfy the judgment notwithstanding defendant bought the land at the execution sale.

4. JUDGMENT §721—CONCLUSIVENESS—COLLATERAL ATTACK.

Where defendant trustee brought suit against plaintiff and his wife to determine amount due from them, a judgment determining what such amount was, as reduced by court on appeal, is, in the absence of fraud, conclusive as to amount due in a subsequent suit to adjust accounts between plaintiff and defendant.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by John Bashore against Charles G. Lamberson. Judgment dismissing action, and plaintiff appeals. Affirmed.

See, also, 167 Cal. 387, 139 Pac. 817.

J. C. Thomas, of Oakland, for appellant. Power & McFadzean and Jas. M. Burke, all of Visalia, for respondent.

HART, J. This action was brought to enforce an alleged trust as to the land described in the complaint in favor of the plaintiff, the legal title, it is alleged, being in the defendant, to have a commissioner appointed for the purpose of ascertaining and adjusting the accounts between the plaintiff and the defendant, and to sell said land "to satisfy the demands of the trustee and the rest-

due thereof, amounting to something over \$10,000.00, be paid to this plaintiff"; that a temporary injunction be granted, enjoining the defendant from selling the land in dispute, etc. The court sustained a demurrer to the complaint without leave to amend, and thereupon rendered judgment dismissing the action. The appeal is by the plaintiff from said judgment. The notice of appeal in this case was signed:

"Rachel D. Bashore, Attorney in Fact for John Bashore. John Bashore, by Rachel D. Bashore, His Attorney in Fact."

[1] Respondent raises the question as to whether this is a valid notice of appeal, citing authorities to the point that the notice of appeal must be signed by the attorney of record in the trial court. *Beardsley v. Frame*, 73 Cal. 634, 15 Pac. 310; *Prescott v. Salthouse*, 53 Cal. 221; *Whittle v. Renner*, 55 Cal. 395; *Ellis v. Bennett*, 3 Pac. 801; *Harrigan v. Bolte*, 8 Pac. 184. But in *Withers v. Little*, 56 Cal. 370, where a notice of appeal was signed by substituted attorneys, respondent's attorneys not having been served with notice of the substitution, it was held, as stated in the syllabus:

"That the plaintiff's attorneys, in acknowledging service of the notice, waived the objection that the notice of the substitution had not been served upon them."

In the present case service of the notice of appeal was acknowledged by respondent's attorneys, and therefore the appeal is properly before us.

[2] As to the objection regarding the change of parties plaintiff in the different pleadings and as to the point that leave of the court was not obtained to file the two amended complaints, we think such objections should have been made in the court below, and that it is too late to raise them now for the first time.

It appears that the complaint, without leave, was amended on two several occasions. In the original complaint John Bashore and his wife Rachel Bashore were the plaintiffs; in the first amended complaint Rachel D. Bashore was sole plaintiff; and in the second amended complaint John Bashore is sole plaintiff.

The second amended complaint is in two counts. In the first count it is alleged:

That in 1900 plaintiff executed a deed of trust by two certain persons as trustees to secure an indebtedness owing by him, the property conveyed being 80 acres of land in Tulare county; that he defaulted in the payment of interest and principal of said indebtedness, and that said trustees sold said property, under the provisions of the trust deed, to one George W. Zartman, to whom plaintiff had delivered the money with which to purchase the property, and, on June 7, 1906, "the said George W. Zartman, acting for, and as the agent of this plaintiff, took a deed for the aforesaid real estate in his

own name," which deed was duly recorded, "that the said sale by the said trustees, and the holding of the said land under said deed by said G. W. Zartman, was all done and performed through, under, and by the direction of the defendant Charles G. Lamberson, who was acting as the attorney for this plaintiff"; that on the 2d day of January, 1907, "without having paid for the said premises with his money, or refunding the money delivered to him by this plaintiff, the said George W. Zartman conveyed the land to defendant * * * without any consideration whatever passing from the said Zartman to this plaintiff; * * * that concurrently with the execution of said deed by the said Zartman to the defendant, and as part of the said transaction, the said defendant last aforesaid delivered to the plaintiff herein the following declaration of trust, which was duly executed by him: 'Know all men by these presents that I hereby agree to sell to John Bashore at any time within five years from the date hereof all that certain property [describing it], upon payment to me by the said John Bashore of all amounts which may be due me at such time by said John Bashore upon book accounts or promissory notes, and upon receiving such payment in full of all such book accounts or promissory notes, I agree to transfer said property to said John Bashore free and clear from all incumbrances done or suffered by me. 'I also agree that said John Bashore shall have the possession and use of said real property during the time this contract remains in force, and shall pay as a rental therefor all state, county, and district taxes of every kind which may be levied or assessed against said property. Dated January 4, 1907. [Signed] Chas. G. Lamberson.'"

It is alleged:

That "before the term of four years next after the said trust agreement was executed by the said Charles G. Lamberson, plaintiff and his wife, Rachel D. Bashore, brought suit to terminate the terms and conditions of the said trust, and to have the said real estate sold and the proceeds applied on the debts, if any, by the said Lamberson, and the balance to be applied to the said cestui que trust; that pending the said proceedings it was discovered by the said plaintiff that he had sold and delivered to and by deed of conveyance had given to the said Rachel D. Bashore, his wife, the aforesaid real estate, by deed dated January 2, 1910."

The complaint then alleges that plaintiff and defendant attempted to settle their accounts, but were unable to do so, and that Lamberson brought suit against plaintiff and his wife to determine the amount due from them; that on the trial of said action the superior court gave judgment in favor of the plaintiff therein, Lamberson, in the sum of \$12,195.97, which amount, on appeal to the Supreme Court, was reduced to \$8,900.50. It is then stated:

That both the superior court and the Supreme Court "indulged in much obiter dictum," but that the sole point decided was as to the amount due; "that said judgment as modified and corrected was made and entered on the 27th day of March, 1914, and thereafter the said defendant herein abandoned his said trust, disregarded the fact that this action was pending to adjudicate and to determine the relation of trust, * * * and caused an execution to be entered," under which the property was sold and bought by the defendant, Lamberson; that, on "the 22d day of July, 1915, and within less than a year after the sale aforesaid, the said Rachel D. Bashore redeemed the real estate described in the said trust signed by the

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 65 Cal. 11x.

² Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 67 Cal. 11x.

said Lamberson and in this complaint, by paying the amount bid for the said real estate by the said Lamberson and interest thereon at the rate of 1 per cent. per month, which is evidenced by a certain certificate of redemption duly made, executed and signed by the sheriff of Tulare county, and delivered to Rachel D. Bashore, then the cestui que trust, and the beneficiary thereof; that the said certificate of redemption described the aforesaid real estate (giving the description and the fact of the recordation of said certificate), and the same (the land) is and remains the property of the said Rachel D. Bashore and those who hold under her, and specially this plaintiff, who, by virtue of that certain quitclaim deed duly executed by Rachel D. Bashore on the 22d day of July, 1915, and admitted to record in the office of the county recorder of Tulare county on the 22d day of July, 1915, * * * and by virtue thereof this plaintiff is the owner thereof."

It is next alleged:

"The plaintiff therefore pleads as a bar to any further acts of ownership by the said defendant the provisions of the statute of redemption, section 703 of the Code of Civil Procedure of the state of California, and alleges that under and by virtue of said section, and the provisions thereof, the effect of the said sale is terminated, and forever barred; that the provisions of the trusted estate have been by virtue of the various acts of the said defendant, Chas. G. Lamberson, violated and abandoned; that the deed made by the said Geo. W. Zartman to the said Chas. G. Lamberson ought to be set aside, held for naught, and without a valuable, or any, consideration therefor, and that this court ought to appoint a commissioner to make and execute a good and proper deed to the said real estate named in this complaint."

The second count "reincorporates" the allegations of the first cause of action as to the facts culminating in the making of said "declaration of trust on the 4th day of January, 1907," and proceeds:

"That the reason and consideration of and for the said trust was, and is, in the fact, that the said Chas. G. Lamberson had procured a deed for the said real estate, as the attorney for this plaintiff, and was acting for and in lieu of the said plaintiff, and in his room and stead, and after obtaining the said deed, simultaneously with the receipt thereof from the said Geo. W. Zartman, he, the said Chas. G. Lamberson, then and there created the said trust by making and executing the same."

The value of the property is stated to be \$16,000, and it is alleged that defendant, knowing its value, "made exorbitant and inequitable charges that he might involve the same in controversy," and that said charges were made to embarrass plaintiff "and to prevent a settlement till the statute of limitations had barred the action on his trust." There is then an allegation to the effect that defendant never disputed the title of plaintiff to the property until he, the defendant, brought suit and that said Lamberson "acknowledged the rights and title to the said tract by making out, as attorney for this plaintiff a homestead on said property." There is an allegation that defendant has collected \$288.50 for wheat and barley grown on the premises which should be paid to plaintiff. There is also an allegation, substantially the same as the one above quoted

herein, as to the redemption of the property by Rachel D. Bashore from the sale of said property under execution to satisfy the judgment of the defendant and the quitclaiming of the land by said Rachel to the plaintiff, John Bashore. There are many other allegations in both counts to which, under our view of the case as presented, it is not necessary to refer.

As we understand the complaint, we gather therefrom that what the plaintiff is complaining of is that the judgment in the former action, even as reduced by the decision of the Supreme Court, is for a much larger sum of money than is or was actually due from the plaintiff and his wife to the defendant, and that the object of this suit is to have the trust relation once existing between the parties as to the land in question established and continued, and thus secure a readjustment of their financial differences and a reduction of the judgment.

It may parenthetically be observed that, although Lamberson held the legal title to the property at the time he obtained the judgment referred to, he caused execution to be issued upon said judgment against the property in question for the purpose of satisfying said judgment. This course was doubtless adopted for the purpose of selling and disposing of any equity either the plaintiff or his wife might have in the land, particularly the wife, to whom, it is alleged, as seen, the plaintiff by deed conveyed the property on January 2, 1910.

[3] It may be conceded that Lamberson took the conveyance of the land from Zartman for the purpose of securing the payment to him of all moneys due from the plaintiff and his wife to him, and that the written agreement whereby he agreed to convey to the plaintiff upon the payment of all such moneys created as to the said real estate a trust relation between him and the plaintiff and his wife. But, according to the complaint itself, that relation ceased to exist when Lamberson caused the land to be sold under an execution issued in the case of Lamberson v. John Bashore and Rachel D. Bashore (see 167 Cal. 387, 139 Pac. 817), to satisfy the judgment obtained by him therein, as modified by the Supreme Court. When that sale took place, the agreement creating the trust was at an end, and so, of course, was the trust relation, notwithstanding that Lamberson himself bought the land at the execution sale. Moreover, Rachel D. Bashore, as a redemptioner, redeemed the land, and thereafter conveyed it to her husband, the plaintiff in this action. When, therefore, this action was instituted, the title to and possession of the corpus of the trust had passed out of the defendant, and finally passed to the so-called cestui que trust himself.

[4] The judgment in the case between Lamberson and the Bashores is, of course, conclusive as to the amount due the former

from the latter, and cannot be attacked or challenged legally, except upon some fraud or other sufficient matter collateral or extrinsic to the questions necessarily involved, examined, and adjudicated in the proceeding or action in which said judgment was rendered. Certainly learned counsel will not contend that the testimony upon which the findings supporting the judgment were predicated could be re-examined in this action for the purpose of determining whether the judgment was thus supported, or that a judgment in a collateral action could be vitiated or set at naught even if it could be shown that it was the culmination of insufficient or perjured testimony.

The complaint here does not directly allege that the judgment was procured through the fraudulent acts or conduct of the defendant. The objection to the judgment is merely that it is for an amount in excess of the sum actually due, a question which was presumptively litigated and finally determined in the action in which the judgment was obtained.

It is very clear that the complaint states no cause of action for the relief prayed for or any relief, and that the demurrer was properly sustained.

It may be added that the opinion of Mr. Justice Melvin in the case of *Lamberson v. John Bashore et al.*, 167 Cal. 387, 139 Pac. 817, supra, presents a full statement of the facts as found by the trial court leading to the judgment in said action, to satisfy which the real estate herein involved was sold.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(36 Cal. App. 116)

PERKINS v. EDINBURG et ux. (Civ. 2038.)

(District Court of Appeal, Second District, California. Feb. 1, 1918. Rehearing Denied by Supreme Court April 1, 1918.)

1. APPEAL AND ERROR ⇨757(1) — SCOPE — RECORD—SUFFICIENCY.

The court on appeal will assume that appellant has brought up in briefs such portions of the record as he desires to call to the court's attention, as required by Code Civ. Proc. § 953c, and will confine its statement of facts to the matters so called to its attention.

2. APPEAL AND ERROR ⇨935(2)—PRESUMPTIONS—OPENING DEFAULT.

Where the court granted motion to set aside an order opening default, and the record on appeal did not show the facts, the court will assume that they supported the ruling, since they may have been in dispute.

3. JUDGMENT ⇨173—DEFAULT—VACATION.

Where default was entered in June, 1913, and in October a "copy" of stipulation for vacation thereof was filed, and a few days later a second default was entered, and in May, 1915, the original stipulation for vacation was filed and the default vacated, and answer filed, which had been verified in September, 1914, an order setting aside the order vacating the default cannot be held error without affirmative showing of

good reason why the answer was not sooner filed.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Geo. H. Perkins against Everett Edinburg and wife. From an order setting aside an order opening default, defendants appeal. Affirmed.

Cates & Robinson, of Los Angeles, for appellants. Cass & Shelton, of Los Angeles, for respondent.

CONREY, P. J. This is an action to recover a sum of money alleged to be due upon contract. Judgment by default was duly entered on the 23d day of June, 1914. On October 3, 1914, there was filed in the action a document marked "copy," purporting to be a stipulation between the attorneys for the plaintiff and the attorney for the defendants to the effect "that the judgment heretofore entered therein upon default may be vacated without prejudice to either party, the said default set aside, and the defendants permitted to file their answer therein within five days after said judgment is so vacated and said default set aside." Said copy was dated September 23, 1914. On October 14, 1914, a second entry of default of the defendants was indorsed upon the complaint and a second entry of judgment was made by the clerk on October 22, 1914. On May 28, 1915, a document purporting to be the original stipulation, of which a purported copy had been filed as above stated, was filed in this action. Thereupon on the same day, May 28, 1915, the court made its order reciting the terms of said stipulation and ordered:

"That the judgment heretofore entered in the above-entitled action, in favor of the plaintiff and against the defendants, is hereby vacated and set aside without prejudice to either party to said action, and the default of the defendants which was entered in said action is hereby set aside and the defendants are hereby given five days from this day within which to serve and file their answer to the complaint in said action."

On the same day the answer (which had been verified on September 14, 1914), was filed. Thereafter, on July 12, 1915, upon due notice, the plaintiff moved the court to set aside the order of the court made on the 28th day of May, 1915, upon the following ground:

"That the said stipulation was given to the attorney for the defendants upon the agreement that it be filed immediately, on or about the 15th day of July, 1914, and that a duplicate of the said stipulation was thereafter filed on the 3d day of October, 1914, and the terms of the said stipulation have been fully complied with by plaintiff."

The motion was granted by order made on said 12th day of July, 1915, and the appeal is by the defendants from that order.

[1] Only a typewritten transcript on appeal has been filed herein. We assume that appellants have printed in their brief such

portions of the record as they desire to call to the attention of the court, and our statement of facts is confined to the matters thus brought to our attention. Code Civ. Proc. § 953c. There is no brief for the respondent.

[2] Counsel for appellants inform us in their brief that the motion of July 12, 1915, was heard upon affidavits and the records of the case. The minute order as printed in the brief shows that at least one affidavit was presented by the plaintiff's attorney. There has not been printed with the brief a copy of the affidavits or any portion thereof. Counsel suggest that the motion could not have been granted upon the ground that the stipulation was given in July, and they further insist that the document filed on October 3, 1914, was not an original of the stipulation, but only a copy. As to these matters the facts may have been disputed, or may have been entirely favorable to the plaintiff as shown by the affidavits; and we must assume that they did support the motion, since the court granted that motion.

[3] Appellants contend that judicial action was necessary to vacate the judgment or set aside the default, and that since there was no judicial action to that effect until May 28, 1915, appellants were entitled under the stipulation to file their answer within five days after that date. Assuming that the filing of a copy or duplicate of the stipulation did not alone vacate the judgment or set aside the default, it does not necessarily follow that the court erred in setting aside the order of May 28th. The court may have found in the affidavits ample reason to be satisfied that the stipulation had been granted by plaintiff's attorneys actually on July 14, 1914, upon the agreement stated in the motion; and that, under the circumstances shown, no good reason existed for allowing the defendants to have their default set aside in order that they might then file an "answer and cross-complaint," which on its face had been verified and ready for filing ever since the previous September.

The order is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

(36 Cal. App. 253)

BEEM et al. v. REICHMAN et al. (Civ. 1776.)

(District Court of Appeal, Third District, California. Feb. 12, 1918.)

EASEMENTS §61(3) — WAY OF NECESSITY — ACTION FOR ESTABLISHMENT — PLEADING AND EVIDENCE.

Under Civ. Code, § 1104, providing that a transfer of real estate creates in its favor an easement to use other real estate of the grantor in the same manner and to the same extent as it was obviously and permanently used by the grantor, for the benefit of the estate transferred, when the transfer was agreed on or completed, a grantee of land having no access to a high-

way, without trespassing on land of strangers, except over other land of the grantor, seeking to establish a way of necessity, must allege and prove that the road claimed to be appurtenant to the granted land was in use as such by the grantor when he conveyed to plaintiffs, and is the only road by which they can pass to and from the granted land, and is necessary to the beneficial use thereof, besides definitely locating it, and stating its width.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by M. O. Beem and others, trustees of the town of Ft. Jones, against G. A. Reichman and another. From an adverse judgment and order, defendants appeal. Reversed, with direction.

Taylor & Tebbe, of Yreka, for appellants. H. V. Ley, of Yreka (Wm. V. Cowan, of Sacramento, of counsel), for respondents.

CHIPMAN, P. J. This is an action to have a right of way declared from plaintiffs' land over defendant Reichman's land to a highway.

It is alleged in plaintiffs' verified amended complaint: That on June 16, 1909, defendant Reichman was the owner of a certain tract of land described as follows:

"Commencing at the northwest corner of said S. W. ¼ of S. E. ¼ of section 35, in township 44 north, of range 9 west, M. D. M., and running thence south for the distance of 600 feet to a rock set in earth; thence running east for the distance of 100 feet to a rock set in earth; thence running a little east of north for the distance of 600 feet more or less, to the north boundary line of said forty acres; and thence west along said line for the distance of 250 feet to the place of beginning"

—together with the tenements, appurtenances, etc.; that on the 16th day of June, 1909, defendant Reichman conveyed said tract of land to plaintiffs, by the above description, and that plaintiffs are now and for a long time have been in possession thereof. That defendant Reichman was on said day "also owner of the land lying on the east and south sides of said tract and between said tract and the county road leading from Ft. Jones to Yreka. That said tract is bounded on the north and west sides by lands of the Southern Pacific Company" (amended to read Central Pacific Railroad Company). It is then alleged in paragraph 6 as follows:

"That the sole and only way from said tract to a public highway is over and across the land of said defendant G. A. Reichman from the east boundary of said tract in a southeasterly direction to the division fence between the land of said defendant G. A. Reichman and land owned by James A. Davidson and others, thence in an easterly direction and parallel with said division fence to the aforementioned county road; that said described way is the most reasonable and practical route that can be selected over and across the lands of said defendant; that there is, and for a long time has been, a road used by said defendant along the line of said route; that plaintiffs are the owners of and entitled to said right of way over the land of said defendant Reichman to the county road aforesaid, to pass and repass on foot and with

teams; and that said easement is appurtenant to the land heretofore described as having been conveyed to plaintiffs."

It is alleged that plaintiffs have requested defendants to "acquiesce in the definite locating of a right of way between said tract and the aforesaid county road, across the land of said defendant G. A. Reichman, * * * but the defendants refuse and neglect to do so"; that defendant Reichman "is still the owner of the land lying between said tract and said county road, and that said county road is the only public highway adjacent to said tract or to the lands of said defendant, Reichman; that the defendant Ft. Jones Creamery & Packing Company claims some interest therein by virtue of an option, but" said right is subject to the right of plaintiffs herein.

Defendants interposed a demurrer to the complaint for insufficiency of facts, and also on the ground of uncertainty, in that "it cannot be told whether plaintiff intends to allege that, at the time when it is claimed that defendant G. A. Reichman conveyed said property to plaintiff, said property was bounded as described in said complaint. Neither can it be told whether or not at the time of said conveyance there was a public highway running past the said land." For like reason the complaint is alleged to be ambiguous and unintelligible. The demurrer was overruled, and defendants answered: Admitted that defendant Reichman was, on June 18, 1909, the owner of the tract conveyed to plaintiff, "and was also owner of the land lying on the east and south sides of said tract and between said tract and the county road leading from Ft. Jones to Yreka," but for lack of knowledge and on information and belief denied that the Central Pacific Company was owner of the land on the north and west sides of said land; alleged that the said tract of land was conveyed to plaintiffs upon certain described conditions, but, as there was no evidence touching this matter, they need not be further noticed; so, also, no evidence was offered as to certain averments of the answer concerning a road now existing from Ft. Jones to the west side of the tract in question. Defendants made certain denials of the averments in said paragraph 6 of the complaint, which will be hereinafter noted.

The cause was tried by the court without a jury. The court made the following finding of fact:

"That all the allegations of the amended complaint on file herein are true"

—and, as conclusion of law, the court found:

"That plaintiffs are entitled to a decree of this court determining and adjudging that plaintiffs are the owners of, and entitled to, the right of way described in the complaint on file herein, said right of way of the minimum statutory width of 20 feet."

The decree adjudged plaintiffs "entitled to an easement for right of way over and across

the lands of defendant G. A. Reichman, to pass and repass on foot and with teams (said easement not to exceed the minimum statutory width of 20 feet), extending from the (respondents say in their brief the word 'east' should be here inserted) boundary of their parcel of land, described in the amended complaint herein, in a southeasterly direction to the division fence between the land of defendant G. A. Reichman and lands owned by James A. Davidson and others, thence in an easterly direction and parallel with said division fence to the county road leading from Ft. Jones to Yreka and following throughout its length the road mentioned in said amended complaint and therein alleged to exist across the land of said defendant G. A. Reichman." Defendants appeal from the judgment and from the order denying their motion for a new trial.

In their specifications of error, defendants challenge the sufficiency of the evidence to support the finding that the facts set forth in paragraph 6 of the amended complaint are true. They challenge the sufficiency of the evidence to support the finding that plaintiffs have requested defendants to acquiesce in definitely locating a right of way across defendant Reichman's land from said tract to the public highway; also that said defendant Reichman is still the owner of the land lying between said tract and said county road, and that said county road is the only public highway adjacent to said tract or to the lands of said defendant Reichman; that the judgment is contrary to law in that there are no findings of fact to support it; that it is not definite or certain as to the location of the land claimed as a right of way and is uncertain as to the servitude to be imposed upon the lands of defendant Reichman, and the location of the easement cannot be determined from the judgment.

Plaintiffs introduced no witnesses; the evidence in support of the findings and judgment being entirely documentary, except as further supplied by the admissions of defendants in their answer.

Plaintiffs introduced a United States patent to the Central Pacific Railroad Company to the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, the S. W. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of section 35, township 44 north, range 9 west, M. D. M., which includes the tract conveyed to plaintiffs by the defendant Reichman. Plaintiffs here rested, as also did defendants. There was no evidence offered to show that any portion of this patented land was conveyed to Reichman, but it was alleged and was admitted that Reichman was the owner of the tract conveyed to plaintiffs and was the "owner of the land lying on the east and south sides of said tract (the tract conveyed to plaintiffs) and between said tract and the county road leading from Ft. Jones to Yreka."

Plaintiffs introduced no evidence to show that the road referred to in paragraph 6 of

the amended complaint in fact existed, or that "there is or for a long time has been a road used by said defendant along the line of said route," but, as the averment was not denied, it may be taken as true. There was no evidence offered to show, as alleged, that this road "is the sole and only way from said tract to a public highway," or that "it is the most reasonable and practicable route that can be selected over and across the land of said defendant," or in support of the averment that the said road "is appurtenant to the land hereinbefore described as having been conveyed to plaintiffs." These averments were specifically denied. Respondents state in their brief that the theory upon which the action was brought is "that where one grants land surrounded by his own lands or partly by his lands and by the lands of strangers, such grantor impliedly grants a right of way to a public highway over and across his remaining lands" (citing *Taylor v. Warnaky*, 55 Cal. 350). It was held in that case that a "way of necessity" arises in favor of a parcel of land "where the same is wholly surrounded by the grantor's other land, or partly by this and partly by land of a stranger. This arises from the effect of the grant or reservation of the land itself, and is so far appurtenant to it as to pass with the land to another, provided he have no other way of access to the same. *Washburn's Easem. & Serv.*, side p. 163, and cases there cited." Cited approvingly in *Barnard v. Lloyd*, 85 Cal. 131, 133, 24 Pac. 658; *Blum v. Weston*, 102 Cal. 362, 367, 36 Pac. 778, 41 Am. St. Rep. 188. Section 1104 of the Civil Code provides as follows:

"A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed."

Section 801 of the same Code declares what may be attached as servitude to other land "as incidents or appurtenances," and among these is "the right of way." Unless expressly excepted, "the transfer of a thing transfers its incidents." *Id.* § 1084. The action is clearly for a right of way as an easement arising impliedly out of a grant of land because of a necessity, and that necessity arises in the present case from the fact alleged that the grantee has no other way to and from the land than that referred to in the amended complaint, without trespassing upon land of strangers. *Goddard's Law of Easements* (Bennett's Ed.) p. 267.

In order that an easement may pass by implication it must be annexed to the estate granted, must be reasonably necessary for the beneficial enjoyment of the same, and must be in open, apparent, and continuous use at the time of the grant. 14 Cyc. 1168.

"When the owner of land divides his property into two parts, granting away one of them, he is taken by implication to include in his grant all such easements in the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form which it assumes at the time he transfers it" (*Cave v. Crafts*, 53 Cal. 135, 140); not that it shall be absolutely necessary for the enjoyment of the estate granted. 14 Cyc. 1171. Three things are necessary to create an easement by implied grant: (1) A separation of the title; (2) that before the separation takes place the use which gives rise to the easement shall have been so long continued and so obvious as to show that it was intended to be permanent; and (3) that the easement shall be necessary to the beneficial enjoyment of the land granted. 14 Cyc. 1168.

A way of necessity is derived from the law, and depends solely on the situation and boundaries of the land to which it is claimed to be appurtenant as they existed at the time of the conveyance. 14 Cyc. 1174. The right of way rests in necessity and not in convenience. *Id.* 1173.

The road alleged to have been used by defendant Reichman is not alleged or shown to have been openly used by him at the time he conveyed said tract to plaintiffs, nor is its initial point on the boundary of said tract definitely stated in the complaint or in the judgment. It is stated in the judgment that the right of way decreed "is not to exceed the minimum statutory width of 20 feet." It is not shown that the road referred to in the complaint or in the judgment is "the sole and only way from said tract to a public highway," nor is it shown, as alleged, that it is a "reasonable and practicable route." The point at the center of the road on the east boundary of said tract can readily be fixed and described with reference to a corner of the tract and the course of the road throughout its entire length should be stated to be coincident with the road as used by defendant Reichman, and its width as determined should be definitely stated. It should be alleged and proved that this road, claimed to be appurtenant to the land, was in use as such by defendant Reichman when he conveyed the land to plaintiffs, and was and is the only means by which plaintiffs can pass to and from said tract, and that it is necessary to the beneficial use of said tract by plaintiffs. These are but just requirements on plaintiffs' part before the servient tenement should be burdened with the easement. Civ. Code, § 1104.

The judgment and the order are reversed, with direction to the trial court to grant plaintiffs leave to amend their complaint if so advised.

We concur: BURNETT, J.; HART, J.

(36 Cal. App. 212)

PEOPLE v. ESCALERA. (Cr. 581.)

(District Court of Appeal, Second District, California. Feb. 8, 1918.)

1. FORGERY — 34(2)—VARIANCE.

Under Pen. Code, § 470, as to forgery, a charge that accused forged a check made payable to order of another than the person whose name was signed as maker would be established by proof of such making alone, without showing an actual passing of the check, such an instrument being capable of being used to defraud.

2. CRIMINAL LAW — 1032(7)—APPEAL—OBJECTIONS BELOW.

In prosecution for forgery of check, the objection of variance between the charge in the information and the proof, in that accused was not charged with making any indorsement on the back of the check, when in fact the indorsement did appear on the back of the check as exhibited, could not be raised on appeal, where the testimony showing that accused indorsed the name on the back of the check when he passed it came in without objection.

3. FORGERY — 44(1)—EVIDENCE.

In forgery prosecution, evidence held sufficient to show that another check passed by accused, offered to show accused's intent, had been forged.

4. CRIMINAL LAW — 824(8) — FAILURE TO INSTRUCT—REQUEST.

In a forgery prosecution, while it would have been better for the court to have distinctly pointed out in instructions the purpose for which evidence of a subsequent forgery was received, error could not be predicated on failure to do so, where accused offered no instruction covering the matter.

5. CRIMINAL LAW — 829(18)—INSTRUCTIONS — DEGREE OF PROOF.

Refusal to instruct that accused could not be convicted upon mere suspicion was proper, where the jury were fully instructed that they must find accused's commission of the acts charged beyond a reasonable doubt.

6. FORGERY — 14—INJURY FROM FORGERY.

To constitute the crime of forgery it is not necessary that any one be actually defrauded, but it is enough if an alleged forged check is of such a character that a person accepting it as true and genuine might suffer loss.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Juan Escalera was convicted of forgery, and appeals. Affirmed.

O. V. Willson and Willson & Stensland, all of El Centro, for appellant. U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., and R. B. Camarillo, of Los Angeles, for the People.

JAMES, J. Appellant was convicted of the crime of forgery. He appeals from a judgment of imprisonment and from an order denying his motion for a new trial.

The charge made in the information was that the defendant, with intent to defraud certain persons, made and passed as true and genuine a check, which check was drawn upon a bank at Brawley, Cal., made in favor of one Carmel Relles and purporting to have been signed by H. G. Baughman. The evidence showed that this check was brought

by the defendant Escalera to the store of Shore Bros. at Brawley; that the defendant presented the check and asked that it be cashed, representing himself to be the payee named in the check; that the proprietors of the store cashed the same after the defendant had indorsed the name of the payee upon the back thereof; that some days later, when the check was returned by the bank, the defendant, who was seen passing the store, was called in and was told of the fact that the check had not been paid; that he thereupon told the storekeepers that he would take up the same and at that time delivered to them a part of the amount mentioned in the check. The storekeepers retained the check, and a few days later the defendant brought in the remainder of the money, at which time he was placed under arrest by a constable. That the check was a forged instrument the evidence amply established, and the evidence also established beyond question that the defendant was not the payee named in the check. Defendant's name was as it appears herein, while Carmel Relles was a person who was known to the defendant. Not only was the proof sufficient to establish these things, but an express admission appears in the transcript of the testimony covering the same matter, as made by counsel for the defendant in the following words:

"Mr. Willson: We can perhaps shorten matters in this trial. We will admit the signature on the check cashed by Mr. Shore and handed to Mr. Baughman is a forgery of Mr. Baughman's name, and we admit the defendant went there and cashed the check and all testimony bearing upon that point is unnecessary in view of the fact we admit it."

[1, 2] One of appellant's principal contentions for error is that there was a variance between the charge made in the information and the proof, in that the appellant was not charged with making any indorsement upon the back of the check, when in fact the indorsement did appear on the check as exhibited. He cites *People v. Thornburgh*, 4 Cal. App. 38, 87 Pac. 234, and *People v. Cole*, 130 Cal. 13, 62 Pac. 274. In the *Thornburgh* Case the check was one payable to the order of the maker and in the *Cole* Case the check was drawn by the defendant in his own name and made payable to himself. It was pointed out in these decisions that there could be no defrauding of any person by the making of checks so drawn, unless an indorsement on the back was added, and in the information there considered the forgery of an indorsement was not charged. This case presents entirely different facts. The check here was not made payable to the order of the maker, and it was an instrument capable of being used to defraud. The charge made by the information that the defendant made such a check would have been established by proof of such making alone, without showing an actual passing of the check. Section 470,

Pen. Code. The testimony introduced showing that the defendant indorsed the name of Carmel Relles upon the back of the check at the time he passed it came in without objection, and we think it is now too late for the defendant to complain of possible error committed in that regard.

[3] Specimens of the handwriting of the appellant were introduced in evidence for the purpose of enabling the jurors to make a comparison of the writings before them. Among the latter was a check purporting to have been drawn to the order of one Bonefessio Escalera, and the proof showed that this check had been negotiated and passed by this defendant at another time at a different store. This latter check bore on the back the name of the payee, and it was offered and received in evidence under the rule which permits like acts of a defendant to be shown where particular intent is involved. *People v. King*, 23 Cal. App. 259, 137 Pac. 1076. The latter decision sustains the right of the prosecution to make such proof, whether it refers to a transaction subsequent to that charged or one prior thereto. Appellant's counsel complain that there was not sufficient evidence showing that the last-mentioned check had been forged. It was shown without dispute that the defendant, who was not the payee named in the check, presented the same and received payment of the amount either in cash or merchandise. There was also before the jury samples of the handwriting of defendant, so that the evidence was available upon which the jury might properly conclude that the defendant had forged the latter check. There was also the testimony of Bonefessio Escalera that he had not delivered such a check to the defendant, and the testimony of Baughman that the signature attached thereto was not his signature.

[4] It would, no doubt, have been better for the court in its instructions to have distinctly pointed out to the jury the purpose for which the evidence of the subsequent forgery was received, but no instruction was offered by the defendant covering that matter; hence no error can be predicated upon the failure of the court so to do. It is contended that the court erred in refusing to instruct the jury that it was not to consider the indorsement made upon the back of the check described in the information, but to disregard "any testimony at this trial given, either against the defendant or in favor of him, concerning any indorsement or any writing upon the back of the check. * * *"

We do not think the defendant was entitled to have this instruction given in the form proposed. As before noted, without any objection the prosecution proved the entire transaction concerning the passing of the check, and we think that all of the acts of the defendant concerning that transaction

were proper to be proved and considered by the jury. Counsel expressly admitted that the check had been forged, and that the defendant went to the store and cashed it, adding that "all testimony bearing upon that point is unnecessary in view of the fact we admit it."

[5] The refusal of the court to give an instruction that the defendant could not be convicted upon mere suspicion, was proper, for the court had fully instructed the jury that they must find beyond a reasonable doubt that the acts charged against the defendant were committed by him.

[6] The instruction that to constitute the crime of forgery it is not necessary that any one should be actually defrauded, but that it is enough if the alleged forged check is of such a character that a person accepting it as true and genuine might suffer loss, was not objectionable. *People v. Kuhn*, 33 Cal. App. 319, 185 Pac. 26. As we have before indicated, we think that the charge given by the court might well have contained a more complete exposition of the law affecting the purposes for which the different classes of evidence might be considered; but it cannot be said from an examination of the entire record that a miscarriage of justice has resulted by the conviction of the appellant.

The judgment and order are therefore affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(36 Cal. App. 229)

HOWARD v. CUNNINGHAM et al.
(Civ. 2325.)

(District Court of Appeal. First District, California. Feb. 9, 1918. Rehearing Denied by Supreme Court April 10, 1918.)

1. BOUNDARIES \S 3(3)—MONUMENTS—COURSES AND DISTANCES.

That monuments upon the ground control courses and distances as recited in a deed is the unquestioned rule of construction of deeds under Code Civ. Proc. \S 2077, subd. 2, providing that where ascertained monuments are inconsistent with measurements the monuments are paramount.

2. BOUNDARIES \S 35(5)—MONUMENTS—PAROL EVIDENCE.

Where a monument has been obliterated or destroyed, its location may be proved by parol.

3. BOUNDARIES \S 37(3)—SUFFICIENCY OF EVIDENCE.

Evidence held to warrant finding that a lost stake which would determine the boundary in dispute was at a place where calls of deeds located it.

4. APPEAL AND ERROR \S 1011(1)—REVIEW—FINDINGS.

A finding of trial court that calls of deeds were correct will not be disturbed; oral testimony as to location of lost post which would determine boundary in dispute being somewhat contradictory and unsatisfactory.

Appeal from Superior Court, Mendocino County; George A. Sturtevant, Judge.

Action by James L. Howard against E. L. Cunningham and others. From the judgment rendered, plaintiff appeals. Affirmed.

Robert Duncan, of Ukiah, for appellant. Thomas & Thomas, of Ukiah, for respondents.

BEASLY, Judge pro tem. This action arises out of a dispute over a boundary line. The plaintiff, James L. Howard, is the owner of lot 15 and $8\frac{1}{2}$ acres off the north end of lot 18 of the Yokayo rancho, near Ukiah, in Mendocino county, and the defendant Ruddick is the owner of the remainder of lot 18, which he acquired from his codefendant E. L. Cunningham. Plaintiff's father formerly owned the two lots, and some years ago he conveyed to the plaintiff the land now owned by him as above stated, and the part now owned by Ruddick he conveyed to another son, by name Mack Howard, who in turn conveyed it to Cunningham.

The sole point in this case is whether the evidence supports the finding against plaintiff of the location of one of the corner posts common to the two properties. The location of this post determines the boundary line between the properties of the plaintiff and of Ruddick. The stake has long since disappeared. The calls of the deed by which plaintiff's father acquired the land now owned by plaintiff, and of the deed conveying it to the latter, both locate this corner—which is described as "P 8"—at the point which is found to have been its location by the trial court.

Oral evidence was introduced to discredit the calls of these deeds as to the location of this corner. All the other monuments fixing the boundaries of these properties are in existence, and their location unquestioned. The point of location of stake "P 8" was, it is conceded, in a line at the northerly end of which is a stake marked "P 9" and at the southerly end of which is a stake marked "P 6." This line forms the entire westerly boundary of Ruddick's land and a part of the westerly boundary of the land of plaintiff. By the calls of the respective deeds of plaintiff and Ruddick this line from end to end should be 44.49 chains long. It is in fact by actual surveyor's measurement on the ground .44 chains longer than this, or 44.93 chains in length; and the plaintiff claims that instead of the stake "P 8" being located, as found by the court, 2.19 chains south from the corner "P 9," it should have been found to be 2.95 chains south therefrom, or 44.98 chains northerly from the corner "P 6."

Mack Howard, upon whose testimony plaintiff mainly relies, testifies that he saw this stake set by the engineer who made the original survey; that it was set at the westerly end of an old fence and in line with two trees, which he stated are still standing, and that he saw this post there for many years thereafter; that this old fence was straight-

ened subsequent to the survey, and thereafter was moved 30 feet south of its original location. This fence still stands on the line to which it was removed. Other members of the Howard family also testified to the same facts except as to actually seeing the survey; Mack Howard being the only witness called who claimed to have been present at the placing of the stake "P 8."

[1-3] The plaintiff contends that the evidence of these witnesses, coupled with certain inaccuracies in the calls of the deeds as to other distances and in the statement of acreage contained within their descriptions, concluded the trial court from finding the location of the stake "P 8" at the point where the decision of the court places it. With plaintiff's assertion that monuments upon the ground control courses and distances as recited in a deed no fault can, of course, be found. This is the unquestioned rule of construction of deeds. Code Civ. Proc. § 2077, subd. 2. Nor can any exception be taken to plaintiff's statement that where the monument has been obliterated or destroyed its location may be proved by parol. But with his contention that under the evidence in this case the trial court could not find the location of the post "P 8" at the point where the finding places it we cannot agree.

The calls of these two deeds were some evidence of the location of the lost stake "P 8." Were there no other evidence whatever, no question could be made but that these calls would be controlling in this case; and were the other evidence conclusive against these calls we are not prepared nor called upon in this case to say that plaintiff might not be correct in his contention that the calls of the deeds must fall before it. But here there are certain inherent disagreements and defects in the testimony of plaintiff's witnesses which tend to weaken the value for accuracy of the evidence of Mack Howard in particular, and also of the other witnesses. For instance, without analyzing this evidence minutely as counsel have done, it may be said that Mack Howard was only 10 or 11 years old when the survey testified to was made, and yet he testifies to the exact location of practically all the stakes set by the engineer. He was 59 years old when he testified. The survey was made 50 odd years ago. There were certain inconsistencies in the testimony of the various witnesses the significance of which it was the province of the trial court to determine. The judge who tried the case saw Mr. Mack Howard on the witness stand, observed his manner of testifying and whether his memory was accurate as to these events of long ago. Upon that judge rested the duty of weighing this oral evidence as against the calls of these deeds and as against the testimony of a surveyor, called by the plaintiff himself, whose evidence in a measure tends to corroborate the deeds.

We find nothing out of harmony with these views in the cases cited and relied upon by the appellant. Thus, in *Gordon v. Booker*, 97 Cal. 586, 32 Pac. 593, a corner post, occupying about the same relative importance to the decision of that case as the post "P 8" does to this, was not undiscoverable. Its location was found by the charcoal placed under it by the government surveyor. This charcoal was actually found in place at the time of the trial, and three surveyors and two other witnesses testified that it was a "charcoal" or "government" corner, and that the charcoal determined the place where the stake had been set. It also appeared that no other corner or stake had ever been seen at a different place in that vicinity. The plaintiff there relied for the location of this corner upon a survey made by courses and distances from a distant corner which, if correct, would have located the corner in question at a different point from the place at which the charcoal was found. The court found against the plaintiff and held that there was no conflict in the evidence. In other words, it discarded the survey from the distant corner in favor of the present location of the charcoal, which indicated the place where the original post had been set by the government surveyor. Of course, this corner monument could not be brought into court, but the testimony of five witnesses uncontradicted that it was the point at which the court found to be its location was held to be conclusive in that case as against a survey made as above indicated. Some language in that case, considered without regard to its context, has misled counsel as to the rule which must be deduced from the decision read as a whole.

In *Penry v. Richards*, 52 Cal. 672, also relied upon by the plaintiff, it was held that, if the evidence shows the point where the monuments had been established by the surveyor, such point must control in determining the location of the property. This is not in conflict with the position of the defendants here, for in the instant case the trial court evidently held that the oral evidence did not correctly point out the place where the stake "P 8" had been set by the surveyor. In the case just cited the court premises the rule announced upon the statement that the evidence must establish the monuments. This is true of all the cases cited by appellant. In each of them it is assumed that the evidence established the location of the disputed monument. In the present case, as we have seen, the trial court evidently held that the oral evidence did not so establish the location of the disputed post "P 8." In other words, the trial court found as a fact that the calls of the deeds as to the length of the line between the posts "P 9" and "P 8" were correct, discrediting, as it

had the power to do, the somewhat contradictory and unsatisfactory oral testimony of the plaintiff's witnesses as to the location of this post.

[4] The whole question is one of fact, and, the trial court having determined it, that ends the matter so far as an appellate court is concerned.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(36 Cal. App. 216)

PEOPLE v. VOGEL (Cr. 582.)

(District Court of Appeal, Second District, California. Feb. 8, 1918. Rehearing Denied by Supreme Court April 10, 1918.)

1. CRIMINAL LAW §415(2)—EVIDENCE—ADMISSIBILITY.

In a trial for murder, testimony of witnesses that deceased, just prior to his death, accused defendant of having shot him, which defendant denied, held inadmissible.

2. CRIMINAL LAW §419, 420(1), 1169(1)—EVIDENCE—HEARSAY—PREJUDICIAL ERROR.

Where in trial for murder a witness for the prosecution, after testifying that deceased accused defendant of having shot him, was asked if he had previously been informed defendant was under suspicion, and who had so informed him, his answer thereto was hearsay and prejudicial error.

3. WITNESSES §250—EXAMINATION—TESTIMONY OF STENOGRAPHER FROM NOTES.

Where a witness for the prosecution in a murder case testified that from the odor of burnt powder about the weapon it had been fired within an hour preceding, and the defense sought to impeach this by showing he had testified in another case that such odor would remain much longer, the court reporter was a proper witness as to such testimony and could use her stenographic notes to refresh her recollection, under Code Civ. Proc. § 2047.

4. CRIMINAL LAW §656(5)—EVIDENCE—INVADING PROVINCE OF JURY.

Where, in a murder trial, defendant attempted to impeach the expert testimony of a witness by showing he had testified differently in another case, the action of the trial judge in stating, after examination of reporter's transcript, that he found nothing in it to impeach the testimony of the witness was uncalled for, and encroached upon the province of the jury.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

John Vogel was convicted of murder, and appeals. Reversed and remanded.

Willson & Stensland, of El Centro, for appellant. U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., and R. B. Camarillo, of Los Angeles, for the People.

WORKS, Judge pro tem. The appellant was convicted of murder in the first degree, and was sentenced to life imprisonment. The appeal is from the judgment and from an order denying a motion for a new trial.

The crime for which the appellant is sought to be punished was in the shooting of one

Joe Ming, the occurrence having taken place near El Centro. Ming operated a dairy, and Vogel was employed by him as a milker. Both the men were Swiss and had been acquainted at least as long as Vogel had been in the United States, a period of 6 years. Vogel had been employed by Ming for 18 months, and they had been friends the entire time. Several other persons, including Ming's wife, were regularly on the ranch and they all testified that, not only had there been no trouble between the men on the day of the shooting, but that there had never been trouble of any kind between them. Ming himself stated, within a short time after he was shot, death not resulting from his wound until more than 36 hours had passed, that he had never had any trouble with Vogel, and that they had always been friends. The record shows no motive whatever for the commission of the crime by Vogel.

The shooting occurred in the early evening. Ming had left the ranchhouse immediately after dinner for the purpose of irrigating a certain field on the ranch. His wife and several others remained in the house, listening to a phonograph. Vogel was not among them, he having left the house from half an hour to an hour before Ming was shot. He says he went to a certain bunkhouse which was on the ranch and retired to bed, not caring to hear the phonograph, of which he says he had become tired. Those in the ranchhouse heard a shot in the direction in which Ming had gone, and also heard some one cry out. Mrs. Ming, a boy of about 16 and a man, one Zeno Burch, ran in the direction of the sounds, the boy reaching Ming first, then Mrs. Ming and then Burch. Ming was walking or standing in the field at a point about 200 yards from the ranchhouse. The boy asked him what was the matter, and he responded that somebody had shot him. He was immediately helped toward the house by the three who had come to his relief, but said nothing to any of them, either on the way to the house or after he was gotten to bed, as to who had fired the shot. As soon as Ming was placed on the bed, the boy who had helped him to the house, accompanied by another boy, went to the bunkhouse, where they found Vogel in bed and entirely undressed. The boys told Vogel that Ming had been shot, and he said, "You are just kidding me." He was told that the statement was true, whereupon he dressed, except that he remained barefoot, and went to the house. He entered the room where Ming lay and had a conversation with him. They were seen talking together by at least two witnesses, but the conversation was so quiet that it was not overheard, except to the extent that Zeno Burch testified that he heard Vogel answer, "Yah," as the reporter writes it, to something said by Ming. In response to telephone call, three or four deputy sheriffs arrived at the ranch from half an hour to an hour after the shooting occurred.

It was after their arrival that Ming made the statements referred to in the bedside conversation mentioned below. Up to that moment he had said nothing as to who had committed the crime upon him.

Aside from the bedside conversation and a dying declaration made by Ming in an automobile as he was starting from the house to a hospital, the evidence against Vogel was entirely circumstantial. Ming's wound, which was in the upper part of the abdomen, was inflicted by a 22-caliber bullet. He was the owner of a rifle of that caliber, which was used indiscriminately by those on the ranch, including Vogel. The latter was seen cleaning the weapon during the day, at about 10 or 11 o'clock. Kemp, one of the deputy sheriffs, says Vogel told him he had been shooting the gun all day. Kemp testifies, from an examination of the rifle after the shooting, that it was not discharged more than once or twice after it was last cleaned. It was kept sometimes in the ranchhouse and sometimes in the bunkhouse. On the day and evening of the shooting it was at the latter place. In addition to the circumstantial evidence already stated, Zeno Burch gave testimony that, as he proceeded after Mrs. Ming and the boy upon hearing the shot and the cry, he saw a man, whom he does not identify, move rapidly in a direction from the place where Ming was, and toward the bunkhouse. This man was near the bunkhouse at the time, and Burch says he saw him moving for a distance only of 15 or 20 feet, the place at which Ming was found after the shooting being several hundred feet from the bunkhouse. In a part of his testimony Burch says the man was walking rapidly. In another part he says he was running. On account of obstructions to his view, Burch could not see the door of the bunkhouse, but he says he did not see the man pass beyond that structure. It may be remarked here that the night was brightly lighted by the moon. The deputy sheriffs found some footprints in the neighborhood of and leading from near the scene of the crime and toward the bunkhouse, and they testified that a pair of Vogel's shoes fitted them. The shoes were of a medium size, one witness having testified that they were about No. 6½, another that they were about 8's. In making this statement of the circumstantial evidence in the record, we have placed it in the light most favorable to the case of the prosecution, and have refrained from stating evidence opposed to some of it and from stating hypotheses upon which the effect of some of it might be explained away.

The record contains testimony by the witnesses Zeno Burch, Cummings, Cleveland, and Kemp to the effect that Ming, while lying in bed after the shooting, accused Vogel of the crime. The appellant made motions to strike out the testimony of these witnesses upon this subject, but the trial court denied

the motions and permitted the evidence to stand. The testimony of Burch, who was another Swiss and did not speak English well, was that Ming pointed at Vogel and said, "That is the man there," and that Vogel answered, "I don't shot." Cummings testifies that Ming, pointing toward Vogel, said that was the man that killed him, that was the man that shot him, and that Vogel responded only with a certain contemptuous and unprintable expression, which to our minds, however, was equivalent to a denial of the accusation. Cleveland has it that Ming said, indicating Vogel, "That is the man who shot me; that is the man that killed me;" and that Vogel answered with the contemptuous expression already mentioned. Kemp was the nearest to Ming when these occurrences took place. He testifies:

"I asked him if he knew who shot him, and I was leaning over him, and he grabbed my arm and raised himself up in the bed and said, 'That is the man that shot me; that is the man that killed me.' Ming seemed to be suffering, and I laid him back in the bed and Mr. Cummings and Cass and Cleveland and myself and two or three others were in the room, and I walked around to where this defendant was, and asked him to come with me. Before I could get to him, he was protesting against Ming accusing him. He said he could not have done it, and what reason did he have to do it, and he was out in the bunkhouse asleep."

Kemp's request to Vogel to come with him is explained by the fact that the former was a deputy sheriff, as also were Cummings and Cleveland.

[1] The appellant's motion to strike the testimony of these witnesses was based on the rule stated in *People v. Teshara*, 134 Cal. 542, 544, 66 Pac. 798, 799. In that case the defendant was on trial for the murder of one Loucks. Before the latter died he accused the defendant of having inflicted his injuries upon him. The court said:

"The court also erred in refusing to strike out the evidence of Patton and Mullen as to the accusation made by Loucks, when Amaya and defendant were brought to his bedside. The statement made by Loucks at that time was hearsay, and Teshara made no admission of its truth, either expressly or tacitly. He expressly denied it. The court and the district attorney seem to have lost sight of the fact that it is not the accusation, but the conduct of the accused, that is evidence in such cases, and that the only reason for admitting the accusation is to explain the conduct. The district attorney should not have offered this evidence, knowing, as he did, that Teshara had not remained silent under the accusation, but had repelled it at the time it was made."

The respondent insists that *People v. Teshara* has no application in this case, and that the motion to strike was properly denied under *People v. Turner*, 1 Cal. App. 420, 82 Pac. 397, and *People v. Cole*, 141 Cal. 88, 74 Pac. 547. In the first of these cases the court said (1 Cal. App. 422, 82 Pac. 398) in dealing with the question of the admissibility of such accusations:

"Even where the defendant flatly denies the criminal act, yet if he goes on to make exculpatory statements, for instance, as to his where-

abouts at the time, and these statements can be shown to be false, then the statements, together with their falsity, may be shown on the theory that falsehood in the matter is an indication of conscious guilt. In such a case, it is the falsehood only that tells against the defendant."

The point now before us is governed by *People v. Teshara*, unless it be for the testimony of the witness Kemp to the effect that Vogel said he was out in the bunkhouse asleep when the crime was committed. It will be noted, however, that Kemp does not ascribe to Vogel the making of this statement immediately upon the making of the accusation. After Ming made the charge Kemp saw that the injured man was suffering, and laid him back in the bed. As Ming was shot in the abdomen Kemp naturally let him down carefully, taking some appreciable time in performing the act. After that was done he started toward Vogel, and it was as he was on his way that he attributes to Vogel the making of the remark about his having been asleep in the bunkhouse. Moreover, Burch, Cummings, and Cleveland all testify to what was said by Vogel in direct response to Ming's accusation, and neither of them imputes to him any remark like the one mentioned by Kemp. They were all nearer to him than was Kemp when the accusation was made. It appears, then, that by what Vogel said in immediate response to the accusation he repelled it, and did not seek to exculpate himself or to explain. The cases of *People v. Turner* and *People v. Cole* of course mean that a person accused of crime must, immediately upon the accusation, make the "exculpatory statements" which the opinions in those cases determine will entitle the conversation to be received in evidence. The accused person cannot be expected to continue long to rely alone upon his denial. If innocent, he will follow the accusation with instant repudiation, and will be satisfied to so leave the matter for a brief interval; but, even if innocent, his mind will quickly go to matters which will justify and sustain the denial before the world. Denial is not proof, and he will almost immediately begin to think of proof; and it will not be strange if his statements reflect the condition of his mind. We are satisfied that the point is ruled by *People v. Teshara* and not by the other two cases. Not only the disposition of the motion to strike Kemp's testimony depends upon what we have just said, but also the motions to strike the testimony of Burch, Cummings, and Cleveland. They all testified before Kemp, and there was a motion to strike the testimony of each concerning the bedside accusation as that testimony was given by each, but counsel for defendant himself asked that a ruling on all the motions be reserved, and he did not finally insist upon them until Kemp had testified and the prosecution was about to rest its case.

[2] After Cummings had testified to the

occurrences at Ming's bedside the district attorney asked him if, up to that time, he had been informed that Vogel was under suspicion for having shot Ming. The question was objected to, but the objection was overruled. Cummings answered that he had. He was then asked who had made the statement to him and, over an objection to the question, he was permitted to answer that it was Zeno Burch. These rulings were both erroneous. The questions called for nothing but hearsay evidence, and should have been ruled out for that reason. This error was most damaging to the appellant's case, as there is nothing in the record, except the testimony of Cummings on this point, which fastens any suspicion whatever upon Vogel before the time of the conversation at the bedside of Ming.

[3] The witness Kemp had examined the bore of the rifle already mentioned, testified to its condition and also testified, from the odor of burnt powder about the weapon, that it had been fired, in his opinion, within a period of 30 minutes or an hour preceding the time of his examination of it. The period mentioned by him would cover the time of the shooting of Ming. The defense sought to impeach this opinion evidence of Kemp by showing expert testimony given by him in another action upon the question as to how long the odor of burnt powder would remain in a gun after its discharge. When he was on the stand Kemp was asked whether or not he had testified in the other action "that the odor of a discharged weapon would last as long or longer than 12 hours," and he answered that he had not. In the present action, the court reporter who had taken Kemp's testimony in the other case was examined, and was asked whether he had then testified that the smell of burnt powder could be detected in a discharged weapon 24 hours after the discharge. An objection to the question was sustained, and the ruling was correct, as the time fixed by the inquiry was different from that embraced in the impeaching question, which had been addressed to Kemp. The court, however, appears to have sustained the objection for a wrong reason, and, while that fact does not affect the propriety of the ruling, the circumstance is necessary to be stated in order to explain what followed. The district attorney had objected to the question on the general grounds, adding the specific objection that the record was the best evidence. When the objection was sustained the appellant's counsel asked the reporter to produce her record. She asked whether it was her notes or the transcribed testimony that was wanted. The district attorney responded that it made no difference to him, and counsel for appellant then asked the reporter to produce the transcript, whereupon the district attorney objected to "any testimony along this line, for the reason that there was no foundation laid; that

the exact question and answer, which the defendant seeks to have read to the jury," had not been previously read to Kemp. After some argument, during which appellant's counsel stated, in effect, that he expected to show by the reporter, with the transcript to refresh her recollection, that Kemp had testified in the earlier case that the odor of a discharged gun would remain in it more than 12 hours, the court sustained the district attorney's very general objection, on the ground that what the transcript showed by way of question and answer had not been exhibited to Kemp. Not only that, but he examined the transcript himself and stated to the jury that "the evidence in the transcript which has been produced, I do not consider as impeachment." Counsel for appellant then offered to prove by the court reporter, she to use her stenographic notes or the written transcript to refresh her recollection, that Kemp had testified in the previous action that the odor would remain in a gun more than 12 hours after its discharge. There was no objection to the offer, but the court, evidently understanding that one had been made, said that he would sustain the objection, and the evidence was not received. These various rulings were erroneous. The court reporter was a proper witness to testify to statements made by Kemp at the trial at which she had acted as reporter, and she could have used her stenographic notes to refresh her recollection, as notes or memoranda made by her at the time to which her testimony related. Code Civ. Proc. § 2047; *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15; *People v. Sexton*, 132 Cal. 37, 64 Pac. 107. Further, under the statement of the district attorney that it made no difference to him whether she produced her original notes or the transcript made from them, she could have refreshed her recollection from the transcript.

[4] We have pointed out the error into which the trial court fell in its rulings upon this question, but, in addition, we are impelled to direct attention to the action of the court in stating, after he had examined the reporter's transcript, that he found nothing in it to impeach the testimony of Kemp. His action in that regard was uncalled for. It was no more within his province to pass judgment upon the effect of the matter contained in the transcript than it would be for him to take the same attitude concerning any private memorandum which any witness was about to use for the purpose of refreshing his recollection under the terms of section 2047, Code of Civil Procedure. His statement was distinctly prejudicial to the rights of the appellant.

There are many other errors which the appellant contends were committed by the trial court, but we have not found it necessary to determine whether the contentions be well founded.

We have made a careful examination of the entire cause, including all the evidence, in order to determine, under the language of section 4½ of article 6 of the Constitution, if it can be said that the errors above pointed out have not resulted in a miscarriage of justice. We have above made an unusually full statement of the facts of the case in order to furnish a background for the consideration of this question. We are impelled to say, from our examination of the record, that a miscarriage of justice has resulted from the errors of the trial court.

The judgment and order are reversed, and the cause is remanded.

We concur: CONREY, P. J.; JAMES, J.

(36 Cal. App. 248)

THOMPSON v. NEWMAN. (Civ. 2271.)

(District Court of Appeal, First District, California. Feb. 11, 1918.)

1. ARBITRATION AND AWARD ⇐1—CONTRACT—APPRAISEMENT.

A contract between plaintiff and defendant calling for the appointment of "arbitrators" to determine the value of certain timber, providing that neither party shall offer any evidence before such arbitrators, is not a contract for arbitration under provisions of Code Civ. Proc. §§ 1284, 1285, but merely an agreement for appointment of appraisers to determine the value of the timber.

2. LOGS AND LOGGING ⇐10(3)—APPRAISAL—EVIDENCE.

Evidence that so-called arbitrators went on the land together to make appraisement and separately examined and valued particular portions of timber, and met, compared notes, and finally concurred in its valuation, does not sustain contention that such valuation was not the result of the joint labor and judgment of such appraisers.

3. ARBITRATION AND AWARD ⇐1—APPRAISEMENT—CONTRACT—TIME OF REPORT.

An objection to an appraisement of timber made under contract that such report was not made within the time provided, is without merit, in view of Civ. Code, § 1492, where time was not made the essence of the agreement, and the delay was caused by the refusal of some of the first appointed appraisers to act.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Mrs. Ada Thompson against Otto Newman. From a judgment for plaintiff decreeing specific performance of a contract, defendant appeals. Affirmed.

Preston & Preston, of Ukiah, for appellant. Robert Duncan, of Ukiah, for respondent.

LENNON, P. J. On the 6th day of October, 1914, plaintiff and defendant entered into a written agreement by the terms of which they agreed to settle a controversy existing between them "with respect to their rights in the growing and down timber" standing and lying upon certain designated land.

The terms of the agreement were in substance these: Within 30 days after the re-

port of "arbitrators" who were to be chosen by the parties according to the method provided by the contract, the plaintiff promised to pay to the defendant the sum estimated by the said "arbitrators" as the value "of all the down and standing redwood and pine timber * * * suitable for merchantable lumber and suitable for the making of ties." The defendant agreed that upon such payment he would make, execute, and deliver to the plaintiff, her heirs, and assigns a deed of all of the said timber. The contract in controversy, among other things, provided that:

"Each of said parties * * * shall appoint and name one person as an arbitrator and the two arbitrators so appointed by the parties * * * shall agree upon and appoint a third person to act as arbitrator in said matters and * * * each and all of said arbitrators shall be men experienced in buying, selling or estimating of redwood or pine timber in the county of Mendocino, state of California. * * *"

The two parties first named in the contract as "arbitrators" failed to agree upon a third person, and one of them subsequently refused to act. In his place and stead, the judge of the superior court of Mendocino county, pursuant to a provision in the contract covering such a contingency, designated another person to act, and he with the person appointed in the first instance and who had consented to act met on the 19th day of April, 1915, surveyed the timber and appraised its value at the sum of \$190. Thereafter on April 28, 1915, plaintiff tendered to defendant the sum of \$190 and demanded a conveyance of the timber. Defendant declined the tender and refused to execute the conveyance.

Thereupon the plaintiff brought this action for specific performance, wherein the court below, in effect, found that, although designated in the contract as arbitrators, the parties who made the valuation were intended to be and were in fact but mere appraisers, and that they had made a fair, just, and reasonable estimate of the quantity and value of the timber which was the subject-matter of the contract here. From the judgment entered in favor of the plaintiff, decreeing specific performance, the defendant has appealed.

It is not claimed that the estimate of the appraisers was the result of collusion or fraud, but merely that their estimate was not in accord with the evidence adduced at the trial. While the record does show some evidence to the effect that the timber was worth more than the value placed upon it by the "arbitrators," nevertheless, the record shows other evidence which fixes the value of the timber at about the sum of \$190. In short there is a substantial conflict in the evidence adduced upon this phase of the case, and, moreover, the contract in terms provided that the "arbitrators'" estimate,

when made, was to be final and conclusive upon the parties to the contract.

[1] The contention that the "arbitrators" did not proceed legally to make the appraisal is grounded upon the fact that before proceeding to their duties, they were not sworn to faithfully perform the same and did not notify the parties to the contract of the time when the timber would be examined and valued. This contention involves the proposition that the contract in controversy was an agreement to submit to arbitration, and not intended for the purpose of merely making an appraisal. Consequently it is argued that the result of the appraisal was of no avail in the absence of a showing that they had complied with the provisions of sections 1284 and 1285 of the Code of Civil Procedure which provide that:

"Arbitrators have power to appoint a time and place for hearing * * * to hear the allegations and evidence of the parties" and, "before acting, they must be sworn before an officer authorized to administer oaths faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy. * * *"

That the contract in controversy was not "a submission to arbitration," in the sense contemplated by the provisions of the Code sections last cited, is shown, we think, by the terms of the contract itself which expressly provide that:

"Neither of the parties * * * shall offer any evidence before said arbitrators, but that said arbitrators shall go upon the ground and make their estimate from their own examination. * * *"

True, the contract in terms specifically uses the word "arbitrators," but that fact does not conclusively control the construction of the agreement. *Foster v. Carr*, 135 Cal. 86, 67 Pac. 43. The term "arbitrators" evidently was incorrectly employed to designate the character and capacity of the men who had been, or might be, agreed upon to carry out the terms of a contract which, when read in its entirety, purported to provide for nothing more nor less than a mere appraisalment.

There is a clear distinction between an arbitration and an appraisalment.

"An arbitration presupposes a controversy or a difference to be tried and decided, and the arbitrators proceed in a judicial way, sometimes as an adjunct to a court of justice. Their investigation is in the nature of a judicial inquiry, and rules of procedure must be strictly observed or their award will be void. On the other hand, an appraisal or valuation is generally a mere auxiliary feature of a contract of sale, the purpose of which is not to adjudicate a controversy but to avoid one. Thus, if A. and B. contract, the former to sell, and the latter to buy, certain property at the value thereof as fixed by X., Y., and Z., the latter are appraisers, not arbitrators, and are not governed in their proceedings by the rules relating to arbitration." *Omaha Water Co. v. City of Omaha*, 162 Fed. 233, 89 C. C. A. 205, 15 Ann. Cas. 498.

In the case of *M. E. Church v. Seltz*, 74 Cal. 287, 15 Pac. 839, the court said:

"There is scarcely a day in which in commercial transactions the valuation of property, or estimate of damages, is not intrusted to third parties, and no one has yet dreamed of looking upon them as arbitrations, and subjected to all the formalities imposed on them by the revised statutes, with the paraphernalia of oaths, witnesses, and notices of trials. It is most frequently confided to the personal skill, knowledge, or experience, or even acquired information of appraisers."

While the preamble of the contract in controversy discloses that there were two suits pending between the parties in the superior court of the county of Mendocino, involving their rights to the land in question and the timber thereon, and that they were desirous of settling between themselves such litigation and all claims involved therein, nevertheless we think that that very preamble, considered in conjunction with the specific terms of the contract, shows that its primary purpose was to avoid existing litigation rather than to adjudicate it, and that in pursuance of that purpose the parties had merged all of their differences into an executory contract of purchase and sale of the disputed timber, which sale was to be consummated when the value of the timber was ascertained in the manner contemplated by and provided for in the contract. In short, the only matter remaining at the time of the execution of the contract to be determined between the parties was the value of the timber in question, and this fact, considered in connection with the proviso in the contract that neither of the parties thereto should offer any evidence to the "arbitrators," who were required to go upon the land and make their own estimate of the quantity and value of the timber, compels the conclusion that the contract in controversy called for a mere appraisalment rather than a submission to arbitration in the strict sense of the term.

[2] The evidence to the effect that although the so-called arbitrators went on the land together for the purpose of making the appraisalment and, while so doing, separately examined and valued particular portions of the timber and then met and compared notes and finally concurred in the valuation of the whole, obviously does not sustain the contention that the valuation of the timber was not the result of the joint labor and judgment of the appraisers.

[3] There is no merit in the contention that the appraisers did not make their report within the time provided in the agreement and that therefore they were without power to report at all. Time was not made the essence of the agreement, and any delay therein could be compensated by the payment of interest on the amount fixed by the appraisers. Civ. Code, § 1492. Moreover, the delay appears to have been caused by the refusal to act of the "arbitrator" selected

by the defendant and was, as well, without prejudice to the defendant.

Judgment affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

(36 Cal. App. 240)

CALLETT v. CENTRAL CALIFORNIA TRACTION CO. (Civ. 1558.)

(District Court of Appeal, Third District, California. Feb. 9, 1918.)

1. STREET RAILROADS §114(5) — COLLISION WITH TEAM—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence in action for the running down by an electric train operated on a street of a vehicle going in the same direction held to sustain finding of negligence.

2. STREET RAILROADS §117(24) — COLLISION WITH TEAM—CONTRIBUTORY NEGLIGENCE.

The driver of a vehicle run down by an electric train, going in the same direction, operated on a street, was not necessarily negligent, because driving within 10 or 12 inches of the track, or because he did not look back.

3. STREET RAILROADS §114(15) — COLLISION WITH TEAM—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence in action for running down by an electric train, operated on a street, of a vehicle going in the same direction held to sustain finding of freedom from contributory negligence.

4. STREET RAILROADS §90(1) — COLLISION WITH TEAM—INTERURBAN TRAINS.

The merits of the case of plaintiff, whose vehicle was run down by defendant's electric train going in the same direction on a street, is not affected by the fact that defendant ran interurban cars over the track; the train in question being a local, proceeding over a track in no respect differing from an ordinary street car track.

5. APPEAL AND ERROR §1071(1)—HARMLESS ERROR—FINDING OF FACT.

Any error in finding defendant guilty of gross negligence was harmless; other findings of negligence and freedom from contributory negligence supporting the judgment.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Saul Callett against the Central California Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Butler & Swisler, of Sacramento, for appellant. Ralph W. Smith and J. M. Inman, both of Sacramento, for respondent.

BURNETT, J. The action was for damages occasioned by the negligence of the defendant. It was tried before the court without a jury and the plaintiff was awarded the sum of \$800. From the judgment the appeal has been taken.

The nature of the action is shown by the following allegations of the complaint:

"That the defendant, on the 10th day of August, 1915, was operating an electric railroad running along the said X street in the city of Sacramento; that on said day at about the hour of 3:30 o'clock in the afternoon thereof, while plaintiff, with due care and caution was pro-

ceeding in a westerly direction upon said X street to the right of the car tracks of the defendant company thereon, seated in a wagon driving a horse thereto attached, at a point 15 feet more or less to the east of the east curb of the intersection of Twenty-Seventh street with X street in said city, and while the plaintiff was lawfully so proceeding on said street on said day and at said time and hour, the defendant willfully, negligently, carelessly, imprudently, and improperly propelled a freight car pushed by another car which was operated by means of an electric motor, in a westerly direction upon the northerly tracks of said defendant company upon said highway, at an excessive and unreasonable rate of speed, and without any regard for the safety of plaintiff or persons using said street and highway, and failed and neglected to give any signal or warning of the approach of said car and failed and neglected to watch or look ahead to avoid injuring plaintiff and others using said street and highway; that the said freight car, while being so propelled along said track, because of the acts of defendant as aforesaid, collided with the left back wheel of the wagon in which plaintiff was riding as aforesaid, throwing plaintiff from the seat thereof with great force and violence, resulting in his sustaining great and permanent injuries."

The plaintiff's version of the accident will appear from the following quotation from his testimony:

"I was working for Strickland; I was soliciting for him; I solicited and delivered suits of clothing. And on this particular day I was coming in from driving in the cleaning wagon, clothes wagon. I had a box wagon; put clothes on both sides; a door in the back, and a canopy over the front seat. I had been soliciting orders and delivering goods in Oak Park and I came back from Oak Park and came to about Z; came down Twenty-Eighth street towards X; my horse was on a trot, or a slow trot all the way; when I came to the crossing I slowed my horse down to a walk and I looked every direction; I could not see any cars coming either way and I turned to the left. I started down toward Twenty-Seventh street. I looked every way, to see any possible chance a car coming. I took the right-hand side of the street; I made a large turn all around. I just went all around the corner * * * until I came to the right-hand side of X street; then I started down to Twenty-Seventh street. I was driving at a rate of about 4 or 5 miles an hour at the time; the wagon was about 10 or 12 inches, probably, away from the track, on the right-hand side; the wheels of the wagon were not in the track at all. When I got down about two-thirds of the street, why, something hit the wagon with such force it threw me out in front, and when I landed I just landed straight over the foot-board, and how I managed to get out of the wagon, I do not know, sure. * * * There was no warning at all or whistle blown. I believe I followed a direct line from Twenty-Eighth street down to the point where the accident occurred. Probably I varied an inch or two either way, I cannot recall; I know this horse was a very gentle horse; there was no necessity of pulling the lines either way, this horse going straight. I did not pull on the line either way; just held the line firmly and let the horse go at a steady gait. It is a smooth macadamized street. The reason I turned down Twenty-Eighth, I have driven down there several times before, I found that road was all cut up and I went out Twenty-Seventh street, found the road down there was a whole lot better for driving, so that was my reason for driving off of Twenty-Eighth into X and going down to Twenty-Seventh where the road was a whole lot better."

It is admitted that the plaintiff was quite seriously injured, and there is no contention that the amount awarded him is disproportionate to the extent of the damage he suffered, nor is there any claim of any defect or imperfection in the pleadings in the case, nor is any ruling of the trial court during the trial challenged by appellant. There are two contentions, however, upon which appellant insists for a reversal of the judgment. One of these is that the evidence does not show that the defendant is chargeable with negligence, and the other is that it appears conclusively from the record that plaintiff himself was guilty of contributory negligence, and therefore under the well-established rule barred from recovery.

[1] As to the first of these contentions it may be said that the accident itself is some evidence of negligence on the part of appellant. The evidence shows that the plaintiff was driving along a public street; that the conductor of the train, who was sitting on top of the freight car, had a straight clear track ahead of him, with nothing to obstruct his view of the position of plaintiff or to prevent him from perceiving the danger of a collision, and, accepting the testimony of the plaintiff, as we must, it appears further that the train approached without any warning and ran down from behind the vehicle of the plaintiff. Under such circumstances, it must be apparent that a car or train would not ordinarily run down a vehicle proceeding in the same direction without there being negligence in its operation, and the mere fact that such an accident occurred in the operation of said street car or train furnishes at least some evidence of negligence. It may be further said that it follows from the testimony of the plaintiff and the witness Mrs. Misphey that there was no gong sounded or whistle blown immediately preceding the accident so as to give warning to the plaintiff of the approach of the car. It is also a fair inference from the testimony of the conductor of the train and of one Doane, who was a witness for the plaintiff, that no warning was given in sufficient time to avoid the injury. It must also be said that the inference is not unreasonable that the train was traveling at an unusual rate of speed. It is true that the conductor testified to the contrary, but the facts and circumstances of the collision justify the conclusion that the train was traveling much more rapidly than he stated on the witness stand.

We have this situation, therefore, which the trial court had a right to accept from the evidence in the case: With an unobstructed view, in broad daylight, on a public street of the city, the train was approaching the plaintiff, who was in a position of danger, no warning being given of its approach, and traveling at an unusual rate of speed. The foregoing statement is sufficient to show with-

out controversy that the defendant is properly chargeable with negligence. It will not be gainsaid that it was the duty of the defendant to travel at a moderate rate of speed throughout the streets of the city. It is equally plain that it was also the duty of the conductor to be on a constant lookout for pedestrians and vehicles and travelers generally, and to use all precautionary measures to avoid injuring any one who might be in proximity to or upon the track and therefore in a position of danger. If the one in charge of the train omits any of these precautionary measures which we have suggested and thereby a collision is caused and damage suffered by another, the defendant is properly chargeable with actionable negligence. This must be true upon principle, and it is well supported by the authorities of this and other states. Of course, we are not concerned with the fact that there was testimony exculpating the defendant from all blame.

[2, 3] As to the question of contributory negligence of plaintiff, accepting the statements of plaintiff and viewing the situation as it is presented by him and other witnesses, it cannot be successfully controverted that the finding of the court is supported by the evidence. It is well settled and hardly needs the citation of authorities that the plaintiff had a right to use the street just as he was using it; that he had the right to drive his vehicle within 10 or 12 inches of the railroad track as he declared he did, or to drive it upon the track itself if he found it necessary or convenient. It was, of course, his duty to exercise ordinary care and prudence in proceeding along the street. He could not disregard the right of others to use the street. He must keep a careful lookout to avoid a collision with other vehicles. He must pay careful heed to any warning that might be given him of the approach of any car or train from behind. Necessarily he is not required to be constantly looking backward to see whether any train may be approaching, as has been said in some of the decisions. He cannot be looking both forward and backward at the same time. His primary duty is to keep looking forward so as to avoid collision with anyone who might approach from that direction, and also that he may suitably direct his course. He has a right to rely upon the exercise of care on the part of those conducting any train that might approach from behind. He has a right to believe that he will be given proper warning of the approach in order that he may place himself in a position of safety. It is well settled that a railroad company has no exclusive right to the use of the street itself. It has, it is true, a superior right to the use of the tracks for obvious reasons, but this is not inconsistent with the right of the pedestrian or one driving a vehicle to use said street also, providing he does so in a careful

way and is willing and ready to respond to any warning or signal of danger and to avoid the obstruction of the course of travel along the tracks. It makes no difference that it does not appear that the street was crowded or that there are any mudholes or obstructions between the curb and the track to prevent plaintiff from driving near said curb. We may repeat he had a right to drive near the track, and we may say, parenthetically, that the reason for his so doing is given by one of the witnesses for appellant, and, indeed, it is apparent to any one who is familiar with the use of graded and macadamized streets. The portion of the street near the center is nearly level and is easier for travel than the portion near the curb which is more inclined.

The horse itself, according to the testimony of this witness, would naturally seek and travel along that portion of the street near the car track. It cannot be said that the plaintiff unreasonably or arbitrarily selected the course upon which he proceeded, but we must hold that his action under the circumstances was natural and reasonable and according to the conduct of the average prudent man under the same circumstances, and there can be no doubt that it is a reasonable inference from the record that he was free from such conduct in this case as would prevent his recovery.

We are entirely satisfied that upon these two vital issues the finding of the court is amply justified, although a contrary inference might possibly have been drawn as to each, and it seems hardly necessary to call specific attention to the decisions of the courts in reference to these questions. We, however, cite three cases decided by our own Supreme Court upon which the decision herein may be safely based, as follows: *Shea v. P. & B. V. R. R. Co.*, 44 Cal. 414; *Swain v. Fourteenth St. R. R. Co.*, 93 Cal. 179, 28 Pac. 829; *O'Connor v. U. R. R. Co.*, 168 Cal. 43, 141 Pac. 803.

In the first case it is held:

"A person is entitled to walk on a street railroad track in a public street, using reasonable care and prudence to avoid injuries; but he is not required to abandon the track in order to avoid possible injuries which may result from the carelessness of the company, and if he is injured by the carelessness of the company while walking on the track, the fact that he might have walked by the side of the track is not contributory negligence on his part."

In the *Swain* Case it is held:

"It is not negligence per se for the driver of a patrol wagon to drive along and upon a street car track, so long as he uses ordinary care to avoid a collision with the cars on the track, and it is a question for the jury whether he has used such ordinary care." Furthermore "it is the duty of a driver of a street car to observe what is in the road before him, so as to avoid inflicting injury upon others, if practicable; and he is guilty of negligence if he omits, without apparent excuse, to look ahead and observe whether or not the track is clear."

In the *O'Connor* Case it is held:

"Other vehicles," besides the street car, "have a right to travel over the entire street, including the space between the tracks, even when other portions of the street may not be crowded or in bad condition," and that "the rule as to 'looking' applied to the drivers of vehicles about to cross the track of a steam railroad at highway crossings does not apply to those driving along street railroad tracks laid upon public highways," and that "the fact that the driver of such vehicle, after looking back and not seeing any approaching car, failed to again look back during an interval in which he drove a distance of about 500 feet, did not constitute negligence per se."

The foregoing authorities and others that might be cited are directly in point here. In judging of the conduct of the plaintiff, the court manifestly had a right to consider all of the circumstances in the case, including the testimony of the plaintiff, that before proceeding upon X street he had carefully looked to see if any car was approaching. To say that the only rational conclusion to be drawn from the record is that plaintiff was guilty of misconduct would be to disregard the unquestionable right of the citizen to use in a careful manner the whole of the public streets of the city.

[4] The fact that the appellant operates interurban cars over the track in question does not, in our opinion, affect the merits of the case. The train which collided with the vehicle driven by the plaintiff was a local train, and was proceeding over a track which in no respect differs from the ordinary street car track. We can see no circumstance in the case which differentiates it from the ordinary street cars. If there be any difference, it would rather be disadvantageous to appellant, since manifestly the operation of the train under the circumstances was attended with more danger to travelers on the street than would be the operation of the ordinary street car. The plaintiff had the same right to use the street and the track under the same limitations and the defendant was under the same obligation as to the speed of the train and the necessity of giving due warning of its approach. The situation is quite different, as must be manifest, from the operation of railroad trains run by steam power upon the ordinary tracks for such trains.

[5] There is some criticism of the action of the court in finding that the defendant was guilty of gross negligence. This conclusion was based upon the theory of the respondent that the case called for the application of "the last clear chance" doctrine. We need not, however, consider the question whether the evidence supports such theory because the finding to that effect may be ignored. The other findings as to the negligence of the defendant and the exercise of ordinary care on the part of the plaintiff are amply sufficient to support the judgment, and we may limit our consideration to the

sufficiency of the evidence to support these findings.

From a careful reading of the whole record and attention to the construction of the elementary principles involved and the decisions of the courts we are entirely satisfied that it must be said that there is no legal ground for disturbing the judgment of the lower court, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(36 Cal. App. 10)

JOHN A. ROEBLING'S SONS CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 2454.)

(District Court of Appeal, Second District, California. Jan. 16, 1918. Rehearing Denied Feb. 15, 1918. On Rehearing in Supreme Court, March 14, 1918.)

1. MASTER AND SERVANT §381—WORKMEN'S COMPENSATION ACT—DEATH AS PROBABLE INCIDENT OF EMPLOYMENT.

If a night watchman, when intoxicated, neglecting his duty, went into the washroom of the plant with intent to sleep, and lighted the gas heater, tightly closing the door and windows, and laid down upon a bench, where he was killed by gas, the death was not such an accidental death as was a reasonably probable incident of the employment, giving his widow right to compensation under the Workmen's Compensation Act (St. 1913, p. 279).

2. MASTER AND SERVANT §403—WORKMEN'S COMPENSATION ACT—INJURY IN EMPLOYMENT—BURDEN OF PROOF.

The burden of proof that the injury for which compensation is asked under the Workmen's Compensation Act was suffered in the course of the employment and arose out of the employment is on the claimant.

3. MASTER AND SERVANT §405(4)—WORKMEN'S COMPENSATION ACT—BURDEN OF PROOF—THEORETICAL CONCLUSIONS.

Where various theoretical conclusions may be drawn from the state of facts established, each being equally plausible, some indicating that the injury may have arisen out of the employment, and others that the misconduct of the person injured was the producing cause, it may not be said that the evidence is sufficient to sustain the cause of claimant under the Workmen's Compensation Act, upon whom the burden of proof rests.

4. MASTER AND SERVANT §405(4)—WORKMEN'S COMPENSATION ACT—DEATH IN EMPLOYMENT—SUFFICIENCY OF EVIDENCE.

In a widow's proceeding under the Workmen's Compensation Act for compensation for death of her husband, a night watchman, from gas, evidence held insufficient to support the conclusion of the Industrial Accident Commission that decedent was killed in the course of his employment, tending, instead, to show that he willfully stepped aside from the performance of his duties and invited by direct action the causes which produced his death.

In Bank. Petition for writ of review by John A. Roebling's Sons Company and the Aetna Life Insurance Company against the Industrial Accident Commission and Ellen J. Bundshu to annul an award made by the Industrial Accident Commission under the Workmen's Compensation Act in favor of

Bundshu as widow of Joseph G. Bundshu. Award annulled.

Redman & Alexander, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

JAMES, J. Petitioners herein seek to have annulled an award made in favor of Ellen J. Bundshu by the Industrial Accident Commission. Said Bundshu is the alleged widow of Joseph G. Bundshu. The commission determined that Bundshu, who died on or about the 10th day of December, 1916, came to his death through accidental means while he was in the employ of petitioner Roebling's Sons Company. It is the contention of petitioners that the award cannot be sustained; that, first, it was not shown that the death of Bundshu was produced by causes arising out of his employment, and second, that it was not shown that Ellen J. Bundshu was the widow of the decedent.

At the time of his death Bundshu was employed as night watchman and janitor in the Roebling's Sons Company's plant in the city of Los Angeles. His duties were to keep watch over the plant during the nighttime, and to do necessary janitor work about the offices of the company. The local manager of the company testified that he had made up the compensation of Bundshu, which was \$85 per month, by calculating about \$60 as proper compensation for the watchman service and \$25 for the janitor work. This witness testified:

"I figured \$20 to \$25 a month extra to have the same man do the janitor work of the office, and make a better job for somebody. In addition to that they would have plenty of time to do the work and make it more economical for us than hiring two men, and would serve to give the fellow something to do and keep him awake and keep busy during the night."

The main business of the watchman, as is common in employment of that character, was to guard the plant against intruders. In order to insure the performance of such duties the watchman was required to "ring in" hourly upon instruments placed in the building which were connected with a concern known as the District Telegraph. It was the duty of the latter concern, whenever there was a failure of the watchman to so report, to send a roundsman to find out the reason for the neglect, if it so should happen to be. Bundshu was at work on the night of the 10th of December, 1916, in the Roebling plant. At about 9:30 o'clock a roundsman of the telegraph company, visiting the Roebling plant, saw Bundshu apparently asleep at a desk in the office. This roundsman rapped loudly upon the door, whereupon Bundshu aroused himself and started to come to the door. On the way he fell. When the door was opened the roundsman asked Bundshu whether he had been drinking, to which Bundshu first replied

"No." The roundsman, however, testified that "there was whisky on his breath," and that he said to Bundshu, "Do you mean to tell me you haven't had any whisky?" to which Bundshu replied, "Oh, I have had a little liquor." At 11 o'clock on the same night Bundshu failed to ring in to the telegraph company, and a roundsman was sent to the Roebling plant to ascertain the reason for the omission. This roundsman testified that he in turn saw the watchman sitting at a desk with his head lying on his arms, and that he had to pound on the door before being admitted. This roundsman testified that when Bundshu came toward the door to admit him he staggered a little, and that he asked Bundshu what kind of "water" he had been drinking, and Bundshu replied, "Damned good." In the opinion of this witness, Bundshu was at the time "somewhat intoxicated." At 1:30 a. m. on the same night Bundshu again failed to ring in, and the same roundsman who visited him at about 9:30 was sent again to the Roebling plant. This witness testified that he reached there about 1:45 and pounded upon the door without being able to secure any response; that he then went to a neighboring plant and aroused the watchman there. The two men took a ladder, and by that means gained an entrance to the Roebling plant through a balcony window. On the main floor of the building was a little room used as a washroom. The door of this room was found to be closed. Upon its being opened the watchman noticed that the air which came from the room was "bad"; it "hurt the eyes." This room had been tightly closed, and they found a gas stove burning therein. Lying on a bench, with his hat on the floor, was Bundshu. He was dead at the time. An examination of the stove showed that the gas was turned on very "high," but there appeared to be no indication that unconsumed gas was escaping in any other way. The windows of the room were tightly closed. This stove had been placed in the washroom and had regularly been made use of by the men employed at the plant while changing their clothes in the mornings before going to work. The manager of the plant testified that on the morning following the death of Bundshu he made an examination of the pipe supplying gas to the stove and failed to find any leak. He testified that the stove had been used since that time as it was used before. He was asked the question as to whether a night watchman employed on those premises had any occasion to be in that room or use the stove, to which he replied, "Absolutely none that I can conceive of, unless he wanted to use the toilet." There was other testimony that the office of the plant was heated during the daytime by steam which proceeded from the heating apparatus in the basement; that this heating plant, after having been used during the day, would ordinarily keep the

office warm until about 1 o'clock in the morning. No instructions had been given forbidding any watchman employed on the premises to make use of the steam-heating plant, if he so desired; neither had instructions been given as to the use of the gas heater, except as has been noted in the testimony of the manager, who said that a watchman would have no business in the toilet room except for the purpose of using the particular facilities therein provided. The use of such facilities, of course, would only consume a brief period of time.

[1-4] In order to sustain the finding of the commission we must conclude it to be a reasonable proposition fairly indicated by the proof that Bundshu, not being affected by any condition arising from his own misconduct, lighted the heater, and that the fumes of the gas overcame him before he was able to protect himself and avoid being suffocated. The expert testimony given before the commission showed that death was due to poisoning produced by carbon monoxide, that being a constituent of illuminating gas in its unburned state. If we are to assume another state of facts, to wit, that Bundshu on the night in question was intoxicated, that neglectful of his duty he went into the washroom with intent to sleep, that he there lighted the heater and tightly closed the door and windows and lay down upon the bench, and that under such conditions was killed, it must at once be said, we think, that the death was not such an accidental death as was a reasonably probable incident of the employment; and the last conclusion we feel is the one which the evidence, with little uncertainty points to. But it is not essential to the case of petitioners that the conclusion last suggested be one which the evidence clearly established. The burden of proving, as has often been said in the decisions both of our own Supreme Court and courts of last resort in other states where similar conditions of statute exist, that the injury for which compensation is asked was suffered in the course of the employment and arose out of the employment, is upon the claimant. Where various theoretical conclusions may be drawn from the state of facts established, each being equally plausible, some indicating that the injury may have arisen out of the employment, and others that the misconduct of the person injured was the producing cause, then it may not be said that the evidence is sufficient to sustain the case of him upon whom the burden of proof rests. A finding in such a case in favor of the claimant is said to be speculative. In Massachusetts the Compensation Act is, in those portions of it relating to the matter here being considered, practically identical with the provisions of the California law. Our Supreme Court has quoted with approval in *Kimbol v. Industrial Accident Commission*, 173 Cal. 351, 160 Pac. 150, L. R. A. 1917B, 595, Ann. Cas. 1917E,

312, the language of the Supreme Court of Massachusetts defining the term "arising out of the employment." Sanderson's Case, 224 Mass. 558, found in 113 N. E. 355, was a case where the Industrial Commission of that state awarded compensation to a widow where death had apparently been caused by accidental means. The court, in the course of its opinion, declared that many conjectures could be made as to the cause of the fall of the deceased, some of which would sustain the application and others negative any right in the claimant. It concluded that the finding of the commission was based "upon surmise, speculation, and conjecture, and does not rest upon a foundation of proof by a preponderance of the evidence"; the court adding:

"It may be the dependent is correct in her contention that the death of the employé was due to a fall from the wagon, but other theories and conjectures are quite as probable."

And we may remark that the uncontradicted evidence in this case indicates, if we are to choose between conflicting speculative deductions, that on the night in question the deceased willfully stepped aside from the performance of the duties which his employment laid upon him and invited by direct action on his part the occurrence of the detrimental causes which produced his death. In our opinion, the conclusion of the commission is not supported by sufficient evidence.

As the conclusion just announced necessarily determines the whole matter of the validity of the claimant's application, it seems unnecessary to give special consideration to the second point urged upon the application for this writ. The second contention is based upon the fact, as shown in evidence, that the claimant here, long prior to her marriage to Bundshu, had been married to two other persons from whom she had not been divorced. The history of her marital experiences were, in brief, as follows: In 1864, when 14 years of age, she married one Butler, from whom she was soon divorced. In 1868 she married one Morrell, living with him for about a year and a half, when she returned to her parents, but was never divorced from the husband. This man, she testified, she had not since heard from. In 1872 she went through a form of the ceremony of marriage with one Maisey, with whom she lived for about 18 years, and by whom she had two children. She testified that Maisey went away with another woman, and that upon consulting the district attorney in Chicago with the design to compel Maisey to support herself and children, she was advised that her marriage with Maisey was not legal. In 1891 she was married to one Brennan, and after living with him 2 years, secured a divorce. She then married Bundshu, with whom she was living at the time of the latter's death. The testimony showed that

Maisey was still living. There was no testimony as to Morrell being alive or not. The latter was of about the age of 25 when he married the claimant. We have presented this statement of facts regarding the second contention, but, for the reasons expressed, do not consider it necessary to announce a conclusion as to the legal proposition involved.

The award is annulled.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

Opinion of Supreme Court Denying Rehearing.

PER CURIAM. In denying the application for a hearing in this court, we deem it proper to say that we do not understand the rule to be that if different conclusions may rationally and fairly be drawn from the evidence, one sustaining the right to compensation and the other being opposed thereto, the Industrial Accident Commission is not at liberty to adopt the conclusion favorable to the claim. Of course it is well settled that the commission can do this very thing, and that its conclusion in that regard is beyond the scope of our review. No member of this court disputes this proposition. The justices opposed to granting the application for a hearing in this court are of the opinion that the opinion of the District Court of Appeal means that in this case there was no substantial evidence reasonably warranting an inference favorable to the claim for compensation, and that any finding to the contrary is necessarily based on mere surmise, speculation, or conjecture, and that when that court speaks of a case "where various theoretical conclusions may be drawn," it is in fact speaking of conclusions based on speculation and conjecture, rather than of inferences reasonably and fairly made from testimony.

The application for a hearing in this court is denied.

(19 Ariz. 436)

BIG EYE MIN. & MILL. CO. et al. v. LIVINGSTON. (No. 1602.)

(Supreme Court of Arizona. March 30, 1918.)

1. BILLS AND NOTES \S 429 — PAYMENT — WHAT CONSTITUTES.

Where the lessee of a mine was to pay lessor's note within 90 days, in lieu of certain additional compensation for the lease and the lease provided for a forfeiture on failure of lessee to perform covenants, but stipulated that no further liability should attach to lessee, the lessee having forfeited all rights under the lease and abandoned the property, and the lessor having assumed actual control, the subsequent purchase of said note by the lessee before maturity, with the intention of acquiring all rights of the payee, did not operate as payment barring suit by subsequent indorsee, after maturity, who knew of the provisions of the lease.

2. BILLS AND NOTES —537(8)—PAYMENT— QUESTION OF FACT.

In an action on note by plaintiff indorsee, whether payment by a prior indorsee of the face value of the note to the payee and payee's indorsement, without recourse, was a purchase or a payment extinguishing the note, *held a question of fact.*

Appeal from Superior Court, Yuma County; Frank Baxter, Judge.

Action by Gus Livingston against the Big Eye Mining & Milling Company and others. Judgment for plaintiff, and the defendants appeal. Affirmed.

Action on a promissory note made and delivered by the appellants on the 1st day of December, 1915, payable to E. F. Sanguinetti "on demand or six months after date," the principal sum of \$3,089.64, with interest from date at the rate of 10 per cent. per annum, payable quarterly, with a promise to pay a reasonable attorney's fee if collection enforced. The plaintiff is the owner and holder of the note by indorsement. Certain property of the makers of the note was attached to secure the judgment that might be rendered. The defendants pleaded certain acts of third parties as payment made to the original payee upon indorsement and transfer by him, and made at the instance of the makers, of which the holder had notice before accepting the note. The facts relied upon as payment appear in the opinion. The plaintiff had judgment, and the defendants appeal.

Peter T. Robertson, of Yuma, for appellants. Thomas D. Molloy, of Yuma, for appellee.

CUNNINGHAM, J. The Big Eye Mining & Milling Company is the owner of certain valuable mines situate in Yuma county. In the operation of such mines prior to December 1, 1915, it incurred certain indebtedness, a portion of which indebtedness was owing to E. F. Sanguinetti for supplies furnished the said company. On said December 1, 1915, it made, executed, and delivered the promissory note sued upon, and the other named appellants indorsed said note before delivery. About the 30th day of May, 1916, one W. W. Reese paid to E. F. Sanguinetti the principal of the note, and Sanguinetti indorsed and delivered the note to said Reese without recourse. Thereafter W. W. Reese indorsed and delivered said note to one W. D. Riley without recourse in payment to said Riley of an obligation Reese was then owing to Riley and appellee Gus Livingston on account of the sale of their corporate stock of the appellant corporation by Reese, the proceeds of which sale he had not accounted for. Riley and Livingston discharged the said account of \$2,616, and paid Reese the difference between that sum and the principal of the note upon acquiring the same. The transaction of transfer of the note by Reese to Riley was consummated about July, 1916, after the note

became due. Thereafter W. D. Riley indorsed the note to Gus Livingston. On November 4, 1916, Gus Livingston commenced this action.

The defendants Big Eye Mining & Milling Company, J. A. Ketcherside, and H. C. Johnson join in an answer. H. V. Ketcherside makes no defense, and the abstract of the record does not show that said last-named defendant was served in the case. The defense interposed by the said answering defendants is alleged to be that of payment resulting from the following: That one C. H. Kleinbeck and W. W. Reese as copartners, on the 21st day of December, 1915, and in the name of C. H. Kleinbeck, entered into a contract with defendant Big Eye Mining & Milling Company, whereby said mining and milling company leased its certain described mines to said partnership for a period of one year in consideration of a payment of \$1 and the promise of said partnership to keep and perform other expressed covenants and agreements. The said lessees agreed to do the necessary assessment work for the years 1915 and 1916, and make statutory proof thereof; pay taxes on personal property for the year 1916. The rent reserved is stated as a royalty on the net returns from ore shipped; they agreed to make an expenditure tending to the development of the mines in the sum of at least \$5,000 every 60 days until \$25,000 has been so expended. "As additional compensation for said lease the said lessees agree to pay, on or before 90 days from the date hereof, certain indebtedness owing by the lessor," including the note owing to E. F. Sanguinetti, the note in suit; also to pay on or before the exercise of a certain option executed of even date herewith (whereby said lessees herein have an option to purchase a block of stock of about 500,000 shares of the Big Eye Mining & Milling Company from H. V. Ketcherside, trustee) certain additional indebtedness of the lessor as set forth in the itemized statement attached hereto and marked Exhibit B.

The lease contains the forfeiture clause, wherein the parties agree that:

"Time is of the essence of this lease, and in the event of the failure or refusal of said lessees to make any payments or perform any obligations herein contained on his part to be performed, then at the option of said lessor this lease shall become null and void, and of no effect, and this lessor shall be entitled to take immediate possession of said premises, and all moneys paid by said lessees to said lessor, or expended by said lessees on the property under this lease, * * * shall be forfeited to the lessor as liquidated damages. * * * In the event that said lease shall be forfeited prior to the termination thereof, peaceable possession shall be delivered to the lessor of said premises, together with all machinery, etc.; * * * then and in that event upon such delivery said lessees shall be free from any further obligation to do or perform any act, or make any payment under said lease. * * *"

The answer, after setting forth a copy of said lease containing the above-quoted lan-

guage, alleges that W. W. Reese was a partner with C. H. Kleinbeck in that lease; that the item of indebtedness shown in Schedule A is the identical item covered by the note sued on which Kleinbeck obligates himself to pay; that pursuant to said contract the lessees entered into possession of the property, and on or about the 30th day of May, 1916, the said Reese, acting for himself and Kleinbeck and "pursuant to and in obedience of the said contract and the covenants therein contained, in due course discharged the said note in full by paying the full amount due thereon to the payee named therein, * * * " and so notified defendants; that thereafter on the 3d day of September, 1916, said Reese without authority indorsed said note to W. D. Riley; that Riley was informed of all of the foregoing facts, and had full knowledge of such facts before he acquired said note; that plaintiff Livingston was fully informed and had full knowledge of said facts before he acquired said note. Said defendants pray that the plaintiff take nothing by his action.

The evidence may be conceded to fairly establish the following facts set forth in the special answer: That is, that Sanguinetti transferred said note to Reese for a valuable consideration before due, specially indorsed payable to W. W. Reese or his order without recourse; that Reese immediately informed the secretary of the Big Eye Mining & Milling Company of the transaction he had with Sanguinetti; that after the note became due, Reese negotiated it to W. D. Riley for a consideration, and without recourse, without informing the makers of his transfer; that Riley knew before accepting the note the terms and conditions of the lease of December 21, 1915, and Reese's relation thereto; that likewise Livingston knew all the facts leading up to his possession of the paper. The evidence fairly tends to establish such facts and knowledge of the said facts by the parties. With such facts before the court, judgment was rendered for the plaintiff, and the answering defendants appeal.

The assignment of errors by the appellants is so general that we are not able to determine the specific error or errors relied upon for a reversal. I presume the appellants contend that the judgment is not sustained by the evidence, and therefore the judgment is contrary to law.

[1] The controlling question presented by the defense is whether the note in question was discharged by the transaction between Reese and Sanguinetti on May 30, 1916, which was consummated by Reese's paying to Sanguinetti the principal sum named on the face of the note and taking the paper specially indorsed to order without recourse. Assuming, as established by proof, that Reese acted in that transaction for and in behalf of Kleinbeck and himself as partners for the reason he was dealing with matters and funds belonging to and with which the partnership was concerned, and with partnership assets,

Reese's acts in the premises may fairly be regarded as partnership acts. If the note was discharged by the partnership payment to Sanguinetti, then certainly Reese had no right to reissue the note as the obligation of the original makers, and Gus Livingston having acquired the paper after it became payable, and chargeable with knowledge of the infirmity in the title of Reese, he cannot recover on the note.

[2] Whether the transaction between Sanguinetti, the holder of the note, and Reese, who paid the money, is of such a character as constituted a payment that operated to extinguish the note, is a question of fact. *Binford v. Adams*, 104 Ind. 41, 3 N. E. 753; *Dougherty v. Deeney*, 45 Iowa, 443; *Moran v. Abbey*, 63 Cal. 56; *Jones v. Bobbitt*, 90 N. C. 391; *Balohradsky v. Carlisle*, 14 Ill. App. 289. The trial court has necessarily found as a fact that said transaction was of such character as did not constitute a payment that operated to extinguish the debt evidenced by the note. The lessees' entire obligation with regard to the payment of the note in suit rests upon the following language of the lease, to wit:

"As additional compensation for said lease, the said lessees agree to pay, on or before ninety (90) days from the date hereof, certain indebtedness now owing by the lessor, all as set forth in the itemized statement attached to this lease and marked Exhibit A. * * *"

The exhibit attached is a list of debts, including a debt owing to Sanguinetti, shown to be the sum of the principal of the note in suit. The parties concede that the Sanguinetti debt shown on the list was covered by the note, and the purpose was to show the note on the list. The debts listed aggregate \$4,000. The clear meaning to be given to the provisions of the lease granted is that the lessees promised thereby to pay the lessor \$4,000 additional compensation in 90 days after the date of the lease; that in discharge of said promise, the lessees had the option of paying said sum direct to the creditors of the lessor, named in the list, in lieu of paying the same to the lessor. No lawyer will deny that the obligation assumed would have been discharged by the lessees if within the 90 days they had paid the \$4,000 direct to the lessor instead of paying the lessor's creditors. The option expired at the end of 90 days. If any obligation of the lessees remained, that obligation certainly was to pay said "additional compensation" to the lessor. The lessees failed to keep this promise, and the time for performance expired. After the 90 days expired the lessees were under no obligation to pay the lessor's debts that were listed in Exhibit A, including the note in suit. Whether the obligation remained to pay the lessor the additional compensation promised is not a question in this case. To a certainty, on the 30th day of May, 1916, when Reese acquired the note, the lessees had wholly failed to perform the assessment work for the year 1915; they had

failed to place improvements on the property worth \$5,000 every 60 days from the date of the lease; they had failed to pay the promised additional compensation for the grant of the lease, and as a fact the lessor had placed a watchman in charge of the property. The fair inference to be drawn from this change in the relation of the parties toward each other and toward the mines is that all parties concerned in the lease regarded and treated the lease as no longer in force or binding upon any party thereto; that the lessees had finally forfeited all of their leasehold rights and abandoned the property; and that the lessor had assumed actual possession of the property. Such was the effect of the trial court's holding, and such was the effect of Reese's understanding of the situation as testified by him. He explains his purpose of taking over the note was to prevent Sanguinetti from commencing an action to collect the note, and thereby seriously interfere with the negotiations he then had on hand with prospective buyers of the mines, or prospective buyers of stock in the Big Eye Mining & Milling Company. The trial court was fully justified in holding that Reese's intention in taking over the note was to acquire all of the rights of the payee, Sanguinetti, in the paper. The special indorsement placed on the note, coupled with the fact that the transaction occurred after the lease terminated and before the date of maturity, corroborates Reese's testimony tending to establish the purpose he had in acquiring the note.

The title acquired by Reese was that of Sanguinetti, and that title was not in the least impaired by Reese notifying the makers of the note that he had acquired the possession of the note, nor by his offer to deliver up the note in consideration of stock of the Big Eye Mining & Milling Company. Reese's acts were consistent with his avowed purpose in acquiring the note. The Big Eye Mining & Milling Company do not pretend to have credited the amount represented by the note on Kleinbeck's agreement to pay additional compensation for the lease. If the lease ceased to be binding by reason of breaches of its covenants, no compensation for injury resulting from such breaches can be recovered other than to declare a forfeiture and recover possession of the leasehold estate. Payment of the promised consideration cannot be recovered by action in the courts, and this in the effect to be given to the defense as pleaded in the answer if such defense is given any effect.

The plaintiff acquired all of the rights in the note which Reese owned at the time of a transfer. The judgment is supported by the evidence, and upon the whole case it clearly appears that justice has been awarded. The judgment is therefore affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

(18 Ariz. 425)

KIRKLAND et al. v. SPRIGGS. (No. 1565.) (Supreme Court of Arizona. March 30, 1918.)

1. APPEAL AND ERROR \S 417(2)—NOTICE OF APPEAL—BOND—DISMISSAL.

When notice recites appeal by partnership consisting of appellant and another, and the attorney filing was not then attorney for such other, who had not been served and did not appear, the notice was effective only as to appellant's appeal, and his individual bond is not at variance therewith.

2. PARTNERSHIP \S 212 — ASSIGNMENT OF NOTE—DEMURRER.

Whether a note assigned was signed individually by defendant or was for a partnership debt, as alleged in the complaint, cannot be determined by demurrer, but must await evidence.

3. ACTION \S 47 — JOINDER OF CAUSES — EX CONTRACTU—EX DELICTO.

A cause of action seeking damages for breach of duties imposed under a lease held not ex delicto, and not subject to a demurrer for joinder with ex contractu causes.

4. APPEAL AND ERROR \S 1050(1)—REVIEW—MATTERS NOT PREJUDICIAL.

Assignments of error as to the admission of testimony which did not militate against appellant will not be reviewed.

5. APPEAL AND ERROR \S 1068(4)—HARMLESS ERROR—CURE BY VERDICT—INSTRUCTIONS.

An instruction upon the measure of damages, if error favoring plaintiff, was cured by a verdict of \$1 for plaintiff, where it appears plaintiff should have recovered many times such amount.

6. COSTS \S 193—PRESERVING PROPERTY—EXPENSES.

Under Civ. Code 1913, pars. 1410, 1413, 1417, attached personal property must remain in the hands of the officer unless bonded or sold according to law, or preserved under order of court, and where no order was given, nor agreement made between the parties, and plaintiff kept defendant's stock, his expenses therefor are not taxable costs under paragraph 638, setting forth items taxable, including disbursements incurred pursuant to order of court or agreement of parties.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Costs.]

7. APPEAL AND ERROR \S 752—REVIEW—ASSIGNMENTS OF ERROR—COURT RULES.

That an alleged error was presented in appellant's motion for new trial and argued at length in his brief is not sufficient under Supreme Court rule 8, subds. 1 and 2 (126 Pac. xi), requiring separate and distinct statement of grounds in assignments of error.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Action by A. E. Spriggs against George Kirkland and another. From a judgment for plaintiff and an order overruling a motion for a new trial, defendant named appeals. Modified and affirmed.

J. J. Cox, W. H. Stilwell, and A. Y. Moore, all of Phoenix, for appellant. M. J. Dougherty, of Mesa, and F. H. Swenson, of Phoenix, for appellee.

ROSS, J. Appellee, as plaintiff, instituted suit against defendants as partners for arrearages in rent, for damages for breach of contract of lease, for money loaned to the partnership, and for assigned wage accounts

of three employes of the partnership. Six causes of action were set out in the complaint. Two of these causes of action grew out of transactions between appellee and defendants; one for rent for \$294, and one for the alleged breach for \$1,000. The others were assigned to appellee for collection and were a note to the Salt River Valley Bank for \$400 made and executed by defendant Williams. This cause is set out in two counts; one on the contract with appropriate allegations, and the other on the general count for money loaned the partnership. The other three causes of action were for work and labor of employes of defendants aggregating \$54.50, or a total of \$1,748.50.

The defendant Williams was not served with process and made no appearance. Appellant, Kirkland, demurred to the complaint for a misjoinder of parties defendant and because, as he contends, it improperly unites actions *ex contractu* with an action *ex delicto*. The demurrers were overruled. In his answer he denied the partnership, as also any indebtedness for rent or on account of the note made by Williams or for money loaned Kirkland and Williams by the bank or for wages of employes, or for breach of contract of lease. A jury trial was had which resulted in a verdict for appellee for \$1. At the time suit was filed a writ of attachment was sued out and levied upon some 15 head of dairy cows, 22 head of calves or young cattle, some horses, and other personal property. The officer who made the levy turned this live stock and other property over to appellee as custodian or bailee. For the care of the stock, appellee claimed, and was allowed by the court, in his cost bill, \$894.27, after deducting a credit of \$67.73 for milk, for hides of calves that had died, and for milk cans sold by the custodian. Appellee was allowed \$60 for the labor of milking cows, \$20 for treating sick cattle, and \$12.50 for sheep dip and a blackleg injector, all told, with the costs of the clerk, sheriff, and witness fees, and mileage, \$1,323.52, which was taxed against appellant, Kirkland, in the court's judgment. Appellant moved for a new trial. He appeals from the judgment and the order overruling his motion for a new trial.

[1] The appellee has made a motion to dismiss the appeal, based upon the following facts of record: The notice of appeal recites that it is an appeal by the partnership composed of Kirkland and Williams, whereas the bond on appeal is executed by Kirkland in his individual capacity and for him only. This variance between the notice and the bond might be fatal under other circumstances, but not under the present. Williams had failed to appear. In fact, it is shown that he had left the country under a cloud. The attorney for Kirkland had no right or authority to represent Williams, and when he drafted the notice of appeal he was not Wil-

liams' attorney. The notice, in fact, then, was effective only as to Kirkland's appeal. The variance between the notice and the bond is more apparent than real. *Garrigan v. Kennedy*, 17 S. D. 258, 96 N. W. 89. The motion to dismiss is denied.

[2] The demurrer for misjoinder of parties defendant was based on the fact that the assigned note from the Salt River Valley Bank was signed by Williams individually and that it was therefore his debt and not a partnership debt. The complaint, however, alleges that the \$400 was obtained for and used by the partnership. If that be true, it was a partnership debt. Whether true or not, it cannot be determined by demurrer, but must await the evidence.

[3] An action for breach of contract may or may not sound in tort. In the present complaint it is based on the violation of covenants and agreements contained in the lease, from which it is alleged appellee suffered damages. The duties imposed under the lease, for the breach of which damages are sought, were contractual. 1 C. J. 129, § 153. Actions in contract and in tort were not united in the complaint, and the demurrer on that ground was properly overruled.

Appellant has assigned a great number of errors based on rulings of the court: (a) In not releasing attached property on his motion; (b) in not ordering a nonsuit on his motion; (c) in overruling motion for arrest and for a new trial; (d) in instructing the jury; (e) in the admission of testimony over defendants' objection; (f) in the rejection of testimony offered by him; and (g) in overruling defendants' objections and exceptions to the cost bill.

[4, 5] Most of these assignments we will pass over as without merit. It is evident that the testimony to which appellant excepted, even if erroneously admitted, did not militate against appellant, and the same may be said as to the instructions on the measure of damages, the verdict being for only \$1 as against \$1,748.50 claimed in the complaint. Under the evidence and the admissions in the pleadings, it appears that appellee should have recovered at least the balance of rent due, to wit, \$294, and we can only account for the small verdict upon the theory that the jury concluded the appellee's conduct toward appellant was so harsh and oppressive as to merit the rebuke implied in its verdict. From any viewpoint, appellant cannot complain of the verdict, and appellee does not complain.

[6] The allowance in the cost bill of the charges for keeping and caring for the live stock attached from the time of the attachment to the time of the trial and judgment is presented by appellant's assignment as error. The attachment was levied by the constable of Mesa precinct, who took possession of the attached property and immediately turned it over to appellee as custodian or

bailee. In connection with the cost bill is found a written statement by the constable in which he says, after giving an itemized statement of costs and expenses incurred:

"That he placed said property under the care of A. E. Spriggs who held possession of said property for this claimant as constable, and subject to this claimant's direction and supervision as constable; * * * that he, the said claimant, undertook to see that the said A. E. Spriggs should be repaid for his services, feed, and care of said property to the amount and out of any and all costs allowed by this court for the caring and feeding of said property; and that the foregoing charges are the reasonable costs for feeding and caring for said property."

The charges for the care and keeping of attached property are contained in appellee's verified cost bill. Our statute on attachments (chapter 1, title 8, Civil Code 1913) nowhere in direct terms provides for the payment of charges for keeping and caring for the attached property, but that the officer shall be paid for his expenses incurred in the caring for the property attached is clearly implied in section 1413, wherein it is provided for its sale, if—

"the keeping of the same until the trial will necessarily be attended with such expense or deterioration in value as greatly to lessen the amount liable to be realized therefrom."

If the property attached is personal, the requirement is that it remain in the hands of the officer unless bonded by the defendant or a third party, or unless sold as provided by law. Section 1410. But if it is not disposed of in one of these ways, it is provided that:

"The judge or justice of the peace, as the case may be, may make such order for the preservation or use of the same as shall appear to be to the interest of the parties." Section 1417.

No order for the use and preservation of attached property was made by the court or judge, and while, perhaps, such an order, under the law as it existed prior to 1913, was not indispensable to entitle the plaintiff to recover expenses incurred in caring for property, since that time it would seem that the power of the court to tax such costs is dependent upon the making of the contemplated order.

Section 638, Civil Code 1913, defines what the costs in the superior court are or may be. This definition includes—

"the fees of officers, of witnesses, cost of taking depositions, compensation of referees, cost of certified copies of papers or records, and such other disbursements as may have been made or incurred pursuant to any order of court or agreement of the parties."

This definition particularly points out what may be taxed as costs in the superior court and, among other things, names disbursements incurred pursuant to any order of the court or agreement of parties. These expenses could have been taken care of in either of these ways. It is not uncommon to do it by agreement, but, the parties failing in that, it would be an easy matter to obtain an order of the court. In *Southwestern*

Commercial Co. v. Owesney, 10 Ariz. 49, 85 Pac. 724, an action against the attachment creditor to recover expenses of the sheriff in caring for attached property, Campbell, J., said:

"We think the proper course under our statute, is to have the court or judge make an order for the preservation of the property, as permitted in paragraph 354 (Revised Statutes of 1901; section 1410, Civil Code), in which event it would seem the expenses might properly be taxed as costs in favor of the attaching plaintiff, if successful in his suit. * * * The statute evidently contemplates that the court should exercise supervision and control over such expenses in order to prevent unnecessary and excessive charges."

While this observation by the learned judge may not have been necessary in the decision of that case, it cannot be criticized as an unfounded or unwarranted construction of our attachment law in the respect alluded to, and the Legislature, in enacting section 638, *supra*, must have been influenced, if not by his language, by the same consideration. That the costs enumerated in section 638 were intended to be the only costs allowed is evidenced by the fact that a jury fee could not be assessed as costs until it was amended by chapter 26, Regular Session, Second Legislature, 1915, where it is provided:

"There shall also be included * * * a jury fee. * * *"

We conclude that the costs in the superior court are limited by section 638 to those named therein, and as the expenses incurred in caring for the live stock attached were not made or disbursed in pursuance of an order of the court or judge, nor by agreement of the parties, they are not a proper charge against appellant. We think the following items should be stricken from the cost bill: \$594.27 for care of stock; \$60 for labor in milking cows; \$20 for treating sick cattle; \$12.50 for sheep dip and blackleg injector.

Happily, the burden in this case falls where it should. Appellee, in addition to trying to collect what he claimed was due him for a debt and damages, assumed to accommodate other alleged creditors of defendants, and attached to secure an aggregate sum of \$1,748.50, a considerable number of live animals needing peculiar care and attention. We have examined the evidence on the issue of damages for breach of contract, for which he asks \$1,000, and our conclusion is that the jury was justified in returning, as it did, a verdict for nominal damages only. Whether the verdict was based upon this cause we do not know, but be that as it may, property of appellant to secure it was taken and held at great expense, and, as it turned out, it was unjustly taken. If this item had been left out and the suit prosecuted for appellee's rent, the property attached would necessarily have been much less and proportionately less expensive to keep and care for. While it is the duty of the officer to attach so much of defendant's property as may be suf-

sufficient to satisfy the command of the writ, it is also the duty of plaintiff, where his claim is for unliquidated damages, to be reasonable in his demand, especially if he would use the writ of attachment in aid of its collection. Otherwise, a writ intended to promote justice, may be converted into an instrument of oppression.

[7] Appellant devotes much of his brief to arguing that the jury and the appellee were guilty of misconduct and therefore that he was denied a fair trial. He has failed to make any assignment of such error. True, he presented the point in his motion for a new trial, the overruling of which he assigns as error, but this is not sufficient under our rules. He should have stated this ground of error separately and distinctly. Supreme Court rule 8, subdivisions 1 and 2 (126 Pac. xl). However, we have examined the facts upon which he bases his argument of misconduct, and do not agree with him that he was deprived of a fair trial or that the jury or appellee were guilty of misconduct.

The judgment of the lower court should be modified by striking therefrom the items of cost above enumerated, and as modified affirmed; appellant recovering his costs on appeal. It is accordingly ordered.

FRANKLIN, O. J., and CUNNINGHAM, J., concur.

(19 Ariz. 481)

WASSON (KILBOURN, Intervener) v.
SMITH et al. (No. 1586.)

(Supreme Court of Arizona. March 30, 1918.)

1. SALES \S 350—ACTION FOR PRICE—TIME TO
SUE.

As part of the price of cattle, the purchaser gave to plaintiffs a nonnegotiable note due in six years, bearing on its face the indorsement "part payment on 2,200 cattle guaranteed." The note was secured by a mortgage on the cattle. The bill of sale of even date contained a provision that the parties of the first part guarantee at least 2,200 head of cattle, and that the second party assumes the obligation to tally out said cattle within two years. The mortgage contained a provision that if the property was disposed of, the debt should become due immediately. Civ. Code 1913, par. 4143, provides that if the mortgagor sell or dispose of the mortgaged property without consent of the mortgagee, the latter shall be entitled to its possession and to have it sold for the payment of his debts, whether the same is due or not. The purchaser, intervener in the present suit, with permission and consent of plaintiffs, sold and delivered the cattle to defendant, who agreed to complete the tally and assume payment of the note subject to the guarantee of 2,200 cattle. Before the tally was completed, defendant, without the permission or consent of plaintiffs, sold and delivered the cattle to a third party, and plaintiffs brought suit before the expiration of the two years allowed for the tally. *Held*, that by the sale of the cattle defendant and intervener waived their right to have a tally or thereafter question the guarantee.

2. TRIAL \S 141—WAIVER—QUESTION OF
FACT.

While the question of waiver is ordinarily one of mixed law and fact, where the facts are all conceded, or where they compel but one conclusion or inference, there is no controversion of fact requiring a jury trial.

Appeal from Superior Court, Graham County; G. W. Shute, Judge.

Action by H. E. Smith and another against A. L. Wasson, defendant, in which G. C. Kilbourn intervened. Judgment for plaintiffs, and defendant and intervener appeal. Affirmed.

W. R. Chambers, of Safford, S. H. Morrison, of Big Springs, Tex., F. C. Knollenberg, of El Paso, Tex., and George J. Stoneman and Fred Blair Townsend, both of Phoenix, for appellants. Jay Good, of Globe and Lee N. Stratton, both of Safford, for appellees.

ROSS, J. The appellants prosecute this appeal from judgment on the pleadings. They are, respectively, defendant and intervener in an action brought by the appellees to recover a debt evidenced by a nonnegotiable promissory note, and to foreclose a chattel mortgage given to secure the note. The note was part of the purchase price of certain cattle sold by appellees to intervener, Kilbourn, due six years from its date, June 23, 1915, and on its face had the indorsement, "Part payment on 2,200 cattle guaranteed." The bill of sale from appellees to intervener, Kilbourn, of even date, contained the following provision:

"The parties of the first part guarantee unto the party of the second part at least 2,200 head of cattle under the several brands herein named, the agreed value being \$40.00 per head; the second party assuming the obligation to tally out said cattle within two years from the date hereof, and the second party agreeing to employ a man to help tally out said cattle who is acceptable to the said first parties."

January 28, 1916, appellant Kilbourn, with the permission and consent of appellees, sold and delivered the cattle to appellant Wasson, who agreed to continue and complete the tally and assume the payment of the note sued on, subject, as he claims, to the guaranty of 2,200 head of cattle. Thereafter, and before the tally was completed, appellant Wasson, without the permission or consent of appellees, sold and delivered all of said cattle to a third party. The suit was brought before the expiration of the two years allowed to tally the cattle, and was originally instituted against appellant Wasson only, upon the theory that he had taken the place of Kilbourn in the performance of the terms and conditions of the contract growing out of the transaction between the appellees and Kilbourn, and, having breached the contract and waived the tally, was presently liable on the note and mortgage. On petition to the court, Kilbourn was permitted to intervene, whereupon he filed an

answer to the complaint. Appellees thereafter filed an amended complaint, setting forth at great length, as is usual in equity cases, every conceivable phase of their case against the appellants. The separate amended answers of the appellants presented the same theory of defense, and consisted of denials, admissions, and pleas in bar. They also filed cross-complaints alleging damages, for which they asked judgment against appellees.

It would serve no useful purpose to incur this opinion with the pleadings, and we, therefore, will state in our way as we proceed the admitted facts, and determine therefrom, as did the trial court, whether these facts require or demand a judgment for appellees.

In addition to the facts heretofore stated, we will say that the tally was not completed, and, therefore, by actual count, it was not determined whether the guaranty of 2,200 head of cattle was made good or not. It was the contention of appellees, and this contention was adopted by the court, that appellant Wasson, in disposing of the cattle without appellees' consent, violated not only the terms of the mortgage, but also the laws of the state, and thereby matured the debt. One of the conditions of the mortgage is that, if the mortgagor shall himself dispose of the property, or dispose of it through any other person, the debt shall immediately become due. Paragraph 4131, Civil Code, provides if the mortgagor sell or dispose of the mortgaged property without the consent of the mortgagee, the latter shall be entitled to its possession and to have it sold for the payment of his debt, whether the same has become due or not. This contention is not controverted by appellants, but they say it cannot be known what, if anything, is due appellees until a complete tally of the cattle is had, and that by the terms of the bill of sale from appellees to Kilbourn, the latter had two years from June 23, 1915, in which to make the tally. Kilbourn, however, seven months after he had acquired title, parted with the same, so that he no longer was in position to personally see to it that a tally was made. Wasson, the new owner, by consent of the mortgagees, had assumed the obligation and duty of tallying the cattle within the time limit fixed by the contract. In this regard, by mutual consent, he took the place of Kilbourn, whose dominion over the cattle had ceased with the passing of his title. Appellant Wasson, before the expiration of the two years, without the consent or knowledge of appellees, disposed of the cattle, thereby losing possession and control of them and placing it out of his power to ever tally them. It is evident that the right to have the cattle tallied or counted was placed in the contract for the sole benefit of Kilbourn. It could in no manner benefit appellees, for if the count showed more than 2,200 head

of cattle, under the brands sold, they could claim no credit for the excess. If less than 2,200 were found, they would be required to make good the deficiency at the rate of \$40 per head. This right to tally the cattle was wholly for the protection of Kilbourn, and, under the agreement as alleged, inured to his transferee, Wasson.

The answers of appellants are framed upon the theory that Wasson was to assume all the duties and obligations devolving upon Kilbourn under the latter's contract of purchase, and to have all the benefits and guaranties accruing to Kilbourn under said contract; that is, Wasson was to do the tallying and to have credit for any shortage at \$40 per head, and that he assumed the payment of the note in suit with that understanding, which was well known and agreed to by appellees. In short, appellants pleaded a complete novation of Kilbourn's contract except in the respect of Kilbourn's liability on the note and mortgage. If, then, Kilbourn would avoid this liability, or reduce it, it was up to him personally to make the tally or see that his transferee made the tally with a showing of a shortage in the guaranty.

[1] The learned trial judge took the position that appellants, by disposing of the cattle to a third party without the consent of the appellees, waived all right to have a tally of the cattle, and we think properly so. That feature of the contract, as we have seen, was for their benefit. The right or duty to tally was exclusively theirs. They could waive it if they chose to do so or, while the cattle were in their possession and control, they had the unrestricted power to proceed with the tallying. The appellees reserved no right in themselves to tally, the only stipulation in their behalf being that the appellants would employ "a man to help tally out said cattle who is acceptable to said first parties." Appellant Wasson, surrendered his power and dominion over the cattle when he sold them, and was no longer in a position to tally them himself or to demand of the new owners the right to tally. Kilbourn's position was no better.

Kilbourn excuses his intervention upon the ground that he, on January 28, 1916, in his sale of the same brands, guaranteed to Wasson 2,600 head of cattle, his interest in this suit being that if less than 2,200 were found, he should at least be made whole to that number. We are not particularly impressed with this suggestion for this reason: In the seven months he was in possession of and handling the cattle upon the range, an opportunity, by actual count and estimation, to verify the guaranty of 2,200 head was afforded him, and it is not likely he would have guaranteed 2,600 head to Wasson without being fully satisfied there were at least as many cattle as appellees had guaranteed to him, especially since the period from June 23, 1915, to January 28, 1916, during which

time he was in possession of the cattle was not, as we believe, the season for very prolific increase. Besides, Kilbourn's guaranty to Wasson of 2,600 head of cattle could not be based upon appellees' guaranty to him of 2,200 head, for we must assume that he was a man of ordinary intelligence, business ability and experience, and, being such, based his guaranty upon his own first-hand information. But, be that as it may—and we only suggest it for the light it throws on the question of waiver—we think when appellants who alone were authorized to tally the cattle, disposed of them and thereby put it beyond their power to have the tally made, they waived the right to have a tally or thereafter to question the guaranty. The tally, under the agreement, was to be made at the expense of the appellants, and, if they had become satisfied with the guaranty, would have been but a useless expenditure of money, and it is not improbable the appellants so concluded.

[2] We recognize that the question of waiver is ordinarily one of mixed law and fact, but where the facts are all conceded, or where they compel but one conclusion or inference, we do not understand there is a controversion of fact requiring a jury trial. Here the facts are agreed, and it is the duty of the court to determine the law therefrom. 40 Cyc. 270.

As the cross-complaints are based upon the alleged shortage in the guaranty, and it appearing that no tally was ever taken, and cannot be had because of the conduct of the appellants, it follows that the cross-complaints are without merit.

The judgment is affirmed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

(19 Ariz. 443)

JACKSON v. LEBANON RESERVOIR & DITCH CO. et al. (No. 1581.)

(Supreme Court of Arizona. March 30, 1918.)

1. APPEARANCE ⇐26 — AFTER JUDGMENT — JURISDICTION OF PERSON.

Although one was made plaintiff without her knowledge in an action to fix rights to water, the court obtained jurisdiction of her, where she appeared and answered a citation on motion to modify the decree.

2. APPEAL AND ERROR ⇐440—EFFECT OF APPEAL—JURISDICTION OF TRIAL COURT.

Where the court expressly retained jurisdiction of a matter involving water rights, an appeal from the decree did not prevent the hearing of a motion to modify such decree.

3. APPEAL AND ERROR ⇐395—NECESSITY FOR BOND.

Under Civ. Code 1913, par. 1233, providing that appeals from orders other than final judgments may be taken within 60 days, and paragraph 1236, providing that appellant shall, within the time for appealing, file an appeal bond, an appeal from an order modifying a decree will be dismissed, where a bond was not filed within 60 days.

Appeal from Superior Court, Graham County; A. G. McAllister, Judge.

Action by the Lebanon Reservoir & Ditch Company, a corporation, and others, against George N. Campbell and others, to settle priority rights to water. There was a decree settling the rights of the parties. From an order modifying the decree, plaintiff Edith Sanberg (now Edith Sanberg Jackson) appeals. Affirmed.

This action was commenced during the spring of the year 1915 by the appellees and the appellant, as plaintiffs, owners of irrigable agricultural lands in Graham county, against George N. Campbell and other named defendants, therein seeking to adjudicate and finally settle the priority rights of all of the parties to the action to the waters of a stream known as Merejildo Wash. The complaint sets forth the priority claims of the parties, the extent of the appropriations made, the acreage of each party irrigated from said stream, the connection the corporation sustains to the landholders, and its service to them, and alleges that the defendants named have wrongfully interfered with the rights of the plaintiffs in the water in question in the main action. The relief demanded is a restraining order prohibiting the defendants from diverting any of the waters of the said wash from the plaintiffs' ditches, and from interfering with the flow of water through plaintiffs' system of irrigation; that the court adjudicate the respective rights and priorities of the plaintiffs and defendants as against one another to the use of the waters of Merejildo Wash; for a perpetual injunction; and for general relief.

The cause was tried on the 12th day of July, 1915, and the trial resulted in a decree determining the respective rights of the parties, granting the injunctive relief prayed for. The decree was entered on the 11th day of April, 1916. The following language was used in the decree:

" * * * And that each of the parties hereto have pursued and is pursuing the reduction thereof [lands] to cultivation by irrigation with all reasonable diligence, and that as against one another each of the said parties has the right to divert and use, on his said tracts of land, water from and of the natural flow of the said Merejildo Wash, in the order of priority and dating from the date as set forth in the said schedule, for the irrigation and cultivation of the amount of said lands shown in said schedule, or so much thereof as may at any time be under cultivation and irrigation, diverting to and applying therein, however, only such limited amount of water as may actually be necessary, economically and carefully used, for the purpose of cultivation thereof such crops as may be cultivated thereon from time to time."

Then follows the schedule, showing that Edith Sanberg is the second in the list, cultivating and irrigating 32 acres from the year 1894. The decree expressly retains jurisdiction over the cause—

"for the purpose of executing this decree, or for the purpose of modifying the same from time to time, if upon application facts are shown justifying such modification. * * *

The defendants in the action gave notice of appeal on September 14, 1916. An appeal bond was approved and filed October 10, 1916. The appeal was never prosecuted in this court. On September 20, 1916, the plaintiffs in the main action moved for an amendment of the decree in the particular of defining and prescribing the manner of distributing the water to the several landowners entitled thereto, to the end of carrying out the decree according to the spirit of its terms and to promote justice. The motion filed complains of the acts of Edith Sanberg in taking water greater in amount than allowed her by said decree, and alleges:

"* * * That since the time the said decree was entered the said plaintiff [Sanberg] has persistently and continually claimed more water than the amount to which she was entitled, * * * has gone upon the plaintiff's ditches and cut the same, has taken water at times sufficient to water 60 acres, and persistently and continually is acting in such manner as to annoy the remaining plaintiffs and interfere with the distribution of water upon their land."

The relief demanded is a modification of the decree, "so that it shall be made definite and certain [as] to the number of days during each month or week that the said Edith Sanberg (now Edith Sanberg Jackson) has the right to said water," and for an injunction restraining said party from interfering with the use of the water by the other parties, and praying for a citation requiring said party to show cause why said decree should not be so modified.

On October 16, 1916, Edith Sanberg Jackson appeared and demurred to the facts set forth in the petition for citation, alleging that the application sets forth facts inconsistent with the pleadings in the main case; that the respondent is named a party plaintiff in the main cause, and in this proceeding she is made a party defendant; that the law provides no such form of procedure as here instituted; that the relief sought herein is a departure from the relief sought in the original action; that the original case is pending on appeal in the Supreme Court, by reason of which fact the lower court is without jurisdiction to grant the relief prayed. Answering the petition, the respondent denies that she was a party to the original action of her knowledge or by her consent, but alleges that her name was joined as a party in said action without her knowledge or consent, and that she received the first actual notice that she was a party to said suit when the citation for modification of the decree was served upon her.

The court overruled the respondent's objections to the proceeding and motion and proceeded to hear evidence offered by the parties. The evidence considered, the court

ordered that the motion be granted, and that the decree be modified—

"in this respect, namely: The amount of water decreed in the original decree to the respondent and to stockholders of the Lebanon Reservoir & Ditch Company shall be distributed until the further order of this court in this manner, to wit: Respondent Edith Sanberg Jackson shall have the use of the water of said canyon during the first four days of each and every month, and also on the 13th day of each month and the 22d day of each month, each term to begin at midnight and end at midnight. The remaining plaintiffs and stockholders of the Lebanon Reservoir & Ditch Company shall be entitled to the use of said water during the remaining days of each and every month."

This order was made November 21, 1916, and entered December 6, 1916. This appeal is from the order made on November 21, 1916, as specified in the notice of appeal on the 11th day of January, 1917. On March 3, 1917, the respondent filed her appeal bond.

E. L. Spriggs, of Safford, for appellant. W. R. Chambers, of Safford, for appellees.

CUNNINGHAM, J. (after stating the facts as above). [1] The contention of the appellant that she was without knowledge of her status as a party plaintiff in the main case is without merit. The citation issued brought her before the court, and gave the court jurisdiction over her with equal effect to that of service of summons. By appearing and answering the citation, she submitted her person and her rights involved in that action to the jurisdiction of the court. By her answer she does not attempt to dispute the facts charged against her in the petition and citation. The whole controversy raised by her in answer to the citation consists of the assertion that she was never legally brought before the court prior to the time of making return to the citation. The trial court decided otherwise, and properly. Becoming satisfied from the evidence that the facts stated in the application are true, and not being denied by respondent, the court made the order complained of, modifying the decree. The appellant has not pointed out wherein her rights have been prejudiced by the order. The order overruling the demurrer, the order denying a new trial, and the order modifying the original decree are assigned as error.

[2] The appellant relies upon the taking of an appeal by the defendants in the original case as an act depriving the trial court of jurisdiction to make the order modifying the decree. The contention seems to be that, after said defendants gave notice of appeal from the principal decree, the trial court lost all power over the decree to modify its terms. The decree was made April 11, 1916, and the appeal was perfected by giving notice of appeal on the 14th day of September, 1916, and by filing an appeal bond on October 10, 1916. The application for a citation to this respondent was filed September 20, 1916, before the said appeal was perfected. The said appeal

as perfected did not have the effect of superseding the decree; hence the trial court did not lose jurisdiction over the same, either by operation of law, by act of the parties appealing, nor in fact, as the court expressly retained jurisdiction of the matter upon the face of the decree, for the purpose of enforcing the equities of the parties.

[3] The appeal in this case is from a final order affecting a substantial right of the appellant, made upon a summary application in an action after judgment, and in order to become effective the appeal must have been perfected within 60 days after the said order was made. Paragraph 1233, Civil Code of Arizona, 1913. The order was made November 21, 1916. Notice of appeal was given on the 11th day of January, 1917, and the bond on appeal was not filed until the 3d day of March, 1917, a period of 100 days after the order was made. In order to effect an appeal "the party appealing shall also, within the time in which the appeal may be taken, file an appeal bond, or undertaking. * * * " Paragraph 1236, Civil Code of Arizona 1913. The filing of an appeal bond in cases where a bond of appeal is required is jurisdictional. *Thomas v. Speese*, 14 Ariz. 556, 132 Pac. 1137.

The appellees contend that, because the appellant has failed to perfect her appeal by filing an appeal bond within 60 days, as shown by the record, the appeal must be dismissed. That contention must be sustained.

FRANKLIN, C. J., and ROSS, J., concur.

(52 Utah. 18)

DENKERS v. SOUTHERN PAC. CO. et al.
(No. 8031.)

(Supreme Court of Utah. Feb. 16, 1918.
Rehearing Denied April 10, 1918.)

1. RAILROADS ⚡348(1)—CROSSING ACCIDENT
—EVIDENCE.

In action against railroad company for injuries received when plaintiff's automobile was struck by a train at crossing, evidence held to support jury finding of defendant's negligence in failing to keep the crossing in a reasonably safe condition.

2. RAILROADS ⚡348(5)—CROSSING ACCIDENT
—EVIDENCE.

Evidence held to support jury finding of negligence, in that defendant's train was running at a dangerous speed.

3. RAILROADS ⚡350(5)—CROSSING ACCIDENT
—QUESTIONS FOR JURY.

Whether the electric bell at the crossing rang as the train approached the crossing held for the jury.

4. RAILROADS ⚡350(13)—CROSSING ACCIDENT
—QUESTIONS FOR JURY.

Contributory negligence held a question for the jury.

5. RAILROADS ⚡351(5)—CROSSING ACCIDENT
—INSTRUCTIONS — "GOOD AND SUFFICIENT CROSSING."

On the issue whether the railroad maintained a "good and sufficient" crossing, as expressly required by Comp. Laws 1907, § 445, the court might properly charge in general terms that a good and sufficient crossing is a crossing

that is sufficient and ordinarily safe for the traveling public to pass to and fro over it, keeping in mind its location, whether in a sparsely settled or populous locality, and the character and volume of traffic that ordinarily may be expected to pass over it.

6. RAILROADS ⚡350(3)—CROSSING ACCIDENT
—QUESTIONS FOR JURY.

There being no statute specifically defining what a "good and sufficient" crossing consists of, the question whether a railroad has constructed such a crossing, as expressly required by Comp. Laws 1907, § 445, is ordinarily one for the jury, unless it clearly appears that but one conclusion can be drawn from the evidence as to the condition of the crossing, when it is a question of law for the court.

7. APPEAL AND ERROR ⚡1066 — HARMLESS
ERROR—INSTRUCTIONS.

In action for injury from crossing accident, in instructing on railroad's duty to maintain, as expressly required by Comp. Laws 1907, § 445, a "good and sufficient" crossing, failure to define what a "good and sufficient" crossing consists of was harmless, where the evidence showed, as a matter of law, that the crossing was not good and sufficient.

Frick, C. J., dissenting in part.

Appeal from District Court, Weber County;
N. J. Harris, Judge.

Action by Herman B. Denkers against the Southern Pacific Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Plaintiff brought this action to recover damages for personal injuries which he alleges he sustained because of the negligence of the defendants. The cause was tried to a jury, who returned a verdict in favor of plaintiff. To reverse the judgment entered on the verdict defendants have prosecuted this appeal.

It is alleged in the complaint, and admitted in the answer, that the defendant Southern Pacific Railroad Company, a corporation, hereafter called Company, "owns, operates, and controls a steam railroad between Oakland, Cal., and Ogden, Utah, over which it transports freight and passengers for hire; that said railroad extends from Ogden Union Depot in Ogden, Utah, in a northwesterly direction across Seventeenth street, a public highway within the city limits of Ogden, Utah, thence westerly to the Great Salt Lake."

The acts and omissions of the defendants which the plaintiff alleged in his complaint as negligence were: (1) That on February 17, 1915, and for a long time prior thereto, the Company and defendant Rowland, division superintendent in charge of the Company's roadbed, "failed and neglected to make and maintain a good and sufficient crossing of the said railroad tracks, and had caused said track to be constructed and maintained across the said Seventeenth street without adequate or sufficient approaches to the said railroad tracks, and without raising the said public road to the elevation of its said rails on either side, and without causing the space between the rails to be filled up

and raised to a proper and safe elevation, with plank, cement, gravel or other suitable material and * * * maintained said tracks with narrow, low, steep, and insufficient approaches and with no filling whatsoever between the said rails," etc.; (2) that on the 17th day of February, 1915, plaintiff, while traveling in an easterly direction along said Seventeenth street in an automobile, and when in the act of passing over and across said railroad track on said crossing, the Company and defendant Thomas Lindsay, a locomotive engineer, "caused a locomotive engine and passenger train to be propelled at an excessive, unreasonable, and dangerous rate of speed, and without adequate, or any warning to plaintiff, around a curve to, against, and upon said automobile, * * * and by force of the impact plaintiff was hurled from said machine approximately 50 feet, through a lumber fence, into a ditch"; that his skull was thereby crushed; that it became and was necessary to have skilled surgeons and physicians remove a portion of his skull, etc.

Defendants, in their answer, "admit that on February 17, 1915, plaintiff drove his automobile to the edge of said railroad crossing and tracks, but no further, that plaintiff, without going onto said tracks, there collided with the locomotive engine of the defendant * * * Company, and that through the force and impact of such collision, plaintiff was hurled several feet into a ditch and was injured, and that plaintiff thereafter had a surgical operation by reason of said injuries; and these defendant admit that plaintiff's injuries were severe." Defendants, however, allege that:

"The injuries, which are a consequence of said accident were caused, and the cause thereof directly contributed to, by the careless, negligent, and heedless acts of the said plaintiff at the time of and leading up to the happening of the said accident, and were not caused, nor the cause thereof contributed to, by any negligent act, fault or omission on the part of the defendant * * * Company, its officers, agents or employes, or the other defendants, or either of them."

Geo. H. Smith, J. V. Lyle, and B. S. Crow, all of Salt Lake City, and C. R. Hollingsworth, of Ogden, for appellants. Skeen & Skeen, of Salt Lake City, for respondent.

MCCARTY, J. (after stating the facts as above). [1] There is abundant evidence to support a finding by the jury that the Company was negligent, and grossly so, in failing to keep the crossing, where the accident in question occurred, in a reasonably and ordinarily safe condition. In fact there is no substantial conflict in the evidence respecting the alleged dangerous condition of the crossing at the time of and long prior to the accident. Paul Kammeyer, a witness for plaintiff, testified, and his evidence is not disputed in any particular, in part as follows:

"I observed the condition of the crossing on the morning of the 18th (the day after the accident occurred), and found it to be as follows: The ties were bare, and there was no gravel or cinders on the inside of the rails. There were mudholes right in between the ties in the crossing, and the dirt was about 2 inches below the ties on the outside of the rails, on the outside of the crossing. I took a flat stick, laid it across the two rails of the west track, and measured with a yardstick the distance from the bottom of the mud between the rails to the stick. I found it to be $9\frac{1}{4}$ inches close to the west rail, $13\frac{1}{4}$ inches in the center of the track, and $11\frac{1}{4}$ inches near the east rail. I measured in front of the west rail and found the mud to be a trifle more than 7 inches deep. * * * I saw a couple of guard rails laying on the west side of the rails, on the west side of the road. There were no guard rails, or planks, or anything of that kind at the crossing of the track, between the rails."

In fact the negligence of the Company in failing to keep the crossing in ordinarily good repair is, in effect, admitted. Counsel for appellants, in their printed brief, say:

"Plaintiff was negligent also by reason of the general principle that one who goes upon a rough and dangerous crossing, knowing it to be rough or dangerous is, by the act itself, guilty of contributory negligence."

[2] There is ample evidence to support a finding by the jury that the train on that occasion, as it approached the crossing and when it collided with the plaintiff and his automobile, was going at the rate of from 35 to 40 miles per hour. The jury might well find that this, under the circumstances, was a dangerous rate of speed and constituted negligence on the part of the Company and Lindsay, the engineer. We deem it unnecessary to further consider the question of the alleged negligence of defendants, except to repeat that there is substantial evidence to support the finding of the jury in that regard.

The important question presented by this appeal is, Was respondent, as a matter of law, guilty of contributory negligence? The particular facts and circumstances leading up to and which culminated in the collision mentioned, over which there appears to be no conflict in the evidence, are as follows: On February 17, 1915, respondent, who was an employé of the Boyle Furniture Company, of Ogden, Utah, had occasion to travel along Seventeenth street, in a westerly direction, in an automobile. Referring to the movements of respondent on that occasion, appellants, in their printed brief, say:

"In passing over the railroad tracks going westerly, he noticed the condition of the crossing; in fact he stated that he had difficulty in getting over, although he did not stall his engine or stop his car. Denkers (respondent), having passed over the crossing, made certain collections from customers residing in the neighborhood lying immediately west of the railroad track, and at about half past 4 o'clock of that afternoon turned back toward Ogden. In doing this it was necessary for him to pass over the same crossing which he had passed on his trip out, which he testified was unusually rough, having practically no ballast between the rails."

Regarding his movements and the diligence, if any, he used in looking and listening for approaching trains just prior to and at the time of the collision, respondent testified in part as follows:

"In making that trip, I had crossed this track once before that day, while it was raining or snowing. When I returned it was snowing and the wind was blowing I presume from the west. * * * My top was up."

He further testified that as he ascended the incline, the approach to the crossing, he "threw the car into low gear," and "approached the tracks at a speed of about 5 miles an hour," and, further:

"I was in a bend of the road about a half or three-quarters of a block west of the track when I looked up to see if a train was approaching. After passing this bend I kept looking up the railroad track in a northerly direction to see if a train were approaching. I continued to look through the isinglass in the side curtains until I reached the track. When I reached the track I didn't hear the bell ringing nor the whistle of a train. * * * After looking up the track I went up to the first rail. * * * I experienced considerable difficulty in getting my auto across the first rail. * * * When I struck the west rail of the track, the first thing I did was to apply more gas, for my speed was insufficient to get across, and I had to have more power, because I knew I was in a dangerous place. * * * I got over the first rail, and in between that and the next rail constituting the track, I had more difficulty. * * * The front wheels of my automobile * * * went right up to the second rail, and in attempting to cross it I applied more gas. I skidded the front portion of the auto towards the south. The engine of my auto stopped, and I commenced to get out for the purpose of cranking the machine. * * * The side curtains of the car were not fastened. * * * I was in the act of getting out * * * when I was struck."

On cross-examination he testified in part as follows:

"Q. Mr. Denkers, you were on that crossing for some little time or quite an appreciable time, were you? A. I was there for a moment. Q. That moment was just long enough for you to pass over one rail and to come to the other rail and skid and stall your engine? A. Why, if the crossing had been in good condition it was just long enough for me to have got clear of it. * * * Q. Did you look for the engine after you got on the track—did you look? A. Yes, sir."

Regarding the space of time he was on the railroad track before he was struck by the engine, he testified in part as follows:

"Well it was difficult to determine the time, but my opinion is it would be less than a minute."

The evidence relating to the distance an approaching train from the north can be seen from the crossing is not as clear as it might be. Counsel for appellant, in their brief, says that a train coming from the north can be seen from the crossing a "distance at least of 1,000 feet." There is some substantial evidence to support this contention.

[3,4] As we have pointed out, there is evidence to support a finding by the jury that the train, as it approached the crossing on the occasion in question, was going at the rate of from 35 to 40 miles per hour. Trav-

eling at the rate of 35 miles per hour a train would go 3,080 feet per minute, or approximately 51.3 feet per second. At that rate of speed it would require 20 seconds only for the train to go approximately 1,000 feet, the distance which it is claimed it could be seen from the crossing. Traveling at the rate of 40 miles per hour, the train would go 1,000 feet in approximately 17 seconds. There was an electric bell at the crossing. Witnesses for appellant testified that they heard the bell ring as the train approached the crossing. Plaintiff testified that he did not hear it ring. Other witnesses who were in the vicinity of the crossing at the time of the accident testified that they did not hear the bell. The evidence shows that the bell is a mechanical device that "may get out of order." Under the circumstances, we think the question as to whether the bell rang on that occasion was for the jury to determine. Taking into consideration the rapidity the jury was warranted in finding the train was moving, and the short space of time in which it passed over the 1,000 feet that it could be seen from the crossing; the all but impassable condition of the crossing and the approaches thereto were in, as shown by the evidence; the trouble plaintiff testified he had in getting his automobile over the west rail of the railroad tracks; the stalling and skidding of the automobile and the killing of the engine in trying to force it over the east rail—we are not prepared to say that as a matter of law plaintiff was guilty of contributory negligence. To hold that the plaintiff was, under the peculiar and somewhat unusual circumstances of this case, as a matter of law, guilty of contributory negligence would be casting practically the entire burden on the traveling public to guard against and avoid accidents at railroad crossings, and would, in effect, grant immunity to railroad companies from liability in such cases, however careless and negligent they might be in maintaining the railroad crossings and approaches thereto, and in operating and running their trains to and over the crossings.

Counsel for appellant have cited in their brief numerous decisions, some of which are Utah cases, in support of their contention that plaintiff, under the facts as disclosed by the record, is not, as a matter of law, entitled to recover. We have examined the cases cited and in none of them are the facts the same, or even similar, to the facts of this case. Counsel cite and quote from Elliott on Railroads, vol. 3 (2d Ed.) § 1166, wherein the author says:

"The duty to look and listen requires the traveler to exercise care to select a position from which an effective observation can be made. The mere fact of looking and listening is not always a performance of the duty incumbent upon the traveler, for he must also exercise care to make the act of looking and listening reasonably effective, and must usually continue to be on the lookout and exercise his faculties until

he has crossed. * * * He has, indeed, no right in any case to omit to take precautions for his own safety upon the supposition or assumption that he may safely cross the track."

This doctrine is declared by the other authorities cited by counsel on this point. The difference, if any, in the cases cited consists only in the phraseology used in illustrating the doctrine. We recognize the wholesomeness of the doctrine and have no desire or disposition to depart from it.

The court, in the case at bar, instructed the jury in part as follows:

"You are instructed that the plaintiff, in attempting to cross the railroad track of the Southern Pacific Company, was, as a matter of law, bound to listen for signals, notice signs put up as warnings, and look attentively up and down the track; and, if by looking he could have seen an approaching train in time to escape, it must be presumed, either that he did not look, or if he did look, that he did not heed what he saw, and was therefore negligent."

There is evidence from which the jury could find that plaintiff on the occasion in question looked and listened for an approaching train from the time he was 150 feet from the crossing until he got onto the railroad, and that the train was neither within hearing nor in sight, and that plaintiff fully appreciated the danger he was in when he started to cross the track. There is also evidence from which the jury might well find that if the crossing had been in ordinarily good condition for travel plaintiff would not have stalled—killed—the engine of his automobile in attempting to cross, and would have cleared the track before the train arrived at the crossing.

[5-7] We have a statute (Comp. Laws 1907, § 445) which provides that:

"Every railroad company shall be liable for damages caused by its neglect to make and maintain good and sufficient crossings at points where any line of travel crosses the road."

The court charged the jury that:

"By statute it was the duty of the Southern Pacific Company to make and to maintain a good and sufficient crossing at the intersection of its roadbed and Seventeenth street, and that it is liable to the plaintiff for all damages, if any, which he sustained at said crossing by reason of its neglect to make and to maintain a good and sufficient crossing, if you find that it did neglect to make and maintain such crossing."

The giving of this instruction is assigned as error. The objection to it is "that it does not explain what a good and sufficient crossing consists of." We have no statute providing what shall constitute a "good and sufficient" crossing, namely its width, the grade of the approaches thereto, the kind of material to be used in its construction on either side of the railroad tracks, and the kind of ballast that shall be used to fill in between the ties and rails, etc. The difficulty a court would have to give a proper instruction as to what would constitute a good and sufficient crossing in these respects is suggested by the argument of appellant's

counsel in their printed brief, wherein they say:

"A crossing may be good and sufficient for one purpose and not for another. It would not be expected of the railroad company that at a point like the one where the accident happened it would have a crossing"

—as smooth and perfect as is ordinarily required where its tracks cross the crowded thoroughfares of populous localities. The court, in a case of this kind, might properly charge the jury in general terms that a good and sufficient crossing is a crossing that is sufficient and ordinarily safe for the traveling public to pass to and fro over it, keeping in mind its location, whether in a sparsely settled or populous locality, and the character and volume of traffic that ordinarily may be expected to pass over it. No complaint, however, is made because such an instruction was not given. There being no statute specifically defining what a "good and sufficient" crossing consists of, the question of whether a certain crossing is good and sufficient is ordinarily one for the jury to determine from the evidence adduced, unless it clearly appears that but one conclusion only can be reasonably drawn from the evidence respecting the condition of the crossing, in which case it becomes a question of law for the court. We think the only inference deducible from the evidence in the case at bar is that the crossing in question was at the time of the accident, and for a long time prior thereto had been, in a dangerous and unsafe condition. The court, therefore, might well have charged the jury that the railroad company, under the circumstances, was, as a matter of law, guilty of negligence in failing to keep the crossing in a reasonably safe condition. This being so, the question of whether the instruction referred to contains a correct or incorrect statement of the law is, so far as this case is concerned, unimportant. Assuming, but not conceding, that the instruction was erroneous, and that the giving of it was, as an academic proposition, error, the error, in view of the conclusions we have arrived at respecting the negligence of the railroad company in failing to maintain the crossing in a reasonably good condition, was harmless, and could not have prejudiced any right of appellant. The assignment of error in which the instruction is assailed is therefore overruled.

Numerous other errors are assigned, but we do not deem them of sufficient importance to warrant discussion.

We find no reversible error in the record. The judgment is therefore affirmed, with costs.

CORFMAN, THURMAN, and GIDEON, JJ., concur.

FRICK, C. J. I concur in the affirmance of the judgment. I, however, cannot concur

with what is said by Mr. Justice McCARTY respecting the court's instruction to the jury upon the subject of railroad crossings. Upon that subject the court charged the jury in the language quoted by my Associate. The statute merely requires the appellants "to make and maintain a good and sufficient crossing," leaving it to them to select the material and to determine the manner of its construction. The statute is therefore merely declaratory of the common law. The duty imposed upon railroad companies in this state, therefore, is to exercise ordinary and reasonable care to make and maintain crossings at all points where by law crossings must be made and maintained which are adequate and sufficient to meet the requirements of the traveling public and to maintain them in such a condition that the public can safely use the same when in the exercise of ordinary care at all seasons of the year and during all hours of the day and night. In other words, it is the duty of railroad companies in this state to make and maintain the public highways and streets reasonably safe at all points where their railroads cross such highways and streets precisely the same as it is the duty of municipal corporations to make and maintain streets in a reasonably safe condition at all places where such streets are being used. *Raper v. Railroad Co.*, 126 N. C. 566, 36 S. E. 115. The highway must be maintained reasonably safe at all points where it is being used, and the duty to make and keep it reasonably safe and convenient for passage at crossings is precisely the same as at other points, the only difference being one of degree, in that the highway may be used more at a public crossing than at other points, and therefore it may require more care and more frequent inspection to keep the crossing reasonably safe at such places than it does at other points where the travel is intermittent. The degree of care is, however, ordinary care under all the circumstances. That such is the duty of railroad companies where the statute does not prescribe the character of the crossings has become almost elementary. 3 Elliott, Railroads (2d Ed.) § 1176; 33 Cyc. 925; White, Personal Injuries on Railroads, §§ 909, 910; Elliott, Roads and Streets (3d Ed.) § 1017. Where, however, the statute prescribes how the crossing shall be constructed, a railroad company is liable for any injury that is caused by reason of its failure to comply with the statute to any one who is using the crossing while in the exercise of ordinary care. *Scanlan v. Boston, etc., Co.*, 140 Mass. 84, 2 N. E. 787; *Hogue v. Chicago, etc., Ry. Co. (C. C.)* 32 Fed. 365. Where the duty is imposed by law, it becomes the duty

of the court in all cases to instruct the jury what the legal duty is, and the jury will then determine from all the evidence whether the duty has been met or not. Take the instruction in this case and it in no way informed the jury what the duty of appellants was. True, it said if they failed to "make and to maintain a good and sufficient crossing," they were liable. What constituted a good and sufficient crossing was, however, left to the judgment of each individual juror, without stating to them what would constitute a good and sufficient crossing under the statute. As before stated, the duty imposed on appellants was to exercise reasonable and ordinary care to make and maintain a crossing which was of sufficient width and was constructed of such material that the traveling public could safely pass over it, either on foot or on horseback, or with all vehicles in ordinary use, and at all times and seasons, when the person using it was in the exercise of ordinary care. If the crossing is by the jury found to be in such a condition then it is a good and sufficient crossing, and the jury should have been so instructed. If the question had been whether a highway or street was in a reasonably safe condition for travel, such would have been the charge, and there can be no distinction regarding the duty of maintaining a highway or a street in a reasonably safe condition and a railroad crossing in a highway or street. The forms of instructions stating the law as I have outlined it are both numerous and easily accessible. See 2 Brickwood, Sackett on Instructions to Juries, §§ 1862, 1938, 1980. See, also, *Brecher v. Chicago Junction Ry. Co.*, 119 Ill. App. 559, where an instruction, which it was held correctly stated the law in a defective crossing case, is set forth. See, also, *Logan v. Lake Shore, etc., Ry. Co.*, 148 Mich. 603, 112 N. W. 506. I am of the opinion, therefore, that the instruction given by the court, and which was excepted to by appellants, was faulty in not correctly defining the duty of appellants in maintaining the crossing in question. I, however, concur with Mr. Justice McCARTY that in this case the error was without prejudice, for the reason that all the evidence is to the effect that the crossing in question was defective and unsafe, and therefore but one result is permissible.

The question of contributory negligence on the part of the plaintiff was submitted to the jury, and they found against appellants on that question. They also found that the defective crossing was the proximate cause of the injury. This court is therefore powerless to interfere with the judgment, and hence it should be affirmed.

(64 Colo. 358)

DE PRIEST v. PEOPLE. (No. 8638.)

(Supreme Court of Colorado. April 1, 1918.)

CRIMINAL LAW §1169(2)—**PREJUDICIAL ERROR—EVIDENCE.**

In prosecution for nonsupport of an illegitimate, it was not harmless error to introduce a heart-rending letter of the girl to her mother regarding her condition and the cause thereof, and like statements to other witnesses, although the girl testified to the truth of such matters.

Error to Juvenile Court, City and County of Denver; Ben B. Lindsey, Judge.

Claude De Priest was convicted of nonsupport of his alleged illegitimate child, and he brings error. Reversed and remanded.

John A. De Weese and C. A. Prentice, both of Denver, for plaintiff in error. Leslie E. Hubbard, Atty. Gen., and Bertram B. Beshoar, Asst. Atty. Gen., for the People.

HILL, C. J. The plaintiff in error was convicted of the nonsupport of his alleged illegitimate child.

The errors urged pertain to the admission of testimony. The mother testified that the relation between her and the defendant (which was with her consent), and which brought about the existence of the child, occurred at a certain rooming house in Denver, on October 5, 1913; that about three weeks thereafter, and when she ascertained her condition as the result of such relation, she wrote her mother a letter concerning it, and gave it to her upon going to work one morning. She identified this letter. The mother testified to receiving the letter. She was likewise permitted to identify it. Over defendant's objection, the letter was received in evidence and read to the jury. The Attorney General admits that the admission of this letter, as well as the testimony of other witnesses as to what the mother of the child said to them concerning the transaction at later periods and not in the presence of the defendant, was error, but maintains that it was harmless error, for the reason that the mother of the child testified to the truth of the contents of the letter, as well as to the truth of the substance of her statements to the other witnesses as testified to by them, and hence that this letter, as well as the testimony of these witnesses, was but cumulative of these questions, for which reason, although erroneously admitted, the errors were harmless.

This argument, though ably and ingeniously presented, ignores the elementary rules concerning evidence and the rights of all defendants in connection therewith. The mother of the child was about 17; the defendant, 20. They lived with their respective parents on opposite sides of the street. The letter told the mother of the daughter's condition and that the defendant was responsible for it. It set forth a history of their love af-

fair, including a statement that this was the only time she had ever committed such a wrong; that she had told the defendant over the telephone of her condition; that in reply he abused her, also got scared, and told his mother something; and that she had sent him away, etc. It also contains heart-rending appeals for sympathy, together with the statements disclosing that she appreciated the seriousness of her condition, the disgrace to her family and self, concluding with the prayer and hope that the defendant would marry her, or could be made to do so, and that everything would come out all right. In addition to being a complete and perfect self-serving declaration in support of her testimony, its contents are such as to appeal to the sympathy, passion, and prejudice of any juror. The fact that the girl had testified to the material facts stated in the letter would not change the feeling that might have been aroused in the minds of the jurors by the heart-rending declarations contained therein; for this reason alone, it was prejudicial error to admit it.

The fact that it was cumulative to the testimony of the girl that the defendant was the father of the child did not make it a harmless error. This question was passed upon in *Connor v. People*, 18 Colo. 373, 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295, where two witnesses, Farley and Newcome, were permitted, over objections, to testify to statements made to them by the people's witness Holliday (a detective), not made in the presence of the defendants, or either of them. In commenting upon this testimony (18 Colo. at page 380, 33 Pac. at page 161, 25 L. R. A. 341, 36 Am. St. Rep. 295), the court said:

"This was hearsay evidence and clearly inadmissible."

Continuing (18 Colo. at page 382, 33 Pac. at page 162, 25 L. R. A. 341, 36 Am. St. Rep. 295), the court stated:

"The witnesses Farley and Newcome testified that they had no personal knowledge of the facts stated by Holliday, and were simply repeating the story told by him. The harmfulness of this can be readily seen. The witness Farley was at the time holding an important official position; he was a respectable citizen, and possessed the confidence of the community, and the repetition by him of Holliday's story might give it a weight and credibility greater than would have attached to it when told alone by Holliday. However this may be, the admission of this testimony was so violative of every rule of evidence that in itself it would compel a reversal of the case, and it becomes unnecessary to notice the further objections."

This declaration is applicable here. The defendant stood upon his legal rights under his plea of not guilty, and otherwise did not attempt to attack the reputation of the prosecuting witness for truth and veracity; in such case the burden was upon the people to establish his guilt beyond a reasonable doubt

by competent testimony. So far as the record discloses, the mother of the prosecuting witness was a good citizen, and the repetition by her that the letter had been written and delivered, in connection with its contents, might give to the real issue a weight and credibility in the minds of the jurors greater than would have attached to it when told by the girl alone. This principle applies to the testimony of the other disinterested witnesses as to what the girl (in the absence of the defendant) told them (concerning the material facts) some time after the transaction is alleged to have occurred.

The judgment will be reversed, and the cause remanded for a new trial.

Reversed.

WHITE and TELLER, JJ., concur.

(100 Wash. 671)

THOMPSON v. THOMPSON. (No. 14402.)
(Supreme Court of Washington. April 3, 1918.)

DIVORCE \Leftrightarrow 252—ALIMONY DECREE—DIVISION OF PROPERTY.

A decree in divorce, awarding the property to plaintiff and defendant in equal parts in common, instead of making an actual division thereof, was erroneous, where the property was extensive and diversified in character; it appearing that a decree would be peculiarly oppressive to defendant and ineffectual for plaintiff without resorting to an independent proceeding instituted in her behalf.

Department 1. Appeal from Superior Court, Lincoln County; Joseph Sessions, Judge.

Bill for divorce by Julia A. Thompson against Boon Thompson, with cross-bill. Judgment for plaintiff, and defendant appeals. Affirmed in part, and reversed in part, and cause remanded, with directions.

Martin & Jessep, of Davenport, for appellant. Freese & Pettijohn, of Davenport, and J. L. Welborn, of Almira, for respondent.

WEBSTER, J. Respondent and appellant intermarried on September 30, 1894, and as the result of this union six children were born. Largely through the joint efforts of the parties a vast amount of property was accumulated, the land lying in Lincoln, Grant, and Douglas counties, the personality being of a diversified character. On April 13, 1915, respondent instituted this action for divorce, for custody of the minor children, and for a division of the property. Appellant realisted the action, and by way of cross-complaint set up grounds for divorce in his favor, and prayed for a decree in accordance therewith. After a trial lasting many days the court, on January 23, 1917, entered a decree, granting the divorce and the custody of the minor children to respondent, further providing that respondent be awarded an undivided one-half interest in and to all of the real estate and personal property owned by the parties,

including the rents, issues, and profits derived from the land and personal property since the commencement of this action, together with one-half of the increase of the live stock and one-half of all moneys on hand or in bank belonging to the parties; also requiring the appellant to account for and pay over to respondent one-half of all moneys and securities now on hand and belonging to the parties, or either of them, and that he be required to forthwith deliver respondent one-half of all unsold crops and one-half of the proceeds from the crops raised, marketed, and sold from the lands since the commencement of the action; further enjoining the appellant from selling or disposing of any of said property without the consent in writing of the respondent. From this decree the defendant has appealed, his chief complaint being that the court should have actually divided the property between the parties instead of awarding it to them in common. It is also insisted, however, that the court should not have granted respondent one-half of the property.

A perusal of the record satisfies us that it is impossible for the parties to longer live together, and that the evidence amply supports the findings of the lower court in granting the divorce on the grounds alleged in the complaint. In view of the interests of the minor children we shall not enlarge upon the domestic unhappiness of respondent and appellant, nor discuss the causes which led to the separation. It is sufficient to say that the provisions of the decree relating to the divorce and the custody and support of the minor children are proper. With respect to the equal division of the property, we are of the opinion that the court did not err. In the light of all the facts and circumstances disclosed by the record the award to respondent of one-half of the entire property was just and equitable.

Taking into consideration, however, the large amount and diversified character of the property both real and personal, the court should have proceeded to a physical division of the property, instead of awarding it in equal shares in common. It is apparent that the decree in its present form is peculiarly oppressive to appellant, likewise ineffectual for respondent without resort to an independent proceeding instituted in her behalf. It is impossible for this court, in the present state of the record, to make a fair and just distribution of the real estate and personality, or to determine the amount due the respondent under the accounting provided for in the decree. Furthermore, we do not feel warranted in depriving the parties of the benefit of the superior facilities possessed by the lower court for discharging such task, including its power to appoint commissioners, if necessary, to assist in parceling out the property.

The decree will therefore be affirmed in all respects excepting the provisions thereof

awarding the property to the parties in common. In that regard the decree will be reversed, and the cause remanded, with directions to the lower court to divide the property, both real and personal, equally, and to proceed to an accounting, if necessary, to the end that the rights of the parties may be fully and completely determined.

ELLIS, C. J., and FULLERTON, MAIN, and PARKER, JJ., concur.

(101 Wash. 34)

MORRIS v. RAYMOND et al. (No. 14459.)

(Supreme Court of Washington. April 4, 1918.)

PARTNERSHIP §153(1)—LIABILITY OF PARTNERS—INDIVIDUAL LIABILITY FOR PERSONAL INJURIES.

Where one of several alleged partners takes an automobile belonging to the partnership for a purpose of his own not connected with the partnership business, and causes personal injuries to a third person, the other partners are not liable.

Department 2. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by F. A. Morris against Hattie R. Raymond and others, doing business as the Raymond Company. Judgment for plaintiff, and defendant Hattie R. Raymond appeals. Reversed, and case ordered dismissed as to appellant.

Wm. H. Pratt and Chas. Bedford, both of Tacoma, for appellant. John Burton Keener, of Tacoma, for respondent.

MOUNT, J. Action for personal injuries. The plaintiff was injured on the night of October 23, 1916, in the city of Tacoma, by reason of a collision between a taxicab in which she was riding and a Ford automobile driven by the defendant W. B. Raymond. She brought this action against Hattie R. Raymond, Alice M. Raymond and W. B. Raymond, doing business under the firm name of Raymond Company, and alleged that W. B. Raymond was driving the automobile owned by the Raymond Company in a reckless, careless, and negligent manner, and ran into the taxicab in which plaintiff was riding, throwing her violently to the pavement and injuring her. The defendants, for answer to the complaint, denied generally all the allegations thereof, and alleged that the cause of the accident was the careless and negligent driving of the taxicab in which the plaintiff was riding.

Upon a trial of these issues the facts appeared as follows: Hattie R. Raymond is the mother of Alice M. Raymond and W. B. Raymond. These two children, at the time, were past the age of majority. Mrs. Raymond was conducting a scavenger business in the city of Tacoma. Her son W. B. Raymond, was employed as manager at a salary,

and her daughter, Alice M. Raymond, was bookkeeper. Mrs. Raymond inherited the business from her husband, who died about three years before the time of the accident. On the night of October 23, 1916, W. B. Raymond took the automobile which belonged to his mother, and which in the daytime was used in the business in which she was engaged, and drove the car to Commerce street. The car stood there for about three hours. At about 11 o'clock, Mr. Raymond undertook to start the car, and he could not start it by cranking it. Some friends who were with him helped him push the car to a hill on Eleventh street. They started the car down the hill and all jumped onto the car when it moved down Eleventh street to Pacific avenue. About the time the car reached Pacific avenue the engine started, and Mr. Raymond then turned the car upon the crossing of Eleventh street and Pacific avenue, intending to go back up the hill to his home. While crossing the street, the taxicab in which the plaintiff was riding came down the street at about 20 miles per hour. The cars collided at the northwest corner of those streets. The plaintiff was injured. At the close of the evidence which showed these facts, each of the defendants moved for a directed verdict. The court granted this motion as to the defendant Alice M. Raymond, but denied it as to Hattie R. Raymond and W. B. Raymond. The jury returned a verdict of \$1,000 against Hattie R. Raymond and her son, W. B. Raymond. Hattie R. Raymond has appealed from that judgment. W. B. Raymond has not appealed.

The principal contention of the appellant is that the court erred in refusing to direct a verdict in favor of the appellant. We think it is clear that this motion should have been sustained, and the jury directed as requested by the appellant. There is no evidence of a partnership existing between the defendants, except the mere fact that the business was conducted as the Raymond Company. It is not disputed in the record that Mrs. Raymond inherited this business from her husband and was conducting it as the sole proprietor. Her son, W. B. Raymond, was an employé, managing the business at a salary. Her daughter was bookkeeper. It was conclusively shown without dispute that W. B. Raymond, on the night in question, was using the automobile, which belonged to his mother, for his own pleasure, and not in connection with business of his mother. If there was a partnership, it is clear that the other partners would not be liable under the circumstances shown. In the case of *Hamilton v. Vioue*, 90 Wash. 618, 156 Pac. 853, in considering this question, we said:

"Even though it should be held that the Hamilton brothers were partners in the ownership of the car (losing sight, for the moment, of the general rule that ownership of property does not of itself create a partnership), no liability will follow to C. T. Hamilton, as the record fails to show that the car, at the time

in question, was operated on behalf of, or within the reasonable scope of, any partnership business. W. W. Hamilton was, at the time of the accident, using the automobile for his own personal pleasure and that of his companions. Under such circumstances, there is no rule of law that will fasten liability against C. T. Hamilton" (citing a number of cases).

The same is true in this case. There was no attempt on the part of the respondent to show that at the time of the accident W. B. Raymond was using the car in connection with his mother's business. The evidence conclusively shows without any dispute whatever that he was using the car for his own pleasure that night, and for no other purpose. In the case of *Ludberg v. Barghoorn*, 73 Wash. 476, 131 Pac. 1165, in concluding that case we said:

"But where upon the defense it is shown conclusively and without any substantial dispute that the automobile was not being used at the time of the injury in the defendant's employment or upon his business, and was being used by some other person on business of his own and without any reference to the business of the owner, it becomes the duty of the court to direct the judgment under Rem. & Bal. Code, § 340."

See, also, *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 14 L. R. A. (N. S.) 216, 125 Am. St. Rep. 915; *Bursch v. Greenough Bros. Co.*, 79 Wash. 109, 139 Pac. 870.

It is clear, therefore, that the appellant Hattie R. Raymond is not liable either as a partner or as the owner of the automobile. Her son, W. B. Raymond, who took the automobile, and who was using it for his own pleasure, is the only person liable for his negligence. He has not appealed.

The judgment of the trial court is therefore reversed, and the case ordered dismissed as to the appellant, Hattie R. Raymond.

ELLIS, C. J., and HOLCOMB and CHADWICK, JJ., concur.

(100 Wash. 687)

GIANINI v. CERINI et al. (No. 14419.)

(Supreme Court of Washington. April 3, 1918.)

1. MASTER AND SERVANT ⇨278(3, 14, 20), 281(1) — INJURIES TO SERVANT — DEFECTIVE APPLIANCES — MASTER'S KNOWLEDGE — WARNING.

In a servant's action for injuries due to an automobile which he was driving being precipitated over a steep bluff because of a defective brake, evidence held sufficient to warrant findings that plaintiff reasonably used all appliances provided for stopping the truck without effect; that the brakes were in a defective condition; that defendant had knowledge thereof; and that he failed to inform plaintiff of it.

2. TRIAL ⇨235(6) — INSTRUCTIONS — INJURIES TO SERVANT.

In an automobile driver's action for personal injuries caused by the truck which he was driving falling over a steep bluff, it was not error to refuse a cautionary instruction relative to a statement by the master after the accident that he knew the brake was loose and was sorry he did not inform plaintiff.

3. TRIAL ⇨110 — MISCONDUCT OF COUNSEL.

In an automobile driver's action for personal injuries due to his machine falling over a bluff because of a defective brake, a statement by plaintiff on redirect examination that defendant carried liability insurance was not misconduct of counsel requiring reversal; it having been casually brought into the case by a legitimate inquiry directed to matters brought out on cross-examination.

Department 1. Appeal from Superior Court, King County; Ralph Bell, Judge.

Action by Carlo Gianini against Peter V. Cerini and another. Judgment for plaintiff, and defendants appeal. Affirmed.

James B. Murphy and Robert C. Saunders, both of Seattle, for appellants. Vince H. Faben, of Seattle, for respondent.

WEBSTER, J. In an action to recover damages for personal injuries, the plaintiff obtained a verdict and judgment, from which defendants appeal, assigning as error the insufficiency of the evidence to sustain the verdict, the refusal of the court to give certain requested instructions, and misconduct of the plaintiff in injecting into the case the fact that the defendant was protected by liability insurance. We shall discuss these assignments in the order stated.

[1] On August 8, 1916, the plaintiff, an employé of the defendant, while backing an automobile truck in an effort to turn it around, was precipitated over a steep bluff, resulting in the injuries complained of. The defective condition of the brakes on the truck was the only ground of negligence submitted to the jury. The plaintiff's version of the accident in his own language is:

"I went to back up the truck, the front around, and when I see I am far enough I take my foot off from the gas and put it on the brake, and the brake don't hold and the truck went overboard. Q. Why? A. Why? Because the brake don't hold me; even when I put in the emergency brake, down he went."

He further testified that the defendant Peter V. Cerini visited him at the hospital a day or two after the accident and said that he was sorry he had never said anything about the brakes; that the brake was loose from the drum and had been "all along." This evidence was sufficient to warrant the jury in finding that the plaintiff reasonably used all the appliances provided for stopping the truck without effect; that the brakes were in a defective condition; that the defendant had knowledge of this fact; and that he failed to inform the plaintiff thereof. Furthermore, it appears that the plaintiff had never driven the truck before the day on which the accident occurred, and only for a short time prior to the accident. The evidence, therefore, if believed by the jury, was sufficient to entitle the plaintiff to a verdict in his favor, and we are not prepared to say that the court abused its discretion in refusing to set it aside.

[2] The instructions requested and refused,

upon which the second class of assignments of error is based, all relate to the testimony of the plaintiff concerning admissions made by the defendant on the occasion of his visit to the hospital. The court was asked to charge in varying forms of words that casual statements, made in random conversations and testified to by bystanders or listeners, should be scrutinized with great caution, and are the weakest character of evidence. In view of the constitutional inhibition against comment on the facts by trial judges in their charge to juries, it has not been the policy of this court to encourage the giving of cautionary instructions. There are very few classes of evidence of any kind in which inherent weakness may not be found in the light of the facts of a particular case, and it would open the door to serious abuses to permit nisi prius judges, under the guise of cautioning the jury, to express their views concerning the weight and probative force of testimony. Such practice, if much indulged in, would seriously trench upon the constitutional right of trial by jury, and make easy the accomplishment of the very evil sought to be guarded against. Moreover, the conversation in question was not a casual or random one, and the testimony concerning the statements made was not given by a chance or uninterested bystander. Here, if the evidence is to be believed, the defendant made a deliberate statement to the plaintiff relative to the very ground of negligence upon which the action is based. If it be assumed that this important admission against interest was in fact made, it cannot be said to be weak or dangerous evidence. The weakness, if any, lies in the question of whether it was made, depending in this case upon the weight of credit to be given the testimony of the plaintiff in the light of his interest, prejudice, and bias; upon which subject the jury was properly charged by an appropriate instruction. There was no reversible error in refusing to give the requested instructions.

[3] Lastly it is contended that the court should have granted the defendants' request to discharge the jury and discontinue the trial of the case for the reason that the plaintiff, while testifying as a witness in his own behalf, disclosed the fact that defendant carried liability insurance covering the accident in question. On cross-examination the plaintiff was interrogated at length concerning a type-written statement signed by him which had been procured by Mr. Murphy, one of the attorneys for defendants, during a visit made by the plaintiff to Mr. Murphy's office. On redirect examination, in an effort to show that the plaintiff had been imposed upon and not treated fairly when the statement referred to had been given, the several visits and conversations leading to the procurement of the statement were gone into by plaintiff's counsel, during which the record shows the following transpired:

"Q. How did you come to go in there that day? A. Well, I went in there to get some money, because a fellow come up to my house and say he represent Cerini's lawyer. Q. He said he was from Mr. Murphy's office? A. He said he was represent Cerini's lawyer, and he says he wants to know what I am going to do, and the lawyer wants to see me; and I says, 'All right;' and I says, 'Where is the office of Cerini's lawyer?'; and he said, 'He is down in the Central Building.' So after 15 days I come down and tell Mr. Murphy I need some money for an operation. I had my baby with me, and so Mr. Murphy he take my baby on his lap, and he says, 'How much do you want?'; and I say, 'I want \$500.' and he say, 'If you give me the baby, I will give you more than \$500.' and I says, 'Is that Cerini talking now,' and he says, 'Yes.' He say, 'I will go up and see him this afternoon; and you come back about 3 o'clock;' and then the time he say that, he push a button and a lady come out, and what I said she put down; and so I says, 'You don't have to write that down; there was a man there who took the statement all at my house,' and he said he lost that. Q. That is the yellow slips? A. Yes; the yellow slips; and the next day I went back, and I said to Mr. Murphy, 'I am here again,' and he said, 'Did you sign that paper yesterday?' And I said, 'Yes,' and he say, 'Now, if you want any money you sue Cerini for it; I am not his lawyer; I am the insurance lawyer.' Q. That is Mr. Murphy now? A. Yes."

The foregoing is the only reference to the subject of insurance made throughout the trial.

While it is the settled law of this state that the wanton intrusion into a personal injury case of the fact that the defendant carries liability insurance covering the accident in question is prejudicial error necessitating the reversal of a judgment for the plaintiff, we do not think this case falls within that principle for three reasons: First, the mere statement that Mr. Murphy was the "insurance lawyer" did not advise the jury that the defendant was protected by indemnity insurance; second, the statement was made on redirect examination relative to a matter brought into the case by the defendant, and was incidental to a legitimate and proper inquiry; and, third, the statement was not wantonly injected into the case through misconduct of counsel for the ulterior purpose of prejudicing the jury. In *Edwards v. Burke*, 36 Wash. 107, 78 Pac. 610, an action to recover damages caused by the negligence of the defendant in maintaining and operating a passenger elevator, the following occurred:

"Q. (by counsel for plaintiff): Did you ever make a statement as to how this accident occurred, prior to to-day? A. I made one to Mr. Lamping. Q. Who is Mr. Lamping?

"Mr. Howe: I object, as immaterial.

"The Court: Answer the question.

"Mr. Howe: We except. A. He is the gentleman that insures the elevator. Q. Why did you make that statement to Lamping? A. He asked me to because—I don't know the reason why he wanted the statement from me how the accident occurred."

Judge Dunbar, in considering the question of whether this matter constituted prejudicial error within the rule under consideration, said:

"This would scarcely be testimony sufficient to sustain an allegation that the elevator had accident insurance at the time of this accident. But, even conceding that the jury might be led to believe from this statement that the appellants were protected by an insurance company from accidents which might occur in the operation of the elevator, it seems to us to be very justly contended by respondent's counsel that they were not responsible for it. It is asserted that they did not know who Mr. Lamping was, and that there was no intention of bringing the question of insurance before the jury. It does appear that, in the exercise of a proper cross-examination, this testimony incidentally cropped out. But certainly the question whether or not the witness had ever before made any statement in relation to the accident was a proper subject of cross-examination, and, after eliciting the fact that he had made a statement to a Mr. Lamping, we know of no reason why the respondent should be prohibited from propounding the very natural inquiry as to who Mr. Lamping was. About all that can be said in this case is that, during the cross-examination, which was properly conducted, testimony was disclosed tending to show the insurance of the elevator."

If the evidence in that case was not sufficient to inform the jury that the defendants had accident insurance on the elevator, certainly the evidence in this case was not sufficient to show the defendants had such insurance on the automobile truck. Furthermore, the offending testimony in that case was brought out incidently on cross-examination, relating to a legitimate subject of inquiry developed upon the examination of the witness in chief. Here the reference to insurance "cropped out" on redirect examination touching pertinent matter brought into the case by the defendant on cross-examination. In the instant case, counsel for defendant having gone into the matter of the statement signed by the plaintiff, it was entirely proper for the plaintiff to show on redirect all the circumstances under which the statement was made, and to develop the entire conversation relating thereto. The evidence therefore was competent, and the mere fact that it may have been prejudicial did not render it inadmissible. If the effect was harmful, such was the defendants' misfortune rather than the plaintiff's fault. The case falls squarely within the principle announced in *Moy Quon v. Furuya Co.*, 81 Wash. 526, 143 Pac. 99. In that case the casualty company, through its claim agent, had piled the injured man while he was in the hospital with carefully written questions, and the claim agent was thereafter produced by the appellant as a witness for the purpose of discrediting respondent's testimony. After he had finished his direct testimony, respondent's attorney, on cross-examination, developed the fact that the witness was claim agent for the casualty company with which appellant carried liability insurance. In considering the matter Judge Ellis said:

171 P.--64

"In a personal injury suit, the fact that the defendant carries liability insurance is wholly immaterial on the main issue of liability. Being essentially prejudicial to the defendant, its wanton intrusion by the plaintiff is positive error constituting ground for reversal. This is the established rule in this state. * * * This rule, however, was never intended to override the equally positive and salutary principle that a party has the right to cross-examine the witnesses produced by his adversary touching every relation tending to show their interest or bias. Many facts wholly immaterial, and even positively prejudicial, on the main issue may be material as touching the credibility of a witness. When a party offers a witness, the relations of that witness to the thing in issue and his interest in the result become material as affecting his credibility. It is universally held that these things may be developed on cross-examination. * * * The distinction between the case here presented and those relied upon by the appellant is found in the fact that in those cases the matter of insurance was first introduced into the trial without reasonable excuse. In the case here, it was not only proper, but necessary, that the jury be advised of the relation of the witness and his consequent interest in the suit, as a matter clearly bearing upon the credibility and weight of his testimony."

It is true the evidence in that case was held admissible as tending to affect the credibility of the witness, yet the effect of the opinion is that, if the testimony with reference to insurance is not intruded into the case without excuse, but performs the office of competent evidence, its prejudicial character does not warrant a reversal of the judgment. Here the evidence was competent, though for a different purpose, to show the circumstances under which the written statement was obtained, it being a part of a conversation first placed before the jury by the appellants. In *Jensen v. Schlenz*, 89 Wash. 268, 154 Pac. 159, Judge Chadwick said:

"The extent of our holding is that if it be apparent that counsel deliberately sets about, although in an indirect way, to inform the jury that the loss, if any, will fall upon an insurance company instead of the defendant, his conduct will be held prejudicial. * * * If such information comes about naturally and is incident to a lawful inquiry, there can be no error. If it is injected in a collateral way, it is held to be harmful. The gravamen of the offense is not in the disclosure of a collateral fact, but in the manner of its disclosure; that is, the misconduct of counsel."

Appellants rely chiefly upon *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59. In that case, however, the testimony concerning the liability insurance was wantonly and unnecessarily injected into the case, and was not competent for any purpose. It is not applicable to the facts of this case for the reasons already stated.

The judgment is affirmed.

ELLIS, C. J., and PARKER, MAIN, and FULLERTON, JJ., concur.

(100 Wash. 636)

In re EMPIRE WAY IN CITY OF SEATTLE. (No. 14355.)

(Supreme Court of Washington. April 2, 1918.)

1. MUNICIPAL CORPORATIONS \S 506 — PUBLIC IMPROVEMENTS—CONFIRMATION OF ASSESSMENTS.

Under Rem. Code 1915, \S 7795, making it the express duty of the court before which condemnation proceedings are pending, whenever objections are made to an assessment roll, to inquire whether the property of the objector is assessed more or less than it would be benefited by the improvement, and if it so finds to enter judgment accordingly, and section 7796, giving the court authority at any time before final judgment to modify, alter, change, annul, or confirm any assessment, the court may reduce the assessment on finding that it exceeds the benefits, notwithstanding the commissioners in making up the assessment roll did not act fraudulently, arbitrarily, or on a wrong basis.

2. MUNICIPAL CORPORATIONS \S 507 — PUBLIC IMPROVEMENTS—CONFIRMATION OF ASSESSMENTS.

Where a city has sought to condemn property for street purposes under an ordinance providing that the improvement shall be paid for by assessment on the property specially benefited, and no portion shall be paid from the general fund of the city, and the court on the hearing of objections to the assessment roll has decided that the assessments exceed the benefits, such judgment does not operate to compel the city to bear the burden of the cost of the improvement; there being no obstacle to the abandonment of the project.

3. MUNICIPAL CORPORATIONS \S 506—PUBLIC IMPROVEMENTS—BENEFITS—REDUCTION OF ASSESSMENTS.

A court, on hearing objections to an assessment of benefits to pay awards for property condemned for street purposes, may reduce the assessment on the property of nonobjecting owners.

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Petition by the City of Seattle to condemn property for a street to be known as Empire Way and for change of grade. From a decree reducing assessments, petitioner appeals. Affirmed.

Hugh M. Caldwell, Walter F. Meir, and Geo. A. Meagher, all of Seattle, for appellant. Martin Korstad, Edward Von Tobel, L. H. Legg, Z. B. Rawson, Morris & Shipley, Paul S. Dubuar, Donworth & Todd, and Hastings & Stedman, all of Seattle, for respondent.

FULLERTON, J. In the year 1913 the city of Seattle by ordinance instituted proceedings to establish a street, to be known as Empire way, extending from the intersection of Rainier and Winthrop streets to the southern boundary of the city, a distance of 5.35 miles. From its point of beginning to its intersection with Holden street, 3.1 miles, the proposed street is 90 feet wide, and from the last-mentioned point to its terminal it follows Renton avenue, which it

widens from 40 feet to 70 feet. The ordinance contained the following provision:

"That the entire cost of the improvement provided for in this ordinance shall be paid by special assessment upon the real property specially benefited in the manner provided by law, and that no portion shall be paid from the general fund of the city of Seattle."

After the enactment of the ordinance condemnation proceedings were begun in the superior court of King county to acquire the property necessary to be taken in the establishment of the street, and to ascertain the compensation necessary to be paid for the property taken and the property damaged by reason of the taking. This proceeding resulted in awards, which, with costs and accruing costs added, required approximately \$171,000 to satisfy. Subsequent to the entry of the judgments on the awards a supplemental petition was filed by the city, pursuant to statute, praying the court that an assessment be made on the property benefited sufficient to pay the awards with costs and accruing costs, and the court referred the matter to the board of eminent domain commissioners of the city of Seattle for the purpose of making the assessment. The commissioners, following the direction of the improvement ordinance, assessed the entire cost of the proceedings to the local property bordering on the street. When the assessment roll was returned by the commissioners, objections thereto were filed by a number of property owners on grounds, among others, that their property was assessed in excess of benefits. A hearing was had on the objections to the roll, at the conclusion of which the court found that certain of the property was benefited by the improvement to the extent of 70 per centum of the amount assessed therein and no more, and that the remainder of the property was benefited to the extent of 80 per centum of the amount assessed therein and no more. and entered a decree reducing the assessments accordingly, the reduction including the property of the nonobjecting owners as well as the property of the objecting owners. The decree left a considerable part of the condemnation award unprovided for, but no judgment or order was made concerning it. The city, feeling itself aggrieved by the decree entered, appealed therefrom.

The principal contention of the appellant is that the evidence does not justify the conclusion reached by the trial court. The evidence we shall not review in detail. On the part of the city was the assessment roll returned by the commissioners, made by the statute competent evidence of the matters therein recited, and the testimony of each of the eminent domain commissioners to the effect that the property was not in his opinion assessed in excess of the benefits conferred on it by the establishment of the streets. On the part of the objectors was the evidence

of a number of witnesses testifying to assessments in excess of benefits on individual tracts of property, and the evidence of a number of others testifying to an assessment in excess of benefits upon the property of the district as a whole. The witnesses for the objectors for the greater part gave the reasons for their conclusions, which upon the face of the record seem as cogent and persuasive as do the reasons given by the commissioners for a contrary view. All of the witnesses testifying on the subject moreover agree that the way was in the nature of an arterial highway, wider and more expensive than it need have been had it been designed for merely local traffic, and that it extends through property not generally desirable as residence property, but more suitable for suburban homes, wherein gardening and the keeping of small live stock might be resorted to as an aid to subsistence. On the whole, without further review, we think the evidence decidedly preponderates in favor of the conclusion of the trial court that the property was overassessed in the amount found by its judgment.

[1] But the appellant contends that this conclusion is not sufficient to overturn the assessment. Attention is called to the rule, frequently announced by this court, that the courts will not set aside an assessment roll on any mere difference of opinion between the commissioners and independent witnesses as to the extent of the benefits conferred by an improvement, but that it must appear that the commissioners acted fraudulently, arbitrarily, or upon a fundamentally wrong basis before such a result will follow, and argue that there was here nothing more than a difference of opinion as to the extent of the benefits, nothing to show fraud, arbitrary action, or that the assessment was made upon a fundamentally wrong basis.

The rule may be admitted, we think, without admitting the application sought to be made of it or the conclusion drawn therefrom. By statute it is made the express duty of the court before which the proceeding is pending, whenever objections are made to an assessment roll, to inquire whether the property of the objector is assessed more or less than it will be benefited by the improvement, and if it so finds to enter judgment accordingly (Rem. Code, § 7795); and by the following section the court is given authority, at any time before final judgment "to modify, alter, change, annul or confirm any assessment * * * and make all such orders as may be necessary to make a true and just assessment of the cost of such improvement according to the principle of the" eminent domain act. These sections make it clear that it was not the intention of the Legislature to compel the courts to follow blindly the findings of the commissioners as to the extent of benefits merely because it is unable to find that the commissioners acted contrary to

some principle of law in making the assessment. The statute expressly provides that the assessment shall not exceed the benefits, and makes the court the arbiter to determine the question. Whether the assessment exceeds the benefit is a question of fact. It is to be determined, like any other question of fact, from the weight of the evidence. In such determination the opinions of persons having knowledge of the situation is competent evidence. But as we said in *Spokane v. Fonnell*, 75 Wash. 417, 135 Pac. 211, "even opinion evidence must be tested by its inherent probability," and when the opinions of commissioners do not square with the surroundings, and are against the opinion of others equally competent to testify, the court may find that their action was arbitrary. The question was here within the primary right of the trial court to decide. It comes to us not only with the evidence the trial judge had before him, but with the added weight of his conclusion, made up after he had seen and heard the witnesses, a privilege we cannot have. Since therefore it appears to us that the weight of the evidence as disclosed by the record was with the conclusion of the trial court, we cannot say that it decided erroneously.

[2] The appellant argues that this conclusion compels the city to do what it expressly decided it would not do, namely, bear a part of the cost of the improvement. We cannot so conclude. The statute provides (Rem. Code, § 7784) that the right of the city to enter upon and take possession of the property sought to be condemned arises only after it has paid to the owners of the property, or paid into court for their use, the amount of the award made such owners, and nowhere does it provide that prior to this time it must continue with an improvement which it has initiated. It has not in this instance paid these awards or taken possession of the property, nor did the court enter the condemnation order provided for in the section first cited which alone authorizes a taking of the property, and since it is found that the means adopted to pay the cost of the enterprise is insufficient for that purpose, we see no reason why it may not be abandoned. We so intimated if we did not directly so hold in *Re Leary Avenue*, 77 Wash. 399, 138 Pac. 8. It is true that the city has incurred the preliminary costs which it will lose by an abandonment, but clearly this does not affect the principle involved.

[3] It is further objected that the court was without power to reduce the assessments on the property of the nonobjecting property holders. But in answer it is sufficient to say that we held to the contrary in the case of *Seattle v. Sylvester-Cowen Inv. Co.*, 55 Wash. 659, 104 Pac. 1121. See, also, *Van Der Creek v. Spokane*, 78 Wash. 94, 138 Pac. 560; *In re West Wheeler Street*, 85 Wash. 146, 147

Pac. 873; *Strelau v. Seattle*, 85 Wash. 255, 147 Pac. 1144.

The view we take of the record requires an affirmance of the judgment. It is so ordered.

ELLIS, O. J., and PARKER, MAIN, and WEBSTER, JJ., concur.

(101 Wash. 31)

BRABSTON et ux. v. SHREWSBURY, Constable, et al. (No. 14424.)

(Supreme Court of Washington. April 4, 1918.)

1. SHERIFFS AND CONSTABLES \S 139(1)—ACTION AGAINST CONSTABLE — DAMAGES RECOVERABLE.

In an action for negligence of constable in breaking and leaving open a trunk in conducting a search for contraband liquor, under a search warrant, the court properly refused to consider alleged mental anguish, humiliation, annoyance, and disgrace as appropriate elements of damage.

2. SHERIFFS AND CONSTABLES \S 138(3)—SEIZURES—LOSS OF PROPERTY—SUFFICIENCY OF EVIDENCE.

In an action for negligence of constable in breaking and leaving open a trunk in conducting a search for contraband liquor, under a search warrant, where it was claimed that a brooch had been stolen from the trunk after the search and before the plaintiff returned, preponderance of evidence held not to support findings for plaintiff.

3. APPEAL AND ERROR \S 1012(1)—FINDINGS—REVIEW.

Where after a careful consideration of the whole record de novo the court on appeal feels that the preponderance of evidence does not support finding of trial court, judgment will be reversed.

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by K. D. Brabston and wife against J. E. Shrewsbury, as constable, and another. Judgment for plaintiffs, and defendants appeal. Reversed.

Alfred H. Lundin, Edwin O. Ewing, and Peters & Powell, all of Seattle, for appellants. James Klefer, of Seattle, for respondents.

HOLCOMB, J. [1] Respondents had judgment upon a cause of action alleging negligence on the part of the officer in breaking and leaving open a trunk belonging to Mrs. Brabston in conducting a search under a search warrant for suspected contraband liquor in a hotel where respondents lodged in North Bend, King county. There was an allegation of damage in the sum of \$400 by reason of "mental anguish, humiliation, annoyance, and disgrace," which the court properly refused to consider appropriate elements of damage in such action. It was alleged that a certain diamond brooch of the intrinsic value of \$350 was contained in the trunk at the time it was forcibly opened and searched, and that it had been stolen from the trunk, after the search and before respondents returned home some hours later, by reason of the trunk being carelessly and negligently left unlocked.

[2] No allegation or evidence connected the officer with the actual abstraction of the brooch. There was no evidence tending to trace the theft to any person. The evidence as to the loss of the brooch was solely that of Mrs. Brabston. She testified, in substance, that the brooch was seen by her in her trunk when she left the room at about 6 o'clock in the morning of the day of the search to go from North Bend to Seattle; that she locked the trunk; that when she returned about 8:15 or 8:30 in the evening of the same day, the trunk had been opened by detaching the two locks on it, and had not been closed entirely; that the brooch and the box containing it were missing, and in place thereof had been left a cheap paste imitation worth about ten cents; that the brooch was worth \$350. She also testified that there was considerable other jewelry in the trunk, aggregating in value approximately \$2,000, none of which was taken. We cannot and do not believe this tale. It taxes credulity beyond the limit. It passes belief that some person other than the officers who made the search—who could have known nothing beforehand of it, since the deputy prosecuting attorney placed the search warrant in the hands of the officer after arriving at North Bend from Seattle about noon and the search of the premises occurred immediately—saw the brooch in its small box, purloined it after the officers had departed, substituted an imitation brooch in its place, and left \$1,700 worth of other jewelry in the trunk untouched.

Although mindful of the rule applicable when the trial court has the opportunity of seeing, hearing, and judging of the credibility of the witnesses at first hand, we are also cognizant that Mrs. Brabston was an interested witness and the most interested person in the success of her cause; that she was undoubtedly smarting under the sense of injury, "humiliation, and disgrace," because of her effects having been searched for unlawful merchandise, no matter how lawful, technically, the search. We also must consider and weigh the evidence upon the record de novo, as required by law.

[3] Two officers, Shrewsbury and another constable, conducted the search, and a deputy prosecuting attorney stood by and observed. They testified that they opened the trunk by prying out three small nails in each of the two locks, which loosened the locks from the trunk; that they lifted the tray out, felt around in the lower part of the trunk, "found nothing for which they were searching," replaced the contents of the trunk, replaced the tray in the same condition as before, closed the lid, replaced the locks, and inserted the three small nails in each as they were before, except that the nails could not be clinched on the inside of the box of the trunk with the lid closed as they were before, but that outwardly the trunk and the locks

had the same appearance as before they took off the locks; that when they opened the trunk no jewelry was visible in it; that they saw none. One of the constables was sued and the other was not, and the deputy prosecutor was not. Certainly then these two were, at least apparently, disinterested witnesses. There was some other evidence tending to show that Mrs. Brabston had made statements tending to show that she had herself previously had her diamond brooch altered into ring settings, and that her husband objected to her keeping the brooch for personal reasons. The testimony of the principal witness for respondents, which stands alone as to the loss, being so thoroughly improbable as to be utterly incredible, we feel, upon the careful consideration thereof and of the whole record, that the preponderance of evidence does not support the findings of the trial court.

The judgment is therefore reversed.

ELLIS, C. J., and MOUNT, J., concur.

(101 Wash. 56)

BLAKE v. MERRITT. (No. 14255.)

(Supreme Court of Washington. April 5, 1918.)

1. CONTRACTS ⇨270(1)—RESCISSION—FRAUD—DILIGENCE.

One who seeks to avoid a contract which he has been induced to enter into by fraudulent representations of another touching the subject-matter of the contract must proceed with reasonable promptitude upon discovering the fraud, or the right to rescind will be waived.

2. VENDOR AND PURCHASER ⇨114—RESCISSION—FRAUD—WAIVER.

Where a purchaser made two payments on the contract after discovering fraud and also paid the taxes, her right to rescind on account of fraud was waived.

3. ESTOPPEL ⇨63—INCONSISTENT CONDUCT—CLAIM AS TO CONTRACT.

Where a vendee after alleged rescission sought to recover money paid under contract, she could not defeat vendor's right to forfeiture for nonpayment of installments on the theory that he accepted payments after they were due, and waived the clause making time of the essence of the contract; such contentions being repugnant.

Department 1. Appeal from Superior Court, King County; E. H. Wright, Judge.

Action by May Blake against W. H. Merritt. Judgment non obstante veredicto for defendant, and plaintiff appeals. Affirmed.

Douglas & Douglas, of Colville, and A. H. Wiseman, of Seattle, for appellant. Saunders & Nelson and George Harroun, all of Seattle, for respondent.

MAIN, J. The plaintiff, claiming to have previously rescinded a contract for the purchase of real estate on the ground of fraud, brought this action to recover the money which had been paid in pursuance of the contract. The defendant denied the fraud and, by way of affirmative defense, claimed a forfeiture on account of the default of the

plaintiff in making the payments as required by the contract. The affirmative defense was denied by a reply. The questions of fact were submitted to a jury, and resulted in a verdict in favor of the plaintiff in the sum of \$1,398.32. Within the time required by law, the defendant moved for a judgment in his favor notwithstanding the verdict. This motion was sustained, and a judgment entered, denying the right of the plaintiff to recover, and forfeiting the contract unless the plaintiff, within 60 days from the entry of the judgment, should pay the balance due thereon in the sum of \$871.60. From this judgment the plaintiff appeals.

The facts may be briefly stated as follows: On August 4, 1909, the appellant purchased from the respondent ten acres of land in Snohomish county. This land is located approximately two miles from the town of Edmonds, and within easy distance from the city of Seattle. The parties to the contract both resided in the latter city. A few days before the contract was executed, the respondent took the appellant out to show her the land. After going as far as they could upon the highway, they alighted from the vehicle in which they were riding and started to walk to the land. They went but a short distance and returned. The appellant claims that the land that she purchased was the land upon which they went, and was bordering upon the highway. The respondent claims that he did not, in fact, and did not intend to, sell the land near the highway, and that he told the appellant that the land which he contemplated selling her was about three-quarters of a mile distant. He also claims that he desired the appellant to go and see the land which he contemplated selling, but, owing to the fact of it being a warm day and the tramp to the land not being an easy one, the appellant concluded not to make the trip, but to purchase the land on the respondent's representation that it was land in general character like that upon which they then were. A few days later, the written contract above referred to was entered into, by which the appellant agreed to purchase the ten acres of land described therein for the sum of \$1,500, \$300 of which was paid at the time, and the balance, or \$1,200, was to be paid at the rate of \$10 per month. The land described in the contract is the land mentioned as being three-quarters of a mile from the highway. The appellant testified that, during the early part of the year 1914, she first became suspicious that the land described in the contract was not the land near the highway, which she had seen. A portion of her testimony on this subject is as follows:

"It was some time in the early part of 1914 when I became suspicious that the land described in the contract was not the land I really thought I bought. I discovered that I had been

deceived at the time when the taxes were due in 1914. It was taxpaying time, some time between March and June, 1914. It must have been some time before June, 1914, that Mr. Merritt and I had the conversation in which he told me that my land was not on a county road, and when he said, 'That day when we went out to look at the land we were not right on your land.'

Subsequent to the conversation detailed by the appellant, in which she says that the respondent told her that the land which she purchased was not near the road, and on June 2, 1914, she made a payment of \$10 on the contract, and on August 3, 1914, a payment of \$20. During the spring of 1915, she paid the 1914 taxes. During the summer of 1915, the appellant caused the land described in the contract to be located by a surveyor, and for the first time saw it. After seeing the land, and having some negotiations with the respondent, she claims to have rescinded the contract. On January 10, 1916, the present action was begun. If there is fraud in this case, it is because the land described in the contract was not the land sold. The evidence took a somewhat wider range, but, without reviewing it here in detail, it may be said that the evidence will not sustain a charge of fraud in any other particular. The question whether the land sold was that described in the contract was submitted to the jury under a proper instruction, and the verdict of the jury will be accepted as determinative of this question.

[1] It is first claimed that the trial court erred in granting the judgment notwithstanding the verdict. Whether this was error depends upon whether the appellant, by making the payments on the contract and the payment of taxes subsequent to the time when she knew that the land described in the contract was not that which she claimed to have purchased, and by her delay in bringing the action, had waived her right to rescind the contract on the ground of fraud. The rule is that one who seeks to avoid a contract which he has been induced to enter into by fraudulent representations of another touching the subject-matter of the contract must proceed with reasonable promptitude upon discovering the fraud, or the right to rescind will be waived. *Angel v. Columbia Canal Co.*, 69 Wash. 550, 125 Pac. 766; *Thomas v. McCue*, 19 Wash. 287, 53 Pac. 161; *Pearson v. Gullans*, 81 Wash. 57, 142 Pac. 456.

[2] From the appellant's own testimony, it appears that she knew of the fraud prior to the month of June, 1914. Subsequent to this she made two payments on the contract—\$10 on June 2, 1914, and \$20 on August 3, 1914. Some time during the spring of 1915 she paid taxes for the previous year. The present action was brought on January 10, 1916. Under these undisputed facts, it must be held that the right to re-

scind had been waived. The appellant did not proceed with reasonable promptitude upon discovering the fraud, if fraud were committed, and made the payments referred to with full knowledge thereof. The appellant claims that she is not barred of her right to prevail by reason of laches, but the doctrine of laches is not applicable to this case.

[3] It is next claimed that the trial court erred in entering the judgment of forfeiture, even though such judgment was a conditional one and gave the appellant 60 days in which to meet the balance due. In support of this contention it is argued that the respondent was not in a position to forfeit the contract because he had repeatedly accepted payments subsequent to the time that they were due, and had thereby waived the clause in the contract which made time of the essence thereof; but this contention is hardly consistent with the contention that the contract had been rescinded. The appellant cannot wage her action on the theory of rescission and at the same time urge the contract for the purpose of defeating the respondent's right to forfeit. She cannot in the same action proceed on the theory that the contract has been rescinded and also seek to enforce the terms of the contract. *Myers v. Calhoun, Denny & Ewing*, 85 Wash. 689, 149 Pac. 19.

The appellant will have 60 days after the remittitur from this court is filed in the superior court in which to comply with the judgment of the superior court covering the matter of forfeiture.

The judgment will be affirmed.

ELLIS, C. J., and PARKER, FULLERTON, and WEBSTER, JJ., concur.

(101 Wash. 1)

STATE ex rel. SNOOK v. JUREY, Superior Court Judge. (No. 14662.)

(Supreme Court of Washington. April 3, 1918.)

1. APPEAL AND ERROR \S 571—STATEMENT OF FACTS—CERTIFICATION.

Under Rem. Code 1915, \S 391, requiring the judge of the trial court to certify a statement of fact as containing all the material facts "when such is the fact," a judge cannot be compelled to certify a statement as containing all material facts, where such is not the case, although the opposing party has proposed no amendments to the statement, notwithstanding section 389, providing that, if no amendment shall be served within the time limited for the filing of the statement of facts, the statement shall be deemed agreed to.

2. APPEAL AND ERROR \S 655(3)—STATEMENT OF FACTS—AMENDMENT.

Where a statement of facts relative to an attorney's allowance of fees contained 70 typewritten pages, but did not contain all the facts material to the issue, the judge of the trial court was not justified in striking it from the record, as being made in bad faith, without allowing proponent an opportunity to amend the statement so as to include all material facts.

Department 1. Original application for a mandate by the state of Washington on the

relation of Ina Hoffman Snook, to compel John S. Jurey, Judge of the Superior Court of King County, to certify a statement of facts. Writ denied, with directions.

Tucker & Hyland, of Seattle, for plaintiff. Roy E. Campbell and Donworth & Todd, all of Seattle, for respondent.

PARKER, J. The relator, Ina Hoffman Snook, seeks an order and mandate from this court, requiring the defendant John S. Jurey, as judge of the superior court of King county, to certify a statement of facts as proposed by her in an action tried and prosecuted to final judgment upon the merits in that court, Judge Jurey presiding, from which judgment she has appealed to this court.

The action in which the relator seeks to have settled and certified the statement of facts in question was commenced and prosecuted in the superior court for King county by her as plaintiff against H. B. Kennedy and eight others, including Carl J. Smith, as defendants. The main purpose on the part of relator in prosecuting that action does not appear in the record before us. It appears, however, that there was, in some manner incidentally involved therein, the question of the amount of compensation Carl J. Smith was entitled to for services rendered by him as attorney for the relator as executrix of the last will and testament of Josephine E. Kennedy, deceased. On August 1, 1917, a judgment for such services was rendered in that action in favor of Carl J. Smith and against Ina Hoffman Snook as executrix of the last will and testament of Josephine Kennedy, deceased, and against the estate of Josephine Kennedy, in the sum of \$6,000. She appealed from that judgment to this court, and thereafter caused to be prepared, filed, and served upon Carl J. Smith and the other defendants in that action her proposed statement of facts. This statement was proposed as a statement of all the material facts occurring in the cause relating to the question of attorney's fees claimed by Carl J. Smith, as was evidenced by the proposed certificate attached thereto to be signed by the judge, reading in part as follows:

"I do further certify that said statement of facts contains all of the material facts, matters, and proceedings heretofore occurring in said cause in the matter of attorney fees and not already a part of the record herein, and that the same contains all the facts, matters, and proceedings, and all the evidence and testimony introduced upon the trial of said cause in the matter of attorney fees."

Thereafter, within the ten days prescribed by section 389, Rem. Code, for proposing amendments to proposed statements of fact, Smith moved the court to compel appellant, this relator, to file a complete statement of facts, or in the alternative to strike her proposed statement of facts, and also objected to the signing of the statement of facts as

proposed; that is, objected to it being signed as a statement of all the facts. This motion and objection was based upon the ground that the proposed statement did not contain all of the facts occurring in the cause relating to the matter of the attorney's fees in question. The judge denied the motion both as to compelling her to prepare a more complete statement and as to striking the proposed statement, but he did not then sign the proposed statement as either a partial or full statement of the facts. Thereafter relator caused to be served upon Smith a notice that she would apply to the judge to certify the statement as proposed by her. The matter came on to be heard, when Smith renewed his objection to the signing of the statement as proposed upon the ground that it did not contain all of the facts occurring in the cause relating to the matter of the attorney's fees in question. The judge in effect sustained this motion, refusing to certify the statement as proposed, but did sign a certificate thereto reading as follows:

"I, John S. Jurey, one of the judges of the above-entitled court, sitting in department No. 5 thereof, and the judge before whom the above-entitled cause was tried, do hereby certify that the matters and proceedings contained in the foregoing statement of facts are matters and proceedings occurring in said cause, and the same are hereby made a part of the record herein.

"Done in open court, counsel for plaintiff and defendant being present, and counsel for plaintiff objecting to the form of this certificate, this 25th day of January, 1918. Exception allowed to plaintiff.
John S. Jurey, Judge."

A copy of the proposed statement as certified by the judge is before us attached to the application for the writ in this proceeding. It contains 70 ordinary pages of type-writing, and it appears upon its face to cover in considerable detail and quite fully the question of attorney's fees for services rendered by Smith to the estate of Josephine E. Kennedy and relator as executor thereof, though we cannot tell from the face of the statement just how far it may be deficient as a statement of all the facts occurring in the cause relating to that question. In his return and answer in this proceeding the judge states in part as follows:

"That the said proposed statement of facts, as on file and of record in said cause, a copy of which is attached to the application for the alternative writ of mandate herein, does not contain all of the material facts, matters, and proceedings heretofore occurring in said cause, but contains only a part of the material facts, matters, and proceedings occurring therein respecting the attorney's fees of the said Carl J. Smith as aforesaid. That at the trial of said cause the said Carl J. Smith, H. B. Kennedy, and P. S. Norton testified at great length concerning the actual services performed by the said Carl J. Smith as attorney for the executrix of the estate of Josephine E. Kennedy, deceased, and for the estate of Josephine E. Kennedy, which testimony was relevant and material upon the issue of the amount of attorney's fees which should be allowed the said Carl J. Smith for the services aforesaid. That

the evidence given by the above-mentioned witnesses is not contained in the proposed statement of facts on file and of record in said cause, nor is it any part of the record therein. That to require affiant to certify that the said proposed statement of facts on file in said cause contains all of the material facts, matters, and proceedings heretofore occurring in said cause in the matter of said attorney's fees and not already a part of the record herein, and all the evidence and testimony introduced upon the trial of said cause in the matter of said attorney's fees, would be requiring affiant, as a judge of the superior court of King county, to certify to something affiant and said court knows not to be true, but false and misleading. Furthermore, affiant states that at the trial of said cause, as is shown by the agreement of counsel made in open court and as set forth on pages 8 and 9 of the proposed statement of facts, all of the testimony in the above-entitled cause was to be considered by the court in fixing and determining the value of the services or amount of the attorney's fees of the said respondent, Carl J. Smith; that all of the testimony as aforesaid was thereby made relevant and material thereto."

There is nothing in the record before us indicating that, at or prior to the signing of the statement as above indicated, counsel for relator was by the judge given any opportunity to furnish such additions thereto as would make it a statement of all the facts occurring in the cause relating to the attorney's fees in question. We think we may assume from the record and the statements of counsel at the hearing in this court that no such opportunity was by the judge given to counsel for relator.

[1] The first question for our consideration is, Was it the duty of the judge to certify the statement as proposed; that is, to certify it as a statement of all of the facts occurring in the cause relating to the attorney's fees in question, in face of the objections of counsel for Smith in whose favor the judgment was rendered, notwithstanding no amendments were proposed in his behalf? As at present advised, we think we are compelled to proceed upon the theory that the statement as proposed did not contain all the facts occurring in the cause relating to the attorney's fees in question. Counsel for relator contend, however, that such fact is of no controlling force here, since no amendments were proposed in behalf of Smith, and that therefore the statement as proposed became in effect an agreed statement of all the facts occurring in the cause relating to the attorney's fees in question.

Section 389, Rem. Code, does seem to make a statement of facts to which no amendments are proposed an agreed statement of facts, and seems to contemplate that the trial judge shall certify it as such, and this we think is ordinarily the case. But we do not think this means that a trial judge is legally bound to certify a proposed statement of facts as containing all of the facts occurring in the cause not already a part of the record therein, when he knows that such is not the fact and the opponent of the party proposing

such statement objects to it being so certified. In section 391, Rem. Code, we read:

"The judge shall certify that the matters and proceedings embodied in the bill or statement, as the case may be, are matters and proceedings occurring in the cause and that the same are thereby made a part of the record therein; and, *when such is the fact*, he shall further certify that the same contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein, or (as the case may be) such thereof as the parties have agreed, to be all that are material therein."

We italicize the words of this section to be particularly noticed. This language negatives the idea that the mere failure to propose amendments compels the certifying of a statement of facts as containing all of the facts, when objections to so certifying it are made by the opponent of the one proposing it, though he may offer no amendments, and the trial judge knows that it does not contain all the facts. Plainly a statement of facts proposed by a party as containing all the facts, which is objected to by the opposing party upon the ground that it does not contain all the facts, is not an agreed statement of all the facts.

In *State ex rel. Smith v. Parker*, Judge, 9 Wash. 653, 38 Pac. 156, there was involved a situation somewhat like that here involved: A statement of facts was proposed by a party to which statement amendments were proposed by his opponent, and which amendments were accepted by the proposing party. This, under section 389, Rem. Code, which was then the law (Laws 1893, p. 115), apparently made it an agreed statement of facts. Counsel for the proposing party insisted that the judge should then certify the statement as containing all the facts occurring in the cause not already a part of the record therein. This was objected to by counsel for the opposing party, though no objection was offered to the certifying of the statement as containing matters "occurring in the cause." This the judge offered to do, refusing to certify that the statement contained all the facts. It was sought by mandamus in this court to compel the judge to certify the proposed statement of facts as containing all the facts. In denying the writ and disposing of the application therefor, Judge Stiles, speaking for the court, said:

"Section 11 of chapter 60, Laws 1893, p. 115, is appealed to by the relators as sustaining their contention that when a statement has been proposed, and amendments are made and accepted, the engrossed statement and amendments are to be taken as an agreed statement of all the material facts, and must be so certified by the judge. But the error of this construction is apparent from the present case. The statute does not contemplate that a trial judge shall be called upon to certify to this court as true what he knows to be not true."

There have been some decisions rendered since then which may seem to hold that it is the legal duty of a trial judge to certify a statement of facts which has been agreed

upon by counsel for all parties, according as it is agreed to be a partial or a full statement, whether such agreement is an express one or one arising from implication of law upon a failure to propose amendments, upon an acceptance of proposed amendments, or upon a failure to object to certifying of such statement as containing all the facts. But this court has never receded from the holding above quoted from in *State v. Parker*, to the extent of even suggesting that it is the legal duty of a trial judge to certify to a statement of facts as containing all the facts, over the objections of the opponent of the one proposing the statement, when the trial judge knows that the statement sought to be so certified does not in fact contain all the facts occurring in the cause and not already a part of the record therein. We cannot say that Judge Jurey failed in his legal duty when he refused to certify the statement of facts as proposed; that is, as containing all the facts occurring in the cause relating to the attorney's fees of Carl J. Smith in question.

[2] What we have said so far might seem to call for our denial of the writ and order prayed for by relator and the giving of no further consideration to her rights in the premises. However, since this is an original proceeding in this court and is invoked in aid of our appellate jurisdiction, we think we are not confined to the mere question of compelling the certifying of the statement of facts as proposed, but that it is our duty to grant relator such relief as the facts presented entitle her to, looking to the fair presentation of her appeal in this court. Counsel for relator express a willingness to supply any deficiency in the statement of facts proposed by her, in order to make it a statement of all the facts, if it be held not to contain all the facts in its present condition.

Now, unless it clearly appears that counsel for relator proposed and sought the certifying of the statement of facts as containing all the facts relating to the attorney's fees in question, in bad faith and in an attempt to cast upon Smith, the judgment creditor, the burden of supplying a statement of some considerable portion of the facts relating to his attorney's fees in order to make it a statement of all the facts, we think the judge should not have limited his decision to the bare question of whether or not the statement as proposed contained all the facts, but, having concluded that the statement did not contain all the facts, should have given relator opportunity to supply such deficiencies with directions as to what should be so supplied; and not until after reasonable opportunity and neglect on the part of the relator to so supply such deficiencies should a certificate as asked for by her have been finally denied. It appears here that a statement of all the facts occurring in the cause relating to the attorney's fees in question is nec-

essary to review the judgment appealed from in the manner relator desires to have that judgment reviewed. So, when a certificate to that effect was finally denied by the judge, such denial was in effect the striking of the statement of facts as proposed, in so far as its benefit to her upon appeal is concerned. We adhere to the rule that a party proposing a statement of facts cannot cast upon his opponent the burden of furnishing any considerable portion of a statement through proposed amendments; but that does not mean that, simply because a proposed statement of all the facts does not contain all the facts, it shall be cast aside by the trial judge and a certificate thereto as such finally refused without giving an opportunity to the one proposing it to supply such deficiencies as the judge may deem necessary to render it such that he can truthfully certify to it as containing all the facts. In *State ex rel. Fowler v. Steiner*, 51 Wash. 239, 98 Pac. 608, Judge Fullerton, speaking for the court, made the following pertinent observations touching this question:

"The procedure herein provided for, it will be noticed, does not contemplate the practice of moving to strike the statement of facts merely because it does not conform to what the adverse party may deem a proper or correct statement. The remedy the statute gives him is the right to propose such amendments as will make the statement a proper and correct statement of the facts of the case, and in all ordinary cases this is the adverse party's sole remedy for a defective or imperfect statement. But it is equally plain that it was not the purpose of the statute to require the adverse party to furnish the entire or any considerable portion of the statement, and the appellant should not be permitted to compel him to do this, either designedly, or by omissions made through inadvertence. If, therefore, there is a serious omission in the proposed statement, or if the proposed statement is not in a form the court may deem proper, the party proposing it should himself be required to supply the defect. But the proper practice to accomplish this end is not to strike the proposed statement. Such a practice will in most cases deprive the party of his right to perfect his appeal, and consequently deprive him of a substantial part of that remedial justice guaranteed by the Constitution and laws of the state. The better practice is to give the party an opportunity to correct the defects and supply the omissions pointed out, and strike the statement only when he refuses to comply with the court's order. The statement should be stricken in the first instance only where it is manifest that the party proposing it has been guilty of bad faith or such gross negligence as will amount to bad faith; the remedy should not be invoked where there has been an attempt in good faith to comply with the statute."

We note from statements made in the judge's return in this proceeding that he expressed the opinion that counsel for relator, in furnishing the statement of facts, did not propose it as a statement in good faith of all the facts relating to the attorney's fees in question. If we have correctly gathered the view of the trial judge upon the question of good faith, we conclude that we cannot concur in his view upon that question in the

light of the record before us. The question of attorney's fees, for which judgment was rendered in favor of Smith, seems not to have been the main issue in the case upon trial, and it seems to us that we have in this record enough facts to warrant us in concluding that there was reasonable ground for difference of opinion as to how much of the facts occurring upon the trial of that case related to the question of the attorney's fees for which judgment was rendered in Smith's favor. We may adopt the trial judge's view that the statement of facts as proposed by relator did not contain all of the facts relating to that question, yet we do not think that the statement as proposed was so far deficient that the trial judge was warranted in treating it as a statement proposed in bad faith with an intent to cast upon Smith the burden of supplying the deficiencies through amendments. This being true, we think that the trial judge should not have finally determined that the statement of facts as proposed should be cast aside entirely as a proposed statement of all of the facts, but that he should have given the relator an opportunity to supply such deficiencies as would make it a statement of all the facts such as the judge could truthfully certify to be such.

While we deny a peremptory writ, requiring the judge to certify the statement of facts as proposed, in its present condition we direct that the judge now furnish to relator a reasonable opportunity and time to prepare such additions to the statement as will make a statement of all the facts occurring in the cause relating to the attorney's fees in question not already a part of the record therein, and that the judge designate in a general way the particulars wherein the statement as proposed is deficient, to the end that counsel for relator may know what is required in that behalf.

ELLIS, C. J., and FULLERTON, WEBSTER, and MAIN, JJ., concur.

(100 Wash. 974)

O'BRIEN v. INDUSTRIAL INSURANCE DEPARTMENT. (No. 14429.)

(Supreme Court of Washington. April 3, 1918.)

1. APPEAL AND ERROR §544(2)—ABSENCE OF STATEMENT OF FACTS—EXTENT OF REVIEW—FINDINGS.

The bringing up of a case on the findings of the court below without a statement of fact raises but one question, which is whether the findings sustain the judgment.

2. APPEAL AND ERROR §931(1)—PRESUMPTION—FINDINGS—EVIDENCE.

All intendments and inferences are to be taken in favor of the findings of the court below, and it must be presumed that there was evidence to sustain the findings.

3. MASTER AND SERVANT §417(5)—WORKMEN'S COMPENSATION ACT—PRESUMPTION ON APPEAL—EMPLOYMENT IN WAREHOUSE. Under the Workmen's Compensation Act

(Rem. Code 1915, §§ 6604-1 to 6604-32), including docks and wharves with the enumerated extrahazardous employments, and on findings that the employer was carrying on a general public warehouse, dock, and wharf business and that deceased was a watchman in the warehouse put to work by the foreman having charge of it and the employer's plant, and on a stipulation that the work was extrahazardous, it will be inferred that the dock, wharf, and warehouse was a single structure or plant, or that if they were separate that they were so operated as to make one business, or, if only a warehouse, that the employment was extrahazardous; either theory entitling the widow of the deceased employé to recover.

4. MASTER AND SERVANT §417(5)—WORKMEN'S COMPENSATION ACT—FUNDS FOR PAYMENT OF CLAIMS.

On the holding that the warehouse might or might not be within the terms of the act, depending upon its character, and that a warehouse built over a dock or wharf may be a structural part of the dock or wharf, it will be presumed that a fund is or would be collected out of which the claim of the widow of an employé killed in such warehouse could be satisfied.

5. MASTER AND SERVANT §420—WORKMEN'S COMPENSATION ACT—APPEAL—ATTORNEY'S FEES.

The right of a litigant to recover attorney's fees from an opposing party is a statutory right, and, though Rem. Code 1915, §§ 6604-20, relating to appeals from the orders of the Industrial Insurance Commission to the superior court allows the recovery of an attorney's fee, yet, in the absence of any statute authority, neither the superior court nor the Supreme Court can allow such fees upon an appeal from the superior court to the Supreme Court.

Fullerton and Main, JJ., dissenting.

En Banc. Appeal from Superior Court, King County; Walter M. French, Judge.

Proceeding under Workmen's Compensation Act by Emma O'Brien, widow of Robert C. O'Brien, to obtain compensation for his death, opposed by the Virginia Street Dock & Warehouse Company, employer. The claim was rejected by the Industrial Insurance Commission, and on appeal to the superior court there was a judgment allowing the claim, and the Industrial Insurance Department appeals. Modified and affirmed.

W. V. Tanner and Howard Waterman, both of Olympia, for appellant. Geo. H. Rummens, Jay C. Allen, and E. L. Wienir, all of Seattle, for respondent.

CHADWICK, J. Robert C. O'Brien was accidentally killed while in the employ of the Virginia Street Dock & Warehouse Company. His widow, the respondent, presented to the Industrial Insurance Commission a claim for compensation under the Workmen's Compensation Act. The claim was rejected by the commission, whereupon the respondent appealed from the order of rejection to the superior court of King county. That court entered a judgment allowing the claim and the commission appeals to this court, assigning as errors: (1) That the claimant is not entitled to compensation because the decedent was killed while working in a ware-

house, which character of work is not extra-hazardous within the meaning of the Workmen's Compensation Act; and (2) that the allowance of the conditional attorney fee is unwarranted by the statute.

The case is before us upon the findings of fact made by the trial court and the conclusions of law drawn therefrom; the evidence on which the findings are based not being in the record. The findings of fact follow:

"I. That on the 4th day of June, 1916, the Virginia Street Dock & Warehouse Company was a corporation engaged in conducting and carrying on a general public warehouse, dock, and wharf operation business in the city of Seattle, state of Washington, and in storing and handling therein goods, wares, and merchandise of other people and the general public for hire, in which said dock, warehouse, and wharf operation it used and operated power-driven machinery in conducting and carrying on its said business.

"II. That on the 3d day of June, 1916, the said corporation directed one David W. West as its agent to procure for said corporation a watchman to work in and guard its said warehouse during the following day, and that pursuant to such direction the said David W. West sought out Robert C. O'Brien and requested him to call at the office of said corporation at its said plant on the morning of the following day, to wit, on Sunday, the 4th day of June, 1916, for the purpose of entering the employ of said corporation in said capacity, and that about 7 o'clock on said Sunday morning the said Robert C. O'Brien reported at the said office of said corporation, and was then and there at said time, by the foreman of said corporation, who was in charge of the said plant of said corporation, placed at work as a watchman in charge of the warehouse of said corporation's aforesaid plant, and was by said foreman directed to report to him, the said foreman, at stated intervals with reference to his said work, and thereupon the said O'Brien went into the said warehouse and commenced to perform services under said employment.

"III. That the said West was in no wise engaged in the business of operating said warehouse, and had no control or direction over the method or manner in which the said O'Brien should perform his services, but said services were to be performed and were performed by the said O'Brien under the order and direction of the officers and agents of the said corporation.

"IV. That at the trial of this cause it was stipulated between the attorneys for the respective parties in open court that the services and work in which the said O'Brien was engaged were of extrahazardous nature, and were such as to bring him within the terms of the Workmen's Compensation Act, in event he was in fact employed by and working for the said corporation, but it was not conceded by the attorney for the Industrial Insurance Department that the said O'Brien was employed by and working for said corporation.

"V. That shortly after said O'Brien went to work in said warehouse, and while he was engaged in the line of the work for which he was employed, he attempted to operate a power-driven elevator, and in some manner not disclosed by the evidence started the elevator in operation and was caught between said elevator and the floor of the building and crushed to death; he having been found dead about four hours after he entered upon the discharge of his duties under such employment.

"VI. That the said Robert C. O'Brien left surviving him, his widow, Emma A. O'Brien,

and one son, to wit, William C. O'Brien, born September 7, 1901.

"VII. That within the time limited by law the said corporation reported said accident and death to the Industrial Insurance Department of the state of Washington. That within the time limited by law, the said Emma A. O'Brien, widow of the said Robert C. O'Brien, deceased, presented and filed her claim in writing under the Workmen's Compensation Act with the Workmen's Compensation Commission of the state of Washington, and thereafter her claim came on regularly to be heard before said Industrial Insurance Department, and upon said hearing the said Industrial Insurance Department made and entered its order rejecting her said claim in its entirety, and denying her any and all relief.

"VIII. The court finds that each and every statement in the said claim so presented to the said Industrial Insurance Department of the state of Washington by the said Emma A. O'Brien was and is true.

"IX. That after the rejection of her said claim by said Industrial Insurance Department, and within the time limited by law thereafter, the said Emma A. O'Brien, being a resident of King county, state of Washington, duly and regularly appealed to the superior court of the state of Washington in and for King county from the order of said Industrial Insurance Department rejecting her said claim.

"X. The court further finds that in the prosecution of her said appeal to this court the said Emma A. O'Brien was compelled to and did employ said attorneys herein named to prepare her said appeal and try this cause on said appeal, and that the judgment herein is one which will reverse the decision of the Industrial Insurance Department and will affect the accident funds, and that a reasonable attorney fee to be allowed and paid to the said attorneys out of the administration fund for the trial of said cause in this superior court is \$150; and the court further finds that in event this cause shall be appealed to the Supreme Court of the state of Washington by the said Industrial Insurance Department, then, in such case, a reasonable attorney fee for the services of said attorneys on such appeal is \$100, which, in event of this cause being affirmed on such appeal, shall be payable to said attorneys out of the administration fund."

Shortly after the judgment of the superior court was rendered, and within the time for appeal, this court handed down its opinion in the case of *State v. Powles & Co.*, 94 Wash. 416, 162 Pac. 569. We held that a resolution of the commission bringing warehouses within the terms of the Industrial Insurance Act was not vital to bring a private warehouse connected with a mercantile business under the law; there being no showing that employment in such a warehouse was either hazardous or extrahazardous. Upon the strength of that opinion, the Attorney General brings up this case, contending that the findings of the court are that the claimant was injured in a warehouse, and for that reason no recovery can be had.

It is recited as preliminary to the findings of fact and conclusions of law:

"A jury being waived, evidence was offered by the respective parties, and the case was argued by attorneys for the respective parties and submitted to the court, and the court being fully advised in the premises makes the following findings of fact."

The decree of the court recites that "evidence was offered by the respective parties," etc.

[1-3] It is settled by a line of authorities so numerous that no citation of them is necessary that a case brought here on the findings of the court below without a statement of facts raises but one question, that is, whether the findings sustain the judgment. But it is argued that the findings are not sufficient, or sufficiently clear, to sustain the judgment of the court.

The court found as a premise for all other findings that:

"The Virginia Street Dock & Warehouse Company is a corporation engaged in conducting and carrying on a general public warehouse, dock, and wharf operation business in the city of Seattle, state of Washington, and in storing and handling therein goods, wares, and merchandise of other people and of the general public for hire, in which said warehouse and dock operation it used power-driven machinery in conducting and carrying on its business."

In finding II it is made to appear that the work that the deceased was called upon to do was that of a watchman in the warehouse of the corporation; that he was put to work "by the foreman" who had "charge of the warehouse of said corporation's aforesaid plant." It was stipulated by the parties that the work was extrahazardous, and is so found by the court.

All intendments and inferences are to be taken in favor of the findings of the court. We must presume that there was evidence to sustain the findings. It is admitted that docks and wharves are within the terms of the act. The court has found that the Virginia Street Dock & Warehouse Company was doing a general public warehouse, dock, and wharf operation in the city of Seattle. From these findings it may be readily inferred, and as we conceive the law it is our duty to infer, that the dock, wharf, and warehouse was a single structure, or plant, or, if they be considered as separate entities, that they were so operated one with the other as to make one business or concern.

To hold that a wharf or dock which is covered by a building in which commodities are stored is because of that fact a warehouse, and ceases to be a dock or wharf, would be to take out of the law by judicial decree the greater number of docks and warehouses in this state. It would be to emasculate the act of its provisions declaring employment on docks and warehouses to be an extrahazardous occupation. This holding in no way trenches upon the Powles Case. We did not there declare that every warehouse was to be exempted from the operations of the act, but rather that the commission had no authority under the law to arbitrarily declare employment in a private warehouse to be extrahazardous when the order of the commission could not be sustained either

by reference to the law, or by proof of the fact. Here it is fairly within the findings that the warehouse was the superstructure of a dock or wharf, and the work was extrahazardous.

It may be said that the findings of the court are too meager to determine whether the warehouse in which the accident occurred was of such a nature as to make employment therein extrahazardous. But this position is not tenable. To reach it we would have to disassociate the word "warehouse" from the finding as to the character of the business which was carried on by the "Dock & Warehouse Company," and rest our decision upon the word "warehouse" alone. We are not privileged to do this under the authorities. We must take all of the findings with their reasonable and legitimate inference, and, when so taken and coupled with the stipulation that the employment was in fact extrahazardous, we are compelled to find either that the warehouse was a part of the dock and wharf structure, or if only a warehouse that the employment was extrahazardous. Under either theory of the law the appellant is entitled to recover.

[4] Counsel urges in the event that we sustain the finding of the trial court no fund is available for the payment of the claim. But this contention is rested upon the theory that the husband was injured in a warehouse, that warehouses are exempted from the operation of the act, and for that reason no fund can be built up for the payment of such claims. But in the light of our holding that warehouses may or may not be within the terms of the act, depending upon their character and use, and that a warehouse built over a dock or wharf may be a part of the dock or wharf either on account of the union of its structural parts, or by reason of its use, we think there is no merit in the contention of counsel. Docks and wharves are within the act by its terms, and warehouses may be, so that we will presume that a fund is or will be collected out of which the claim can be satisfied.

[5] On the second question, we are of the opinion that the court erred in allowing the conditional attorney fee. The right of a litigant to recover his attorney's fees from the opposing party is a statutory right. It did not exist at the common law. The statute cited as bearing upon the question (Rem. Code, § 6604—20), relates to appeals from the orders of the Industrial Insurance Commission to the superior court. No statute authorizes the allowance of attorney's fees on an appeal from the superior court to the Supreme Court. There being no statute granting the right, it is beyond the power of either the superior court or this court to make an allowance of attorney's fees for such an appeal. See *Boyd v. Pratt*, 72 Wash. 306, 130 Pac. 371.

With this modification the judgment is affirmed.

ELLIS, C. J., and MOUNT, HOLCOMB, PARKER, and WEBSTER, JJ., concur.

FULLERTON, J. (dissenting). On the first question discussed by the majority I am unable to concur in the conclusion reached. Whether the warehouse in which the accident occurred was of such a nature as to render employment therein extrahazardous, the findings of fact, it seems to me, are too meager to determine. While docks and wharves are among the places enumerated in the Workmen's Compensation Act as extrahazardous for workmen laboring therein, warehouses are not. If a warehouse is within the act, therefore, it is because of some special circumstance making work therein extrahazardous, a fact to be determined from the conditions surrounding the particular case.

Turning to the finding, and disregarding for the moment the stipulation mentioned in the findings, nothing is found to indicate that this warehouse differed in its operation from the ordinary warehouse such as was under contemplation in the case of *State v. Powles & Co.*, cited by the majority. True, the court found that the corporation owning the warehouse was "engaged in conducting and carrying on a general public warehouse, dock, and wharfage operation business * * * and in storing and handling therein goods, wares, and merchandise of other people and the general public for hire," but this is not a finding that the warehouse was so closely connected with the dock and wharf as to be an inseparable part of both or either of them. The finding could be true, and the warehouse be not connected with or form a part of either of such places. The remaining findings lend color to the fact that it was not so connected. It is found that the person killed was employed to work in the warehouse, not the warehouse, dock, and wharf, and that he was killed in the warehouse, not on either the dock or wharf, implying a separate structure rather than one connecting with some other. As a matter of fact it was not so connected. In the first argument of the cause it was stated without contradiction that the warehouse was across the street from the dock and wharf, connected with them only by an overhead covered tramway.

It was found, it is true, that power-driven machinery was used in the business, and that the person killed was killed while in the act of using a power-driven elevator, but as we pointed out in *Remsnider v. Union Sav. & Tr. Co.*, 89 Wash. 87, 154 Pac. 135, Ann. Cas. 1917D, 40, the Workmen's Compensation Act does not say, nor does it imply, that every place in which power-driven machinery is employed impresses an extrahazardous

character on work performed therein. It but employs the circumstance of the presence of power-driven machinery with a number of other things, some one or more of which must be connected with or concur with the power-driven machinery to impress the place with an extrahazardous character. The case is authority also for the proposition that a power-driven elevator does not impress a place with an extrahazardous character.

I think therefore that the majority are in error in reaching the conclusion from the facts found that the place in which the person killed was employed to work was impressed with an extrahazardous character.

The trial court found the place of work extrahazardous because of the stipulation of the parties. But I cannot think the stipulation controlling under the peculiar circumstances of the case. That stipulation and its subsequent inadvisability arose from the following circumstances: Prior to the accident which resulted in the death, the commission by resolution sought to bring within the operation of the Workmen's Compensation Act "all firms or individuals operating storage warehouses, or warehouses in connection with mercantile establishments, whether operated independently or in connection with other businesses," and required the owners and operators thereof to make contribution to the accident fund at the basic rate of 2 per centum on the amount of their respective pay rolls. At the time of the happening of the accident, and at the time the cause was tried in the court below, the commission was giving full force and effect to the resolution, and naturally its counsel did not suggest the question whether the work in which the person killed was engaged fell within the operation of the Compensation Act, but commendably stipulated every question on which it did not desire to take issue. The claim for compensation was denied by the commission on another ground, namely, that the person killed was not an employé of the warehouse company; and this was the only question contested at the trial. However, shortly after the judgment was entered, this court handed down its opinion in the case of *State v. Powles & Co.*, in which it was held that the resolution of the commission, in so far as it was sought to bring within the operation of the Compensation Act private warehouses operated in connection with a mercantile business the work in which was not in fact extrahazardous, was beyond the powers of the commission. The effect of the decision was to introduce a new element into the case. If the warehouse in which the death occurred fell within the rule of the case cited, the accident was one for which compensation could not be lawfully made out of the funds under the control of the commission, and it found itself burdened with a judgment with the possibility of no funds or means of

creating a fund out of which the obligation could be met.

It is doubtless the general rule that stipulations concerning facts, and perhaps stipulations concerning mixed questions of law and fact, are binding where private interests are involved, and cannot afterwards be repudiated or questioned when the effect is to set aside or reverse a judgment entered on the faith of the stipulation. But, however general the rule may be, I do not think it ought to be controlling in litigation of this character. The Industrial Insurance Commission is in no sense a private litigant. Whatever may be the result of litigation in which it is a party, it as an entity neither gains nor loses. It is but the representative of a public interest, the trustee of an involuntary trust, if I may so define its functions. Through powers invested in it by legislative authority it collects from persons, firms, and corporations engaged in certain businesses called extrahazardous funds which it disburses to workmen employed in such businesses when they are injured in the course of their employment. Losses caused by the mistakes of the administrators fall upon the contributors thereto, since the amount paid in by them is governed by the amount disbursed by the commission. Since these payments are involuntary, and since the commission is a state institution, not the private employé of the contributors, losses caused by its mistakes should not be left without a remedy where remedy is still within the power of the courts, even though to give relief may violate some settled policy of the law applicable to individual litigants. That the stipulation here was the result of a mistake, and a pardonable one, on the part of counsel representing the commission, needs only to be stated to receive sanction. The counsel was but following the settled policy of the commission as indicated in the resolution mentioned.

Nor do I think it follows from my conclusions that the respondent must be summarily dismissed. If the place in which her husband was employed to work was extrahazardous, she is entitled to recover, even though a warehouse is not among the extrahazardous places especially enumerated in the statute. The act (Rem. Code, § 6604—2) provides:

"If there be or arise any extrahazardous occupation or work other than those hereinabove enumerated, it shall come under this act. * * *"

If therefore it can be shown that this warehouse presented an extrahazardous condition for labor engaged therein, either because of its situation, its connection with another establishment, or for other causes, the respondent is entitled to compensation for the death of her husband therein. The death need not have been caused by the hazards of the place. It is sufficient if it occurs in the place or away therefrom; the person em-

ployed being at the time of his death in the course of his employment.

"Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 6604—4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer." Rem. Code, § 6604—3; *Stertz v. Industrial Ins. Com.*, 91 Wash. 588, 158 Pac. 256.

If it be said that the clause from the Compensation Act quoted is not self-executing, and that it requires some action on the part of the commission, or an application on the part of the owner or operator, to bring within the operation of the act businesses not within the specific enumeration of extrahazardous businesses, but which are actually so, we have here such action in the resolution of the commission. The action of the commission as evidenced by the resolution was not in itself declared void by the case of *State v. Powles & Co.*, supra. It was but held that the commission could not by resolution impress an extrahazardous character on work performed in a particular place the work in which was not in fact extrahazardous. The resolution can therefore operate in all places therein described in which the work is extrahazardous, a fact to be determined from the nature of the work carried on in the particular place.

The respondent then having only a possible, not a clear, right to compensation, the cause should in justice to the parties concerned be sent back for a retrial, not summarily affirmed.

On the second question I agree with the conclusion of the majority.

MAIN, J. I concur in the views expressed by FULLERTON, J.

(101 Wash. 61)

KENNEDY v. BURR. (No. 14433.)

(Supreme Court of Washington. April 5, 1918.)

1. APPEAL AND ERROR ⇐1002 — VERDICT BASED ON CONFLICTING EVIDENCE — REVIEW.

The case having gone to the jury on conflicting evidence, the verdict is conclusive of all the facts.

2. EVIDENCE ⇐215(5) — DECLARATIONS AGAINST INTEREST—ADMISSIBILITY.

In action for deceit against defendant executrix, the issue being whether defendant had falsely misrepresented fact of solvency of estate, so that plaintiff had failed to file claim, defendant's report to state tax commission was competent as a declaration against interest, and in rebuttal of her statement that estate was bankrupt.

3. APPEAL AND ERROR ⇐1051(1)—ADMISSION OF TESTIMONY—HARMLESS ERROR.

Conceding that report of defendant executrix to state tax commission was incompetent on issue of solvency, defendant was not prejudiced where court's order of solvency was also introduced; it being competent to prove, prima

facie at least, the issue of solvency of estate to which it was directed.

4. EVIDENCE ⇨183(13) — SECONDARY EVIDENCE—FOUNDATION.

Evidence that a memorandum to the effect that the note involved was secured by an assignment of a mortgage had been pinned to note by maker in his lifetime was incompetent as proof of an assignment, in the absence of showing that an assignment could not be produced.

5. EXECUTORS AND ADMINISTRATORS ⇨116—ACTION FOR DECEIT—EVIDENCE.

If plaintiff, in reliance on false and fraudulent representations of defendant executrix that estate was bankrupt, failed to file a claim against the estate within the time provided by law, defendant was liable for deceit.

6. TRIAL ⇨296(7) — INSTRUCTIONS — CONSTRUCTION.

In an action against executrix for deceit, statement in an instruction that it was defendant's duty to direct plaintiff to file a sworn statement against said estate, when considered in connection with other parts of the instruction, held to mean no more than that a promise to pay, coupled with a concealment of fact that claim should be presented, was a circumstance which might be considered as evidence of deceit.

7. EXECUTORS AND ADMINISTRATORS ⇨450—DECEIT—PRIMA FACIE CASE—"SOLVENCY."

In an action against defendant executrix for deceit, consisting of statements as to solvency leading plaintiff not to file claim against estate, a showing that estate was incumbered did not overcome prima facie case of solvency; "solvency" meaning an excess of assets over liabilities; the power to pay debts in due course.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Solvency.]

8. EXECUTORS AND ADMINISTRATORS ⇨450—ACTION FOR DECEIT—BURDEN OF PROOF.

In an action against defendant executrix for deceit, consisting of statements as to solvency leading plaintiff not to file claim against estate, the burden was on defendant to show, not merely incumbrances, but an actual state of insolvency of estate to defeat plaintiff's case.

Department 2. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by Nellie Kennedy against Frances Burr. Judgment for plaintiff, and defendant appeals. Affirmed.

Corwin S. Shank and H. C. Belt, both of Seattle, for appellant. James R. Chambers, of Seattle, for respondent.

CHADWICK, J. This is an action for deceit. The plaintiff is the holder of a note made by Arthur S. Burr in his lifetime. Defendant, surviving wife and sole devisee of deceased, was appointed executrix of the will of her husband, and made publication of notice to creditors on May 16, 1914. Plaintiff and the Burrs had been friendly to the point of intimacy for several years before Mr. Burr's death. Plaintiff had loaned Burr money which he had paid back. In October, 1914, after the qualification of defendant as executrix she paid plaintiff interest amounting to \$22.50, and asked the plaintiff if she would wait for the principal, which plaintiff agreed to do, "If that would accommodate her in any way I would be

glad to wait," says the plaintiff. In the February following plaintiff was in a hospital being treated for an injury. She asked defendant to call on her. The note was a subject of conversation. Plaintiff's version of the conversation is as follows:

"A. We talked about it. I asked her how she was fixed, how Mr. Burr left her, and if he left her in fairly good condition as to finances and she said that she was nearly crazy, that she was almost a bankrupt, and that she was living on 10-cent lunches a day, and I know I laughed and said that was kind of bad and let it go at that. Q. Did you or did you not believe those statements? A. I surely believed them. I would have no reason to disbelieve Mrs. Burr, because I had always found her a truthful woman. I believed it all. I was sorry for her to think she had to live on 10-cent lunches a day. Q. She said she had to live on 10-cent lunches a day? A. Yes, sir. Q. What effect, if any, did these statements have upon your failure to file a claim against the estate? A. I thought as long as she was so overworked that I would let it go; that she would pay me when she could, as her husband has always paid whatever he owed to me. If I had been up and around I would have looked after things better."

Defendant promised to call again. Nothing was done, so plaintiff some three or four months thereafter had defendant summoned by telephone. "Then I asked her again if she couldn't do something for me, because my hospital bills were heavy and my doctor's bill heavy, and she asked if I would take \$25 a month and I said that would be better than nothing, but I could do more if I got it all in a bunch and she said 'I will write to my brother in New York and see what he will do for me.' Q. Was anything said about the estate? A. No, sir; the estate was not mentioned. I said that if it was all right I would like to have it in one sum, but she said 'I will write to my brother and let you know what I can do.'"

After the 16th of May, 1915, the time for filing claims, defendant either failed or refused to call upon or communicate with plaintiff in any way. Plaintiff wrote a letter saying, among other things:

"This is to let you know that I have left the hospital and am out to my friend's, Miss Dixon's, 6535 Second Ave. N. E. I was very tired of the hospital and besides felt as tho must cut expenses as you know twenty-five dollars a week for fifteen weeks besides your other expenses amounts to something. Now, dear friend, I should love to have you do something for me. Under no other condition would I do this, but I simply must have some money. Now please see what you can do for me. My telephone is Kenwood 2490, and if you can come out. * * *"

Plaintiff rested upon her assumption that the estate was bankrupt and defendant was distressed financially until some time thereafter when she employed counsel to look into the estate. Investigation revealed the fact that the estate had been appraised as of the value of \$26,071.30.

This action was brought to recover damages fixed as the value of the note. Defendant by her answer admits that she told

plaintiff that she had obtained nothing from the estate for her personal use, and that she was indulging in 10-cent lunches; but denies that her statements were false and fraudulent, or that they were intended to deceive.

[1, 2] The case went to the jury on conflicting testimony. The verdict is conclusive of all the facts, but defendant assigns as error the ruling of the court admitting in evidence the appraisal, the report of the executrix to the state tax commission, and the order of solvency made by the court when the will was admitted to probate. This order is not in the files, but it was introduced at the trial. Counsel seem to rest their charge of error upon the belief that the issue was whether the estate was in fact worth a sum approximating the amount of the inventory, whereas the issue was whether defendant had falsely misrepresented the fact of solvency. The appraisal which was accepted and returned by her to the state tax commission was competent as a declaration against interest and a rebuttal of her statement that the estate was bankrupt.

[3] But, if it were not so, defendant is not prejudiced, for the order of solvency, being in itself a judgment of a court of general jurisdiction, was competent to prove at least prima facie the issue to which it was directed, that is, the solvency of the estate.

[4] It developed on the cross-examination of the plaintiff that a memorandum had been pinned to the note by Burr in his lifetime to the effect that:

"This note * * * is secured by an assignment of mortgage for \$500, with accrued interest, by Charles T. McDonald, said mortgage is due October 30, 1914, and is secured by lot 5, block 5, central Seattle."

The court rejected this offer because the defendant had not pleaded the fact. This is assigned as error, but no prejudice resulted. It was not competent as proof of an assignment, in the absence of a showing that the assignment could not be produced. We can hardly hold that defendant has been prejudiced by a rejection of the memorandum, when we would hold as a matter of law that the memorandum was incompetent if it had been admitted over objection.

[5] It is complained that the court erred in instructing the jury that they might find defendant liable if they found that the statements made by her were false and fraudulent, and they further found that plaintiff relying on them did not file a claim against the estate. This instruction goes to the gravamen of the case. It directs the mind of the jury to the controlling issue, that is, whether the representations were false and fraudulent, and whether by reason thereof plaintiff was misled to her damage. The action being for deceit, and not upon contract, the instruction was proper.

[6] The giving of the following instruction is assigned as error:

"You are further instructed that the defendant as executrix of the estate of Arthur S. Burr, if you find from the evidence was negotiating with the plaintiff for the payment of the note signed by said Arthur S. Burr above mentioned within a year after giving notice to creditors, viz. on the 16th day of May, 1914, *it was the defendant's duty and obligation to notify and direct the plaintiff to file a sworn claim against said estate*, she being the executrix of the estate, and if you find from the evidence that the said defendant did so negotiate for the payment of said claim, but failed to so notify and direct the plaintiff to file such claim, then such failure is evidence which you may consider in connection with other evidence in the case that defendant intended to defraud plaintiff out of her said note and claim."

Counsel lays emphasis upon that part of the instruction which for convenience of argument we have italicized. It may be granted that the instruction is inapt in form, but when considered with the first condition "if you find from the evidence (defendant) was negotiating with the plaintiff for the payment of the note," the italicized words mean no more than that a promise to pay, coupled with a concealment of the fact that the claim should be presented as a claim against the estate, was a circumstance which might be considered with other testimony as evidence of deceit. In the light of the issue and an actual payment upon the note, the instruction does not mean that the executor is under any duty, independent of the facts of the case, to advise the filing of a claim, but rather that he may be held as for deceit if it is shown that his negotiations for payment had gone to the extent of holding out his own promise, although it may not be binding in law.

[7, 8] It is said that the verdict is excessive. The court instructed the measure of recovery as the amount of the note with interest. Counsel contends that a recovery could not in any event exceed the amount that the estate would have been able to pay, and inasmuch as it is not shown that the assets will exceed the liabilities on final settlement no recovery can be had. Here again counsel fails to hold fast to the real issue. The contention is based on the assumption that the suit is against the executrix and is to be paid out of the estate. Solvency has a well-defined meaning in law; it means an excess of assets over liabilities; the power to pay debts in due course. It is true that the defendant undertook to show that the estate was incumbered, but this did not overcome the prima facie case. The burden was on defendant to show, not incumbrances merely, but an actual state of insolvency to defeat plaintiff's case. This she not only did not do, but, as we read the record, adroitly avoided doing.

ELLIS, C. J., and HOLCOMB and MOUNT, JJ., concur.

(101 Wash. 51)

E. F. BROAD, Limited, v. ERICKSON CONST. CO. (No. 14617.)

(Supreme Court of Washington. April 4, 1918.)

SALES §77(2)—LIABILITY OF PURCHASER FOR EXCHANGE AND DISCOUNT.

If defendant buyer was to pay for the timber in Australia and not in the United States and in American money and stand the expenses of making such payments, the loss of exchange and discount on payments made must be borne by it; fixing the price as a certain number of dollars per thousand, plus cost, freight, and insurance, being merely a convenient way of stating the price in American money.

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by E. F. Broad, Limited, against the Erickson Construction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Corwin S. Shank and H. C. Belt, both of Seattle, for appellant. Donworth & Todd, of Seattle, for respondent.

HOLCOMB, J. This action is one to recover a balance alleged to be due upon the purchase price of a lot of Australian hard wood, sold and delivered by respondent to appellant for use in the construction of a dry dock for the United States government at Bremerton. Upon the trial of the issues the court found, in substance: (1) That respondent sold and delivered to appellant hardwood timbers at an agreed price of \$31,242.49, and that the timbers were shipped from Sidney, Australia, to Bremerton. (2) That in connection with such shipments respondent incurred expenses in consular invoices and cablegrams in the amount of \$25.10, which expenses according to the general custom of the trade were to be paid by the purchaser or consignee; that appellant was indebted to respondent in that amount. (3) That appellant had paid \$30,063.36 to respondent, and that there was a balance owing to the respondent from appellant in the sum of \$1,204.23. (4) That according to the agreement between appellant and respondent the timbers ordered were to be of certain dimensions as modified by the parties; that all of the timbers so ordered except 20,000 feet were up to the dimensions specified. (5) That the 20,000 feet which were not according to the dimensions specified could have been purchased at the sum of \$78 per thousand; that appellant sold the 20,000 feet for \$65 per thousand. (6) That appellant was damaged in the sum of \$260 by reason of the fact that 20,000 feet of the timbers were not up to the dimensions ordered, leaving a balance all told due to respondent of the sum of \$1,124.55. For the last-mentioned sum the trial court gave respondent judgment against appellant.

Appellant excepted to the findings numbered 3, 4, 5, and 6, and the conclusions of law in conformity therewith and supporting the

judgment against it, and assigns its errors thereon. All of these assignments involve questions of fact except as to the conclusions which followed the findings. We have carefully examined the entire record, and are of the opinion that the evidence supports the findings of the trial court.

The argument of appellant upon these assignments of error is considerably involved and complicated, but we think the issues were very simple. In finding No. 3, for instance, the court found that the agreed price of the timbers amounted to \$31,242.49. This was arrived at by computing the price of the short timbers at \$65 per thousand and of the longer timbers at that price plus three shillings per hundred feet extra, with a still greater price on a few extra long timbers. The price of three shillings extra upon long timbers appears in invoices made by the secretary of the respondent company; but Mr. Erickson himself, the president of appellant company, testified that there was an additional price to be paid for the longer timbers though he could not say from memory how much it was in difference, but an increase in price was agreed to. This increased price on the longer timbers appeared in each and every invoice and bill of lading through the period of shipment covering a year and two months, and no objection was made when the excess charge was first made, or thereafter, until this suit.

Objection is made to the allowance of the cost of consular invoices and cablegrams. It is conceded that the duty was to be paid by appellant upon the arrival of the shipments in this country. The consular invoices issued by the United States consular officer were necessary in order that the shipments could be received in this country and for the payment of duty. While there was a dispute as to whether the timbers were to be shipped f. o. b. Bremerton, or c. i. f., that is, cost, insurance, and freight, there was testimony justifying the court in finding that the shipments were to be made cost, insurance, and freight, and the insurance and freight were invariably paid by prepaying upon shipment and adding it to the cost of the timbers. The other items, consular invoices and cablegrams, were included in cost, and there was testimony that that was the invariable custom in shipments from overseas. These terms would include consular invoices and cablegrams incidental to shipments as well as insurance and freight.

The contract was made by appellant with the Ehrlich-Harrison Company, a timber brokerage concern of Seattle, acting through a Mr. Abbott. The contract was for the materials to be ordered from respondent in Sidney, Australia. The price to be paid was stated in American money, but was to be paid to the respondent in Australia, and appellant agreed to and did furnish a letter

of credit to cover the \$60 per thousand which was to be paid to respondent in Australia. It was not therefore a contract made between two parties in this state, but was a contract made between a party in this state and a party in Australia. A letter of credit which appellant authorized its bank to deposit in a bank in Australia, followed by a cablegram and a letter from appellant's bank, apparently interpreted the understanding of the agreement between the parties on the part of appellant, that respondent should receive the \$60 per thousand feet upon shipping documents and policy of insurance, including consular invoice with costs, insurance, and freight added to the cost of the timbers. This was later confirmed by letter from appellant to the bank in Sidney.

The third assignment of error assails the fifth finding of fact, to the effect that appellant had paid no part of the sum agreed upon except the sum of \$30,063.36, leaving a balance due and owing of \$1,204, based upon the contention that the court credited appellant only with the proceeds of the drafts negotiated for the advance payment at \$60 per thousand converted into American money at the current rate of \$4.8665. It is apparent that all that the court did was to convert the total credit of money paid by appellant in Australia in English money into American money at the then current rate, which amounted to the sum found in American money. It is claimed that by this move appellant lost approximately \$293.39 by reason of exchange and discounts on the payments made. But if appellant was to pay for the timber in Australia and was to stand the expense of making such payments, that is, charges and discounts, this loss of exchange and discounts must be borne by it. That was one of the costs and charges contemplated in the contract entered into. It is a contract whereby the payments were to be made not in the United States and in American money, but in Australia, and the fixing of the price at \$60 per thousand, plus cost, freight, and insurance, was only a convenient way of stating the price in American money.

As to the claim of error in the finding of the court that but 20,000 feet of the timbers delivered, instead of 46,626 feet, were too small, and in finding that the cost to the appellant of buying the additional lumber was \$1,560 instead of \$3,925.20, the amount which appellant paid to replace the shortage in timbers, the evidence, while in conflict, justified the finding.

It would serve no useful purpose to enter into an analysis of the intricate and voluminous evidence pro and con upon these points. Suffice it to say that, while the court might have found in favor of appellant upon these questions, the evidence does not preponderate against the findings; and, while it is true

that appellant paid \$84 per thousand for the timbers which it procured as necessary to complete its order, there was evidence which would have justified the trial court in finding that it could have procured the timbers for \$76, while the trial court allowed \$78 per thousand for the 20,000 feet short. Judgment affirmed.

ELLIS, C. J., and MOUNT and CHADWICK, JJ., concur.

(100 Wash. 657)

McKILLIP v. GRAYS HARBOR PUB. CO.
et al. (No. 14398.)

(Supreme Court of Washington. April 3, 1918.)

1. LIBEL AND SLANDER \S 7(1)—CRITICISING CANDIDATE FOR OFFICE—WORDS LIBELOUS PER SE.

Under Rem. Code 1915, \S 2424, 2425, defining libel, paid advertisement stating that candidate for county superintendent of schools had waged campaign of abuse and slander, was disqualified for office, and had lied about an honorable opponent, and that his conduct branded him as unworthy of the office he sought, and that his vicious methods should be disapproved of, was libelous per se, especially in view of section 4904, making false assertions in elections criminal, since such advertisement charged a crime.

2. LIBEL AND SLANDER \S 48(3)—"PRIVILEGED COMMUNICATION"—CRITICISM OF CANDIDATE.

Such article was not privileged under section 2430, Rem. Code 1915, providing that every communication made to a person entitled to or concerned therein by one also concerned in or entitled to make it shall be privileged, since demurrers to the complaint admitted its allegation that the article was false, and no person could be interested in the false defamation of a candidate.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Privileged Communication.]

3. LIBEL AND SLANDER \S 48(3)—WORDS LIBELOUS PER SE—PRIVILEGE.

Such advertisement, if privileged at all, must be justified under Rem. Code 1915, \S 2425, as a true and fair statement published with good motives and for justifiable ends, when honestly made in belief of its truth and fairness and upon reasonable grounds for such belief, and consisting of fair comments upon the conduct of any person in respect to public affairs made after a fair and impartial investigation.

4. LIBEL AND SLANDER \S 48(3)—WORDS LIBELOUS PER SE—PRIVILEGE.

Rem. Code 1915, \S 4833, permitting newspapers to publish paid advertisements concerning candidacies at elections, does not make privileged a paid advertisement falsely charging that a candidate has waged a campaign of slander and lies.

Department 2. Appeal from Superior Court, Grays Harbor County; Geo. D. Abel, Judge.

Action by N. D. McKillip against the Grays Harbor Publishing Company and others. Judgment dismissing the action on plaintiff's refusal to plead over after demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

O. M. Nelson, of Montesano, for appellant, Bridges & Bruener, of Aberdeen, for respondents.

CHADWICK, J. This is a civil action for damages arising out of the publication of an alleged libelous article. A demurrer was interposed to the complaint and sustained. The plaintiff elected to stand upon his complaint and judgment was entered dismissing the action. This appeal followed.

The complaint alleges in substance that the respondent Grays Harbor Publishing Company is a corporation organized and existing under the laws of this state, and as such is engaged in the publication of the Aberdeen Daily World, a daily newspaper of general circulation throughout the state; that the respondent W. A. Rupp claims to be the publisher and is the editor of such paper, and the manager of the respondent corporation; that as such he has charge of the advertisements and other printed matter; that the appellant has for many years past been a teacher in the public schools of the state; that since the 1st day of July, 1902, he has held a life diploma issued to him by the state of Washington; that during many years past he has been acting as county superintendent of schools for Grays Harbor county; that during such time he possessed the confidence of his friends and fellow men; that during the year 1916 he was "again" a candidate for county superintendent of schools for Grays Harbor county, both in the primaries and general election; that on the 6th day of November, 1916, the respondents knowingly, willfully, and maliciously published, or caused to be printed and published, of and concerning the respondent personally and as a teacher and candidate for office, the following article in the Aberdeen Daily World:

"(Paid Advertisement).

"Paid for by friends of T. W. Bibb, Republican Nominee for County Superintendent of Schools.

"We, the undersigned voters of Grays Harbor County, hereby publicly express our complete confidence in T. W. Bibb, Republican candidate for Superintendent of Schools, and commend him to the voters of this county as worthy of their support. We wish also to publicly denounce the campaign of abuse and slander being waged against him by N. D. McKillip, his opponent, and we warn all loyal friends of the public schools of this county not to be misled thereby. Over and above many other disqualifications which, in our judgment, render McKillip unfit for this important office, his conduct in thus waging a campaign of *slander and lies* against an honorable opponent, *brands him as unworthy of the office he seeks*. Let all true men and women who like to see fair play, place the seal of disapproval on McKillip's *vicious methods* by rallying to the support of that clean and deserving young man, T. W. Bibb. We vouch for his honesty and for his honor." (Italics ours.)

The article purports to have been signed by more than 60 names and concludes with the words "and hundreds of others." It is

further alleged that the charges in the article quoted are false and untrue, and were known to be such by the respondents at the time they were published; that the publication of the article was malicious and was intended to, and did, expose the appellant to hatred, contempt, ridicule, and obloquy, and was intended to, and did, deprive the appellant of the benefit of public confidence, social intercourse, and the respect of his friends and the electors of the county; that T. W. Bibb, the person named in said article, was an opposing candidate at the general election of 1916; that the appellant did not at any time make any false assertion or propagate any false report concerning Bibb or his candidacy for office which had a tendency to prevent his election or with a view thereto; that because of the publication of said article the plaintiff has suffered mental anguish, injury to his feelings, his character, and reputation; that he has been deprived of public confidence, the respect of his fellow men; that his mental and physical vigor were thereby impaired; and that he was "thereby defeated for election as county superintendent of schools."

The appeal presents two principal questions: (1) Is the article set forth libelous per se? (2) Is it upon its face privileged? These questions will receive consideration in the order stated.

The demurrer was based upon two grounds: (1) That the complaint does not state facts sufficient to constitute a cause of action; and (2) that the article set forth is not libelous, and that the publication of the same was privileged.

The Code (Rem. § 2424) provides that:

"Every malicious publication by writing * * * which shall tend: (1) To expose any living person to hatred, contempt, ridicule, or obloquy, or to deprive him of the benefit of public confidence or social intercourse; * * * or (3) to injure any person * * * in his * * * business or occupation, shall be a libel."

Section 2425 provides that every publication having the tendency or effect mentioned in the preceding section shall be deemed malicious, unless justified or excused. It further provides that:

"Such publication is justified whenever the matter charged as libelous charges the commission of a crime, is a true and fair statement, and was published with good motives and for justifiable ends. It is excused when honestly made in belief of its truth and fairness and upon reasonable grounds for such belief, and consists of fair comments upon the conduct of any person in respect of public affairs, made after a fair and impartial investigation."

Section 2427 provides that:

"Every editor or proprietor of a * * * newspaper, * * * and every manager of a copartnership or corporation by which any * * * newspaper * * * is issued, is chargeable with the publication of any matter contained in any such * * * newspaper. * * *"

[1] I. The article is libelous per se. *Byrne v. Funk*, 38 Wash. 506, 80 Pac. 772, 3 Ann. Cas. 647; *Lathrop v. Sundberg*, 55 Wash.

144, 104 Pac. 176, 25 L. R. A. (N. S.) 381; *Chambers v. Leiser*, 43 Wash. 285, 86 Pac. 627, 10 Ann. Cas. 270; *Wilson v. Sun Publishing Co.*, 85 Wash. 503, 148 Pac. 774, Ann. Cas. 1917B, 442; *Wells v. Times Printing Co.*, 77 Wash. 171, 137 Pac. 457; *Quinn v. Review Pub. Co.*, 65 Wash. 69, 104 Pac. 181, 133 Am. St. Rep. 1016, 19 Ann. Cas. 1077; *Lindley v. Horton*, 27 Conn. 58; *State v. Keenan*, 111 Iowa, 286, 82 N. W. 792; *Upton v. Hume*, 24 Or. 420, 33 Pac. 810, 21 L. R. A. 493, 41 Am. St. Rep. 863; *Riley v. Lee*, 88 Ky. 603, 11 S. W. 713, 21 Am. St. Rep. 358; *Belknap v. Ball*, 83 Mich. 583, 47 N. W. 674, 11 L. R. A. 72, 21 Am. St. Rep. 622; *Danville Democrat Pub. Co. v. McClure*, 86 Ill. App. 432; *Colby v. Reynolds*, 6 Vt. 489, 27 Am. Dec. 574; 25 Cyc. 336; 18 Am. & Eng. Encyc. of Law (2d Ed.) 920.

In *Byrne v. Funk*, supra, it was held that a published article charging one with being (a) a "liar and a poltroon" was libelous per se, and that a charge imputing a criminal offense or moral delinquency to a public officer was libelous. In the *Lathrop Case*, a publication which insinuated that the appellant was not a reputable physician and classing him with criminal practitioners, patent medicine fakirs, quacks, etc., was held libelous. In the *Quinn Case* it was held that charging the respondent, an officer holding by appointment, "with being a part of the system of jobbery and graft in the management of city contracts" was libelous per se. In the *Lindley Case* it was held that a publication charging the plaintiff with being a "liar" was libelous. In *State v. Keenan* the court said that any charge which is within the definition of the statute is libelous.

The appellant contends that the article charges him with the commission of a crime under the provisions of Rem. Code, § 4964, which provides:

"* * * Nor shall any person at any such election, knowingly and willfully, make any false assertion or propagate any false report concerning any person who shall be a candidate thereat, which shall have a tendency to prevent his election, or with a view thereto, and if any person shall be guilty of any act forbidden or declared to be unlawful by this section, he shall be deemed and taken to be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine and imprisonment, or both. * * *

We think this view is sound. The charge that appellant waged a campaign of "slander and lies" against his opponent, and that his method of campaign was "vicious," is equivalent to the charge that he knowingly and willfully made false assertions against his opponent with a view to prevent his election. The article clearly charges the appellant with moral delinquency. The charge in effect is that he unlawfully lied about an honorable opponent. To a man of normal sensibilities this is a most grievous charge. That it tended to deprive the appellant "of the benefit of public confidence" is not open to doubt, because honest men

instinctively shun a liar. This court has uniformly held that, forasmuch as damages in this class of cases are only compensatory, malice is not a necessary element of the cause of action. *Byrne v. Funk*, supra; *Wilson v. Sun Publishing Co.*, supra.

[2] II. Is the article on its face privileged? The respondent asserts that it is "at least qualifiedly privileged" under the provisions of Rem. Code, § 2430, which provides:

"Every communication made to a person entitled to or concerned in such communication, by one also concerned in or entitled to make it, or who stood in such relation to the former as to offer a reasonable ground for supposing his motive to be innocent, shall be presumed not to be malicious, and shall be termed a privileged communication."

The argument is that it is privileged because it is addressed to the electors and has reference to the candidacy of the appellant for an elective office. The complaint charges that the article is false and was known to be false by the respondents at the time that it was published. This is admitted by the demurrer. It would pass the limit of common sense to hold that the electors are "entitled to or concerned in" the willful defamation of the character of a candidate for public office, or that any person is "concerned in or entitled to make it." Nor can it with reason be said that the respondents "stood in such relation to the former," that is, to the electors as to offer a reasonable ground for supposing their motives to be innocent. In interpreting this section we must keep in mind the facts pleaded, that is, that the charge was made knowing it to be false.

In *State v. Sefrit*, 82 Wash. 520, 144 Pac. 725, in commenting upon this section of the Code, the court said that it is but a statutory declaration of the general doctrine of qualified privilege "which exists independent of any statute." Referring to Rem. Code, § 2425, the court said that the general rule of privilege had not been enlarged by the statute, "which merely adds the defense of excuse to that of justification which existed at common law." The court further said, speaking of section 2430, that it "affords no immunity to a publisher of a newspaper for the publication of matter libelous per se different from that which it affords to any other person," and that "the general rule of privilege is, we believe, correctly interpreted by this court in *Byrne v. Funk*, supra," where, quoting from 18 Am. & Eng. Encyc. of Law (2d Ed.) 1041, the rule is thus stated:

"The official acts of public officers may lawfully be made the subject of fair comment and criticism, not only by the press, but by members of the public. But the prevailing rule is that charges imputing a criminal offense or moral delinquency to a public officer cannot, if false, be privileged, though made in good faith, and this though the charge relates to an act of the officer in the discharge of his official duties."

In *Dauphiny v. Buhne*, 153 Cal. 757, 96 Pac. 880, 126 Am. St. Rep. 136, it was held that a publication was libelous which charged that one who was a candidate for reelection as a councilman, and who had opposed granting a franchise to a railroad company, voted for the franchise after saying to the company that if it would purchase groceries from him, he would vote for it. Answering the argument that it was privileged under the provisions of a section similar to section 2430, the court said:

"This privilege must be confined to statements of the truth," and that there is "no privilege of publication under the Code, or general law, which will exempt one from responsibility for falsehood."

The court further said that the "reputation and character" of a candidate for public office "are as much entitled to protection against false accusation when he is a candidate for office as at any other time"; that "his talents and qualifications for the office, * * * his faults or vices, in so far as they may affect his official character may be freely discussed;" that "the public has an interest in knowing the truth about those who occupy or seek public office, but it has no interest in having falsehoods concerning them disseminated."

In *Wilson v. Sun Publishing Co.*, 85 Wash. 503, 148 Pac. 774, Ann. Cas. 1917B, 442, the court said:

"At common law, of which the statute is merely declaratory, the truth of a libelous charge, though no defense in a criminal prosecution for libel, was usually a complete defense in a civil action for damages."

The following cases announce a like view: *General Market Co. v. Post-Intelligencer Co.*, 96 Wash. 575, 165 Pac. 482; *Upton v. Hume*, 24 Or. 420, 33 Pac. 810, 21 L. R. A. 493, 41 Am. St. Rep. 863. In 17 R. C. L. 355, the rule is thus stated:

"Nor as a rule does any privilege attach to the publication of accusations against public officers * * * calculated to bring public officers into contempt."

The object of the privilege accorded to published comments upon public officers or those seeking public office is to inform the electorate of the fitness or unfitness of those falling within either class. To permit the publication of a falsehood concerning a candidate for office which either charges him with the commission of a crime or with being morally depraved would be subversive of the very purpose from which the privilege springs. The press is allowed a large liberty in commenting upon the character and fitness of a candidate for public office. This liberty, however, does not give it free license to promulgate falsehoods.

[3] The article upon its face is not privileged. Whether it is privileged presents a mixed question of law and fact. The respondents may, if they can, justify or excuse the publication under the provisions of Rem. Code, § 2425, and not otherwise.

[4] It is next asserted that, being a paid

advertisement, it is privileged under the provisions of Rem. Code, § 4833. But a reading of this section will disclose that it was not its purpose to enlarge the liberty of the press but to take from it many privileges which it had theretofore enjoyed and freely exercised. It deals with the subject of paid advertisements, and makes it unlawful for a newspaper to support or advocate the election or defeat of any candidate at any primary election for a consideration, provided that the publisher of a newspaper may, subject to named restrictions, publish any matter, article, or articles, "advocating the election or defeat of any candidate, * * * and receiving from such person not a candidate a consideration therefor," if it plainly appears that the article is a "paid advertisement."

Aside from the question of privilege, there is nothing in the statute (section 4833) which permits the discussion of the merits or demerits of a candidate for office under the caption of a "paid advertisement" that in any way counteracts the virility of the law to protect a man in his good name or fame. If in the heat of partisan politics a libel is published, those who give it currency must still justify or excuse. The fact that the libel is published in a newspaper and paid for by a third party makes no exemption in favor of the press for as said in *Riley v. Lee*, 88 Ky. 603, 11 S. W. 713, 21 Am. St. Rep. 358:

"The press is under the same restraints. As said, the gravamen of libel consists in its publication. If it be said the conductors of newspapers may publish, as an advertisement, what has been written by others, the answer is that the conductors of the paper are presumed to know that the writing is an attack upon the character and reputation of another, which no one has the right to make unless the truth of charge actually exists, and its publication in the newspaper not only gives the charge a more extended circulation but gives it a permanent lodgment in the memory of the living, and it may be reproduced when all else concerning the person has been forgotten. Continuing the parallel: If the citizen, for wages, should proclaim and read a libelous writing from the street corners, would the fact that he merely did it as a matter of business protect him? The answer is, No; for the reason that the good name of a citizen is too sacred to be let out on contract. So the answer to the conductors of the paper is that the advertisement proclaimed the defamation of a person's character, which, unless true, is not a subject of lawful advertisement, consequently they must answer in damages. Also, in reference to publishing such writing, without malice, as a matter of news, for the same reasons the answer comes back that it is not lawful to bruit, thither and yon, defamation of a person's character merely to gratify a morbid appetite for such scandal; that nothing short of the truth of the matter published will be heard in justification of the unwarranted liberties thus taken with a person's good name. But it is said that it would be a harsh rule to require conductors of newspapers to be responsible for the truth of the information that they furnish the public. The answer is that the press must not be the vehicle of attacks upon the character and reputation of a person unless the attack is known to be true; if it is not known to be true, do not publish it; the publication can seldom, if ever, do good, and the indulgence in publications of the sort, not strictly true, would

soon deprave the moral taste of society and render it miserable."

The complaint states a cause of action for compensatory damages.

ELLIS, C. J., and MOUNT, and HOLCOMB, JJ., concur.

(101 Wash. 46)

BARBOUR et ux. v. ST. PAUL FIRE & MARINE INS. CO. (No. 14599.)

(Supreme Court of Washington. April 4, 1918.)

1. INSURANCE \Leftrightarrow 548—FIRE POLICIES—EXAMINATION UNDER OATH.

Where insured appeared before notary public and submitted to examination under oath, failure to sign the statements then made did not show noncompliance with clause of policy requiring insured to submit to examinations under oath.

2. INSURANCE \Leftrightarrow 612(2)—FIRE POLICIES—EXAMINATION UNDER OATH.

Where insured on insurer's request submitted to examination under oath which was filed in the suit, though she did not sign the original copy until after the action had been commenced, she complied with the policy, providing that no suit should be "sustainable" until full compliance with requirement that insured submit to examination under oath.

3. INSURANCE \Leftrightarrow 233 — CANCELLATION OF POLICY.

Where insured, intending to secure a specified amount of insurance, discovered that double the intended amount had been secured, and sought cancellation, which the company agreed to permit on insured's signing a receipt, but the receipt was never signed, the policy remained in full force and effect.

Department 2. Appeal from Superior Court, Snohomish County; Guy C. Alston, Judge.

Action by Theron T. Barbour and wife against the St. Paul Fire & Marine Insurance Company. Judgment for plaintiffs on directed verdict, and defendant appeals. Affirmed.

H. T. Granger, of Seattle, for appellant. J. W. Russell, of Seattle, for respondents.

CHADWICK, J. This is an action on a policy of insurance brought by Theron T. Barbour and Mary Barbour, his wife, against the St. Paul Fire & Marine Insurance Company. At the close of the evidence, the trial judge instructed the jury to return a verdict in favor of the plaintiffs. The defendant insurance company has appealed.

Appellant contends: (1) That plaintiffs did not comply with the provisions of the policy requiring the insured, if requested by the company, to submit to an examination under oath, and subscribe the same, which is made a condition precedent to sustaining an action on the policy; (2) that the policy was canceled by mutual consent prior to the time the loss occurred. The policy provided:

"The insured, as often as required, shall * * * submit to examinations under oath by any person named by this company, and subscribe the same."

"No suit or action on this policy for the recovery of any claim, shall be sustainable in any

court of law or equity until after full compliance by the insured with all the foregoing requirements. * * * (Italics ours.)

At the request of the insurance company Mrs. Barbour appeared before a notary public, and was examined under oath by the attorney for appellant. She was given a carbon copy of her testimony to correct before signing. She did not sign the original copy of the examination until after the present action had been commenced; the examination being introduced in evidence by appellant.

[1] When Mrs. Barbour appeared before the notary public and submitted to an examination under oath, there was a substantial compliance with this provision of the policy. The insurance company had obtained the information which it was designed to secure. The signing of the written result of the examination was a purely incidental matter.

[2] But, even if this were not so, when we look to the words of the policy, which it is well settled must be strictly construed against the insurance company, we do not find that it provides that no action shall be "commenced," but that no action shall be "sustainable." At the time plaintiffs sought to sustain their action by proofs, the examination had been signed and was in the hands of the defendant. All that the policy required had been performed.

To decide whether or not the policy was canceled by mutual consent prior to the time of the loss requires a discussion of the facts. The plaintiffs were the owners of a house and lot in Edmonds, Wash. The house and its contents were insured in the Orient Insurance Company for \$1,900. The property was mortgaged; and the policy, which was payable to the mortgagee as its interest might appear, was in the possession of the mortgagee. In August, 1915, about the time the policy was due to expire, Mr. Barbour called on the insurance agent, Rudolph Damus, in Seattle, through whom he had obtained the insurance, and told him that he wanted it renewed without, however, specifying any particular company. Mr. Damus told him that he would attend to the matter. Damus, who was not the agent of the defendant company, and in this instance was acting as a broker, ordered the insurance from the defendant's local agent. The policy was issued and delivered to Damus, or his office, but never reached the plaintiffs, probably, as the record suggests, being lost in the mail. About the 1st of the following September, Mr. Barbour received a statement of his account from the mortgagee, which statement included an item of \$22.80 for an insurance premium. He testifies that he supposed this was the premium on the policy he had ordered through Damus. In July, 1916, nearly a year later, while Mr. Barbour was in British Columbia, Mrs. Barbour received

ed a notice from Damus to the effect that \$22.80 was due him as a premium on insurance. She immediately investigated, and found that the policy secured by Damus was not the one covered by the statement sent by the mortgagee, and that the mortgagee had secured insurance in the same amount, \$1,900, on the property in the Continental Insurance Company. She took the matter up with Mr. Damus; and he advised her that one policy would have to be canceled, and suggested that it had better be the policy last issued. This was ascertained to be the policy on which this suit is brought. She then told Damus that "theirs (the policy secured by the mortgagee) was first, and we would have to cancel the other one." Damus then took the matter up with the local agent of the defendant, and, according to the testimony of the agent, the following is what took place:

"He came down to the office, and told me that they had other insurance on there. I asked him what company it was, and he said, 'Why, the Continental was on.' I said, 'Well, that is funny,' and he said, 'What are you going to do?' He told me the premium had not been paid. I said, 'The only way to do, then, is to make out a receipt for the earned premium and get it and have the company sign it,' and I was pretty busy at the time, and he said, 'You wait a while, and I will bring it up to you.' He said, 'They are up there in the office now,' and I said, 'All right; if that is the case, I will get rid of it right now.' and I went and figured out the earned premium on the receipt, and Mr. Damus was sitting right by the side of the desk when that was made, and I said, 'There it is now; you can go right up and have your party sign it up.'"

The receipt was in the following form:

"Lost Policy Receipt.

"St. Paul Fire & Marine Insurance Company of St. Paul.

"Release for Lost Policy.

"In consideration of 14.25 dollars, the receipt of which is hereby acknowledged we surrender, release and relinquish all our right, title and interest in policy No. 356869 (renewal No.), of the St. Paul Fire & Marine Insurance Company of St. Paul, Minn., issued at its Seattle Wash. Agency, and all advantages to be derived therefrom, and the said policy having been lost or mislaid, we agree to make no claim whatever for any loss or damage for which said company might become liable under said policy, and to return the said policy and renewal (if found) to the said company forthwith, and without further compensation. We hereby certify that said policy has not been assigned or transferred.

"Witness: _____

"If this policy is payable in case of loss, this receipt must be signed by assured, mortgagee or other parties in interest."

When Damus presented this receipt to Mrs. Barbour for her signature, she refused to sign it, and nothing further was done about the matter until after the loss occurred.

Plaintiffs made claims against both the Continental Insurance Company and the defendant. The Continental settled; and the

defendant refusing to do so, this suit was instituted.

[3] It is clear, as appellant contends, that the plaintiffs never intended to carry more than \$1,900 worth of insurance; and if they are permitted to recover in this action, they will reap where they did not intend to sow. But it is also clear that they intended to order the policy which Damus secured from the defendant. Assuming, but not deciding, that Mrs. Barbour had authority to order a cancellation of the policy, we do not think the policy was actually canceled. It is plain that she intended to cancel the policy, and that the insurance company was willing to do so. But before the insurance company would actually cancel the policy, it required that a receipt be signed. This receipt was not signed, and, as nothing further was done, the policy remained in full force and effect. In order to effect the cancellation of a policy there must be something more than a willingness on both sides that the policy be canceled; there must be an actual agreement or understanding to the effect that the policy is then and there canceled. That this was not so in the present case is clear.

Affirmed.

ELLIS, C. J., and MOUNT, MAIN, and HOLCOMB, JJ., concur.

(100 Wash. 668)

SOUND CREDITS CO. v. POWERS et ux.
(No. 14399.)

(Supreme Court of Washington. April 3, 1918.)

1. JUDGMENT \Leftrightarrow 138(3) — MOTION FOR DEFAULT—NOTICE OF HEARING.

Where the record shows that the hearing on motion for default was continued through the efforts of defendants' counsel, they cannot claim they had no notice that the motion would be heard on the day fixed.

2. APPEAL AND ERROR \Leftrightarrow 935(2) — APPEAL FROM ORDER OF DEFAULT—AFFIDAVITS—RECORD.

Where it does not affirmatively appear that the affidavits in support of motion to vacate default contained in the transcript were the only affidavits considered by the lower court, or that there was no other evidence submitted, such affidavits will not be considered.

3. BANKRUPTCY \Leftrightarrow 418(3)—HUSBAND'S DISCHARGE—COMMUNITY PROPERTY.

In an action against husband and wife, an answer pleading the discharge of the husband in bankruptcy held a good defense, both as to him and as to the community property.

4. JUDGMENT \Leftrightarrow 98—DEFAULT—RIGHT TO BE HEARD.

The striking of answer and entry of judgment by default against both husband and wife because of husband's failure to answer interrogatories propounded where none have been propounded to the wife was error; the wife having a right of defense before entry of judgment against the community.

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by the Sound Credits Company against C. C. Powers and wife. Judgment for plaintiff, and defendants appeal. Affirmed in part and reversed in part.

Ray R. Greenwood and Wright, Kelleher & Allen, of Seattle, for appellants. Robert F. Sandall, of Seattle, for respondent.

CHADWICK, J. This is an appeal from an order of default and judgment entered against appellants for failure to answer interrogatories, and from an order denying appellants' motion to vacate the order of default and judgment.

[1] Appellants contend that they were not given notice that the motion for default was to be heard, and therefore that the court committed error in entering the judgment. The case is brought here without a statement of facts. The only record before us is a transcript showing part of the papers filed in the superior court. From this fragmentary record we are able to glean, however, that the motion for default was served on counsel for appellants; that they were served with a notice that the motion would be brought on for hearing on February 17, 1917; that on February 23, 1917, at the behest of defendants an order for a stay of proceedings until March 2, 1917, was entered. It appears from the journal entries that at the same time the stay order was entered the motion for default was continued until March 2, 1917, on which date the motion for default was granted. This being true, under the present state of the record we are bound to assume, and it seems altogether reasonable, that on February 23, 1917, the motion for default was continued to March 2, 1917, through the efforts of counsel for defendants. If this be true—and we cannot say it is not—they had notice that the motion would be heard on that date.

[2] Counsel for appellants have brought up as a part of the transcript what purports to be copies of affidavits filed in the superior court in support of their motion to vacate the default and to set aside the judgment. It has been held that, where it does not affirmatively appear that the affidavits contained in the transcript were the only affidavits considered by the lower court, or that there was not other evidence submitted to the court, and it does not so appear here, they will not be considered. *International Dev. Co. v. Sanger*, 75 Wash. 546, 135 Pac. 28; *Beall & Co. v. O'Connor*, 78 Wash. 651, 139 Pac. 605; *Mattson v. Eureka Lbr. Co.*, 79 Wash. 266, 140 Pac. 377; *Thurman v. Kildall*, 80 Wash. 266, 141 Pac. 691; *State v. Clay* (No. 14603) 171 Pac. 241.

[3] It does appear, however, that the lower court erred in entering judgment against the community composed of both appellants. Appellant Gertrude I. Powers had entered her appearance jointly with her husband,

and had joined with him in answering. The answer pleaded a discharge of appellant C. C. Powers in bankruptcy, and was a good defense not only as to him but as to the community.

"When the husband was discharged in bankruptcy from the obligation of the contract, it must of necessity follow that the wife was also discharged because her separate property is not subject to the community debt." *Bimrose v. Matthews*, 78 Wash. 32, 138 Pac. 319.

[4] No interrogatories had been propounded to the defendant wife, and she was not in default. She had a right to be heard in support of her defense before a judgment against the community could be entered.

The order of default and judgment in so far as it is against the community will be vacated, with directions to try out the issues raised by the answer. The judgment in so far as it affects the appellant husband individually is affirmed. The appellant wife will recover her costs on appeal.

ELLIS, C. J., and MOUNT and HOLCOMB, JJ., concur.

(101 Wash. 67)

SINGER v. METZ CO. (No. 14446.)

(Supreme Court of Washington. April 5, 1918.)

1. APPEAL AND ERROR ⇨387(4) — APPEAL BOND—TIME TO FILE.

Under Rem. Code 1915, § 1721, making an appeal ineffectual unless at or before giving notice of appeal or within five days thereafter an appeal bond be filed, an appeal was not ineffectual because the bond was filed 83 days before notice of appeal was served.

2. APPEAL AND ERROR ⇨639(1) — DISMISSAL — GROUNDS—INSUFFICIENT ABSTRACT.

The fact that the abstract of record fails to comply with court rules is not a ground for dismissal of an appeal in the first instance, since under Rem. Code 1915, § 1730—6, opportunity to amend or supplement an insufficient abstract must be given.

3. APPEAL AND ERROR ⇨655(4) — DISMISSAL — GROUNDS—INSUFFICIENT ABSTRACT.

The abstract of record will not be stricken because the title page does not disclose the court and the judge nor the names and addresses of the attorneys, nor because the pleadings are set out in full, nor because only portions of the evidence and none of the instructions were included, since the title page is capable of amendment and literal copies of pleadings may be used if deemed essential, and only those matters deemed necessary to disclose the errors need be set out in the abstract.

4. APPEAL AND ERROR ⇨1002 — REVIEW — VERDICT.

Where the evidence on all questions was conflicting and the case was submitted to the jury under proper instructions, no error can be predicated on the sufficiency of the evidence to sustain the verdict.

5. EVIDENCE ⇨123(11), 272 — ADMISSIBILITY — RES GESTÆ — DECLARATION AGAINST INTEREST.

In action for injuries in collision with automobile driven by defendant's employé, who has since left the state, declarations of such employé in reporting the accident to the police department, showing that he had violated traffic rules, were not admissible as *res gestæ* nor as declarations against interest by a party to the action.

6. WITNESSES \Leftrightarrow 390—IMPEACHMENT.

In action for injuries in collision with automobile, where a passenger in the car testified that the driver in reporting accident said he did not cut the corner, declarations of the driver in reporting the accident to the police, to the effect that he did cut the corner, were not admissible for impeachment of the passenger.

7. WITNESSES \Leftrightarrow 383—IMPEACHMENT.

Such declarations should have been excluded upon the further ground that the examination was as to a collateral matter, since a witness may not be impeached upon a matter collateral to his proper examination.

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Louis Singer, an infant, by Fannie Singer, his guardian ad litem, against the Metz Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

J. Speed Smith and Henry Elliott, Jr., both of Seattle, for appellant. Leopold M. Stern and J. W. Russell, both of Seattle, for respondent.

FULLERTON, J. The respondent, Louis Singer, was riding a motorcycle, proceeding north on one of the streets of the city of Seattle, and an employé of the appellant was driving an automobile south on the same street, each on the proper side of the street under the law of the road. The driver of the automobile turned to the left, crossing the course of the motorcycle at an intersecting street, which the two vehicles approached from opposite directions at about the same time. A collision occurred, in which the respondent was seriously injured. The respondent brought the present action for damages, based on the alleged negligence of the driver of the automobile in failing to conform to the city ordinance, requiring that vehicles turning from one street into another should make the turn around the center of the intersecting streets; the charge being that the driver "cut the corner of the street," or, in other words, made a turn short of the center of the intersection, instead of rounding that point. This was denied by the appellant, and the defense of contributory negligence set up. On submission to a jury a verdict was returned, awarding the respondent \$2,500 damages, and from the judgment thereon this appeal is prosecuted.

[1] A motion to dismiss the appeal is made by the respondent on the ground that it is ineffectual because the appeal bond was filed some 83 days before the notice of appeal was served. Our statute provides that:

"An appeal in a civil action or proceeding shall become ineffectual for any purpose unless at or before the time when the notice of appeal is given or served, or within five days thereafter, an appeal bond to the adverse party * * * be filed with the clerk of the superior court." Rem. Code, § 1721.

It appears that the notice of appeal was regularly given within the statutory time.

The statute requiring an appeal bond, it will be noticed, permits it to be filed before the time when the notice of appeal is given or served, and contains no limitation upon the extent of such antecedent period of time. *Laurendeau v. Fugelli*, 16 Wash. 367, 47 Pac. 759, is cited by respondent in support of his contention that the filing of the bond was premature, but it will be noted that our holding in that case is based on the fact that the appeal bond was filed prior to entry of judgment, as well as prior to the notice of appeal. Under the statute then in force (Laws 1891, p. 342, § 6), the bond was required to be filed within five days after notice of appeal.

[2] The respondent also urges as a ground for the dismissal of the appeal that the appellant's abstract of the record fails to comply with the statutes and rules of court. But this is not a ground for the dismissal of an appeal in the first instance. Under section 1730—6 of the Code (Rem.) the appellant must be given an opportunity to amend or supplement the abstract if it is found deficient, and the abstract stricken only after the opportunity is given and a refusal is made to supplement or amend. No order of the court for amendment of the abstract having been made, the motion for dismissal on the ground of its insufficiency is not well founded.

[3] A motion is likewise made to strike the abstract of record on the grounds that the title page does not disclose the court and judge before whom the cause was tried, nor the names and addresses of the attorneys; that the pleadings are set out in full instead of being abstracted; and that portions of the evidence and the whole of the instructions are omitted. We find in this no sufficient ground for striking the abstract. The title page is capable of amendment. The rule does not exact the statement of the pleadings in substance, but permits literal copies if the litigant deem them essential to show error. As to omissions of evidence and instructions, the statute and rules of court require the incorporation of such matters only as are deemed necessary to show the errors involved. Provision is made for the filing of a supplemental abstract by opposing counsel covering matters omitted and deemed essential to correct or supplement the original abstract, and ordinarily this is the sole remedy. But aside from this, ample remedies are provided for amending insufficient abstracts other than the striking them from the record on appeal, and they will not be stricken until these remedies are resorted to without success. The motions are denied.

[4] The appellant first asserts that it was entitled to a directed verdict, both at the close of respondent's evidence and at the conclusion of all the evidence, and to judgment notwithstanding verdict, on the grounds that

the evidence failed to show negligence on its part, that it did show contributory negligence on the part of the respondent, and showed that the accident occurred while the automobile was being used by an employé of appellant, not in the course of his employment, but surreptitiously, for the purpose of a Sunday pleasure trip by the employé. The evidence on all of these questions was conflicting, the case was submitted to the jury under proper instructions directed to these issues, and accordingly no error can be predicated upon the sufficiency of the evidence.

[5] The second contention is that the court erred in the admission of evidence. The evidence introduced to show negligence on the part of the appellant was that its driver had cut the corner in turning from the one street into the other, instead of rounding the center of the intersection of the two streets, as required by the city ordinance. This was one of the vital issues in the case, and the evidence upon it was conflicting. The driver of appellant's automobile at the time of the accident left the state shortly thereafter, and was not present as a witness at the trial. He had made statements in reference to the accident in reporting it to the police department, and these statements, which had been taken down in shorthand by a clerk in the department and afterwards written out, contained a purported declaration on the part of such driver that he had cut the corner of the street in making the turn. The declaration was not directly admissible in evidence on the theory of *res gestæ* nor as a declaration against interest made by a party to the action. *Patterson v. Wabash, etc., Ry. Co.*, 54 Mich. 91, 19 N. W. 761; *Scheel v. Shaw*, 252 Pa. 451, 97 Atl. 685; *Ballard v. Durr*, 165 Ky. 632, 177 S. W. 445.

[6] It was, however, introduced under the guise of impeaching testimony. The witness Spangler, who accompanied the driver Helvey to the police office, was cross-examined as follows:

"Q. Is it not a fact, Mr. Spangler, in making his report to the police department Mr. Helvey said, 'I cut the corner in making that turn, * * * Said so in your presence, didn't he?' A. No. Q. You heard and remember what he said? A. I heard every word. Q. And if he made such a statement, did you correct it there in the police department? A. I did not correct it because I did not hear any such statement made. Q. Were you in a position where if such statement were made, you would have heard it? A. I would; yes. Q. You were right alongside of Helvey all the time? A. Right alongside of him, yes."

Timely and proper objections were interposed to this cross-examination by the appellant. In rebuttal the respondent placed on the stand the police clerk, and, over proper objection by appellant, elicited the following: "Q. Have you your notes with you that you took at that time? A. Yes. Q. Turn to the statements made by Mr. Helvey first. * * * In making that statement, did Mr. Helvey say this, or this in substance: 'I cut the corner—

I cut the corner, in speaking of the turn, of making the turn? A. Yes; he made that statement."

The court, as we say, permitted the admission of this evidence on the assumption that it was proper for the purpose of impeaching the witness Spangler. We think the trial court committed prejudicial error in allowing the introduction of such evidence. A witness cannot be impeached by statements of others for which he is not responsible and which have not been approved by him. *V.-C. Chemical Co. v. Knight*, 106 Va. 674, 56 S. E. 725; *Wharton v. Tacoma Fir Door Co.*, 58 Wash. 124, 107 Pac. 1057; *L. & N. R. Co. v. Webb*, 99 Ky. 332, 35 S. W. 1117.

[7] The further reason suggests itself that the question to Spangler pertained to a matter collateral to the legitimate examination of Spangler, and in such a case contradictory evidence was inadmissible for the purpose of impeaching him upon such collateral matter. *State v. Carpenter*, 32 Wash. 254, 73 Pac. 357; *State v. Stone*, 66 Wash. 625, 120 Pac. 76; *State v. Schuman*, 89 Wash. 9, 153 Pac. 1084; *Wharton v. Tacoma Fir Door Co.*, supra.

For error of the court in refusing to exclude the police clerk Wall's testimony as to declarations made to him by Helvey, the judgment is reversed, with directions to the trial court to grant a new trial.

ELLIS, C. J., and PARKER, MAIN, and WEBSTER, JJ., concur.

(101 Wash. 38)

CULLEY et al. v. KING COUNTY.
(No. 14481.)

(Supreme Court of Washington. April 4, 1918.)

1. HIGHWAYS §211 — INJURIES FROM DEFECTS—EVIDENCE.

In an action for personal injuries due to defective highway, evidence held not sufficient to sustain a verdict for plaintiff.

2. HIGHWAYS §194 — INJURIES FROM DEFECTS—DUTY TO MAINTAIN BARRIERS.

The duty resting upon a county to place barriers along highways at dangerous points is not an absolute one, but depends on the circumstances of the particular case, having regard to the character and amount of travel, the nature of the road itself, its width and general construction, the extent of the slope or descent of the bank, the length of the portion claimed to require a railing, whether the danger is concealed or obvious, and the extent of the probable injury.

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by Rosella Culley and her husband against King County. Judgment for plaintiffs, and defendant appeals. Reversed and remanded, with directions.

Alfred H. Lundin and Edwin O. Ewing, both of Seattle, for appellant. Charles A. Spirik, of Seattle, for respondents.

WEBSTER, J. Respondents brought this action to recover damages for personal injuries sustained by Rosella Culley while traveling upon one of the established highways of King county. The cause was tried to the court without a jury, and from a judgment rendered in plaintiffs' favor the defendant has appealed. The sole question presented is the sufficiency of the evidence to sustain the recovery.

The complaint alleges that at the point where the accident occurred the highway in question was very narrow; that on the north side thereof there was a steep bank, and on the south side a precipitous decline to the bed of a creek about 15 feet below; that the south track of the highway was in dangerous proximity to the edge of the decline; that on the afternoon of April 16, 1916, while respondents were driving along the highway, the rear wheels of the buggy in which they were riding struck a gully which had been worn in the highway at that point, and by reason thereof the respondent Rosella Culley and the horse and buggy were precipitated over the decline; that the injuries complained of resulted from the negligence of the county in maintaining the highway dangerously close to the edge of the decline without providing any barrier or protection, and in failing to keep the highway in a reasonable state of repair.

[1] The case being before us for trial de novo, we have carefully examined the entire record, and find these facts sustained by a preponderance of the evidence: The highway, though established for many years, was not extensively traveled. The grade of the incline up which respondents were driving was 17.8 per cent. The entire width of the roadway was 9 feet 2 inches, the traveled portion thereof being marked by parallel ruts varying from 10 inches to 2 feet in depth. There was a space 3 feet wide between the center of the south rut and the crest of the decline toward the creek, the top of which space, at the point where the buggy went over, was approximately 1 foot above the bottom of the south rut of the roadway. The decline along the south slope of the embankment from its crest to the creek varied in the degree of pitch from 2 to 1, to $1\frac{1}{2}$ to 1. The theory of plaintiffs' case is that, when the rear wheels of the buggy struck the gully extending across the road, the earth to the south side gave way, causing the buggy and its occupants to be thrown over the bank. It is not contended that the road was not sufficiently wide at the point where the accident occurred to enable them to pass in safety if no gully had been there. When reduced to its final analysis, their position is that the giving way of the earth caused by the existence of the gully extending across the south edge of the road precipitated the buggy over the decline, which would not have occurred had there been a guard rail or barrier at

that point. The overwhelming weight of the evidence is to the effect that there was no such gully, and no giving way of the earth; hence the absence of a barrier would seem to be wholly immaterial.

[2] Nor can the recovery be sustained upon the theory that the county was negligent in failing to place a railing or barrier along the south side of the roadway. In *Leber v. King County*, 69 Wash. 134, 124 Pac. 397, 42 L. R. A. (N. S.) 267, we held that the duty to place barriers upon a highway, although travel thereon be in a degree dangerous, is not absolute, and that the law does not require such precaution unless the danger to be guarded against is unusual. The duty in this respect must necessarily depend upon the circumstances of the particular case, having regard to the character and amount of travel; the nature of the road itself, its width and general construction; the extent of the slope or descent of the bank; the length of the portion claimed to require a railing; whether the danger is concealed or obvious; the character of the place between which and the traveled road it is claimed the barrier should be erected, and the extent of the injury likely to occur if a railing is not maintained. That is to say, the question in each case is whether under the facts disclosed by the evidence the county by not erecting the barrier failed in its duty to maintain the highway in a reasonably safe condition for ordinary travel. Measured by this standard it cannot be said that the danger, if any, to be guarded against was unusual, or that the highway was unsafe for public travel in the ordinary way. In fact the elevated portion of the roadway between the south wagon rut and the crest of the slope was in itself a sufficient barrier to insure the safety of vehicles traveling along the highway in the customary and proper manner. In determining the necessity of a barrier the essential question is whether the highway is safe without one. Pertinent to the situation presented in this case is the observation of the court in *Leber v. King County*, supra:

"We think it will require no argument to make plain the fact that here there was no extraordinary condition or unusual hazard of the road. A similar condition is to be found upon practically every mile of hill road in the state. The same hazard may be encountered a thousand times in every county of the state. Roads must be built and traveled, and to hold that the public cannot open their highways until they are prepared to fence their roads with barriers strong enough to hold a team and wagon when coming in violent contact with them, the condition being the ordinary condition of the country, would be to put a burden upon the public that it could not bear. It would prohibit the building of new roads and tend to the financial ruin of the counties undertaking to maintain the old ones."

See, also, *Swain v. Spokane*, 94 Wash. 616, 162 Pac. 991, L. R. A. 1917D, 754.

Furthermore, we are strongly inclined to the conclusion that the accident was due to

the fact that the horse driven by the plaintiffs balked and backed the vehicle out of the roadway and over the embankment. The evidence clearly gives rise to such inference as the only logical cause of the accident.

The judgment appealed from is reversed, and the cause remanded, with instructions to enter judgment for the defendant.

ELLIS, C. J., and FULLERTON, MAIN, and PARKER, JJ., concur.

(101 Wash. 42)

**WESTERN ACADEMY OF BEAUX ARTS
v. DE BIT. (No. 14527.)**

(Supreme Court of Washington. April 4, 1918.)

1. INJUNCTION — 46 — TRESPASS — STREETS.

Where a corporation owns a plat of ground, with streets and alleys, surrounded by a fence, and lots cannot be leased or sold without its consent, injunction will issue to restrain a quarrelsome outsider from trespassing on the streets.

2. INJUNCTION — 118(4) — PLEADING — INSOLVENCY.

Where a corporation owns a village, and sues to restrain a quarrelsome outsider from trespassing on the streets, it is not necessary to allege that he was insolvent.

3. INJUNCTION — 148(1) — CONDITIONS PRECEDENT — BONDS — NECESSITY.

It is error to grant a temporary restraining order without bonds, under Rem. Code 1915, § 725, providing that no injunction or restraining order shall be granted until the party asking it shall enter into a bond, in such sum as shall be fixed by the judge or court granting the order, conditioned to pay all damages and costs.

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by the Western Academy of Beaux Arts to enjoin Ralph M. De Bit from entering Beaux Arts Village. From an order granting a temporary injunction, defendant appeals. Reversed and remanded.

J. H. Templeton, of Seattle, for appellant. Gay & Griffin, of Seattle, for respondent.

HOLCOMB, J. This action was prosecuted to enjoin appellant from entering upon the thoroughfares and wharf in a plat of ground located on Lake Washington and known as Beaux Arts Village. An order was issued by the lower court July 20, 1917, requiring appellant to appear and show cause on a day appointed why he should not be restrained and enjoined from entering upon the thoroughfares and wharf of Beaux Arts Village pending the trial of the case on the merits. Hearing was had on the show-cause order on August 9, 1917, and a demurrer by appellant to the complaint being overruled, upon considering the affidavits filed in behalf of the respective parties, the court granted a temporary restraining order as prayed for, pending the final hearing of the action and until the further order of the court. The same order recited that appellant, deeming himself

aggrieved, gives notice of intention to appeal to the Supreme Court, and requests that a supersedeas bond be fixed and a stay of proceedings be had until the same may be perfected, and the court fixed the sum of \$500 as the amount of the supersedeas bond, and granted a stay of proceedings for a period of 48 hours, from 3 o'clock on August 9, 1917, to file the appeal and supersedeas bond, and that in case of failure so to do the injunction order should be immediately in full force and effect, and that, if the appellant should thereafter fail to perfect his appeal and continue to be a trespasser, then he should be dealt with according to law as and for contempt. No bond of injunction was required.

Appellant assigns three errors: (1) That the court erred in overruling the demurrer; (2) that the court erred in granting a temporary restraining order or injunction pendente lite; (3) that the court erred in failing to require respondent to give a bond indemnifying appellant upon the issuing of the injunction.

[1] The complaint showed that the respondent, a Washington corporation, is the owner of the tract of land platted into Beaux Arts Village. The land is subdivided into lots, with streets, alleys, parking, strips, commons, and a wharf; around it had been built a high fence, with gates. The corporation formed a society known as the Beaux Arts Village, and the members held land therein strictly in accordance with the grant of the deed, which was required to contain the following clause:

"The land herewith conveyed shall not at any time after the date hereof be sold, conveyed, leased, let, or sublet, or underlet, in whole or in part, to any person without written consent of the party of the first part."

It was alleged that appellant was unlawfully trespassing upon the property of the respondent; that he was threatening to so continue; that he was causing dissatisfaction and strife, was disrupting their social happiness, destroying their common well-being, and was a menace to the peace and dignity of the community; that he has an unsavory reputation for morals, peace, and quiet, and is not tolerable or endurable; that his presence in the village is a danger and detriment to the same, depreciating its value as an ideal village; that he has assaulted certain persons, and threatens to do so again; that he has used language calculated to cause a breach of the peace; that his behavior is belligerent, quarrelsome, and menacing; and that respondent fears that such conduct will culminate in serious acts, endangering the peace of the community and the lives of its owners. These allegations of continuing trespasses and threats and menaces to respondent and the inhabitants of the village were sufficient to warrant the issuance of an injunction, if such facts were sufficiently

proven. It is evident, therefore, that respondent would be damaged if the acts complained of were continued. *Silver v. Washington Inv. Co.*, 65 Wash. 541, 118 Pac. 748.

[2] It was not necessary to allege that appellant was insolvent. *Silver v. Washington Inv. Co.*, supra; 14 R. C. L. 453; *Walker v. Stone*, 17 Wash. 578, 50 Pac. 488; *Sequim Canning Co. v. Bugge*, 49 Wash. 127, 94 Pac. 922, 16 Ann. Cas. 196.

[3] The court, however, was without authority to grant a temporary restraining order without bonds. Section 725, Rem. Code, provides that:

"No injunction or restraining order shall be granted until the party asking it shall enter into a bond, in such a sum as shall be fixed by the judge or court granting the order * * * conditioned to pay all damages and costs which may accrue by reason of the injunction or restraining order."

Where a statute requires the giving of a bond as a condition precedent to the granting of an injunction, the court is not at liberty to disregard such statute, and it is error in such case to grant the injunction without the required bond. 2 High on Injunctions (4th Ed.) § 1520; *Keeler v. White*, 10 Wash. 420, 38 Pac. 1134; *Cherry v. Western Wash., etc., Ass'n*, 11 Wash. 586, 40 Pac. 136; *Swope v. Seattle*, 35 Wash. 69, 76 Pac. 517. The order was therefore invalid.

Reversed and remanded for further proceedings.

ELLIS, C. J., and MOUNT and CHADWICK, JJ., concur.

(100 Wash. 642)

LARSEN v. RICE. (No. 14221.)

(Supreme Court of Washington. April 3, 1918.)

1. MASTER AND SERVANT §69—REGULATION OF EMPLOYMENT—MINIMUM WAGE—CONSTITUTIONALITY.

Laws 1913, p. 602, relating to the employment of women and minors, making it unlawful to employ women in any industry at wages inadequate for their maintenance, creating the Industrial Welfare Commission, with power to establish conditions of labor and to fix reasonable standards of wages sufficient for decent maintenance of women, empowering commissioner to investigate conditions of labor and establish minimum wage for women, making it a misdemeanor to employ women for less than the wage established, authorizing an investigation by commission on employee's complaint, providing that any employee receiving less than a legal minimum wage may recover in a civil action the full amount of the legal minimum wage, and making the commission's determination of facts conclusive, but giving an appeal to the superior court, is constitutional.

2. MASTER AND SERVANT §70(1)—EMPLOYMENT OF WOMEN—RECOVERY OF MINIMUM WAGE—"CLERICAL WORK."

Under an order of the Industrial Welfare Commission made under the authority of Laws 1913, p. 602, relating to the employment of women and minors and declaring that no person, etc., shall employ any female over 18 years in certain enumerated employments, or in any clerical work in any establishment in which a

minimum wage rate applicable to employees had not been before established, at a weekly wage of less than \$10, plaintiff who had been employed as a ticket seller in a moving picture house, was employed in "clerical work," and entitled to recover the minimum wage of \$10 per week of 48 hours.

3. COMPROMISE AND SETTLEMENT §9—LEGALITY—PAYMENT OF LESS THAN MINIMUM WAGE.

A compromise between plaintiff, who had been employed as ticket seller in a moving picture house at \$3 per week, and her employer, under which she would not receive any just equivalent for the surrender of her right to a minimum wage of \$10 a week, under Laws 1913, p. 602, relating to the employment and to the wages of women, and under an order of the Industrial Welfare Commission declaring such amount necessary to a decent maintenance, was against the policy of the statute, and not enforceable.

Parker, J., dissenting.

Department 1. Appeal from Superior Court, Lewis County; W. A. Reynolds, Judge.

Action by Lillie Larsen against J. D. Rice. Judgment for plaintiff, and defendant appeals. Affirmed.

H. E. Donohoe and Forney & Ponder, all of Chehalis, for appellant. Floyd M. Hancock and Gus L. Thacker, both of Chehalis, for respondent.

FULLERTON, J. At its biennial session of 1913 the Legislature of the state of Washington passed an act relating to the employment of women and minors. Section 2 of the act makes it unlawful to employ women or minors in any industry or occupation under conditions detrimental to their health or morals, or to employ women in any industry at wages which are not adequate for their maintenance. Section 3 creates a commission to be known as the Industrial Welfare Commission, and empowers it to establish conditions of labor such as shall not be detrimental to health and morals, and to fix reasonable standards of wages which shall be sufficient for the decent maintenance of women. Section 7 provides that every employer of women and minors shall keep a record of the names of such persons employed, and shall on request permit the commission or any of its duly authorized representatives to inspect such record. Sections 9, 10, and 11 empower the commission, through the instrumentality of an advisory conference, to investigate the conditions of labor in any occupation, trade, or industry in which women and minors are employed, together with the wages paid such employees, and to establish by an obligatory order standard conditions for labor therein, and a minimum wage to be paid for such labor. Section 17 declares it to be a misdemeanor for any person to employ a woman or minor for a less wage or under conditions prohibited by the order. Sections 17½, 18, and 19 read as follows:

"Sec. 17½. Any worker or the parent or guardian of any minor to whom this act applies may complain to the commission that the wages paid to the workers are less than the minimum rate and the commission shall investigate the same and proceed under this act in behalf of the worker.

"Sec. 18. If any employé shall receive less than the legal minimum wage, except as hereinbefore provided in section 13, said employé shall be entitled to recover in a civil action the full amount of the legal minimum wage as herein provided for, together with costs and attorney's fees to be fixed by the court, notwithstanding any agreement to work for such lesser wage. In such action, however, the employer shall be credited with any wages which have been paid upon account.

"Sec. 19. All questions of fact arising under this act shall be determined by the commission and there shall be no appeal from its decision upon said question of fact. Either employer or employé shall have the right of appeal to the superior court on questions of law."

Acting under and in pursuance of the statute, the Industrial Welfare Commission appointed in pursuance thereof, after due investigation in the manner provided in the act, entered an obligatory order under the date of December 21, 1914, affecting office employment. The part of the order material here reads as follows:

"(1) No person, firm, association or corporation shall employ any female over the age of eighteen years as a stenographer, bookkeeper, typist, billing clerk, filing clerk, cashier, checker, invoicer, comptometer operator, or in any clerical work of any kind in any establishment whatsoever, in which a minimum wage rate applicable to such employé has not heretofore been established as provided by law, at a weekly wage rate of less than ten dollars (\$10.00), any lesser wage rate being hereby declared inadequate as to such employés to supply the necessary cost of living and maintain them in health.

"(2) Not less than one hour shall be allowed for noonday luncheon to any female employé specified in paragraph (1) hereof, such requirement being demanded for the health of such employés.

"This order shall become effective sixty (60) days from the date hereof."

Subsequent to the time the order became effective the appellant in this action employed the respondent as a ticket seller in a moving picture house conducted by him at Chehalis. The respondent served in that capacity, as found by the trial court, for a period of 56 weeks, working 39 hours per week, being "absent at different times for a total of seven (7) days." The contract wage was \$3 per week, and this sum was paid her in full.

In July, 1916, the respondent began the present action to recover the difference between the wage rate paid and the sum she conceived herself entitled to under the statute and the obligatory order of the Industrial Welfare Commission made in pursuance thereof. In her complaint she demanded judgment based on a flat rate of \$10 per week for the number of weeks she was employed, but at the trial conceded through her counsel that she was entitled to recover only on the basis of \$10 per week for a week of

48 hours. The trial court allowed a recovery on the latter basis, entering judgment in favor of the respondent for the sum of \$278.87.

In his answer to the respondent's complaint the appellant interposed general denials, and set up three affirmative defenses. The first of these affirmative defenses suggests the question whether the respondent's employment falls within or is subject to the obligatory order entered by the Industrial Welfare Commission. In the second defense a settlement of the controversy between the respondent and the appellant was set forth. The third raises the question of the constitutionality of the act. A demurrer was interposed to the several defenses and overruled as to the first two, but sustained as to the last. At the trial the court determined from the evidence that the respondent's employment was within the obligatory order of the commission. It was held, however, that the facts set forth as constituting a settlement, although further amplified by a trial amendment, did not constitute a defense, and evidence offered to substantiate the plea was rejected.

In this court the appellant assigns error upon the several rulings of the trial court. These we will notice in turn, although not in the order in which they are presented in the brief.

[1] The first question is the constitutionality of the act. On this question we do not feel disposed to enter into an extended discussion. The state of Oregon has a law upon its statute books almost the exact counterpart of our own, and its constitutionality was sustained by the unanimous decision of the highest court of that state sitting en banc, against attacks based upon the several grounds urged by the appellants here. *Stettler v. O'Hara*, 69 Or. 519, 139 Pac. 743, L. R. A. 1917C, 944, Ann. Cas. 1916A, 217; *Simpson v. O'Hara*, 70 Or. 261, 141 Pac. 158. These cases were taken, by writ of error on the federal question involved, to the United States Supreme Court, and were there affirmed, after a reargument, although by an equally divided court, Mr. Justice Brandeis taking no part in the consideration and decision of the cases. *Stettler v. O'Hara* and *Simpson v. O'Hara*, 243 U. S. 629, 37 Sup. Ct. 475, 61 L. Ed. 937. The reasoning of the justices of the Oregon court writing the decisions in the cases appeals to us as sound and conclusive, and we are content to rest our judgment on the authority of the cases as there determined.

[2] The second question, Is the work which the respondent was employed to perform within the obligatory order of the Industrial Welfare Commission? was also, we think, correctly determined by the trial court. While the court found that the work was that of a cashier, and thus fell within the enumerated employments set forth in the order, and while we think this conclusion may be

questioned, we have no doubt that the work was clerical work, and thus within the general clause of the order which follows the specially enumerated employments. This does not add to the list of employes a class not considered by the conference appointed to investigate and make recommendations with reference to office help. The record shows that ticket selling in moving picture houses, along with a number of other employments of similar kind not specifically enumerated in the recommendation made, received the especial attention of the conference. The record shows with reference to this particular class of employes that they were then receiving an average wage of \$8.34 per week of 48 hours, and that the conference members by a unanimous vote determined that this sum was insufficient, to use the language of the statute, "for their decent maintenance," and recommended a wage of \$10 per week, which recommendation met with the approval of the commission.

[3] The final question relates to the ruling of the court with reference to the defense of compromise. The offer of proof was reasonably within the allegations of the answer as amended at the trial. As it appears in the record, the offer was this:

"With the amended answer, thus amended, defendant offers to prove by this witness, J. D. Rice, and by other witnesses, that on or about the 22d day of June, 1916, and after all the services ever rendered by plaintiff for defendant at his moving picture show, included in the complaint, had been fully performed, and after plaintiff had been paid by defendant the amount she claimed for said services, and at a time when plaintiff was 21 years of age and in all respects competent to bind herself by contract and agreement, plaintiff made a further claim against defendant for her said services, claiming additional compensation in the sum of \$274, and no more, and that at said time there was a dispute between plaintiff and defendant, the plaintiff claiming that she had performed services for 5½ hours per day for a period of 56 weeks, and defendant believing and claiming that plaintiff had only performed services for him for a period of 3½ hours each day for a period of 56 weeks, and that defendant also believing and contending that the Industrial Welfare Commission of Washington had not complied with the law in attempting to promulgate or establish a minimum wage rate affecting the employment of females over the age of 18 years, and the order upon which this suit is based, and also believing and contending that plaintiff's said services so performed by her did not and do not entitle her to be classified as a cashier within the meaning of the law or within the meaning of said pretended order of the Industrial Welfare Commission, and does not entitle her to be classified in any manner under said pretended order so as to be entitled to the minimum wages therein specified, and that in these circumstances, after a full and free discussion both pro and con of the respective claims of the plaintiff and of the defendant and for the purpose of avoiding litigation, delay, and uncertainty and preserving amicable feelings between the parties, plaintiff and defendant entered into a written contract whereby in full satisfaction of all differences between them it was mutually agreed that defendant should pay plaintiff the sum of \$40 by check, which the defendant then and there did, and further that defendant should employ plaintiff to sell

tickets in his moving picture show window at Chehalis, Wash., between the hours of 7 p. m. and 10 p. m. of each day for a period of 6 months after the date of said agreement at the rate of \$5 per week, working during said hours only, which sum so paid by defendant to plaintiff and said contract so entered into was then and there mutually agreed to be in full satisfaction of all claims, if any, that plaintiff then had against the defendant for any services performed by her for him mentioned in the complaint herein and particularly in satisfaction of her claim for the services sued upon in this action; that plaintiff, after signing said contract and after receiving a check for the \$40 signed by defendant and payable to her order and drawn upon the bank of Coffman, Dobson & Co., Chehalis, Wash., and after retaining a copy of said written contract, actually entered upon the duties of her employment under said contract of settlement and actually worked thereunder for a considerable length of time selling tickets for defendant as therein provided; that defendant has at all times been able, ready, and willing to carry out and has carried out, as far as he was permitted to do by plaintiff, his part of the contract, and that he is ready and willing to carry out the same and do all things therein provided to complete the fulfillment of said contract; that there was at the time said check was issued, has been at all times since, and now is ample funds to the credit of defendant in the bank on which said check was drawn to pay the same, and said check now certified by the cashier of said bank is tendered to plaintiff in open court, and that it has been stipulated that said tender may be considered as if made in cash at the time the first answer was served in this case."

It is undoubtedly a general rule that private controversies between individuals *sui juris* may be compromised by them by mutual agreement, and that the courts will not, where no question of fraud intervenes, relieve from the agreement, even though it be shown that the one gained rights thereby to which he would not otherwise have been entitled, and that the other gave up rights to which he was fully entitled; this on the principle that compromises are favored by the law, since they tend to prevent strife and conduce to peace and to the general welfare of the community. But the controversy here had an added element not found in the ordinary controversy between individuals. It was not wholly of private concern. It was affected with a public interest. The state, having declared that a minimum wage of a certain amount is necessary to a decent maintenance of an employe engaged in the employment in which the respondent was engaged, has an interest in seeing that the fixed compensation is actually paid. The statute making the declaration not only makes contracts of employment for less than the minimum wage void, but has sought to secure its enforcement by making it a penal offense on the part of the employer to pay less than the minimum wage, and by giving to the employe a right of action to recover the difference between the wage actually paid and such minimum wage. The statute was not therefore intended solely for the benefit of the individual wage-earner. It was believed that the welfare of the public requires

that wage-earners receive a wage sufficient for their decent maintenance. The statute being thus protective of the public as well as of the wage-earner, it must follow that any contract of settlement of a controversy arising out of a failure to pay the fixed minimum wage in which the state did not participate is voidable, if not void. Especially must this be so, as here, where the contract of settlement is executory, has been repudiated by one of the parties, the parties can be placed in statu quo, and the wage-earner, by carrying out the contract, will not receive the wage to which she is justly entitled. One has but to glance at the terms of the proposed settlement in this instance to see that the respondent will not receive thereby any just equivalent for the sum which she agreed to surrender. Our opinion is that it is such a contract as the courts are not required to enforce, and that it would be against the policy of the statute so to do.

These conclusions require an affirmance of the judgment; and it is so ordered.

ELLIS, C. J., and MAIN and WEBSTER, JJ., concur.

PARKER, J., I dissent. I think the compromise was permissible, and that appellant should have been allowed to prove it as offered by him.

(101 Wash. 12)

MATSON v. KENNECOTT MINES CO. et al.
(No. 14463.)

(Supreme Court of Washington. April 3, 1918.)

1. APPEARANCE §9(4) — GENERAL OR SPECIAL APPEARANCE—ANSWER—"GENERAL APPEARANCE."

Under Rem. Code 1915, § 241, providing that appearances shall be deemed general unless defendant states that same is special, where defendant, stating his appearance as special, invoked the jurisdiction of the court by pleading to the merits of the cause and praying for relief thereon, the appearance was general, and the court had jurisdiction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Appearance.]

2. CORPORATIONS §630(1/2) — ACTIONS AGAINST AFTER DISSOLUTION.

Under Laws Nev. 1903, c. 88, §§ 89, 90, providing for dissolution of corporations, and that a dissolved corporation shall be continued for one year and until the winding up of litigation in which it shall be interested, where a corporation made a general appearance within the year after dissolution, plaintiff was entitled to proceed to final judgment.

3. CORPORATIONS §639 — DISSOLUTION — WHAT LAW GOVERNS.

The coming into and going out of existence of a corporation is determinable by the laws of the state of creation, which laws have extraterritorial effect in the winding up of their affairs after dissolution.

4. PARTIES §51(4) — BRINGING IN NEW PARTY.

In an action against a dissolved corporation, the making of a third party defendant to

compel him to account for corporation property alleged to have been appropriated was not a proper subject for litigation therein.

5. JUDGMENT §106(3)—DEFAULT—FAILURE TO ANSWER AMENDED COMPLAINT.

The denial of plaintiff's motion for default against defendant for failure to answer his third amended complaint was not error, where as to such defendant this complaint was the same as the second amended complaint, which he answered.

6. STATUTES §281—ACTION AGAINST DISSOLVED CORPORATION—PLEADING.

The introduction in evidence in an action against a Nevada corporation of a copy of Laws Nev. 1903, c. 88, § 90, relating to actions by and against dissolved corporations, needed no prior pleading, where its introduction was to negative the claimed reincorporation of the company.

Department 1. Appeal from Superior Court, King County; John J. Jurey, Judge.

Action by Matt Matson against the Kennecott Mines Company and Stephen Birch. From an order dismissing the action as to the Company, and from an order dismissing the action as to Stephen Birch, plaintiff appeals. Affirmed in part, and reversed in part.

Geo. H. Rummens, Willmon Tucker, Heber McHugh, and John T. Casey, all of Seattle, for appellant, Roberts, Wilson & Skeel and Bogle, Graves, Merritt & Bogle, all of Seattle, for respondents.

PARKER, J. This action was originally commenced in the superior court for King county against the defendant Kennecott Mines Company, a Nevada corporation, by the plaintiff, Matson, seeking recovery of damages for personal injuries which he claims to have suffered as the result of the negligence of that company while working at its mines in Alaska in January, 1915. Thereafter Matson filed his third amended complaint, attempting to make Birch a party defendant to the action, which complaint was served upon Birch together with a summons. The case is in this court upon an appeal by Matson from orders of the superior court dismissing the case as to both defendants and denying him a trial upon the merits.

The dismissal of the case as to the company was by the trial court rested upon the ground that it had been reincorporated before the commencement of the action. While counsel seek to sustain the order of dismissal upon that ground, they also seek to sustain the order upon the ground that the superior court never in any event acquired jurisdiction over the person of the company either by an effective service of summons upon it in this state or by its general appearance in the action. The dismissal as to the defendant Birch was by the trial court rested upon the ground that no cause of action was stated against him in the third amended complaint which could be a proper subject of litigation in this case.

On June 1, 1915, Matson signed and veri-

fied his original complaint in this action. Thereafter that complaint, together with the summons in usual form, was served upon four different persons in this state, at different times, as resident agents of the company who were claimed by Matson to be agents of the company upon whom service might be effectually made for it at the time each service was so made. Thereafter counsel for the company appeared specially and made motions to quash the service of the summons upon each of these persons as service upon the company, which motions were rested upon the ground that neither of the persons so attempted to be served was an officer, agent, or representative of the company in this state. We do not find in either of these motions or elsewhere in this record any claim that the Kennecott Mines Company was not doing business in this state of such nature and extent that it was subject to be sued therein upon a cause of action such as Matson set forth in his several complaints, apart from the claim that it had been disincorporated. These motions to quash were brought on for hearing before the court when, after hearing evidence and argument of counsel, they were by the court denied. Thereafter the company by its counsel answered Matson's complaint upon the merits, denying that its negligence resulted in or contributed to the injury of Matson as alleged by him, and affirmatively pleading contributory negligence and assumption of risk on his part, and also that his injuries, if any, resulting from the fault of persons other than himself, were the result of the fault of his fellow servants. In the making and filing of this answer the company attempted to preserve its special appearance as made in its motions to quash the service of summons. The portions of the answer, aside from its denials and pleadings of affirmative defenses as above noticed bearing upon the question of whether the company preserved its special appearance in the action, are the following:

"Comes now the defendant Kennecott Mines Company, the court having overruled and denied its motion to quash service in this action, and not waiving its motion to quash the service, and still reserving its special appearance, and its right to contest the question of the jurisdiction of this honorable court, submits this its answer to the complaint of the plaintiff."

"Wherefore the defendant Kennecott Mines Company, having fully answered the complaint of plaintiff, prays for judgment for dismissal and for costs."

Thereafter Matson filed his amended complaint and his second amended complaint, both of which were answered in order by the company in substance the same as it had answered his original complaint.

On June 14, 1916, the cause came regularly on for trial in the superior court sitting with a jury; counsel for the company still insisting that the appearance of the company was special and not general. Counsel for the company then presented to the court

and offered in evidence a duly certified copy of the articles of incorporation of the company showing that it was a corporation organized under the laws of Nevada in November, 1906. Indorsed upon the certified copy of the articles so presented and offered in evidence was a statement over the signature of the secretary of state of Nevada, as follows: "Dissolved June 10, 1915." Counsel for the company also presented to the court and offered in evidence a duly certified copy of section 89 of the general corporation law of Nevada (Laws 1903, c. 88), relating to the voluntary dissolution of corporations of that state. That section, after providing for the procedure and the manner of giving consent to a dissolution by those interested, provides:

That certain written evidence thereof "shall be filed in the office of the secretary of state, who, upon being satisfied by due proof that the requirements aforesaid have been complied with, shall issue a certificate that such consent has been filed, and the corporation shall thereby be dissolved, and the secretary of state shall make an indorsement to that effect on the original certificate of incorporation and on the amendments thereto in his office."

Counsel for the company also presented to the court and offered in evidence a certificate of the secretary of state of Nevada made as provided by the above-quoted portion of section 89, further evidencing the disincorporation of the company. This was the first claim made that the company had been disincorporated. These papers showed in apparent disincorporation of the company before the commencement of the action. Thereupon counsel for Matson, claiming surprise at this proof of apparent disincorporation, having no notice that there would be a claim of its disincorporation, asked for a continuance of the cause to the end that they might be able to show that the company was in fact not disincorporated, and, if necessary, plead additional facts to that end. The trial court thereupon granted this request, dismissed the jury, and continued the case. The case was never thereafter brought to trial upon the merits. Thereafter counsel for Matson filed his third amended complaint, setting up his cause of action against the company the same in substance as in his second amended complaint, upon which the case was proceeding to trial when continued. In this third amended complaint it was sought to make Stephen Birch a defendant in the action upon the theory that he was the moving spirit in bringing about the disincorporation of the company and the organization of a new corporation which succeeded to the rights and properties of the company, and that this was accomplished by the fraudulent acts of Birch. That portion of the third amended complaint is a somewhat involved story, but we think this is a sufficient noticing of its nature. This third amended complaint, together with a summons in usual form, was served in King county upon Birch, who was then tem-

porarily there, but whose residence was not in this state. Thereafter several motions were made by the respective parties, which presented the question of Matson being entitled to default as against both the company and Birch for want of answer to his third amended complaint; the question of the sufficiency of the allegation of Matson's third amended complaint to constitute a cause of action against Birch, properly triable in this case, the question of the dismissal of the third amended complaint and of the action as to Birch, and the question of the striking of the third amended complaint and the dismissal of the action as to the company. These motions were apparently all heard together, upon which hearing the court had before it the certified copies of the articles of incorporation of the company, the indorsement thereon, and the certificate of the secretary of state of Nevada apparently showing that the company had been discontinued, which papers had been offered in evidence upon the trial terminated by the continuance. The court also had before it a printed pamphlet offered in evidence by counsel for Matson, purporting to be an official publication of the general corporation law of Nevada issued by the secretary of state of Nevada, which pamphlet was considered in evidence by the court without objection on the part of counsel for the company, and which pamphlet contained section 89, above noticed and quoted from, and also the following provisions in section 90 of the general corporation law of Nevada:

"All corporations, whether they expire by limitations, or are otherwise dissolved, shall nevertheless be continued as bodies corporate, for the term of one year from such expiration or dissolution, and until all litigation to which such corporation is a party, if begun within that time and process served within said year, is ended, for the purpose of prosecuting and defending suits by or against them, begun within said time. * * *

The result of the hearing upon these motions was that the court entered two orders, which in effect finally terminated the action both as to the company and Birch and prevented a trial thereof upon the merits: (1) An order dismissing the action as to the company containing recitals showing that the order of dismissal was by the court rested upon the ground that the company had been discontinued and dissolved under the laws of Nevada before the commencement of the action; and (2) an order dismissing the action as to Birch containing recitals indicating the court's opinion that Matson's third amended complaint did not constitute a cause of action against Birch triable in this action. The appeal of Matson is taken from these two orders terminating the action, and also from a subsequent order made by the court denying Matson a new trial upon the merits.

In so far as we are concerned with the claim of error in the entering of the order

of dismissal as to the company, we have here presented two questions: (1) Assuming that the company was not discontinued so as to prevent the commencement of this action against it, did the trial court acquire jurisdiction over the person of the company either by service of summons upon it in this state or by its general appearance in the action? (2) Was the company discontinued under the laws of Nevada so as to prevent the commencement of this action?

[1] We pass, without deciding, the question of whether jurisdiction was acquired by the court over the person of the company by service of summons upon it in this state, since we have arrived at the conclusion that in any event jurisdiction was acquired over it by its general appearance in the action, and that it appeared generally therein when it answered the original complaint upon the merits and prayed for a dismissal of the action and for judgment for costs against Matson. Section 241, Rem. Code, relating to the appearance by defendants, reads in part as follows:

"A defendant appears in an action when he answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance. * * * Every such appearance made in an action shall be deemed a general appearance, unless the defendant in making the same states that the same is a special appearance."

The concluding words of this section may suggest the thought that a defendant can limit any appearance he may make in an action so as to make it a special appearance only, and thereby avoid submitting himself generally to the jurisdiction of the court, by simply stating "that the same is a special appearance," regardless of its real nature, and regardless of the fact that he may in the making of his appearance invoke the jurisdiction of the court by asking the rendition of a judgment or order in the case such as the court could only render when it has jurisdiction over the persons of the parties to the action. This, it seems to us, is the only possible theory upon which counsel for the company can rest their argument that the statements in their several answers effectively preserved their special appearances made in their several motions to quash the services of the summons. We think that the language of section 241 above quoted does not mean that an appearance, which by its very nature is general, can be made special by the mere designation of it as such by the one making it, but that the language of the section means only that no appearance which by its nature can be made special will be regarded as special, unless the party making it states that "the same is a special appearance," that is, that even a motion confined by its terms exclusively to a challenging of the court's jurisdiction over the person of the defendant will not be considered a special appearance unless stated to be such, and that no appearance which by its very nature

is general can be made special by a statement that it is special. When the company answered upon the merits in this case and prayed for judgment for dismissal and for costs, it in effect invoked the jurisdiction of the court and asked a determination of the cause upon the merits, which, of course, could not be done by the court unless it had jurisdiction over the person of both the company and Matson. Manifestly this prayer of the company's answers was more than a prayer for dismissal for want of jurisdiction. To so limit it would be to lose sight of both the negative and affirmative defenses pleaded in the body of the company's answers going to the merits of the case. The denials and allegations of the answers did not touch the question of jurisdiction, but related wholly to the merits of the case. Nor does the fact that the company stated in the introduction to its answers that it was preserving its special appearances negative the fact that it was also defending the case upon the merits.

In *Teater v. King*, 35 Wash. 188, 76 Pac. 688, there was involved a motion, in form a special appearance:

"(1) To quash the summons, and set aside the service thereof; (2) to set aside and quash the writ of restitution, for the reason that the same was prematurely issued, and that the court had no jurisdiction to issue the same; and (3) to dismiss the said action, for the reason that no summons had been issued and served in said cause as required by law."

The court sustained the motion to quash the summons, but refused to quash the writ of restitution or dismiss the action. Later another summons was issued, and apparently served on the defendant. It was also moved against as the former one was. The court, however, finally ruled that it had jurisdiction of the person of the defendant by virtue of his appearance in his motion to quash; this upon the theory that it was in effect a general appearance. This court disposed of the question of jurisdiction over the person of the defendant, holding the appearance to be general, as follows:

"The appellant's position is that the action abated, when the original summons and service thereof were quashed and set aside, and therefore carried the proceedings for the writ of restitution with it, as an incident, and that the trial court erred in not quashing the writ and dismissing the case. There would be much force in appellant's contention, if he had not asked the court below to dismiss the action. The appearance of appellant was in form special, for the purpose of objecting to the court's jurisdiction over his person, but in the body of his motion he invoked the jurisdiction of the court below on the merits, when he asked for a dismissal. A party desiring to successfully challenge jurisdiction over his person should not call into action the powers of the court over the subject-matter of the controversy. By so doing he waives his special appearance, and will be held to have appeared generally."

This view of the law was adhered to in *Bain v. Thoms*, 44 Wash. 382, 87 Pac. 504. It may be said that in that case there was an asking for relief which was more clearly a

submission to the jurisdiction of the court than in the *Teater* Case. However, the defendant in the *Bain* Case stated in his motion that he was "appearing specially herein for the purpose of questioning the jurisdiction of this court, and for no other purpose." Holding that the appearance was general, and not special, though expressly stated in the motion to be special, this court quoted with approval from *Burdette v. Corgan*, 26 Kan. 102, as follows:

"* * * We remark that this appearance by the motion, though called special, was in fact a general appearance, and by it this defendant appeared so far as she could appear. The motion challenged the judgment not merely on jurisdictional, but also on nonjurisdictional grounds, and whenever such a motion is made the appearance is general, no matter what the parties may call it in their motion."

We note that the *Bain* Case, and also the *Kansas* case quoted from, involved motions to vacate default judgments, upon the ground, among others, of want of jurisdiction over the persons of the defendants therein, but the problem presented in those cases was the same in substance as here, because the question in each was one of requiring the moving defendant to answer upon the merits, as well as one of the setting aside of the default judgments for want of process. It is also to be noted that the *Teater* and *Bain* Cases were decided by this court long after the enactment of section 241, Rem. Code, above quoted from, and while the concluding words of that section, relied upon by counsel for the company in this case, were a part of our statute law relating to appearance.

The reason of this view of the law is well stated by the Supreme Court of Wisconsin in *Lowe v. Stringham*, 14 Wis. 241, as follows:

"We think it is also a waiver of such a defect [want of jurisdiction] for the party, after making his objection, to plead and go to trial on the merits. To allow him to do this would be to give him this advantage: After objecting that he was not properly in court, he could go in, take his chance of a trial on the merits, and if it resulted against him, he could set it all aside upon the ground that he had never been properly got into court at all. If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection."

See *Merrill v. Houghton*, 51 N. H. 61; *Bucklin v. Stickler*, 32 Neb. 602, 49 N. W. 371; *Honeycutt v. Nyquist*, etc., Co., 12 Wyo. 183, 74 Pac. 80, 109 Am. St. Rep. 975; *State v. District Court*, 40 Mont. 359, 106 Pac. 1098, 185 Am. St. Rep. 622; 2 R. C. L. 327; 4 C. J. 1318.

The early decision of this court in *Woodbury v. Henningsen*, 11 Wash. 12, 39 Pac. 243, holds to the contrary of our conclusion here reached. That discussion was not accompanied by the citation of any authorities upon the subject. We think that decision was in effect overruled by our later decisions in the *Teater* and *Bain* Cases, above noticed.

In *Deming Investment Co. v. Ely*, 21 Wash. 102, 57 Pac. 353, the challenge to the court's

jurisdiction was upon the ground that the case was not one wherein jurisdiction could be acquired by the publication of summons. It was held that, since the defendant's appearance was special in form, and his motion went only to the question of jurisdiction over his person, he did not appear generally by moving to quash the service of the summons. In so holding the court observed:

"If the granting of the relief requested in the appearance is consistent with a want of jurisdiction over the person, the defendant may appear for a special purpose, without submitting himself to the jurisdiction of the court for any other purpose."

This is quite in harmony with our present view of the law.

In *Walters v. Field*, 29 Wash. 558, 70 Pac. 66, wherein there was an answer by the defendant upon the merits, without any statement therein claiming such appearance to be special or claiming the preservation of his prior special appearance, the court did say (29 Wash. at page 565 of the opinion, 70 Pac. 68) that:

"The defendant could have preserved his special appearance in his answer to the merits, but he did not see fit to do so."

However, a reading of that decision, we think, renders it plain that the question of the preservation of a former special appearance by a statement to that effect in an answer upon the merits was not at all necessary to be decided in the case. If this can be considered as anything more than mere dictum, it was in any event also overruled in our later *Teater and Bain Cases*, above noticed. This is the only American decision coming to our notice which can be at all regarded as suggesting that an appearance by an answer to the merits can be made special by merely asserting it to be special.

In *Larsen v. Allen Line S. S. Co.*, 37 Wash. 555, 80 Pac. 181, it seems to have been assumed merely for the purpose of argument that a special appearance can be preserved when the court is asked to make some ruling in the case other than upon the question of its jurisdiction over the person of the defendant. We do not think this decision is of any controlling force here, especially in view of our later decision in the *Bain Case*, above noticed. We conclude that the superior court acquired jurisdiction over the person of the company by virtue of its general appearance, assuming that it was not discontinued prior to the commencement of this action.

[2, 3] Was the company discontinued under the laws of Nevada prior to the commencement of this action, so that it could not be sued as a corporate entity? If we had nothing before us other than the copy of its articles of incorporation with the indorsement thereon, certified by the secretary of state of Nevada, the certificate of the secretary as to the discontinuation of the company, and section 89 of the corporation law of Nevada, we would probably be re-

quired to hold that the discontinuation so evidenced would prevent the maintenance of this action. But, when we look to the language of section 90 of the general corporation law of that state, here in evidence, which is above quoted from, it at once becomes apparent that, in so far as this action and its prosecution to final judgment is concerned, the company is not discontinued. That section is as much a part of the law of the company's corporate being as section 89 of the general corporation law of Nevada, here relied upon by counsel for the company to show its discontinuation. Some contention is made that the provisions of section 90 continuing the life of a corporation for the purpose of continuing pending actions against it and for the purpose of commencing actions against it have no extraterritorial effect. We cannot agree with this contention. There is nothing in section 90 or elsewhere in the Nevada corporation law here in evidence indicating to our minds any intent on the part of the Legislature of Nevada to continue the corporate existence of a corporation of that state, as provided in section 90, only in that state.

The Court of Appeals of New York, in the comparatively recent case of *Sinnott v. Hanan*, 214 N. Y. 454, 108 N. E. 858, had for determination this exact question in substance, although that was a question of abatement of a pending action. A New Jersey corporation was discontinued under the New Jersey law, much like this Nevada law, pending an action against it in the New York courts. Disposing of the question in harmony with our present view, Judge Collins, speaking for the New York Court of Appeals, said:

"The Corporation Act of New Jersey contained, however, a section (section 53) as follows: 'All corporations, whether they expire by their own limitation or be annulled by the Legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property, and to divide their capital, but not for the purpose of continuing the business for which they were established.'"

"Inasmuch as this section relates to and regulates the corporate existence and power, it has extraterritorial operation and effect, even as had the statute under which the corporation was created and which was a part of its charter and the law of its existence. *Relife v. Rundle*, 103 U. S. 222 [26 L. Ed. 337]; *Michigan State Bank v. Gardner*, 15 Gray (Mass.) 362. The existence and the powers of any foreign corporation coming into this state to do business are at all times subject to the law of its creation and of its domicile, and, additionally, to our laws relating to it, and the terms laid down by our Legislature as conditions of allowing it to transact business here. *Bank of Augusta v. Earle*, 13 Pet. 519, 588, 589 [10 L. Ed. 274]; *Demarest v. Flack*, 128 N. Y. 205 [28 N. E. 645, 13 L. R. A. 854]; *Hoyt v. Thompson's Executor*, 19 N. Y. 207. The sections we have quoted are therefore entitled to recognition and enforcement by the courts of this state. They apparently and under authority (*American Surety Co. v. Great White Spirit Co.*, 58 N. J. Eq. 526 [43 Atl. 579])

are parts of a legislative scheme respecting corporations, are in *pari materia*, and to be construed together. Their effect was to continue the life of the corporation as to its capacity to prosecute and defend suits by or against it, to settle and close its affairs, to dispose of and convey its property and to divide its capital, and to destroy its capacity and existence in all other respects and for all other purposes. Under them the action did not abate, because as to it the corporate existence was not affected. The corporation remained the defendant, with its power and authority to defend existent and unlesened."

Counsel for the company call our attention to *Marion Phosphate Co. v. Perry*, 74 Fed. 425, 20 C. C. A. 490, 33 L. R. A. 252, which they claim supports the contrary view. We do not so regard that case. It was there attempted to invoke the law of Florida in the determination of the question of the disincorporation of a Georgia corporation which became a party to litigation in the federal court in Florida. The Fifth Federal Circuit Court of Appeals held simply that:

"The Chatham Investment Company, incorporated under the laws of the state of Georgia, when dissolved according to those laws, became a dissolved corporation everywhere—dead in Florida as well as Georgia."

It was not claimed or suggested in that case that the corporation law of Georgia had any saving provision as to disincorporation, as the law of Florida had, which was much like section 90 of the Nevada law here in evidence. That decision, like the New York decision above quoted from, means only that the coming into and going out of existence of a corporation is determinable from the laws of the state of creation. 10 Cyc. 1323. The defendant company, as we have seen, entered its general appearance in this action in January, 1916, when it filed its answer to Matson's original complaint. It was disincorporated for purposes other than that of litigation by and against it, and some other purposes not of moment here, in June, 1915, less than one year prior to entering its general appearance in this action, which had the same effect as the due service of a summons upon it at that time.

Thus this action comes within the express terms of section 90 of the Nevada law, which in effect continued the corporate existence of the company for the purpose of commencing actions against it for the period of one year following its disincorporation for other purposes. We are of the opinion that the company had a legal existence as a corporate entity for the purposes of this action at the time of its commencement, assuming that it was commenced at the time the company entered its general appearance therein, and that, the action having been so commenced within one year following the disincorporation of the company for other purposes, the action may now proceed to final judgment upon the merits in favor of or against the company as a corporate entity. We conclude that the superior court erred in dismissing

the action as to the defendant Kennecott Mines Company.

[4] Did the superior court err in striking Matson's third amended complaint and dismissing the action as to Birch whom Matson by that complaint attempted to bring into the case as a defendant with the company? We think not. In so far as Matson's cause of action against the company is concerned, it was set forth in his third amended complaint in substance the same as in his second amended complaint upon which the trial was proceeding when the continuance was ordered. Manifestly the only purpose of the third amended complaint was to bring Birch and another corporation, which was not served, into the action as defendants, to the end that Birch and the other corporation might be compelled to account for the property of the company which it was alleged they had appropriated in connection with the disincorporation of the company and the organization of the other corporation. We are of the opinion that this was not a proper subject of litigation in this action, though it may be a proper subject of litigation in another action looking to the compelling of an accounting for property of the company so alleged to have been appropriated, when Matson shall have recovered a judgment against the company in this action.

[5] As to Matson's motion for default against the company for failure to answer his third amended complaint, we think the court did not err in denying it. The company had already answered the same allegations in Matson's second amended complaint.

[6] It is also clear to us that the introduction in evidence, upon the hearing of the motions to dismiss, of the copy of the corporation law of Nevada, embodying section 90 thereof, above quoted from, needed no prior pleading thereof, in view of the fact that it was introduced to negative the claimed disincorporation of the company. Hence the striking of Matson's third amended complaint, though properly done, did not in the least affect his right to have the court consider section 90 of that law in connection with section 89, offered in evidence and relied upon by counsel for the company as showing its disincorporation.

The order dismissing the action as to the defendant Stephen Birch is affirmed. The orders dismissing the action as to the defendant Kennecott Mines Company and denying to the plaintiff Matson a new trial upon the merits as against that company are reversed. The cause is remanded to the superior court for trial upon the merits as against that company, upon Matson's second amended complaint, the answer of the company thereto, and Matson's reply to that answer, and for such further proceedings as are not inconsistent with this decision.

The defendant and respondent Birch is entitled to recover his costs in this court as against the plaintiff and appellant Matson,

and Matson is entitled to recover his costs in this court as against the Kennecott Mines Company.

ELLIS, C. J., and WEBSTER, MAIN, and FULLERTON, JJ., concur.

(88 Or. 209)

OLDS v. OLDS.

(Supreme Court of Oregon. April 2, 1918.)

1. MASTER AND SERVANT §401—EMPLOYERS' LIABILITY ACT—PLEADING—ELECTION.

Since Laws 1913, p. 188, creating Industrial Accident Commission does not raise any presumption whether the employer is subject to the act, an injured servant need not allege that the master had given notice that he would not come under the act; the fact of absence of such notice being a matter of affirmative defense.

2. WITNESSES §281—INJURIES TO SERVANT—EVIDENCE—ADMISSIBILITY.

In servant's action for injuries when lumber on wagon having no brake, crowded horses and caused runaway, in the absence of evidence that a chain, rope, or other deterrent was furnished by the master, question on cross-examination why the servant did not lock the wheels was properly excluded, since he was not required to furnish such appliances.

3. NEGLIGENCE §101—INJURIES TO SERVANT—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In view of Laws 1911, p. 16, § 1, requiring contractors on any work involving a risk or danger to the employé to use every practicable device, care, and precaution, and section 6, providing that the contributory negligence of the injured servant shall not be a defense, though it may be considered in fixing damages, and Gen. Laws 1913, p. 192, §§ 13 and 14, defining engineering works as hazardous occupations and to include the repair of highways, a servant injured by runaway of team while hauling lumber for repairing bridge, which was caused by failure to supply brake for wagon, so that in going down hill the lumber crowded the horses and frightened them, the servant's alleged negligence could be considered only in mitigation of damages.

4. TRIAL §252(11)—INJURIES TO SERVANT—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In servant's action for injuries in runaway when lumber on wagon crowded horses, frightening them, evidence held to warrant refusal of instruction that, if the load became loosened, plaintiff could not recover, since it showed that the load did not become loosened until the horses were frightened by being crowded by the lumber because the tongue of the wagon was too short.

Department 2. Appeal from Circuit Court, Clackamas County; J. U. Campbell, Judge.

Action by D. W. Olds against Edwin D. Olds. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action to recover damages for a personal injury, and is based upon the obligation created by the Employers' Liability Act (Gen. Laws Or. 1911, c. 3). The com-

plaint charges, in effect, that at the time of the accident the plaintiff was employed by the defendant to aid him in constructing a bridge on the public highway, which crosses the Sandy river in Clackamas county, Or.; that on September 4, 1915, the plaintiff was ordered by the defendant to take the latter's horses, harness, and wagon, drive to a saw-mill, get a load of lumber, and take it to the bridge; that in obeying the command it became necessary for the plaintiff in returning from the mill to descend a steep hill, and in doing so the lumber, without his fault, crowded upon the horses, causing them to run and rendering it impossible to check their speed, whereby he was violently hurled to the ground and seriously injured, particularly describing the hurt; that the wagon so furnished was defective, in that it had no appliance to prevent the vehicle from pressing upon the team while going down hill; that the defendant had full knowledge of the inadequate condition of the wagon, and had promised the plaintiff and other employés to attach a brake to the vehicle, but he failed to do so, which neglect was the proximate cause of the injury; and that by reason thereof the plaintiff sustained damages in the sum of \$10,000, for which judgment was demanded. The answer denies the material averments of the complaint, and for further defenses alleges facts tending to show: (1) That the plaintiff knew and assumed the risk to which he was exposed; (2) that he was guilty of negligence in managing the team at the time he was hurt; and (3) that the accident was unavoidable. The reply put in issue the allegations of new matter in the answer, and, the cause having been tried, the plaintiff secured a verdict and judgment for \$3,500, and the defendant appeals.

F. S. Senn, of Portland (Grant B. Dimick, of Oregon City, on the brief), for appellant. Earle C. Latourette and C. D. Latourette, both of Oregon City (C. D. & D. C. Latourette, of Oregon City, on the brief), for respondent.

MOORE, J. (after stating the facts as above). It was contended at the trial in this court that the complaint does not state facts sufficient to constitute a cause of action, in that it fails to allege that the defendant at the time of the accident had been relieved from the obligations of the Industrial Accident Insurance by filing with the commission a written notice of his election not to be subject to the provisions of that statute (Gen. Laws Or. 1913, c. 112). Section 10 of that enactment reads in part:

"All persons * * * engaged as employers in any of the hazardous occupations hereinafter specified shall be subject to the provisions of this act: Provided, however, that any such person * * * may be relieved of certain of the obligations hereby imposed, and shall lose

the benefits hereby conferred by filing with the commission written notice of an election not to be subject thereto in the manner hereinafter specified."

A part of section 13 of that statute provides:

"The hazardous occupations to which this act is applicable are as follows: * * * Engineering works."

Section 14 thereof, as far as involved herein, is as follows:

"Engineering work means any work of construction, improvement or alteration or repair of * * * highways."

When this action was commenced section 15 of the enactment contained a clause as follows:

"Any employer engaged in any such hazardous occupations who would otherwise be subject to this act, may * * * file with the commission a statement in writing declaring his election not to contribute to the industrial accident fund hereby created, and thereupon such employer shall be relieved from all obligations to contribute thereto and * * * shall be entitled to none of the benefits of this act, and shall be liable for injuries to or death of his workmen, which shall be occasioned by his negligence, default or wrongful act as if this act had not been passed."

The provisions thus quoted are sufficient to show that, though the plaintiff, when he was injured, was engaged in engineering work, the performance of which is classified by the statute as a hazardous occupation no action to recover the damages occasioned by the hurt could have been maintained against the defendant unless he had elected, in the manner prescribed, not to be subject to the obligations imposed, nor to enjoy the privileges conferred by the enactment. The complaint herein contains no allegation of such renunciation, and for lack thereof the defendant's counsel insist that the initiatory pleading is insufficient. In support of the legal principle so asserted reliance is placed upon the decision in the case of *Krisman v. Johnson, etc., Mining Co.*, 190 Ill. App. 612, where in construing the provisions of a Workmen's Compensation Act of Illinois which provided:

"No common-law or statutory right to recover damages for injury or death sustained by any employé, while engaged in the line of his duty as such employé other than the compensation herein provided shall be available to any employé who has accepted the provisions of this act," and every employer included in the act "is presumed to have elected to provide and pay the compensation according to the provisions of this act, unless and until notice in writing of his election to the contrary is filed with the state bureau of labor statistics"

—it was held that a judgment in favor of the plaintiff could not be sustained when the initiatory pleading contained no averment that the parties were not under the provisions of the act. To the same effect is the case of *Dietz v. Big Muddy Coal Co.*, 263 Ill. 480, 105 N. E. 289. The conclusions thus reached evidently proceed upon the theory that in order to overcome the presumption thus declared, it was necessary for the

plaintiffs in the cases cited, upon whom the burden of proof was thus imposed, to allege in the initiatory pleadings and to prove at the trial that the employers for whom each rendered services when hurt had given notice of an election not to accept the provisions of the enactment.

[1] Our statute creating the State Industrial Accident Commission, clauses of which have hereinbefore been quoted, does not proclaim any presumption in favor of or against the employer or any other person, and hence it was unnecessary to allege in the complaint herein that the defendant, prior to the injury, had declared his election, in the manner prescribed, not to contribute to the industrial accident fund. The act last referred to confers a special privilege upon an employer, thereby releasing him from the common-law liability to respond in damages for a personal injury that has been caused by his negligence, unless he formally renounces the benefits thus bestowed, and such enactment, like the statute of limitations or other bar raised by the Legislature to the maintenance of a common-law action must be set up as new matter in the answer, unless the fact affirmatively appears upon the face of the complaint, which defense a plaintiff is not obliged to anticipate as a condition precedent to the right to maintain his action. The Employers' Liability Act of Oregon is a modified form of the common-law remedy, whereby an employé is permitted to recover from an employer damages for a personal injury which was caused by the latter's negligence. The complaint herein is sufficient.

[2] Upon cross-examination the plaintiff was asked:

"Having been up and down the hill and knowing it was a steep grade like Singer Hill out here, why didn't you lock the wheels with a chain or rope?"

An objection to the inquiry on the ground that an employé was not required to furnish suitable appliances was sustained, an exception allowed, and it is contended by defendant's counsel that an error was thereby committed. The evidence shows that the plaintiff used a chain with which to bind the load of lumber to the wagon in order to prevent the material from slipping on the vehicle when it was being hauled from the sawmill to the bridge. No testimony was offered tending to show that the defendant furnished the plaintiff a rope or any other chain with which he could have locked the wheels while descending the hill. If it had appeared from the evidence that the defendant had supplied the means suggested by the use of which the movement of the wagon might have been retarded in going down hill, and the plaintiff had failed to employ such appliances for the purpose for which they were furnished, a very different question would have been presented as tending to show that his negligence in this respect was the proximate cause of the in-

jury. No error was committed in this particular.

[3] The jury were instructed, in effect, that the plaintiff's alleged negligence, if any, could be considered only in mitigation of damages. An exception having been taken to this part of the charge, it is contended by defendant's counsel that an error was thereby committed. The rule thus declared by the court obtains in actions based upon the liability created by The Employers' Liability Act. Gen. Laws Or. 1911, c. 3, § 6. In another enactment "engineering work," in the performance of which the plaintiff was engaged when he was injured, is declared to be one of the "hazardous occupations." Gen. Laws Or. 1913, c. 112, §§ 13 and 14. The term last employed is a legislative classification of a peril to which the plaintiff was exposed, and though the phrase is used in another statute, it relates to a "work involving a risk or danger to the employes" as specified in section 1, Gen. Laws Or. 1911, c. 3. The testimony does not disclose how far it is from the hill where the plaintiff was hurt to the bridge which the defendant was building. If it be assumed, however, that the distance is so great that it can certainly be said the plaintiff was not then engaged in "engineering work," the services which he was discharging were rendered hazardous, because the defendant furnished a wagon, the tongue of which was too short, and neglected to supply a rope or chain with which to lock the wheels. In any event, therefore, the plaintiff, when he was injured, was performing labor which involved risk and danger to employes within the specifications of the Employers' Liability Act. The action herein is properly based upon the right created by the latter enactment, and, this being so, no error was committed in giving the instruction in question.

[4] An exception having been taken to the action of the court in denying the request of defendant's counsel, they insist an error was committed in refusing to charge the jury as follows:

"If you find that the plaintiff was injured because the lumber became loosened on the wagon and struck the horses and it was the loosening of the lumber that caused the horses to run, then I instruct you that the plaintiff cannot recover in this case, and your verdict must be for the defendant."

Assuming without deciding that the requested instruction correctly stated the rule of law applicable to a particular state of facts, it is not believed the evidence which was received was sufficient to justify such a charge. J. H. Frommeyer testified that by direction of the defendant he went with the plaintiff to the mill where the material was loaded upon and properly chained to the wagon; that the ends of the lumber extended beyond the front bolster to the line of the doubletree; that the end of the wagon tongue had been broken, and in consequence thereof was shortened; that as the team

began to descend the hill the ends of the lumber struck the legs of the horses, causing them to run, and after the team had started in mad speed the chain slipped, allowing the lumber further to press upon the horses. On recross-examination this witness was asked:

"Now, you say they [the horses] started down the hill. When did the chain get loose?"

He replied:

"After the timbers hit the horses when they started to run, while they were running. Q. Why did you testify in direct examination that the timbers got loose and slipped down on the horses when they started down the hill? A. That is the way I mean it. That the timbers hit the horses after they started down the hill, and then they started to run."

A careful examination of the testimony shows that because the end of the wagon tongue had been broken off, thereby shortening the pole, the horses were necessarily hitched closer to the load, and since the wagon had no brake the ends of the projecting lumber struck the horses' legs, causing them to run, and thereupon the chain employed to fasten the lumber to the wagon became loose. The defendant offered no evidence. The testimony of plaintiff's witnesses shows that it was the lack of a brake or other appliance to retard the speed of the wagon which constituted the proximate cause of the injury, and not the binding of the lumber by a chain to the wagon. No error was committed in this particular. The court was requested to charge the jury as follows:

"If you find that the lumber on this wagon became loosened and shifted on the horses, and that this was the proximate cause of the horses' running away and injuring plaintiff, then I instruct you that the verdict must be for the defendant."

The request was denied, and it is maintained that an error was thereby committed. This question is so nearly identical with the inquiry immediately preceding that the answer there undertaken to be made renders any further comment thereon unnecessary.

The defendant's counsel also excepted to the court's refusal to charge as follows:

"It was the duty of the plaintiff, the injured party, to exercise ordinary care in driving this team and hauling this lumber, and when going down this hill it was his duty to exercise ordinary care to avoid injury, and if you find that his injuries resulted from his own lack of care in the manner in which he drove the team, or if you find he struck one of the horses, and this caused the team to run away and injure him, and this act on his part was a want of ordinary care, then I instruct you that the plaintiff cannot recover damages and your verdict must be for the defendant."

This action, as has hereinbefore been determined, is based upon the Employers' Liability Act, a section of which provides, in effect, that the contributory negligence of the person injured shall not bar the maintenance of an action founded upon that statute, to recover damages for the hurt sustained, but such want of ordinary care

may be taken into consideration by the jury in awarding the measure of recovery. Gen. Laws Or. 1911, c. 3, § 6. The concluding clause of the request shows that no error was committed in refusing to give the instruction requested.

Other alleged errors are assigned, but, as they are not argued in the brief of the defendant's counsel, they will not be considered.

It follows that the judgment should be affirmed; and it is so ordered.

McCAMANT, BEAN, and BENSON, JJ.,
concur.

(88 Or. 238)

McLEMORE v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Oregon. April 9, 1918.)

1. MASTER AND SERVANT — 78 — BENEFIT FUND—AMOUNT OF RECOVERY.

In action for benefit from employers' fund on death of workman, where answer set up defendant's election to accept the Laws 1913, p. 188, and that plaintiff filed claim to compensation under such act, and the state treasurer set aside for her benefit a sum of money from which she had received certain amounts, the master was entitled to the credits of all sums so paid and set aside to the plaintiff.

2. MASTER AND SERVANT — 78 — BENEFIT FUND—CONSTRUCTION.

The rule that a contract is to be strongly construed against the party drawing it does not apply to the employers' benefit fund rules drawn by him where he was under no obligation to inaugurate such a plan.

3. MASTER AND SERVANT — 78 — BENEFIT FUNDS—DEDUCTIONS.

Where widow of workman had been allowed certain sums by the state under the Workmen's Compensation Act, and she sued for the amount of the employers' benefit fund, the sum of \$300 as ten monthly allowances payable if plaintiff remarried under Laws 1913, p. 199, should be deducted from the amount recoverable under the benefit plan.

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

On rehearing. Former opinion modified. For former opinion, see 171 Pac. 390.

V. A. Crum, of Portland, for appellant. Dolph, Mallory, Simon & Gearin and Hall S. Lusk, all of Portland, for respondent.

McCAMANT, J. [1] Both parties have petitioned for a rehearing. Their petitions challenge practically every proposition announced in the former opinion. Plaintiff contends that we have given defendant the benefit of a defense not pleaded. The answer sets up the election of defendant to accept the benefits of chapter 112 of the Laws of 1913. It is charged that plaintiff filed her claim to compensation under this act March 3, 1915; that the state treasurer on March 5, 1915, set aside for plaintiff's benefit a sum of money; and "that ever since the 15th day of March, 1915, the plaintiff has been receiving pay-

ments of \$30 per month from the moneys set aside for her, and since the 31st day of May, 1915, has been receiving the additional sum of \$6 per month on behalf of said child." The answer also pleads the stipulations of the plan on which defendant relies. We think that the allegations are sufficient to entitle defendant to the credits allowed it in the former opinion.

[2] Plaintiff quarrels with the rule announced for the construction of the plan. Authorities are cited to the effect that a contract is to be most strongly construed against the party drawing it. This principle, as applied to ordinary commercial contracts, is well established, but it is inapplicable to the instrument which is the basis of this litigation. Defendant was under no legal obligation to provide this protection for its employees. It is not suggested that the compensation paid the deceased was diminished by a dollar when the plan was promulgated. The entire fund was created by defendant. We agree with plaintiff's counsel in his claim that the promulgation of the plan inured to the advantage of defendant. Broad-gauge, generous conduct is usually well advised, even from a selfish standpoint. It is contrary to fair dealing to enlarge by construction the burdens assumed by an employer of labor who voluntarily provides for such a system of pensions and benefits. The duty of the court is to ascertain the intent of the parties; that of the defendant in announcing the plan; and that of the deceased in remaining in defendant's employ after the plan was put in effect. This intent is to be gathered from a fair and impartial interpretation of the language used.

It is true that prior to the promulgation of defendant's plan the states of Ohio and Washington had adopted statutes similar to chapter 112 of the Laws of Oregon for the year 1913. It is nevertheless apparent that the author of the plan was familiar only with industrial accident legislation providing for payments by the employer directly to the employé.

The other contentions of plaintiff have been duly considered, but it would unnecessarily prolong this opinion to discuss them.

Defendant contends that we are in error in holding that the burden of proof devolved on defendant to show that plaintiff's benefit under the act of 1913 was greater than the benefit provided by the plan. Defendant cites *Mercer v. Germania Insurance Company*, 171 Pac. 412. In that case plaintiff sued on a policy of fire insurance written in favor of her husband. The policy provided that it should be void if the interest of the insured were anything other than sole and unconditional ownership. Plaintiff contended that defendant was estopped to rely on the above provision in the policy, but her estoppel was pleaded only in the reply. It was held that she could not recover. The contract on which

she relied was inconsistent on its face with her right of recovery.

In the case at bar there is nothing in the contract which on its face precludes a recovery by plaintiff. There is no presumption that defendant had accepted the provisions of chapter 112 of the Laws of 1913, nor is such acceptance alleged in the complaint. Notwithstanding section 32 of article 9 of the plan, plaintiff was entitled *prima facie* to recover. Her rights under the act of 1913 were a defense which it devolved on defendant to allege and prove. These conclusions are supported by the opinion of Mr. Justice Moore in *Olds v. Olds*, 171 Pac. 1046, decided April 2, 1918. Plaintiff's complaint is sufficient, and her proof corresponds with her allegations.

Defendant relies on *Clark v. New England Co. (Mass.)* 118 N. E. 348. This case is based on a plan similar to that with which we are concerned. The Massachusetts court holds that, where the facts are in dispute, the finding of the committee thereon is conclusive. In the instant case the facts are not in dispute. The answer admits the facts on which plaintiff's right to recover is based. The reasoning of the Massachusetts court is in entire harmony with our former opinion, and the rule of construction applied conforms to the views above expressed.

[3] Defendant calls our attention to the fact that under our industrial accident statute (Laws of 1913, p. 199) in case plaintiff marries she is entitled to receive the equivalent of ten monthly allowances, or \$300. We think that this sum as well as the moneys which plaintiff has already received should be deducted from the sum of \$2,700 provided by the plan. Plaintiff admits in her petition that the sum of \$30 a month has been paid her since March 15, 1915. Plaintiff asks that the case be remanded, with directions to enter the judgment to which she is entitled.

The former opinion will therefore be modified. The judgment will be reversed, and the circuit court will be directed to enter a judgment in favor of plaintiff for \$1,320.

MCBRIDE, C. J., and MOORE and BEAN, JJ., concur.

(88 Or. 247)

WEST v. KERN.

(Supreme Court of Oregon. April 9, 1918.)

1. MASTER AND SERVANT §330(1)—MUNICIPAL CORPORATIONS §706(3) — INJURIES SUSTAINED IN AUTOMOBILE COLLISION — BURDEN OF PROOF.

Plaintiff suing for damages for injury sustained in a collision with an automobile has the burden of proving that it was negligently operated, and that defendant is responsible for the acts of the driver; and, unless he makes out a *prima facie* case on such propositions, he is not entitled to go to the jury.

2. MASTER AND SERVANT §330(1)—USE OF AUTOMOBILE FOR MASTER'S PURPOSES—PRESUMPTION.

Proof that defendant is the owner of the automobile which collided with plaintiff creates

a presumption from which the jury may infer that it was being used at the time of the accident for defendant's purposes, and that the driver was defendant's agent.

3. EVIDENCE §90—BURDEN OF PROOF—PURPOSE OF RULE.

The rules of law as to the burden of proof are aimed at establishing the material facts in the most convenient way, and in the administration of justice it is often wise to place the ultimate burden of proof on the party best able to bear it.

4. MASTER AND SERVANT §330(1)—INJURIES TO THIRD PERSON — NEGLIGENCE — BURDEN OF PROOF.

On plaintiff's proof of negligence and that the defendant owns the car which collided with him, the burden of proof shifts, as the defendant is best able to show that the car was driven by a stranger or on an errand having no connection with defendant's business, if that be the fact.

Department 1. Appeal from Circuit Court, Multnomah County; H. H. Belt, Judge.

On petition for rehearing. Denied.

For former opinion, see 171 Pac. 413.

Wilbur, Spencer & Beckett and F. C. Howell, attorneys of Portland, for appellant. Malarkey, Seabrook & Dibble, of Portland, for respondent.

MCCAMANT, J. Defendant's petition for a rehearing is directed chiefly to so much of the opinion of the court as holds that ownership of the car is sufficient to make out a *prima facie* case as to the responsibility of the owner for the acts of the driver of the car.

[1, 2] The opinion of Mr. Justice Harris is in entire harmony with that of Mr. Justice Bean in *Dalrymple v. Covey Motorcar Co.*, 66 Or. 541, 135 Pac. 91, 48 L. R. A. (N. S.) 424, on which defendant relies. In every case where a plaintiff sues to recover damages for injuries sustained in a collision with an automobile, the burden devolves on plaintiff to prove that the automobile was negligently operated, and that the defendant is responsible for the acts of the driver. Unless he makes out a *prima facie* case on these propositions, he is not entitled to go to the jury. The foregoing are the ultimate questions to be determined, but proof that defendant is the owner of the automobile creates a presumption from which the jury may infer that the automobile at the time of the accident was being used for the defendant's purposes, and that the driver was the defendant's agent. The opinion of Mr. Justice Bean in *Dalrymple v. Covey Motorcar Co.*, 66 Or. 541, 135 Pac. 91, 48 L. R. A. (N. S.) 424, logically supports the conclusions of Mr. Justice Harris. It is held in the *Dalrymple Case* that proof of ownership of the automobile is helpful in determining the ultimate question of responsibility for the acts of the driver. That only is helpful in determining an issue of fact which is evidence in support of the contention of one or the other of the parties. If plaintiff in the instant case offered any

evidence tending to show the responsibility of the defendant for the acts of Lopez and Lawrence R. Kern, he was entitled to go to the jury on this question.

[3] An automobile is a valuable piece of personal property. It is ordinarily driven by the owner or his agent. Proof of ownership therefore logically tends to prove responsibility of the owner for the acts of the party in charge. If, as is suggested in the petition, the automobile is stolen while the owner is away from home, the owner is able to prove this fact. The rules of law on the subject of the burden of proof have for their purpose the establishment of the material facts in the most convenient way. In the administration of justice it is often wise to place the ultimate burden of proof on the party best able to sustain it.

Where goods are intrusted to a carrier in good condition and delivered by it in bad condition, the burden is on the carrier to show that the injury was caused by some force or agency for which the carrier is not responsible. *Wells v. Great Northern Co.*, 59 Or. 165, 174, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A. (N. S.) 818, 825. Where a debtor transfers his property to a near relative to the disadvantage of his creditors the burden devolves on the grantee to show that the transfer was made in good faith and for a valuable consideration. *Marks v. Crow*, 14 Or. 382, 395, 396, 13 Pac. 55; *Mendenhall v. Elwert*, 36 Or. 375, 384, 52 Pac. 22, 59 Pac. 805; *Wright v. Craig*, 40 Or. 191, 195, 66 Pac. 807. Proof that defendant owns a railroad creates a presumption that defendant is operating the railroad. *Peabody v. Oregon Railway Co.*, 21 Or. 121, 134, 26 Pac. 1053, 12 L. R. A. 823. In all these cases the party most familiar with the facts and best able to furnish the evidence is charged ultimately with the burden of proof.

A citizen who is injured by an automobile negligently operated is usually uninformed as to the party operating the car. If, in maintaining the burden of proof as to the owner's responsibility, he were denied the benefit of the presumption arising from the ownership of the car, in many cases he would fail, although under the facts entitled to prevail.

It is usually possible for the party injured to prove the ownership of the car by which he is injured. The car is required to carry a conspicuous number plate. *Laws of 1917*, page 264. By the aid of this number the ownership of the car may be determined from the public records. *Laws of 1917*, pp. 261, 262.

[4] If it be held that on proof of negligence and proof that defendant owns the car the burden of proof shifts, the right of a plaintiff with a meritorious case is protected. On the other hand, the defendant is well able to show that the car was driven by a stranger or on an errand having no connection with defendant's business if such be the fact. The

rule announced in the former opinion therefore tends to the convenient ascertainment of all the facts material on the question of liability.

It is true, as contended by defendant, that juries are often influenced by sympathy for a plaintiff who has sustained a personal injury, and that they do not always weigh evidence discriminatingly in personal injury cases. The remedy for this situation is to be found in a better appreciation by jurors of the obligations of their oath and of the importance of their functions. The rules of law cannot be based on the assumption that jurors will disregard their duty.

In the respects above noted and in the other respects in which it is attacked we are satisfied of the soundness of the former opinion, and it is adhered to.

McBRIDE, C. J., and BENSON, and HARRIS, JJ., concur.

(88 Or. 321)

HENDRY v. HENDRY.

(Supreme Court of Oregon. April 9, 1918.)

DIVORCE \Leftrightarrow 184(10)—DECREE BASED ON CONTRADICTORY TESTIMONY.

As trial judge who had witnesses before him was better able to appraise the value of the testimony than the court on appeal, decree in divorce suit will be affirmed, where court on appeal is of opinion that evidence sustains decree.

Department 2. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Divorce suit by Elizabeth Hendry against E. J. Hendry. Decree for plaintiff, and defendant appeals. Affirmed.

J. J. Fitzgerald, of Portland (S. M. Johnson and John F. Logan, both of Portland, on the brief), for appellant. Waldemar Seton, of Portland (Seton & Strahan, of Portland, on the brief), for respondent.

McBRIDE, C. J. This is a suit for divorce. There was a decree for plaintiff, and defendant appeals.

In these cases a recital of the testimony is worse than valueless, serving only to spread upon the record the details of domestic discord, of which the least said the better. The testimony is contradictory, and as the trial judge had the witnesses before him, he was much better able to appraise the value of the testimony than we. Upon the whole, we are of the opinion that the evidence sustains the decree, and it is therefore affirmed.

MOORE, McCAMANT, and BEAN, JJ., concur.

(88 Or. 261)

SIVERSON v. CLANTON et al.

(Supreme Court of Oregon. April 9, 1918.)

1. PAYMENT \Leftrightarrow 89(1)—PAYMENT UNDER DURESS—RECOVERY—FORM OF ACTION.

The action for money had and received, the old remedy for recovering back a payment made

under duress is an equitable action, and proceeds on equitable principles.

2. PAYMENT \S 39(4) — DURESS — RECOVERY — COMPLAINT.

L. O. L. \S 67, requires the complaint to contain a plain and concise statement of facts constituting the cause of action and a demand for the relief claimed. L. O. L. \S 5236, makes it unlawful to take fish or salmon in any waters within the state's jurisdiction except during a prescribed open season; section 5268 makes a violation thereof a misdemeanor; section 5321e makes any fish trap used during a closed season subject to forfeiture, and requires the fish warden to seize it, and the prosecuting attorney to bring action to have it condemned and sold after summons to the owner. A complaint by a plaintiff, whose fishing during the closed season had made his fish trap subject to forfeiture, alleged that the defendant, the master fish warden of the state, without his knowledge or consent seized plaintiff's fish trap, valued at \$2,000, threatened to sell it before condemnation, and exacted \$1,000 as a condition precedent to its release to plaintiff. Held, that the complaint stated a cause of action for the recovery of money paid under compulsion or duress, as the defendant's proceeding was not warranted by the law.

3. PLEADING \S 34(1) — INITIATORY PLEADING — CONSTRUCTION.

An initiatory pleading, not challenged by demurrer, should be construed liberally.

4. PLEADING \S 48 — COMPLAINT — SUFFICIENCY.

A complaint, alleging facts that bring the case clearly within the provisions of the law by which it is governed, sufficiently states a cause of action, which, if properly substantiated, entitles the plaintiff to the relief sought.

5. TRIAL \S 391 — FINDINGS OF FACT — ISSUES.

Where the findings of fact originally made conform to the averments of the complaint, it is unnecessary to find upon any other issues.

6. INTEREST \S 39(3) — JUDGMENT — STATUTE.

In an action to recover a payment exacted as an unwarranted condition precedent to the release of plaintiff's pound net or fish trap by defendant, as the master fish warden of the state, wherein the defendant, in good faith, denied plaintiff's right of recovery, interest would not be allowed on the recovery from the date when the payment was made on defendant's demand, but only on the plaintiff's claim when liquidated by judgment.

In Banc. Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

On petition for rehearing. Denied.

For former opinion, see 170 Pac. 933.

George M. Brown, Atty. Gen., I. H. Van Winkle, Asst. Atty. Gen., and C. W. Mullins, Dist. Atty., of Portland, for appellants. Anderson & Eriskson, of Astoria, for respondent.

MOORE, J. Attention is called in a petition for a rehearing to the fact that in the former opinion herein it was taken for granted that no reply had been filed, when the abstract shows that by stipulation of the parties the averments of new matter in the answer were deemed denied. Based upon this mistake, it is argued by appellants' counsel that the allegations of the complaint are not sufficient to constitute a cause of action, and that the findings of fact as made by the court

do not support the judgment which was rendered. The complaint reads:

"(1) That on and prior to the 12th day of September, 1912, the plaintiff was the owner of and in possession of, a certain pound net fish trap, in the waters of the Columbia river, in the vicinity of Woody Island, and about 1,000 feet from the shorelands of said river, and within the boundaries of Clatsop county, state of Oregon, which said pound net fish trap at that time was marked 'No. 1, Ore.' and No. —, U. S. and was and is of the value of \$2,000.

"(2) That on or about the — day of September, 1912, the defendants, without the knowledge or consent of the plaintiff and against his will, took, converted, and appropriated said pound net fish trap to their own use, and deprived the plaintiff of his title thereto and of his possession thereof; that said defendants withheld the possession of said pound net fish trap from the plaintiff, during the period from September —, 1912, until September 12, 1912, and thereby deprived the plaintiff of his right to maintain and operate said fish trap for the purposes of catching salmon fish, to the injury of the plaintiff in the sum of \$300.

"That said defendants, although the plaintiff frequently demanded that they return said fish trap to the plaintiff, refused and neglected to return the same to him, unless he pay them the sum of \$1,000; that in order to secure possession of said trap, said plaintiff was compelled to pay said sum of \$1,000 to said defendants; that said defendants threatened to sell said trap to other parties than the plaintiff, unless the plaintiff paid said sum, and they did offer the same for sale to other persons than the plaintiff, and thereupon the plaintiff, in order to operate said trap, paid said sum of \$1,000.

"Wherefore, by reason of the premises, plaintiff demands judgment against the defendants in the sum of \$300, and the further sum of \$1,000, with interest thereon from September 12, 1912, until paid, and for his costs and disbursements herein."

Based upon the testimony received at the trial, findings of fact were made to the effect:

(1) That on and prior to September 12, 1912, the plaintiff was the owner and in the possession of a pound net fish trap, located and marked as alleged in the complaint.

(2) That the trap was of the value of at least \$2,000.

(3) That on and prior to September 12, 1912, the defendant R. E. Clanton was master fish warden of the state of Oregon, and the defendant Frank Sweet was his deputy for the Columbia river district.

(4) That on or about September 8, 1912, the defendants, without the knowledge or consent of the plaintiff, and against his will, took possession of the fish trap and withheld it, thereby preventing the plaintiff from operating the trap.

(5) That the possession and operation of the trap during the time mentioned was of great value to the plaintiff; that large quantities of fish abounded in the waters in the immediate vicinity of the trap in September, 1912.

(6) That on and prior to September 12, 1912, the defendant R. E. Clanton threatened to sell the fish trap, and offered it for sale to persons other than the plaintiff; that

Clanton would have sold the appliance to persons other than the plaintiff, unless the latter paid that defendant the sum of \$1,000 therefor.

(7) That persons, other than the plaintiff, had submitted bids to Clanton for the fish trap.

(8) That in order to prevent the sale of the trap to persons other than the plaintiff, and to secure possession thereof so as to operate it, the plaintiff was compelled to, and on September 12, 1912, did, pay Clanton the sum of \$1,000.

(9) That prior to September 12, 1912, Clanton offered to sell the trap to persons other than the plaintiff, and had received from them bids therefor; that Clanton informed the plaintiff that unless he paid the sum of \$1,000 therefor, the trap would be sold to other persons, and that defendant would have sold the same unless the plaintiff paid him the sum of \$1,000.

(10) And that because of the acts of the defendant Clanton, the plaintiff was damaged in the sum of \$1,000.

As conclusions of law the court also found that Clanton deprived the plaintiff of the fish trap without due process of law, and converted the same to his own use; that the sum of \$1,000 so paid by the plaintiff was not voluntary, but was made under duress of his property; and that the plaintiff was entitled to judgment against Clanton in the sum of \$1,000, with interest at the rate of 6 per cent. per annum from September 12, 1912, until paid, and for his costs and disbursements herein. Judgment was rendered in accordance therewith July 17, 1916.

The defendants on September 7, 1916, requested the court to make other findings all of which were denied, except as follows:

"(1) That on or about the 8th day of September, 1912, the plaintiff was unlawfully operating and causing the operation of the fish trap mentioned in plaintiff's amended complaint, and thereupon the defendant Frank Sweet took possession of said trap and transferred the possession thereof to the defendant R. E. Clanton.

"(2) That thereafter, to wit, on the 9th day of September, 1912, a complaint was sworn to before one P. J. Goodman, the justice of the peace for Astoria precinct, Clatsop county, state of Oregon, accusing and charging the plaintiff with operating the said fish trap during the closed season of said year; that thereafter, to wit, on or about the 9th day of September, 1912, said warrant was served upon the plaintiff herein, and the plaintiff appeared on said day in said justice's court and entered a plea of guilty to said charge, and thereafter, to wit, on said 9th day of September, 1912, judgment was entered against the plaintiff, adjudging that he be fined in the sum of \$50 and costs, which judgment was entered and docketed in said court, and which judgment the plaintiff then and there paid."

[1] The first question to be considered is whether or not the complaint states facts sufficient to constitute a cause of action for an alleged duress of personal property. In a note to the case of *Mayor of Baltimore v. Lefferman*, 4 Gill (Md.) 425, 45 Am. Dec. 145,

154, in speaking of the ancient remedy that was invoked in such instance, it is observed:

"The action for money had and received, which is the form in which a party must sue to recover back a payment which he has made by compulsion is an 'equitable action' (*Moses v. Macfarlane*, 2 Burr. 1009); and it proceeds on equitable principles."

To the same effect is the case of *Alston v. Durant*, 2 Strob. (S. C.) 257, 49 Am. Dec. 596, where the Supreme Court of South Carolina held that an action of assumpsit would lie for money paid by the plaintiff for the return of his slave, whom the defendant, as sheriff, refused to surrender, except upon the receipt of a sum in excess of his lawful fees.

[2] In Oregon the distinction between forms of actions at law has been abolished, and only one form of such action is now permissible. L. O. L. §§ 1, 64. The complaint is required to contain a plain and concise statement of facts constituting the cause of action, without unnecessary repetition, and a demand for the relief which the plaintiff claims. Id. § 67. Section 2 of an act filed in the office of the secretary of state February 28, 1901, makes it unlawful to take or fish for salmon in any of the rivers or tributaries in Oregon, or in any waters over which the state has concurrent jurisdiction, except during prescribed open seasons. Gen. Laws Or. 1901, p. 328; section 5236, L. O. L. Section 15 of that act declares that any person fishing for, taking, or catching salmon in violation thereof shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined, etc. Section 51 of that statute provides generally that any fish trap used in catching salmon by any persons, or left in a condition to take such fish during a closed season, shall be forfeited. It is made the duty of the fish warden to seize such appliance, and thereupon the prosecuting attorney of the proper district is required to institute an action in the circuit court to have such appliance condemned and sold. A summons to be issued in such action requires the owner of the trap, if known, to appear within 15 days from the service of such process. If, at the trial a judgment of condemnation is given, an execution is to be issued as in ordinary actions, and the appliance so seized is to be sold to the highest bidder for cash. L. O. L. § 5321.

In the case at bar no judgment was given, nor was any action commenced to condemn the fish trap. By the plaintiff's plea of guilty, however, to the charge of unlawfully using such means of catching salmon during the closed season, he thereby rendered himself liable to forfeit all his right and title in and to the property so employed for an illegal purpose. It will be remembered the trial court found that the fish trap was of the value of at least \$2,000. The defendant Clanton, if he was authorized without a warrant to seize the appliance, had no right to compromise the offense by accepting only one-half of the value of the trap. He did not

possess any pardoning power. He was not authorized to surrender the appliance to any person, except to the highest bidder for cash upon a valid sale thereof by the sheriff, pursuant to an execution issued upon the judgment of condemnation. *Nicklas v. Rathburn*, 69 Or. 483, 139 Pac. 567. Instead of notifying the prosecuting attorney whose duty it was to institute an action to condemn the trap, the master fish warden assumed to act as the court in rendering a judgment to that effect, and also as sheriff to enforce the execution issued upon such final determination, except that Clanton threatened to sell the appliance to any person who would purchase it from him, and finally disposed of it to the plaintiff for only one-half of its value. That Clanton acted from pure motives is unquestioned, and he undoubtedly thought he was performing his official duty in protecting the salmon by undertaking in such summary manner to enforce the provisions of the statute. In a note to the case of *Harris v. Cary*, 112 Va. 362, 71 S. E. 551, Ann. Cas. 1913A, 1351, 1354, it is said:

"It is well settled that if a person has in his possession personalty belonging to another, and refuses to deliver the property to the owner unless he is paid a sum of money which he has no right to receive, and, in order to obtain possession of his property, the owner pays the sum demanded, the payment is made under compulsion, and may be recovered."

[3, 4] The complaint herein, stripped of superfluous verbiage, practically charges the exaction of a sum of money as a condition precedent to the release of property under conditions similar to those specified in the excerpt last quoted. When a complaint alleges facts that bring the case clearly within the provisions of the law by which it is governed, the pleading sufficiently states a cause which, if properly substantiated, entitles the plaintiff to the relief sought. The initiatory pleading, not having been challenged by a demurrer, should be construed liberally, and thus interpreted it is sufficient.

[5] The findings of fact, originally made, conform to the averments of the complaint, thereby rendering it unnecessary to find upon any other issues. *Lewis v. First Nat. Bank*, 46 Or. 182, 78 Pac. 990; *Freeman v. Trummer*, 50 Or. 287, 91 Pac. 1077; *Naylor v. McCulloch, Mayor*, 54 Or. 305, 103 Pac. 68; *Wells v. Great N. Ry. Co.*, 59 Or. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A. (N. S.) 818, 825.

[6] The judgment rendered herein July 17, 1916, awarded the plaintiff a recovery of \$1,000, with interest thereon at the rate of 6 per cent. per annum from September 12, 1912, the time when that sum was paid upon Clanton's demand. Particular attention was not called to this part of the judgment in the brief originally submitted by appellant's counsel, and for that reason the matter was overlooked. In *Baker County v. Huntington*,

48 Or. 593, 603, 87 Pac. 1036, 89 Pac. 144, it was said:

"When the right to recover in an action is in good faith denied, interest will not be allowed on the demand prior to its liquidation by judgment."

To the same effect are the cases of *Sargent v. Am. Bank & Trust Co.*, 80 Or. 16, 154 Pac. 759, 156 Pac. 431; *Carnahan Mfg. Co. v. Beebe-Bowles Co.*, 80 Or. 124, 156 Pac. 584; *Holtz v. Olds*, 84 Or. 567, 164 Pac. 583, 1184; *City of Seaside v. Ore. Surety & C. Co.*, 171 Pac. 396. The defense herein was interposed in good faith; and, this being so, no interest was permissible until the judgment was rendered. A correction will be made in this particular, thereby allowing the appellant his costs and disbursements upon this appeal. In all other respects the former judgment is adhered to, and the petition for a rehearing is denied.

(88 Or. 278)

FURUSET et al. v. AABY et al.

(Supreme Court of Oregon. April 9, 1918.)

REFORMATION OF INSTRUMENTS §43 — MISTAKE—BURDEN OF PROOF.

In an action to reform a deed, the burden of proof is on grantor to substantiate his complaint and to show that there was a mutual mistake, and that the conveyance executed by him to grantee was not in accordance with the agreement of the parties.

In Banc. Appeal from Circuit Court, Lane County; F. M. Calkins, Judge.

On petition for rehearing. Former opinion (170 Pac. 1180), adhered to, and motion for rehearing denied.

Charles A. Hardy, of Eugene, and Oscar Furuset, of Portland, for appellants. H. E. Slattery and W. G. Martin, both of Eugene, for respondents.

BEAN, J. Upon a petition for rehearing we have again carefully read all the evidence in the case, the statement of which is found in the former opinion. 170 Pac. 1180. The only question involved is one of fact as to whether the minds of the contracting parties met, constituting a contract other than as expressed in the deed of conveyance which plaintiff seeks to have reformed. The cause of the misunderstanding appears to be that plaintiff, Mr. Furuset, had his conversation largely with Mr. Aaby, the husband of Maria R. Aaby, the owner of the land described in the conveyances of which plaintiff complains. There is no testimony whatever showing that Mr. Aaby was the authorized agent of Mrs. Aaby. When Mrs. Aaby appeared upon the scene, the evidence of plaintiff himself upon cross-examination (Transcript of Test. p. 16) tends to show that she complained of the first draft of the deed tendered by plaintiff to her on account of the title. In answer to the question. "What did

Mrs. Aaby say to Mr. Wheeler about the abstract of title in your presence?" he stated:

"Then when we had talked to Mr. Wheeler, she bobbed up and said something about the incumbrances and all those things, and Mr. Aaby said to her, 'Everything is all right.'"

When the parties went to the office of Mr. A. E. Wheeler, an attorney of 35 years' experience in conveyancing, for the purpose of having the first draft of the deed corrected, according to the testimony of Mr. Wheeler, who is an entirely disinterested witness, Mrs. Aaby said repeatedly, "I want to know that I am getting a good title and all clear." The evidence on her part shows that she insisted that she did not want property with a "mortgage" on it, as she termed the liens which the plaintiff declares she assumed and agreed to pay. The burden of proof is on the plaintiff to substantiate his complaint and to show that there was a mutual mistake, and that the conveyance executed by plaintiff to defendant Mrs. Aaby was not in accordance with the agreement of the parties. He has not shown by a preponderance of the evidence that Mrs. Aaby agreed to assume the liens on the property deeded to her in making the exchange.

The former opinion is adhered to, and the motion for rehearing is denied.

McBRIDE, C. J., and BENSON and BURNETT, JJ., concur.

(88 Or. 596)

CARTWRIGHT et ux. v. OREGON ELECTRIC RY. CO.*

(Supreme Court of Oregon. April 9, 1918.)

1. SPECIFIC PERFORMANCE \S 74—RIGHT TO REMEDY—EXISTENCE OF OTHER REMEDY.

Where plaintiffs granted right of way in consideration of railway's agreement to build a dike which the railway failed to build as specified in the contract, plaintiffs were not entitled to specific performance, since they could have had another build the dike and could recover as damages the cost thereof.

2. SPECIFIC PERFORMANCE \S 128(1)—RETAINING JURISDICTION—DAMAGES.

Where existence of adequate remedy at law precluded jurisdiction in court of equity of suit for specific performance, the question of damages prayed for in such suit could not be considered.

Department 2. Appeal from Circuit Court, Linn County; Wm. Galloway, Judge.

Suit by John R. Cartwright and wife against the Oregon Electric Railway Company. Decree for defendant, and plaintiffs appeal. Affirmed.

This is a suit to enforce the specific performance of a contract which is set out in full in the complaint. Its terms so far as they are of interest here are as follows:

"Whereas, the parties of the first part are the owners of certain lands lying in the William A. Forgey donation land claim, lying in section sixteen (16) and twenty-one (21) in township fifteen (15) south of range four (4)

west of the Willamette meridian in Linn county, Oregon, and the said parties of the first part have this day sold and conveyed by deed bearing even date herewith, a right of way to the said party of the second part over and across the said lands, reference to which said deed is hereby made for greater particularity: and whereas, it is the intention of the said party of the second part to build, construct and maintain over and along the said right of way so granted, an electric railway line and in constructing the same to excavate borrow pits along the said route upon the lands described in the said deed, for the purpose of building an embankment and elevating the grade of the said railway line above the natural surface of the said lands: Now therefore, in consideration of the said conveyance and in consideration of the sum of one dollar (\$1.00) receipt whereof is hereby acknowledged, paid by the said parties each to the other, it is agreed, that the said party of the second part shall and will build and construct a pile dike not less than 1,120 feet in length, across the said right of way at a convenient place near the north bank of the Willamette river upon the lands of the parties of the first part, and fill the same with earth and stones in such a manner as to protect, as far as may be, the lands of the parties of the first part from the back flow of the waters of the Willamette river through the said borrow pits; and also build and construct a second pile dike of not less than 160 feet long, at a convenient distance down stream and westerly from the first-mentioned dike, and fill the same with brush and stones as a further protection to the lands of the parties of the first part from the back flow of the waters of the Willamette river. The location of the said right of way, borrow pits and dikes are shown upon the blueprint hereto attached and made a part of this contract. And the parties of the first part give and grant to the party of the second part the right and privilege of making use of said lands so far as may be necessary for the construction of said dikes. It is agreed that the party of the second part and its successors or assigns shall maintain the said dikes in a reasonably good and substantial manner and condition to accomplish its purposes above mentioned."

The complaint alleges that the agreement to construct the dikes mentioned was a part of the consideration to be paid by the railroad company for the land included in the right of way described in the deed; that defendant failed to construct all of the longer dike mentioned in the contract, in that it did not extend it into the river as indicated on the blueprint referred to in the written agreement; and that it has failed and refused to construct any part of the shorter dike therein described. These averments are followed by detailed descriptions of the land, its value, and the injuries already suffered by the failure of defendant to fully perform its contract. The prayer also asks for a decree, compelling defendant to extend the 1,120-foot dike 100 feet into the Willamette river, to construct the 160-foot dike extending into the river, requiring defendant to maintain said structures in a reasonable way, and a judgment in the sum of \$10,000 for the damages already suffered.

After denying any failure to perform its contract, the answer alleges that the Willamette river is a navigable stream under

control of the United States government engineers; that after the execution of the contract and in obedience to statutory requirements it applied to the proper authorities for permission to extend the dikes into the river, which was refused; that thereafter the United States engineers outlined to defendant a plan which met their approval, and which would permit the defendant to construct a dike along the bank on plaintiff's land so as to protect the bank and at the same time protect the channels of the river; that defendant in carrying out this plan constructed 1,591 feet of dike along the bank, substantially complying with the contract; and that the building of the shorter dike was prevented by the refusal of the United States engineers to grant a permit so to do. A second affirmative defense pleads the prior filing of an action at law between the same parties, involving the same subject-matter, which action is still pending. A reply having been filed joining issue on the affirmative defenses, a trial was had, resulting in a decree for defendant, and plaintiff appeals.

A. C. Woodcock, of Eugene, and J. K. Weatherford, of Albany (A. C. Woodcock, of Eugene, and Weatherford & Weatherford, of Albany, on the brief), for appellants. Charles H. Carey, of Portland (Carey & Kerr, of Portland, Gale S. Hill, of Albany, and Omar C. Spencer, of Portland, on the briefs), for respondent.

BENSON, J. (after stating the facts as above). The substance of the whole case may be briefly stated thus: Plaintiff wants about 100 feet of the longer dike and about all of the shorter dike to extend into the river in such a manner as to form wing dams for deflecting the current toward the opposite bank, and also seeks a decree compelling the defendant to perpetually maintain such structures. In addition to this he seeks damages for the injury wrought by the failure to so construct them.

[1] Defendant insists that plaintiff has not made a case calling for the interposition of a court of equity, and we think that this contention is fully sustained by the record and the authorities. It is to be noted at the outset that, while the longer dike crosses the lands of defendant included in the right of way, that portion of it which plaintiff now seeks to have built, and all of the shorter dike, are by the terms of the agreement to be constructed entirely upon the lands of the plaintiff; and there is nothing to prevent him from going ahead, completing the wing dams, and prosecuting an action at law for damages, which, so far as can be discovered from the record before us, furnishes a complete remedy. An eminent author says:

"The general rule has long been settled, after a period of conflict and uncertainty in the early cases, that contracts for building and construction, and contracts to make repairs, will not be enforced in specie on account of inconvenience in enforcing a decree by the process of attachment for contempt, when numerous questions must usually arise under the decree in such a case as to whether there has been substantial performance, whether defective performance may be excused, what compensation should be made for the deficiency, and the like. Moreover, if the building is to be done on the plaintiff's land, the remedy at law is usually adequate, since he may do the work himself and sue at law for the cost." 6 Pomeroy, *Equity Jurisprudence*, § 760.

In *Oregonian Ry. Co. Lim. v. O. R. & N. Co.* (C. C.) 37 Fed. 733, Deady, J., says:

"As a general rule, a contract to build or repair will not be specifically enforced by a court of equity. It is said that, if one won't build, another will; and if there is any loss sustained, the remedy is at law, for damages. And this is especially so as to contracts like the covenant in the present lease, to repair during a period of many years."

In the case of *Dove et al. v. Com. Tit. Ins. Co. et al.*, 6 Pa. Dist. R. 263, the court says:

"It appears to us that if there was any contractual relation between the Commonwealth Title Insurance & Trust Company and Dove, it was only for the completion of the houses, and if the company refused to complete the houses under any contract it made with Dove, there was a complete and adequate remedy at law, and equity cannot be invoked to compel specific performance of a contract on the part of the company to complete the houses. All that Dove had to do was to do the work claimed to be necessary to complete the houses and sue the company, whose responsibility is not questioned, upon its promise to pay for the work."

In *Leonard v. Board of Directors of Plum Bayou Levee District*, 79 Ark. 42, 94 S. W. 922, 9 Ann. Cas. 159, the court says:

"This suit is no more nor less than one to require of appellant the specific performance of his executory contract to construct the levee. The remedy at law is complete and adequate, and a court of equity is without jurisdiction of the subject-matter. Equity will not decree specific performance of an executory contract to do work, for the obvious reason that there is no method by which its decree could be enforced."

We might continue citing and quoting from a long line of authorities all to the same effect, but do not deem it necessary. Our attention has not been called to any cases which are inconsistent with the doctrine announced in the above quotations.

[2] Since equity has no jurisdiction of the suit, the question of damages must be disposed of in like manner. *Oregon-Washington R. & N. Co. v. Reed*, 169 Pac. 342.

The decree of the lower court is affirmed.

McBRIDE, C. J., and MOORE and McCAMANT, JJ., concur.

(100 Wash. 651)

ROBINSON et al. v. AGNEW-COPPING
REALTY & INVESTMENT CO.
(No. 14328.)

(Supreme Court of Washington. April 3, 1918.)

FRAUDULENT CONVEYANCES — 95(1)—VOLUN-
TARY CONVEYANCE BY HUSBAND AND WIFE
—EXISTING EQUITIES.

Where lessees A. and W. at the time a corporation was formed by A. and others were in default for rent, and A., who was solvent, turned over all his property to the corporation and received shares of stock, and transferred the same to his wife without consideration, such stock was subject to garnishment after execution had been returned unsatisfied on judgment procured by lessors against A. and wife for rent, whether or not the stock became separate or community property, since the lessors, at the time of the transfer, had existing equities.

Department 2. Appeal from Superior Court, Lewis County; E. M. Card, Judge.

Action by David Robinson and others against C. R. Wilson and others, in which plaintiffs recovered judgment, and in which the Agnew-Copping Realty & Investment Company was garnished after execution was returned unsatisfied. From judgment rendered in garnishment proceedings, garnishee appeals. Affirmed.

C. D. Cunningham and George Dysart, both of Centralla, for appellant. Forney & Ponder, of Chehalis, for respondents.

MOUNT, J. This appeal is from a judgment in a garnishment proceeding. The trial court adjudged that 247 shares of stock of the Agnew-Copping Realty & Investment Company, a corporation, were the community property of S. A. Agnew and wife, and were subject to be sold to satisfy a judgment in favor of the respondents against Agnew and wife.

The facts are substantially as follows: In the year 1914, Agnew and one Wilson entered into a lease with respondents for what is known as the Wilson Hotel, in Centralla. This lease was for a period of five years, commencing in November, 1914, at a monthly rental of \$400 for the first year, and a monthly rental of \$425 for the succeeding years. Agnew and Wilson occupied the hotel under the lease, and paid the rent until February, 1916, when payment was discontinued. In December of 1915, Agnew and wife and one Copping formed the corporation which is the appellant in this case, the Agnew-Copping Realty & Investment Company, with a capital stock of 250 shares of the par value of \$100 each. At the time this company was formed, Agnew was solvent. He owned separate property of the value of about \$25,000. This property was all turned over to the Agnew-Copping Realty & Investment Company in payment for 248 shares of the stock of the corporation. These shares of stock were issued to Mr. Agnew. The other 2 shares of stock were held, one by Mrs. Agnew, and the

other by Mr. Copping. Thereupon Mr. Agnew gave 247 shares of the stock to Mrs. Agnew. This stock was turned over by Mr. Agnew to his wife without any consideration. Before the Agnew-Copping Realty & Investment Company was formed, the Wilson Hotel was financially embarrassed, and the lessees were having trouble with the respondents concerning the leased premises. In October, 1916, respondents recovered a judgment for \$4,250, on account of rent, against Agnew and wife, and Wilson and wife. On October 11th of the same year, an execution was issued upon that judgment, and returned wholly unsatisfied. Thereafter a writ of garnishment was served upon the Agnew-Copping Realty & Investment Company. It was claimed that the stock of that company standing in the name of Mrs. Agnew was community property of Agnew and wife and subject to execution as such. The trial court so found, and this appeal followed.

The appellant insists that because Agnew was the owner of the stock as his separate property at the time it was issued to him he had a right to give it to his wife, and that the gift to his wife made the stock her separate property, and therefore not subject to the debts of the community or the separate debt of Mr. Agnew.

We think this case is controlled by the rule in *Sallaske v. Fletcher*, 73 Wash. 593, 132 Pac. 648, 47 L. R. A. (N. S.) 320, Ann. Cas. 1914D, 760. The facts in that case are very similar to the undisputed facts in the case before us; the only difference being that the plaintiff's husband in that case was adjudged a voluntary bankrupt soon after the original judgment was rendered. In that case it was argued that there was no existing equity at the time of the transfer of the property of the appellant to his wife. We there said:

"The only question involved in this appeal is, Did the respondents Fletcher and Stebbins have an existing equity by reason of the lease at the time the conveyance was made to the appellant on May 9, 1911, so that the conveyance was as to them fraudulent and void?"

Then, after discussing the question, we concluded:

"It is obvious that under our statute the motive actuating the voluntary conveyance to the other spouse is immaterial. Even assuming, therefore, as counsel would have us assume, that existing debts and existing equities are synonymous terms, this statute would be in effect the same as those statutes directed against fraudulent conveyances generally under which, without regard to the actual motive of the donor, voluntary conveyances are universally held void as to existing creditors the collection of whose debts they hinder or delay. Under such statutes, the act of voluntary conveyance itself is conclusive evidence of fraud. The intent is presumed from the act." *Bump, Fraudulent Conveyances* (4th Ed.) § 242."

We there held that community property conveyed to the wife was void as to existing equities, and was subject to a community debt.

The appellant here argues that, because the court made no finding that the stock was conveyed by Agnew to his wife in fraud of creditors, we must presume that the court did not find that the property had been conveyed in fraud of the rights of creditors. It is true the court made no finding of fraud, but he found that the transfer of the stock by Mr. Agnew to his wife made the property, under the circumstances, community property, because it was acquired by the wife subsequent to the marriage. Whether the court was strictly correct upon this question we need not determine, for it is plain that the stock was transferred by Agnew to his wife in order to avoid any liability upon the lawsuit which he then saw was imminent. He conveyed the stock to his wife without any consideration. Under the Sallaske Case, supra, the property conveyed was clearly subject to the separate debt of Mr. Agnew and of the community. The respondents, at that time, had existing equities, and we think it is apparent from the record that the transfer of this stock was solely for the purpose of avoiding these equities and placing the property of Mr. Agnew where it could not be reached by execution. We are satisfied, therefore, that the trial court properly subjected this stock to the payment of the judgment.

The order appealed from is therefore affirmed.

ELLIS, C. J., and HOLCOMB and CHADWICK, JJ., concur.

(100 Wash. 655)

ROBINSON et al. v. RICHARDS et al.
(No. 14351.)

(Supreme Court of Washington. April 3, 1918.)

FRAUDULENT CONVEYANCES — 159(1) —
KNOWLEDGE OF BUYER.

Where lessee of hotel after judgment was procured against him on account of rent made a sale of furniture in hotel so that lessors could not realize upon judgment, the sale was not a good-faith purchase, where the buyer had the situation explained to him and the furniture was subject to the judgment in garnishment proceedings after execution had been returned unsatisfied.

Department 2. Appeal from Superior Court, Lewis County; E. M. Card, Judge.

Action by David Robinson and others against C. R. Wilson and others, in which plaintiffs had judgment and in which W. B. Richards and others were garnished after execution returned unsatisfied. From judgment rendered in the garnishee proceedings, plaintiffs appeal. Reversed and remanded, with instructions.

Forney & Ponder, of Chehalis, for appellants. Geo. Dysart and C. D. Cunningham, both of Centralia, for respondents.

MOUNT, J. This appeal is from an order of the lower court releasing a garnishee defendant. The garnishee defendant is one who was garnished in the case of Robinson et al. v. Agnew-Copping Realty & Investment Co., referred to in 171 Pac. 1057, just decided, and tried upon the same record. In October, 1916, after a judgment had been rendered in favor of the appellants and against Wilson and wife and Agnew and wife and the Hotel Wilson, Incorporated, Mr. Agnew, acting for the Hotel Wilson, Incorporated, sold all the furniture in the hotel to the respondent W. B. Richards for the price of \$4,000. The trial court found that the sale was a bona fide sale, and therefore dismissed the writ of garnishment. The judgment creditors have appealed.

It appears that Mr. Richards, at the time in question, was engaged in running a pool hall. Mr. Agnew, after the judgment was obtained against him and his wife and the Hotel Wilson, agreed to sell this furniture to Mr. Richards for \$4,000. Mr. Richards went to the bank with Mr. Agnew, who borrowed the money from the bank to pay for the furniture. Mr. Richards signed the note, but did not know its terms, and did not hear the conversation between Mr. Agnew and the bank cashier concerning the loan. Mr. Agnew made all the arrangements for borrowing the money and for securing the payment of the note. Mr. Agnew and his wife, while they did not sign the note, guaranteed its payment by separate writing. Mr. Agnew testifies that he received the money from the bank upon Mr. Richards' note, and that he paid the debts of the Wilson Hotel Company, of which he was the principal creditor. While the trial court concluded that Mr. Richards had purchased the furniture in good faith, we are convinced, from a reading of the record, that the transaction was wholly fraudulent. It is true that the record shows that Mr. Richards was peculiar in the manner of his doing business, that he did not do business through the banks, and that he did not keep his money in the banks. He was well-to-do. Mr. Richards, of course, knew of the lawsuit which was pending between the appellants and Mr. Agnew. They were intimate friends of long standing. He testifies that he did not know of the judgment which had been obtained a few days before. He was not acquainted with the character of the furniture. Mr. Agnew made the arrangement at the bank for the money with which Mr. Richards could pay for the furniture, although Mr. Richards, at that time, had money of his own which he could have used for that purpose. Mr. Agnew and his wife guaranteed the payment of the note upon which the money was procured for the purchase of the furniture. We are satisfied that Mr. Agnew, at the time

he made the sale of the furniture, was endeavoring to cover up his property so that these appellants could not realize upon their judgment against him; and we are also satisfied that he explained the situation fully to Mr. Richards. It was natural that he should do so, even though the testimony does not expressly show it. We are of the opinion, therefore that the trial court erred in concluding that the sale was a good-faith transfer.

The judgment of the trial court is therefore reversed, and the cause remanded, with instruction to the lower court to enter a judgment subjecting this property to the judgment of the appellants against Agnew.

ELLIS, C. J., and HOLCOMB and CHADWICK, JJ., concur.

(178 Cal. 10)

IRWIN v. GOLDEN STATE AUTO TOUR CO. (L. A. 4156.)

(Supreme Court of California. March 28, 1918.)

1. NEGLIGENCE — 93(1) — IMPUTED NEGLIGENCE—PERSON INVITED TO RIDE IN AUTO TRUCK.

Where the driver of an auto truck invited plaintiff to ride home with him, and plaintiff had no control over the driver's conduct, or any participation in his management of the truck, and had not become a passenger upon the truck, but was about to board it, any negligence of the driver with respect to the position of the truck by the curb was not imputable to plaintiff, so as to defeat his action for personal injury from being struck by defendant's automobile.

2. NEGLIGENCE — 93(1) — IMPUTED NEGLIGENCE—PASSENGER IN AUTOMOBILE.

A passenger, about to board an automobile truck on driver's invitation to ride, if conceded a passenger, is not to have imputed to him the negligence of the driver as to matters over which the passenger has no direction or control.

3. MUNICIPAL CORPORATIONS — 705(10)—INJURY FROM AUTOMOBILE — CONTRIBUTORY NEGLIGENCE.

Plaintiff, in an action for injury when struck by defendant's automobile as he was about to board a standing truck on the driver's invitation, was responsible only for the exercise of ordinary care on his part.

4. MUNICIPAL CORPORATIONS — 706(7)—INJURY FROM AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for personal injury when struck by defendant's automobile while about to become an invited passenger on a truck standing by the curb, *held*, on the evidence, that plaintiff's contributory negligence was for the jury.

5. MUNICIPAL CORPORATIONS — 706(4)—PERSONAL INJURY FROM AUTOMOBILE — EVIDENCE—ORDINANCE.

In an action for personal injury when struck by defendant's automobile before plaintiff had become an invited passenger on another's truck, which was standing by the curb, so that the driver's negligence, if any, was not imputable to him, the exclusion of an ordinance tending to show the driver's negligence in allowing his truck to stand in a forbidden position was properly excluded.

6. MUNICIPAL CORPORATIONS — 706(6) — INJURY FROM AUTOMOBILE — NEGLIGENCE — QUESTION FOR JURY.

In an action for injury to plaintiff, when struck by defendant's automobile while about to board a standing truck, *held*, on the evidence, that defendant's negligence was for the jury.

Department 1. Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by W. H. Irwin against the Golden State Auto Tour Company. Judgment for plaintiff, and from the judgment, and from an order denying a motion for a new trial, defendant appeals. Judgment and order affirmed.

Riddle & Cheroske, of Los Angeles, for appellant. Tyrrell, Abrahams & Brown, of Los Angeles, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment and order denying a motion for a new trial in an action for damages for personal injuries. Concerning the facts of the case there is, with one exception, no material dispute. The accident in which the plaintiff suffered his injuries occurred on the evening of February 18, 1914, on North Broadway street, near Pritchard street, in the city of Los Angeles. Plaintiff's version of it is substantially adopted for the purpose of this appeal. He testified that about 5 o'clock on the evening of the above date he had taken a car on North Broadway and Eighteenth avenue, and ridden out North Broadway to Pritchard street, where he got off the car and went across the street to a butcher shop to get some meat. As he went into the butcher shop he met Mr. Kelley, whose truck was standing in front of the shop, and who asked him if he wanted a ride home. (Mr. Kelley lived in his neighborhood.) The plaintiff answered, "Yes," and went on into the shop to get his meat; Mr. Kelley in the meantime going elsewhere on an errand. Coming out of the shop, the plaintiff walked to the curb at the rear end of Kelley's truck, which it is stipulated was 14 feet long and 5 feet wide. It was backed up; the right-hand rear wheel being against the curb and the right-hand front wheel a distance from the curb stated by the plaintiff to have been not over 3 feet, but variously estimated by the different witnesses. It is upon this point in fact that the main dispute between the parties arose; the witnesses for the defendant asserting that the front end of Kelley's truck was at such a distance from the curb out in the street as to constitute a violation of the ordinance of the city in respect to the positions of vehicles with relation to the curb. However that may be, the plaintiff states that he walked to the curb and looked down the street, when he saw a touring car approaching, and being at the time about 150 feet away, and out in the street next to the car track. The street was

fairly lighted, though it was raining at the time, and the plaintiff had his umbrella up. The front and rear lights on Kelley's truck were lighted. The plaintiff stepped off the curb, walked around the rear end of Kelley's truck toward the front, put his right foot on the footboard, laid his meat on the seat, lowered his umbrella and was about to step up into the truck; his face being toward it and his back in the direction of the approaching touring car. While in this position he was struck by the touring car, which passed over his leg, causing the injuries for which he sues. The touring car, prior to its impact upon the plaintiff, had been climbing a somewhat steep grade from the lower street, going slowly and making sufficient noise to be heard by the plaintiff as he went around the truck to board it. Plaintiff, in this respect, states that he heard the noise of the approaching car, but that no other warning was sounded prior to the collision. It was between 25 and 30 feet from the nearest track to the curb on that side of the street, and as the plaintiff first observed the touring car it was approaching out in the street near the track, and following a line of approach which would have taken it safely by the head of Kelley's truck, and safely past the point where the plaintiff was about to board it, with space to spare. Upon a showing of these facts the plaintiff recovered a verdict and judgment for the sum of \$2,500, which the court refused to set aside on motion for a new trial, wherefore the defendant prosecutes this appeal.

[1] The first contention urged by the appellant is that the court erred in giving the following instruction:

"You are instructed that, if you find from the evidence that plaintiff was about to board the automobile truck as the guest of its driver, neither exercising nor assuming any control over it, then, even though you may also find that the auto truck was not properly equipped or lighted, or that its driver was negligent in any other respect, such negligence must not be imputed to plaintiff. The plaintiff is responsible only for the exercise of ordinary care on his own part."

In this connection the appellant also alleges that the court erred in refusing to give, in lieu of the foregoing instruction, the following instruction requested by the defendant:

"You are hereby further instructed that the plaintiff, when he was in the act of getting onto the auto truck which was standing in the street, accepted the conditions there existing, including the position in which said auto truck was standing."

The rule which the appellant seeks to invoke in support of its contention that the trial court was in error in giving and refusing respectively the foregoing instructions is that the negligence of the driver of a vehicle is to be imputed to the passenger, or, as in the case at bar, to one about to become such passenger; the appellant claiming that there was sufficient evidence that Kelley was negligent, with respect to the position in

which his truck was standing at the time of his invitation to the plaintiff to ride with him, and in the position in which it still stood at the time when the plaintiff was attempting to board it, to permit the application of the above rule, and hence that the appellant was entitled to an instruction to the jury to that effect. We are of the opinion that the rule for which the appellant contends, however correct in a proper case, cannot be given application to the facts of the case at bar. It is true that the plaintiff had been invited by Kelley to ride home with him in his truck, but the plaintiff had in no way participated in any act of negligence which Kelley may theretofore have committed in the placing of his truck; nor had the plaintiff any control over the conduct of Kelley in regard thereto, or in his management of his vehicle. The plaintiff had not yet become, in point of fact, a passenger upon Kelley's truck. The cases, therefore, cited by counsel for the appellant, of persons occupying a vehicle and engaging in a mutual adventure with its driver have no application to the instant case.

[2-4] But, even if it were to be assumed that the relation of driver and passenger had arisen upon the acceptance of the former's invitation to ride, we still think the sounder rule to be that the passenger is not to have imputed to him the negligence of the driver in respect to matters over which the passenger or persons about to become such, had no direction or control. The following authorities sustain this view: *Bresce v. L. A. Traction Co.*, 149 Cal. 131, 85 Pac. 152, 5 L. R. A. (N. S.) 1059; *Robinson v. N. Y. Central R. Co.*, 66 N. Y. 11, 23 Am. Rep. 1; *Dyer v. Erie Ry. Co.*, 71 N. Y. 228. It follows that the court did not err in refusing to give the defendant's suggested instruction, nor in its refusal to give any other of the defendant's offered instructions in which the doctrine of imputed negligence was sought to be invoked; nor was the court in error in giving the foregoing instruction at the plaintiff's request, since, aside from its correct statement as to the rule of imputed negligence, it also embodied in its concluding sentence the proper rule governing the plaintiff's situation in the instant case:

"The plaintiff is responsible only for the exercise of ordinary care on his own part."

Whether or not he exercised such care under the circumstances of the instant case was a question of fact for the jury.

[5] The appellant's next contention is that the court erred in the exclusion of the ordinance of the city of Los Angeles in effect at the time of the accident, making it unlawful to stop any vehicle on any street unless the side next the curb is not more than 2 feet from the curb. The only bearing which this ordinance could have upon this case would be upon the question of the imputed negligence of Kelley in allowing his vehicle to remain standing in a position violative of

the requirements of the ordinance. But when the doctrine of imputed negligence is eliminated from the case, the terms of this ordinance become entirely immaterial to it, and hence it was properly excluded by the trial court. This reasoning and conclusion also applies to another ordinance to practically the same effect, which the defendant omitted to introduce upon the main trial, but which it sought to have presented as newly discovered evidence upon its motion for a new trial. It was neither newly discovered evidence nor was it material to the issues in the case.

[8] The remaining points urged by the appellant relate to its contention that upon a consideration of the whole evidence in the case the record shows that the plaintiff was guilty of contributory negligence, which, as a matter of law, should prevent his recovery, and also shows that the accident was unavoidable and in no sense due to any fault on defendant's part. The facts of this case do not warrant either of these contentions. The question of the plaintiff's contributory negligence was, under proper instructions by the trial court, a question of fact for the jury. The evidence does not show that the accident was unavoidable, but, on the contrary, discloses that the plaintiff, while in plain sight of the driver of the defendant's touring car for a distance of 150 feet, and while upon the public street, where he had a right to be, was run into from behind by the defendant's car, while the driver of said car had practically three-fourths of the width of an otherwise unoccupied street, in which to have so altered his course as to avoid striking the plaintiff. Under such circumstances we cannot say, as a matter of law, that the accident was unavoidable.

Judgment and order affirmed.

We concur: SLOSS, J.; SHAW, J.

(178 Cal. 17)

FERGUSON v. EDGAR et al. (L. A. 4221.)
(Supreme Court of California. March 23, 1918.
Rehearing Denied April 22, 1918.)

1. CONTRACTS §§266(1), 270(1)—RESCISSI—
DUTIES OF PARTIES.

Under Civ. Code, § 1691, parties to a contract must rescind promptly upon discovering facts entitling them to rescind, and restore to the other parties all they received under the contract.

2. LANDLORD AND TENANT §§34(4)—CON—
TRACT—RESCISSI—DUTIES OF PARTIES.

Where defendants entered on land under lease with option to buy, having presumptive knowledge of existence of road across land, such road being obvious, and they retained possession until expiration of the lease and the option, they could not then rescind and relieve themselves from the unperformed obligation of the lease to make certain improvements on the land.

3. VENDOR AND PURCHASER §§135(1)—CON—
TRACT—CONSTRUCTION—"CLEAR TITLE."

A covenant in a contract to give a clear title refers to title free from incumbrance, including

taxes, assessments, and liens, as defined by Civ. Code, § 1114, but does not mean title free of obvious burdens, such as state highway, whose use was open and notorious.

[Ed. Note.—For other definitions, see Words and Phrases, Clear Title.]

Department 2. Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Don G. Ferguson against Ray Edgar and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Childers & Bruce, of El Centro, for appellants. Conkling & Brown and B. D. Noel, all of El Centro, for respondent.

VICTOR E. SHAW, Judge pro tem. The facts upon which this action is based are as follows: On January 22, 1913, plaintiff and defendants entered into a written agreement whereby the former gave the latter an option to be exercised at any time prior to January 22, 1914, to purchase 160 acres of land for the sum of \$16,000, payable "\$12,000 cash on delivery of clear title," subject to mortgage of \$4,000, and also gave to defendants the right to the use and occupation of the land for the period covered by the option. In consideration therefor defendants on their part agreed to do certain improvement work upon the land and seed the same to alfalfa. Defendants entered thereon and continued in the use and occupation thereof until January 22, 1914, at which time, the option by its terms having expired without defendants exercising the right given thereby to purchase the property, they surrendered possession of the same to plaintiff, who, in May following, brought this action to recover damages for defendants' breach of contract to do the work agreed to be done by them upon the property.

In their answer defendants alleged that at no time during the period covered by the option could plaintiff have given them a clear title to the land for the reason that by virtue of an easement therefor granted by plaintiff a public highway existed along one side of said tract of land which constituted an incumbrance upon the title. It was further alleged that upon discovery of the fact that such incumbrance existed defendants rescinded the contract. The issues joined were tried by a jury, which returned a verdict in favor of the plaintiff. Judgment followed, from which defendants appeal.

"The only question involved," says counsel for appellants, "is whether or not the admitted public road and the other easements * * * are incumbrances" which entitled defendants to rescind the contract. "If the facts did not warrant a rescission of the contract, then," says appellants' counsel, "the judgment is correct, and should be affirmed."

Section 1689 of the Civil Code provides that:

"A party to a contract may rescind: * * *
2. If, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part; * * * 4. If such

consideration, before it is rendered to him, fails in a material respect, from any cause."

The consideration moving to defendants and upon which their promise to do the work was based was the use and occupation of the land for one year, together with the right at their option during said time to buy the same at a specified price. In effect, the contract was a lease for a term of one year for a stipulated rental with an option given to purchase.

[1, 2] In order to accomplish rescission of the contract, it devolved upon defendants, as provided in section 1691, Civil Code, to rescind promptly upon discovering facts which entitled them to rescind and restore to plaintiff everything of value which they had received from him. Presumably, since the contrary is not shown, they knew of the existence of the highway and its physical effect upon the land when they entered. Notwithstanding this fact, they entered upon and took possession thereof and retained possession of the same, and all rights under the option, until the expiration of the lease with which the option also expired. Then, and not till then, when all rights under the contract had terminated, they surrendered possession of the property. The effect of such action was to defeat any right of the defendants to rescind the contract. *Evans v. Duke*, 140 Cal. 22, 73 Pac. 732. Not only was there an entire absence of the exercise of diligence in their purported act of rescission, but a total failure on the part of defendants to restore to plaintiff that which under the contract they had received, and all of which they retained. Under these circumstances to hold the facts sufficient to constitute a rescission and release defendants from their promise would be most inequitable. *Cross v. Mayo*, 167 Cal. 595, 603, 140 Pac. 283; *Bailey v. Fox*, 78 Cal. 393, 20 Pac. 863. The attempted rescission after the contract had terminated was a futile act.

[3] Moreover, while there is some apparent conflict of authority upon the subject, the covenant in the contract to give a "clear title" must, upon the facts disclosed by this record, be deemed to have been understood and intended by the parties as a title free of incumbrance as defined by section 1114 of the Civil Code. It was not considered as having reference to obvious and physical burdens, permanent in character, such as a state highway, the use of which was open and notorious. As to such obvious burden the party proposing to buy, having full knowledge of the servitude and the necessity therefor as a means of egress and ingress to the premises, contracts subject to the physical and visible burden imposed upon the land. *Sisk v. Caswell*, 14 Cal. App. 377, 112 Pac. 185. In the case of *Patterson v. Arthurs*, 9 Watts (Pa.) 152, the owner, as here, had covenanted to convey the property free from all

incumbrances, and it was there held that a public road which occupied a portion of the property was not an incumbrance within the meaning of the covenant. In *Brewster on Conveyancing*, § 203, it is said:

"In cases where there is a physical burden of this sort, which is visible, there is a fair and reasonable presumption, in the absence of an express agreement, that both parties act with reference to this plain, existing burden, and that the vendor on the one hand demands, and the vendee on the other pays, only the fair value of the land as visibly incumbered. Therefore, it is said, such burdens, by way of open and notorious easements, are not really incumbrances within the meaning of this covenant, because the real subject-matter of the dealings between the grantor and the grantee is the land, subject to visible easements."

What is said applies with like force to the canal or water ditch, the purpose of which was to convey water for irrigation and use upon the land in question in common with other lands in the vicinity, and without which, as known by defendants, the land would be valueless.

The judgment is affirmed.

We concur: MELVIN, J.; WILBUR, J.

(178 Cal. 54)

In re BEER'S ESTATE. (Sac. 2679.)

(Supreme Court of California. March 23, 1918.)

EXECUTORS AND ADMINISTRATORS — 17(2) — RIGHT TO ADMINISTRATION.

Since, under Code Civ. Proc. § 1474 (Civ. Code, § 1265), the wife's selected homestead vests absolutely in the husband on her death, the brother of a wife, who selected a homestead from her separate property, and predeceased her husband, was not entitled to administration in preference to the public administrator, on the husband's estate, under Civ. Code, § 1386, subd. 8, as to descent of property to kin of spouse who first died, in view of Code Civ. Proc. § 1365, stating order of administration, since no interest in the homestead came to him by descent directly from his sister, within Civ. Code, § 1386, subd. 8.

In Bank. Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Proceedings in the matter of the estate of Christian Beer, deceased. Contest for letters of administration between the Public Administrator and William Seliner. The superior court granted Seliner's petition, and the Public Administrator appealed, and the court in Division No. 2 reversed the order. On rehearing in bank order of the superior court reversed.

Von Detten & Henry, of Stockton, for appellant. Lawrence Edwards and Ben Berry, both of Stockton, for respondent.

ANGELLOTTI, C. J. Christian Beer died intestate, leaving no wife, issue, father, or mother. There was a contest for letters of administration between the public administrator and William Seliner, a brother of Christian Beer's predeceased wife, Elizabeth

S. Beer, who also died intestate. The superior court granted Sellner's petition, and the public administrator appeals.

The right of Selner to letters of administration is dependent upon his right under subdivision 8 of section 1386, Civil Code, to succeed to property of the decedent as the surviving brother of the predeceased wife of the decedent; he himself not being related by blood to the decedent. Section 1365, Code Civ. Proc. The estate of decedent consists in part of a lot of land with the house thereon in the city of Stockton. This was the separate property of the predeceased wife, who died in the year 1911. In the year 1910, while said property was her separate property, she had duly selected it as a homestead, and therefore upon her death, by express provision of the homestead statute, it vested in the surviving husband, the decedent. Civ. Code, § 1265; Code Civ. Proc. § 1474. Selner's claim of right to succeed to this property is based on a provision of subdivision 8 of section 1386 of the Civil Code, which provides that, if any portion of the estate "was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise or bequest," such portion shall go to specified relatives of the deceased spouse. Section 1265, Civil Code, and section 1474, Code of Civil Procedure, as they now are, and as they were at the time of the selection of this homestead, both substantially provide that, if the selection of a homestead was made by a married person from the community property, or from the separate property of the spouse making the selection or joining therein, the land selected, on the death of either of the spouses, vests in the survivor. The precise question here is whether homestead property so vesting in the survivor of the marriage comes to him "by descent" within the meaning of this provision of subdivision 8 of section 1386, Civil Code.

We are of the opinion that this question must be answered in the negative. It seems clear to us that this provision contemplates only such property as comes by will or under the law of succession to the surviving spouse, directly from and through the deceased spouse. In view of our decisions as to homesteads selected from the community property or from the separate property of the spouse making the selection or joining therein, the property selected as a homestead does not so come. The character of such a homestead under our law is perhaps nowhere better described than in the opinion of Mr. Justice Lorigan in *Wall v. Brown*, 162 Cal. 307, 122 Pac. 478, where, subsequent to the selection of a homestead from the community property, the husband conveyed the property to the wife, and there was a question as to the effect of such conveyance on the homestead. It was said:

"But it does not follow because a conveyance is made by the husband to the wife of an inter-

est in the community property impressed with a homestead that the homestead is impaired or the right of survivorship created thereby is to the extent of the property conveyed destroyed. The homestead is something distinct from the legal title. It qualifies and limits the right of the owner of the title for the benefit and protection of both spouses while living, and to insure future protection to the survivor. A conveyance of the community property to the wife does not affect any of the characteristics incident to the homestead itself. It affects only the title to the property which has been so impressed; what was community property when the declaration was filed becomes by the conveyance her separate property, but though the character of the title is changed, this does not affect the homestead, but the title is taken subject to it."

This means that to the extent provided in the homestead law for the benefit and protection of both spouses while living, and for the benefit and protection of the survivor, the title to the property is at all times subject to the homestead, with the result that upon the death of one of the spouses whatever title he or she had in the property selected as a homestead is absolutely extinguished by operation of law, the homestead absorbing all of such title. The owner of separate property selected by him or her as a homestead, by the selection impresses the property with the homestead character, dedicates it to this paramount purpose, and the vesting of the title on the death of one of the spouses under the law relative to homesteads is simply in satisfaction of the homestead claim of the survivor. The title to the property does not come to such survivor directly from or through the deceased spouse. It has been substantially said many times by this court that upon the death of the husband or wife it vests absolutely, by operation of law, in the survivor; that the property is never in fact a part of the estate of the deceased spouse; that the court in probate is without power to affect the absolute title vested in the surviving spouse at the moment of the other's death; and that any order setting such property apart as a homestead is not essential to the title of the surviving spouse, and has no other effect than to withdraw it from further consideration by the court and relieve the executor or administrator from further obligation in regard thereto. See *Estate of Klumpke*, 167 Cal. 420, 139 Pac. 1062; *Saddlemire v. Stockton Savings, etc., Soc.*, 144 Cal. 653, 79 Pac. 381; *Hart v. Taber*, 161 Cal. 20, 118 Pac. 252; *Wall v. Brown*, *supra*; *Estate of Shirey*, 167 Cal. 195, 138 Pac. 994; *Williams v. Williams*, 170 Cal. 625, 151 Pac. 10. In such a case the deceased spouse at the moment of his or her death has no interest in the property which is capable of being effectually devised (*Williams v. Williams*, *supra*), or, it would appear to follow, passing by succession, as the term is defined by section 1383, Civil Code.

It seems clear that the provision of subdivision 8, § 1386, Civil Code, has no appli-

cation to such a case as is here presented, and that therefore Seliner is not entitled to succeed to any portion of the estate of deceased. It follows that he could not legally be appointed administrator in preference to the public administrator.

The order is reversed.

We concur: WILBUR, J.; RICHARDS, Judge pro tem.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.; SLOSS, J.

(178 Cal. 40)

BULLIS v. STANIFORD et al. (S. F. 7447.)
(Supreme Court of California. March 25, 1918.)

1. HOMESTEAD \Leftrightarrow 57(3) — RESIDENCE — EVIDENCE.

In an action to set aside a homestead, evidence held not to sustain a finding that defendant actually resided on such homestead at the time of declaration.

2. HOMESTEAD \Leftrightarrow 181(3) — EVIDENCE — CHANGE OF RESIDENCE — HEAD OF FAMILY.

In an action to set aside a homestead claimed as exempt from execution, evidence held to require a finding that the husband of defendant was the head of the family and had established his residence elsewhere than on the homestead claimed by his wife.

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by W. S. Bullis against Virginia Lee Stanford and husband. Judgment for defendants, and plaintiff appeals. Reversed.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco, and Edgar K. Brown and Trask & Brown, all of Los Angeles, for appellant. Frank Kauke, of Fresno, for respondents.

MELVIN, J. Plaintiff, who is a judgment creditor of defendants, sued to annul and set aside a homestead which was alleged to have been declared fraudulently by defendant Virginia Lee Stanford, wife of defendant George F. Stanford, upon certain premises in the city of Fresno. Judgment was given in favor of defendants. From said judgment plaintiff appeals.

The most important question in the case was whether or not, at the time of filing the declaration of homestead, Virginia Lee Stanford was actually residing with her husband and family on the premises in the contemplation of the homestead law. The declaration of homestead was filed in February, 1914. It is undisputed that the property in question had been originally purchased by the Stanfords as their place of residence and had been occupied by them. At that time Mr. Stanford was employed in the business of special agent of insurance companies. His occupation compelled him to travel over certain territory embracing Fresno. At times he was able to be at home with his family as his territory included the San Joaquin Valley. In 1912 he was given duties which required his services elsewhere and was re-

lieved of the task of attending to business for his employers in the San Joaquin Valley. He was then, as he testified, "transferred absolutely to Southern California." At that time he went to Los Angeles, and had been there all of the time from 1912 until the trial took place in 1915. It was shown without contradiction that George F. Stanford had registered as a voter in the city of Los Angeles in April, 1912, again in September of that year, and yet again in April, 1915, and that he had voted at all regular elections in that city between 1912 and 1915. Of course, his registrations were supported by affidavits solemnly alleging, in each instance, that his residence was in Los Angeles. It was shown, further, that in August, 1914, George F. Stanford had testified in the superior court of Los Angeles county that his residence was in the city of Los Angeles. It will thus be seen that, between 1912 and the time of the declaration of the homestead, Mr. Stanford, not only by his solemn declarations under oath, but by every overt act, indicated his intent, as running with his physical presence, to make Los Angeles the place of his residence.

Appellant's counsel contend that as Mr. Stanford was the head of the family, furnishing support to his wife and the younger son, who was a student at Stanford University, his residence was the residence of his family, and that, irrespective of the intention of Mrs. Stanford with regard to her place of residence, his residence in Los Angeles at the time of the declaration of homestead is established without contradiction and is determinative of the whole matter. We will have occasion to consider this theory further in a subsequent part of this opinion. It appears without contradiction that, when the Stanfords moved into the home in Fresno, the family consisted of Mr. and Mrs. Stanford and two sons. In 1912 the elder son established himself as a physician in San Francisco and the younger was a student at Leland Stanford, Jr., University. In that year the defendants leased the property in Fresno, and Mrs. Stanford went to San Francisco to keep house for her elder son and to be near the younger one. Mr. Stanford had gone to Los Angeles. During the first year of their absence the tenants were a family named Johnson. Judge George B. Graham, a warm friend of the defendants and a relative of the Johnsons, went to lodge and board with his kinsfolk, and at the expiration of the written lease to the Johnsons, in July, 1913, a lease for the following year was taken in his name. In February, 1914, a foreclosure suit by plaintiff upon other property of the defendants being in progress, but not yet carried to a judgment, Mrs. Stanford consulted an attorney in San Francisco upon the subject of filing a homestead on the Fresno property. He wrote a letter to Judge Graham and Mrs. Stanford, without previous notification to the judge, went with her younger son to Fresno and to the property

here in question. Judge Graham was about to start on a business trip to San Francisco. This was February 20, 1914. On presentation of the letter from her attorney in San Francisco, Mr. Coldwell, to Judge Graham, a "rider" canceling the lease was pasted on the written contract. Judge Graham then departed for San Francisco, taking with him only the articles necessary for a short sojourn, and he returned from San Francisco on the 26th or 27th of February. Meanwhile Mrs. Staniford remained at the house, and her younger son was there part of the time. Graham's subtenants stayed on the premises just as they had been in occupancy of the place. There is no evidence that they ever attorned to Mrs. Staniford or paid her any rent. On February 24th Mrs. Staniford filed the declaration of homestead wherein she certified and declared that she was actually residing on the premises with her husband and family. On Judge Graham's return a new lease was executed whereby he became the tenant of the property for one year from March 1, 1914, upon exactly the same terms upon which he had previously rented it and Mrs. Staniford returned to her son's home in San Francisco where she continued to remain.

From these facts, appellant insists that the cancellation was a mere "paper transaction," carried through so that Mrs. Staniford could file a homestead. The validity of this contention is virtually conceded by counsel for respondents. He declared at the oral argument that he did not depend upon the brief sojourn of Mrs. Staniford and her younger son in February to establish residence, but he contended in his briefs and in his argument that defendants had never surrendered their residence in Fresno. In support of this contention he calls attention to the fact that Mr. Staniford was almost constantly on the move from place to place in his territory; that the family furniture was left in the Fresno house; that a small room or closet was reserved, by the lease, for the storage of some of the goods of the Stanifords; and that Mrs. Staniford retained membership in a lodge in Fresno.

[1] It is argued that undoubtedly the family resided on the premises originally; that the burden of proof was on plaintiff to show a change of residence in effect at the time of the declaration; and that this burden had not been met. With this contention we cannot agree because it appears not only that Mrs. Staniford was physically present in San Francisco substantially all of the time between her arrival there in 1912 and the time of the trial, but that she solemnly swore that she resided in San Francisco. Her first registration was on October 4, 1912. Regarding this matter she said that she was induced to register in a moment of enthusiasm over the newly acquired right of women to exercise the electoral franchise and without any intention of abandoning her home and

residence in Fresno. We cannot help lauding her enthusiasm in a cause so great and praising its continuance, for not only did she vote in San Francisco at all elections following her registration, but on the 15th of July, 1914, after filing the declaration of homestead, she again registered and voted in San Francisco. In her affidavits of registration she deposed that she was a resident of the city and county of San Francisco.

At the oral argument counsel for respondents said in substance that there was no question that both Mr. and Mrs. Staniford violated the law by voting, but that "that did not have the effect of changing their residence. It was only a circumstance." Undoubtedly our laws are most liberal to homestead claimants and the courts in the interpretation of such laws go to great lengths to protect the actual home of the family from creditors; but to permit such an alleged homestead as this to withstand appellant's attack would make a mockery of laws passed for the beneficent purpose of preserving an abiding place for the actual, bona fide residence of the family. True, our own courts have held that in certain instances residence on the property, though only for a day, may be sufficient. *Skinner v. Hall*, 69 Cal. 195, 10 Pac. 406; *Hohn v. Pauly*, 11 Cal. App. 724, 106 Pac. 266. But in both of those cases there were special circumstances vastly different from those presented in the case at bar to sustain the judgments. In *Skinner v. Hall* the declarant had abandoned one homestead, which had undoubtedly been created in good faith, and had immediately filed a new declaration. In the opinion in the other case it was said "that the plaintiff actually resided in the building and that it was her only home is not questioned."

It has also been held that, although the wife may not declare a valid homestead on one piece of property and the husband upon another parcel of land, she may establish a valid homestead. *Gambette v. Brock*, 41 Cal. 78; *Harlan v. Schulze*, 7 Cal. App. 287, 94 Pac. 379. But in both of those cases the right of the wife was carefully qualified by the statement that the wife's selection of a homestead is valid only in the absence of any proof that the husband had a home or fixed residence elsewhere. In the case at bar not only did the husband declare by registration, by voting and by his sworn testimony in court that Los Angeles, where his business permanently kept him, was his place of residence, but, when asked if he, as the head of the family, was supporting his wife and his sons during their absence from Fresno, he said:

"I was turning over my earnings to them. I don't know about being the head of the family. I supplied the money to them."

The only justification for the conclusion of the lower court that Mr. Staniford had not changed his residence to Los Angeles appears in his own declarations, which were contra-

dicted by his repeated acts and his solemn sworn asseverations, when not confronted with any question involving the homestead. That he was not actually residing on the property personally or by legal intentment when the homestead was declared is obvious, and any pretense to the contrary is sham. The law on this subject is declared in *Tromans v. Mahlman*, 92 Cal. 1, 27 Pac. 1094, 28 Pac. 579, wherein it is said:

"It is settled law in this state that to constitute a valid homestead the claimant must actually reside on the premises when the declaration is filed. *Prescott v. Prescott*, 45 Cal. 58; *Babcock v. Gibbs*, 52 Cal. 629; *Aucker v. McCoy*, 58 Cal. 524; *Ffister v. Dasey*, 68 Cal. 572 [10 Pac. 117]; *Lubbock v. McMann*, 82 Cal. 228 [22 Pac. 1145] 16 Am. St. Rep. 108. * * * The obvious purpose of the statute in providing for the selection of a homestead was to thereby make a home for the family, which neither of the spouses could incur or dispose of without the consent of the other, and which should at all times be protected against creditors. To effect its purpose, the statute has been liberally construed in some respects, but the requirement as to residence at the time the declaration is filed has been strictly construed. Thus this court has many times used and emphasized the word 'actually,' to show that the residence must be real, and not sham or pretended."

Again, speaking of the purpose of our homestead law, this court has said:

"The benign object of the statute was to protect the home of the owner from forced sale, and not to withdraw from the reach of creditors property of the debtor as a source of revenue for the support of himself or family." *Maloney v. Hefer*, 75 Cal. 422-424, 17 Pac. 539, 540 (7 Am. St. Rep. 180).

[2] Under the undisputed facts in this case the husband was the head of the family. His place of residence was the residence of his wife. Section 52, subd. 5, Pol. Code; *Luck v. Luck*, 92 Cal. 653, 28 Pac. 787. The record in the case discloses no single act of the husband from 1912 to the time of the trial, such as would alter the effect of his removal to Los Angeles as a change of residence. The only contradiction of all of his acts and sworn statements while he was actually occupying an office and lodgings in Los Angeles occurred in the trial of this case. At one place in the record we find that he said, while a witness:

"Traveling the way I was, my home was under my hat all the time."

Again, he was asked if he had any intention of having any other place of abode, as a residence or home, than Fresno, and he said:

"Not in Los Angeles, or directly in Los Angeles, but if we could have ever sold our property, disposed of it properly, and taken up a home somewhere else, where we had purchased a ranch, which we had purchased, and over which this controversy is, we might have done it."

Yet during his absence from Fresno the property claimed as a homestead was occupied by a tenant, except for a few days, when the pretended surrender of the lease took

place, and during that time the lessee's subtenant was undisturbed. Added to this were his admitted permanent business activities outside of the San Joaquin valley, his repeated statements under oath that Los Angeles was his place of residence, and his participation in all regular elections held in that city. At most his testimony amounts to proof of a floating intention some day to return to Fresno to live, and this, as against the solemn, undisputed evidence of facts establishing his residence in Los Angeles, is negligible. *Estate of Weed*, 120 Cal. 634, 53 Pac. 30.

Appellant sustained the burden of proving the establishment of another residence than Fresno by Mr. Staniford, thus fixing the family home in Los Angeles, and this showing was not overbalanced by the mere declaration that Mr. Staniford had always intended to keep the property in Fresno as his home. The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

(178 Cal. 6)

GILMOUR v. NORTH PASADENA LAND & WATER CO. et al. (L. A. 4159.)

(Supreme Court of California. March 23, 1918.)

1. HUSBAND AND WIFE § 131(1)—SEPARATE PROPERTY—PRESUMPTIONS.

A conveyance of property to a husband and his wife presumptively vests an undivided half interest in the wife as her separate property under the direct provisions of Civ. Code, § 164, as amended by St. 1889, p. 328.

2. HUSBAND AND WIFE § 131(1)—SEPARATE PROPERTY—PRESUMPTIONS.

The presumption under Civ. Code, § 164, as amended by St. 1889, p. 328, that the conveyance to a husband and wife vests an undivided half-interest in the wife as her separate property is not conclusive as to one not a bona fide purchaser, but may be overcome by evidence that the property belongs to the community.

3. HUSBAND AND WIFE § 262(2)—COMMUNITY PROPERTY—BURDEN OF PROOF.

Where a conveyance of real property is made to a husband and his wife, the burden of proving the community character of the property rests on the husband.

4. HUSBAND AND WIFE § 254—COMMUNITY PROPERTY—GIFTS.

Where property deeded to a husband and wife is bought with community funds, the property acquired becomes community property in the absence of an intent on the husband's part to make a gift to the wife of the interest transferred in her name.

5. HUSBAND AND WIFE § 49½(8)—GIFTS—EVIDENCE.

The form of a conveyance of real estate to a husband and his wife is itself some evidence of an intent by the husband to make a gift to the wife of the interest transferred in her name.

6. HUSBAND AND WIFE § 270(9)—WIFE'S SEPARATE PROPERTY—QUESTION OF FACT.

The presumption declared by Civ. Code, § 164, as amended by St. 1889, p. 328, that conveyance to a married woman and her husband by an instrument in writing gives her an undivided separate interest, in itself constitutes

evidence, so that it is for the trial court to say whether evidence offered to overthrow presumption is sufficient for that purpose.

7. HUSBAND AND WIFE \Leftrightarrow 49½ (8)—**GIFT TO WIFE—EVIDENCE.**

Where community property is transferred to a husband and wife, the intent of the husband to make his wife a gift is to be inferred from all the circumstances; the husband's own testimony not being conclusive, although competent.

8. COSTS \Leftrightarrow 96—**PARTIES—REPRESENTATIVE CAPACITY.**

The fact that a suit is brought by individuals describing them as "a water committee for residents of block A," etc., does not absolve such parties from personal liability for costs.

Department 1. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Howard J. Gilmour against the North Pasadena Land & Water Company and others. Plaintiff appeals from judgment for defendants and from order denying new trial. Affirmed.

Wm. Lewis, of Los Angeles, for appellant. Porter & Sutton, of Los Angeles, for respondents.

SLOSS, J. In 1910 Mrs. H. J. Gilmour (the wife of the plaintiff and appellant in the present action), together with Arizona Garrison and Mary F. Taylor, commenced an action against North Pasadena Land & Water Company, a corporation. That action resulted in a judgment in favor of the defendant and against the plaintiffs for \$378.05, costs of suit. The judgment was affirmed on appeal. *Garrison v. North Pasadena L. & W. Co.*, 163 Cal. 235, 124 Pac. 1009. In March, 1913, the judgment creditor caused execution to be issued and placed in the hands of the sheriff of Los Angeles county. The sheriff levied on all the right, title, and interest of Mrs. H. J. Gilmour in and to two lots in the city of Pasadena, and was about to sell them when the plaintiff commenced the present action to enjoin such sale. The complaint alleged, in effect, that the lots were community property of the plaintiff, Howard J. Gilmour, and his said wife, and that the threatened sale would cast a cloud upon plaintiff's title. An application for a temporary injunction was denied, and the property was sold by the sheriff to J. E. Garrison, who had become the assignee of the judgment obtained by North Pasadena Land & Water Company. The sum bid by Garrison was \$185, which was credited on the judgment. The assignment to Garrison and the execution sale to him were set up by a supplemental complaint, in which the plaintiff asked that Garrison be made a party, and that the execution sale and the sheriff's certificate issued thereunder be "decreed to be clouds upon the plaintiff's title." The answer denied, among other things, that the lots were community property of the plaintiff and his wife, and the court found against

the averments of the complaint in this behalf. Judgment was entered in favor of the defendants. Plaintiff's motion for a new trial having been denied, he appeals from the order of denial, and from the judgment.

[1-5] The plaintiff attacks as unsupported the finding relative to the ownership of the lots sold. The instrument under which plaintiff claimed title was a deed made in 1908, granting the property "to Howard J. Gilmour and Sarah J. Gilmour, his wife." Under section 164 of the Civil Code, as amended in 1889 (St. 1889, p. 328), such conveyance presumptively vested an undivided one-half interest in the wife, as her separate property. Except as against a bona fide purchaser for value—and it is not claimed that the defendants come within this category—the presumption is, however, not conclusive. It may be overcome by evidence showing that, notwithstanding the form of the conveyance, the property conveyed belongs to the community. *Fanning v. Green*, 156 Cal. 279, 104 Pac. 308. The burden of proving the community character of the property rests on the husband. *Alferitz v. Arrivillaga*, 143 Cal. 646, 77 Pac. 657. If, as appears to have been the case here, the purchase price consisted of community funds, the property acquired would become community property, unless there was an intent on the part of the husband to make a gift to the wife of the interest transferred to her name. *Fanning v. Green*, supra. But the form of the conveyance is itself some evidence of an intent to make such gift. *Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012.

[8, 7] The appellant contends that the undisputed evidence shows conclusively that the husband had no intent to make a gift of any part of the property to his wife. We cannot assent to this claim. The presumption declared by section 164, "although disputable, is itself evidence, and it is for the trial court to say whether the evidence offered to overthrow the presumption has sufficient weight to effect that purpose." *Pabst v. Shearer*, 172 Cal. 239, 156 Pac. 466. The testimony relied on by the appellant in this behalf was by no means clear. While both spouses were careful to say that the land was conveyed to them "as community property," their further and more specific statements indicated that the deed was made to both because of the wife's demand, agreed to by the husband, that she should have a separate interest in the property. The intent accompanying the act is to be inferred by the court or jury from all the circumstances, and the party's own testimony that he did not intend to make a gift, while competent, is not conclusive. It certainly cannot be said, in view of the character of the evidence in this case, that the court was not authorized to find that the presumption had not been overcome. In *Fanning v. Green*, supra,

as in *Fulkerson v. Stiles*, 156 Cal. 703, 105 Pac. 966, 26 L. R. A. (N. S.) 181, cited by appellant, the trial court had found that, notwithstanding the form of the conveyance, the property was, in fact, community property, and in each case the finding was held to be sustained by the evidence. If the trial court had found the other way on the evidence, its finding might equally have been upheld on appeal. In the present case, the evidence offered to overcome the statutory presumption is decidedly less direct and convincing than it was in the cases referred to.

If the wife was the owner of an undivided one-half interest in the lots, the plaintiff was, of course, not entitled to prevent a sale of her interest, or to have such sale, once made, set aside.

[8] The contention that Mrs. Gilmour was not personally liable on the judgment for costs is without merit. The former action was brought by her and her two coplaintiffs, and the judgment for costs ran against them as individuals. The fact that they described themselves in their complaint as a "water committee for residents of block A," etc., does not alter their status as parties to the action.

It is further claimed that the judgment in the former suit had been paid and satisfied by Garrison. But the finding is to the contrary, and it is fully supported by evidence indicating that Garrison did not pay the judgment, but merely took an assignment thereof from the North Pasadena Land & Water Company.

The views herein expressed render immaterial any other points urged in the briefs.

The judgment and the order denying a new trial are affirmed.

We concur: RICHARDS, Judge pro tem.; SHAW, J.

(178 Cal. 15)

RAHMEL v. ROST et al. (L. A. 4138.)

(Supreme Court of California. March 23, 1918.)

1. APPEAL AND ERROR ⇐856(5)—REVIEW—NEW TRIAL.

Where motion for new trial is made upon all the statutory grounds, the order granting such motion, general in its terms, will be upheld on appeal, if sustainable upon any of the grounds stated.

2. APPEAL AND ERROR ⇐1015(2)—REVIEW—NEW TRIAL.

An order granting a new trial will not be reviewed, where the testimony is conflicting as to the issues.

3. APPEAL AND ERROR ⇐933(4)—REVIEW—PRESUMPTIONS.

Where the order granting a new trial does not indicate that it is based on misconceptions of the trial court as to matters occurring at the trial, it must be presumed to have been made on the ground of insufficiency of the evidence to justify the decision.

Department 1. Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by Gottlieb Rahmel against Jules Rost and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Trask & Brown and Edgar K. Brown, all of Los Angeles (Everett L. Ball, of Los Angeles, of counsel), for appellants. James R. Jaffray and B. P. Welch, both of Los Angeles, for respondent.

RICHARDS, Judge pro tem. [1-3] This is an appeal from an order granting the plaintiff a new trial. The action was one to recover damages for deceit alleged by the plaintiff to have been practiced upon him by the defendants in an exchange of properties. The findings and judgment of the court upon the trial were in favor of the defendants. The motion for a new trial appears to have been duly made upon all the statutory grounds. The order of the trial court granting said motion was a general order, and hence if sustainable upon any of the grounds stated will be upheld upon appeal. The appellants devote a large amount of space in their opening brief to a review of the evidence in the case, but it is conceded that as to the alleged misrepresentations upon which the plaintiff principally relied, there was direct conflict of testimony, the plaintiff asserting and the defendants denying that such misrepresentations had been made. Upon such a state of the record the order granting the motion for a new trial will not be reviewed upon appeal. Counsel for the appellants, however, undertook to argue that the order granting the motion for a new trial was based upon some misconceptions of the trial court as to certain matters occurring at the trial; but the order of the court does not so indicate, and hence must be presumed to have been made upon the ground of the insufficiency of the evidence to justify its former decision. *Newman v. Overland Pac. Ry. Co.*, 132 Cal. 73, 64 Pac. 110; *Pollitz v. Wickersham*, 150 Cal. 238, 88 Pac. 911.

The order is affirmed.

We concur: SLOSS, J.; SHAW, J.

(178 Cal. 46)

DAWES v. TUCKER et al. (S. F. 7261.)

(Supreme Court of California. March 27, 1918.)

1. MORTGAGES ⇐369(2)—FORECLOSURE—SETTING ASIDE—SALE—GROUNDS.

In suit to set aside sale under trust deed for error of the recorder in entering dates of publication of notice, plaintiff could not prevail, in the absence of showing that he saw the copy erroneously stating such dates or relied upon such record.

2. MORTGAGES ⇐94—RECORDATION—SUFFICIENCY.

Recorder's error in copying trust deed, requiring notice of sale to be published once a

week, so as to require notice twice a week, was not such as to render the recordation void, where all other matters were correctly copied, so that a subsequent purchaser could not disregard such record as of no validity.

3. MORTGAGES — 369(7) — SETTING ASIDE SALE—RECORDATION—PRESUMPTIONS.

In suit to set aside sale under trust deed for recorder's error in copying provision for notice of sale on default, plaintiff, who never saw the record, was not entitled to the presumption arising from constructive notice that he inspected it and was misled by the error.

In Bank. Appeal from Superior Court, Alameda County; N. D. Arnot, Judge.

Action by George M. Dawes against Helena M. Tucker, Sr., and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Keyes & Martin, of Oakland, and Leon Martin, of San Francisco, for appellant. A. F. St. Sure, J. Leonard Rose, McKee & Tashelra, and H. L. Breed, all of Oakland, for respondents.

RICHARDS, Judge pro tem. This is an appeal from a judgment in favor of the defendants in an action brought by the plaintiff to have set aside a sale of certain premises under a trust deed executed by the plaintiff's grantor, and to compel a conveyance of the premises to plaintiff free from the operation and effect of the trustees' deed issued pursuant to such sale and all subsequent deeds and mortgages executed by the purchaser at said sale and his successors to the title acquired thereby. The cause was submitted to the trial court for decision upon an agreed statement of facts, which may be briefly summarized as follows:

On May 1, 1906, Mary Polk Du Bose was the owner of the premises affected by this action. On that day she executed a deed of trust thereon in favor of Helena M. Tucker, Sr., with Emily F. Tucker, and Helena M. Tucker, Jr., as the trustees named therein, for the purpose of securing an indebtedness of the grantor to said Helena M. Tucker, Sr., in the sum of \$2,500, evidenced by a promissory note for said sum. The trust deed contained the provision that, in case of default on the part of the maker of said note, the trustees were empowered to sell the property described in said trust deed, provided that before such sale they should first publish a notice of the time and place thereof, with a description of the property to be sold, "at least once a week for three successive weeks, in some newspaper published in the town of Berkeley." This deed of trust was filed for record with the county recorder of Alameda county, and was recorded on May 7, 1906. The recorder, however, in attempting to copy said trust deed in his proper book of records, made a mistake in transcribing the above-quoted sentence in said deed, so as to make it read that the notice of trustees' sale should be published "at least twice a week," etc. It was this error which gave rise to this action.

On April 25, 1907, Mary Polk Du Bose, for a sufficient consideration, sold and conveyed the premises covered by said trust deed to George M. Dawes, the plaintiff and appellant herein. By the terms of said conveyance the said property was sold subject to said trust deed, with express reference therein to the date and place of its record, and to the amount of the promissory note which it had been given to secure. Default was made in the payment of the principal and interest due on said note, and thereafter, and shortly before June 5, 1908, a demand was made upon said Dawes for the payment thereof, and he was notified that if such payment was not made the premises would be sold by said trustees to satisfy said indebtedness. Such payment not having been made, the trustees, on June 5, 1908, began the publication of a notice of the sale of said premises under said trust deed in a Berkeley newspaper, and thereafter published the same once a week for three consecutive weeks prior to the 29th day of June, 1908, the date fixed for said sale; and on said last-named day sold the said property to M. S. McQuarrie, one of the defendants herein, for the sum of \$2,700, and on the 7th day of July, 1908, executed to said McQuarrie their trustees' deed for the same, which was duly recorded on the following day; whereupon the said M. S. McQuarrie took possession of the premises so conveyed to him. On July 27, 1908, defendants M. S. McQuarrie and Margaret McQuarrie made, executed, and delivered to Isabel De Lancey a grant deed to said premises, which was also duly recorded. On August 12, 1908, the said Isabel De Lancey and her husband, John S. De Lancey, also made defendants herein, made, executed, and delivered a deed of trust covering said premises to secure the payment of the sum of \$2,500 to the Bankers' Trust Company of Oakland, said deed being duly recorded, and on August 18, 1908, the said defendants Isabel De Lancey and John S. De Lancey conveyed the premises by a deed of grant to Jennie P. Stover, also one of the defendants herein. On October 8, 1908, the plaintiff herein tendered to Helena M. Tucker, Sr., and to her said trustees under said first-named deed of trust the entire amount due to said date upon the promissory note secured thereby, and thereupon demanded a reconveyance to him of the premises in question, which tender and demand were refused by the said Helena M. Tucker, Sr., and also by her said trustees. Shortly thereafter the plaintiff commenced this action.

In his second and supplemental complaint filed herein the plaintiff sets forth in the main the facts above summarized, and in addition thereto alleges that prior to the commencement of the action he never saw the original of the said trust deed to the trustees of Helena M. Tucker, Sr., and had no knowledge or information, either actual or constructive, as to the contents and provisions

thereof except as the same appeared and were set forth in the record thereof; and that the said plaintiff in the purchase of said premises and at all times thereafter, in all matters relating thereto, "did rely implicitly and absolutely upon said record of said deed of trust, and did at all times until long after said sale of said premises to M. S. McQuarrie fully believe that said record of said trust deed in all things and particulars correctly set forth the exact terms and provisions of said original trust deed." The plaintiff also alleged, in substance that the said M. S. McQuarrie and all other purchasers and incumbrancers subsequent to said trustees' deed were not purchasers or incumbrancers in good faith, for value and without notice, of the plaintiff's equities as set forth in his complaint. His prayer was that the trustees under said original trust deed be ordered and directed to convey the premises to him, and that the conveyance by them to M. S. McQuarrie, and all subsequent transfers and incumbrances made by said McQuarrie or his grantees or successors in interest, be declared void, and that all such persons be declared to have no right, title, or interest in said premises, and that the said plaintiff do have and recover damages in the sum of \$3,000 from all of said defendants for the detention of said property, and for such other and further relief as may be proper in the premises, and for costs of suit.

The defendants, while admitting in their answers the facts averred by the plaintiff, which are matters of record, deny that the plaintiff ever or at all relied upon the record of said trust deed in his purchase of said premises, or believed that said record thereof correctly set forth the terms and provisions of the original trust deed; and they further deny that said M. S. McQuarrie and his subsequent purchasers and incumbrancers were not innocent purchasers without notice of the plaintiff's asserted equities.

Upon the trial of the cause the parties stipulated as to the facts of the case upon which the findings of the court should be made, expressly reserving therein respective objections to the introduction and relevancy in evidence of the several instruments upon which the respective parties relied. The court admitted all such instruments in evidence, subject to said objections, and made its findings of fact accordingly, disposing of said objections by the form and scope of its judgment, which it rendered in the defendants' favor.

It is to be noted that neither in the stipulation of the parties as to the facts of the case, nor in the findings of the court made thereon, is there to be found any statement or finding in support of the averment of the plaintiff's complaint to the effect that he relied upon the terms and provisions of the record of the said trust deed from Mary Polk Du Bose to the trustees of Helena M. Tucker, Sr., in making his purchase of the premises, or at any later time; nor is there any statement in el-

ther the stipulation of the parties or the findings of the court that the plaintiff ever actually saw said record, or ever had any knowledge of the contents thereof, other than that given by the reference thereto in his own conveyance, or other than that imparted by the naked constructive notice thereof arising from the fact of such record. Such being the state of the agreed facts and findings herein, it is plain that the plaintiff depended at the trial of the cause for his right of recovery therein, and must here depend, for his right to a reversal of the judgment, solely upon his constructive notice of the terms and provisions of the record of said original trust deed, without any proof or showing on his part of any actual knowledge of the contents of said record, or of any actual reliance thereon at the time of his purchase of the premises, or at all. This presents the sole question necessary to be determined upon this appeal.

[1] There can be no quarrel with the cases cited by the appellant herein, dealing historically with the subject of constructive notice imparted by the recordation of instruments conveying title to real property and declaring the full right of purchasers or incumbrancers of such property to rely thereon. We are in full accord with the principles enunciated in these cases. But the difficulty herein consists in their application to the facts of the case at bar as these are set forth in the stipulation of the parties and in the findings of the court. The plaintiff herein comes into a court of equity seeking relief from the effect of a trustees' sale of the premises to which he claims title, under the precise terms of an original trust deed covering the same, and executed prior to the time when he acquired whatever title or equity in the said premises remained in the maker of said trust deed. In order to obtain such equitable relief the plaintiff must have been able to show some actual injury sustained by him through the said action of such trustees in the proper exercise of their trust, and this injury could only have arisen out of the fact, if it be the fact, that the plaintiff had relied upon said record in making his purchase of the premises and in respect to the trustees' sale thereof, and had been misled as to the terms and conditions contained in said original trust deed by the mistake of the recorder in erroneously inserting in his record of the same the single word upon which the plaintiff rests his case. In order for the plaintiff to recover in such a case by proof that he had been thus misled, he must have been actually and not merely constructively misled; for no person can be misled to his injury in a transaction by any fact or circumstance upon which he placed no reliance in entering into such transaction. In the stipulation of the parties hereto as to the facts upon which the findings and judgment of the trial court are predicated there is no showing or even suggestion that the plaintiff ever saw the recorded copy of the trust deed in question or any abstract thereof, or ever

knew or inquired as to the contents thereof in making his purchase of the property, and there is no statement or suggestion that the said plaintiff did in fact actually rely either upon said record or upon the legal fiction of his constructive notice of its contents in making said purchase, or at any time thereafter, or at all. In the absence of such a showing he has not made out his case.

[2] The plaintiff, however, insists that the record of the original deed is void and of no effect because it is not a true copy thereof, but only a purported copy of an instrument which had no existence in fact, and that he therefore stands in the position of one who has purchased property upon which there was an unrecorded incumbrance of which he had no notice. We do not think, however, that the error of the recorder in the instant case was of such consequence as to render the recordation of the instrument in respect to which it happened entirely and utterly void. In all such essential particulars as the names of the parties, the designation of the debt secured, the description of the property, the general definition of the rights of the parties and duties of the trustees, the record truly transcribes the original trust deed, and it was therefore sufficient in these respects to give notice to intending purchasers or later incumbrancers of the existence and terms of said trust deed. It cannot therefore be held to be void as a record of a nonexistent original which the plaintiff was entitled wholly to disregard. In some respects, at least, the trust deed, as originally written and as recorded, required the plaintiff, as a subsequent grantee of the premises, to look behind the record and to the original documents to ascertain certain vital facts affecting his purchase of the premises; as, for instance, the trust deed does not set forth the terms of the promissory note which it secures, either as to the amount of interest it bears or the time of payment thereof. It would have been the duty, therefore, of the plaintiff, for his own protection, to have inquired as to the contents of the original documents in respect to these matters; and it may be plausibly argued that his duty to thus ascertain the time when the indebtedness would fall due would also require him to inform himself, by reference to the original documents, as to the penalties which would follow upon the default of either his grantor or himself in the payment of the obligation thus secured. It is not necessary, however, to press the inquiry thus far, for the reason that the stipulated facts of the case fail to disclose that the plaintiff went either to the record or to the original documents to inform himself as to any of these matters, but rests his entire case upon the naked fiction of his constructive notice of the terms of the instrument as recorded, without proof or finding that he ever in fact relied thereon.

[3] The appellant urges, however, that notwithstanding the absence of any showing in the stipulated facts of the case that plaintiff knew anything of the record or that he relied thereon in his purchase of the property in question, or thereafter, he is entitled to the presumption, arising from his constructive notice thereof, that he did in fact investigate the record and did in fact rely upon it; for since, as he argues, the law holds that as against a party he is presumed to have known such facts as, being put upon inquiry, he would reasonably have discovered, the like presumption operates in his favor. The argument is plausible, but it is sophistry. The reason for the creation of such a presumption against a party put upon inquiry as to any fact is that due diligence is required of all persons concerned in a transaction; but to invert the presumption would be to destroy the reason for it by rewarding a party for not doing that which due diligence would have required him to do. As in the instant case, so far as the record herein discloses, the plaintiff purchased the property in question without any examination or inquiry as to the state of the record title, and without any actual reliance upon the fact which it would have disclosed had such examination been made. To indulge in a presumption that he did these things would be to substitute the presumption for proofs, which it was his duty and fully within his power to produce if they existed, and, if they did not exist, to permit the presumption to furnish the foundation for a wrong. We find no merit, therefore, in this contention on appellant's behalf. The foregoing views render unnecessary a consideration of the question argued elaborately in the briefs of respective counsel as to whether the subsequent purchasers and incumbrancers under the trustees' deed from McQuarrie were bona fide purchasers and incumbrancers so as not to be affected by the equity asserted by the plaintiff in this action.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

(178 Cal. 20)

SOUTHERN PAC. CO. v. INDUSTRIAL
ACC. COMMISSION. (S. F. 8583.)

(Supreme Court of California. March 25, 1918.
Rehearing Denied April 24, 1918.)

1. COURTS §97(5) — DECISIONS OF UNITED STATES COURTS—FEDERAL EMPLOYERS' LIABILITY ACT.

On question whether employment falls within scope of Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1916, §§ 8657-8665), the court must give controlling force to the decisions of the United States courts.

2. COMMERCE \Rightarrow 27(5)—FEDERAL EMPLOYERS' LIABILITY ACT — CHARACTER OF EMPLOYMENT—"INTERSTATE COMMERCE."

A servant injured while working on main power line carrying alternating current to substations, which converted it to direct current for operating cars in interstate commerce, was not injured in interstate commerce; his employment being too remote.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Wilbur and Melvin, JJ., dissenting.

In Bank. Application by the dependents of William T. Butler for workmen's compensation. Opposed by the Southern Pacific Company, employer. On petition of the employer for a writ of review, to review award of the Industrial Accident Commission in favor of the dependents. Award affirmed.

A. L. Clark and Henley C. Booth, both of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondent.

SLOSS, J. The Industrial Accident Commission made an award in favor of the dependents of William T. Butler, who was killed while working as an electric lineman in the employ of petitioner, Southern Pacific Company. Said company operates a system of electric railway lines in Alameda county; its cars being used in both intrastate and interstate commerce. For the generation of electric power the company maintains at Fruitvale a main power house, whence an alternating current of high voltage is transmitted through a main power line to substations. At the substations the current passes through converters and transformers which convert it to a direct current and reduce its voltage. The direct current, thus reduced, passes to the trolley wires, and from them to the motors on the cars. When Butler sustained the fatal injury, which was caused by an electric shock, he was engaged in wiping insulators on the main power line between the Fruitvale power house and the substations.

This writ of review was issued to test the validity of the employer's claim that the commission was without jurisdiction to make an award, for the reason that Butler was engaged in interstate commerce, within the purview of the act of Congress of April 22, 1908. In its findings the commission, after setting forth in some detail the circumstances surrounding the employé's injury, declares:

"That while said employé was working as aforesaid between said power house and said substation, the electricity which caused said electric shock had not reached its point of distribution to said electric cars, and he was employed in work preliminary to the running of said electric cars, and that therefore he was not employed in interstate commerce."

[1] Upon the question whether a given employment falls within the scope of the federal act, we must look to the decisions of the courts of the United States as of controlling

force. In *Shanks v. Del., L. & W. R. R. Co.*, 239 U. S. 556, 38 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797, the court said:

"The true test of employment in such commerce in the sense intended is: Was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?"

The commission was, no doubt, seeking to apply this test, and we take it that the word "preliminary," though perhaps not an altogether appropriate term, was used by it in its finding to express the idea that the work in which Butler was engaged was not so closely related to interstate transportation as to be a part of it.

The opinion in the *Shanks Case* refers to a number of earlier cases in which, upon varying facts, the federal statute had been held to be applicable or inapplicable. Upon examination of these decisions it will be found that each case turned upon the peculiar facts of the employment in question. It may be said, however, that the decisive consideration is always the closeness or remoteness of the particular work, as related to interstate transportation. In this court it has been held that a mechanic engaged in repairing a switch engine which was used in the transportation of commerce, interstate and intrastate, was engaged in interstate commerce within the meaning of the act (*Southern Pac. Co. v. Pillsbury*, 170 Cal. 782, 151 Pac. 277, L. R. A. 1916E, 916); that a watchman on a main steam line was engaged in interstate commerce (*Southern Pac. Co. v. Industrial Acc. Com.*, 174 Cal. 8, 161 Pac. 1139, L. R. A. 1917E, 262); as was a lineman who was removing a telephone wire which had fallen on the trolley wire of the same lines involved in this proceeding (*Southern Pac. Co. v. Industrial Acc. Com.*, 174 Cal. 19, 161 Pac. 1143).

In *O., B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 38 Sup. Ct. 517, 60 L. Ed. 941, the Supreme Court of the United States had occasion to consider a state of facts more closely analogous to the situation here presented. The injured employé was a member of a switching crew which was engaged in switching cars of coal belonging to the railroad company. The coal was being switched to a shed, where it was to be placed in bins and chutes, and supplied as needed to locomotives engaged in interstate as well as intrastate transportation. It was held that the federal Employers' Liability Act was not applicable. Applying the test laid down in the *Shanks Case*, the court said that:

"Manifestly there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use."

[2] The reasoning is apt here. The coal was essential to the production of motive power for the locomotives, just as, in this case,

the electric current was necessary to move petitioner's cars. But in moving the coal to the shed Harrington was engaged in a work which was at least one step removed from the actual furnishing of the coal to the engines, and this precluded that close relation of his work to interstate commerce which would bring him within the scope of the federal act. So in this case Butler was working on the part of the line between the main power house and a substation. The current was still to pass through the transformers and converters, and be so converted and reduced as to be suitable for use in propelling the cars. The test of remoteness seems as applicable in the one case as in the other. It is true, as petitioner claims, that the electric current, once it is generated at the main power house, passes along the main power line, to and through the converters and transformers in the substations, and to the trolley wires, without interruption, and without storage. No doubt, too, a break in that current at any point, however remote from the lines of track, would immediately stop the progress of all cars then moving. But we think the decisive factor in the case is not to be sought in these characteristics of electric energy. As the Supreme Court of the United States says:

"The federal act speaks of interstate commerce in a practical sense suited to the occasion." *Shanks v. Del., Lack. & West. R. R.*, supra; *C. B. & Q. R. R. v. Harrington*, supra.

Viewing the question before us in this light, we think the answer to it should be the same as that given in the *Harrington Case*. The main power line is not part and parcel of the railroad or its equipment, in the same sense as the roadbed or the trolley line. It is an instrumentality by means of which something necessary for the operation of the cars is brought to a point where it can be usefully applied. Its purpose is simply to get to the road the necessary power to operate cars thereon—the same purpose served by wagons or cars laden with coal to be carried to the road for the operation of its locomotives. Even though the power flows without interruption from the power house to the trolley lines, it still remains that all that the main line does, and all that those engaged in keeping it in order do, is to assist in putting on to the trolley line the necessary power to be used by the operatives of the road as desired, or, to paraphrase the language already quoted from the *Harrington Case*, "putting the electric power [coal supply] in a convenient place from which it could be taken as required for use."

We think, therefore, that the commission was justified in exercising jurisdiction.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; VICTOR E. SHAW, Judge pro tem; RICHARDS, Judge pro tem.

WILBUR, J. I dissent. The test is stated by the Supreme Court of the United States to be:

"Was the employé at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

The deceased was engaged in working upon an insulator that supported a wire that was actually in use in moving trains engaged in interstate commerce, and was killed by a fall resulting from a shock caused by an escape of some of the electric current so used. His connection with the actual movements of trains was so direct that had all the current short-circuited through his body its effect on the trains in motion would have been instantaneous.

The electricity in question was generated at a steam-generating plant at Fruitvale. That steam plant was just as truly operating the moving cars as though the steam had been generated in a locomotive attached to the train. The electric transmission line was merely a means of conducting that power to the train, and in no sense differs in legal contemplation from the system of transmission of power by cable to the cars of a cable railroad. It is merely a means to an end; an instrumentality for moving interstate commerce; a method of applying the potential energy of coal and fuel oil to the movement of a train. The instant the potential energy was converted into kinetic energy it became the proximate cause of train movement, and the instrumentalities used in applying it to the interstate commerce is as much a part of the system of transportation as the car in which the passenger or freight rides. The intimate connection with the actual movement of trains is shown by the fact that the instant the power plant ceases to operate, or the transmission wire breaks, the car upon the railroad track, whether it be 10 miles or 500 miles away, immediately stops. The fact that in transmitting this power it passes through what is known as transforming stations has no significance whatever. It must be conceded that distance is not a factor in the determination of the question whether or not a person is engaged in interstate commerce. For instance, no one would doubt that if a train despatcher on Eiffel Tower, Paris, operated trains on an interstate railroad in California from there, he would be engaged in interstate commerce. The question of the method of the transmission of his orders would likewise be immaterial. He might use wireless across the Atlantic Ocean, a telegraph wire from New York to San Francisco, and a telephone from San Francisco to the station agent, who writes the message and hands it to the conductor. It would make no difference if the message was originally written and transmitted in French and was afterwards translated into English. It is obvious that the true question is: "Were the messages that were sent by the train despatcher obeyed by the train

crews in operating their trains?" So the question here is: "Was the power passing along the power line the proximate cause of the motion of the trains?" If so, those engaged in operating or maintaining the devices by which the power is transmitted would, upon the principle above stated, be engaged in interstate commerce. That this power so transmitted was the proximate cause of the movement of the trains would seem to be conclusively answered in the affirmative by the fact that any break in the power line instantaneously affects the moving trains. The transforming stations referred to in the majority opinion are merely a means to an end, viz. the transmission of the power from the steam plant to the train. The fireman in the generating plant is as truly engaged in moving interstate commerce as is the fireman of a locomotive hauling such commerce. In each case the fireman is putting into the firebox potential energy in the form of coal or oil. That energy before it is applied to the cars must first be converted into heat, a form of kinetic energy, and then from heat into train motion. The fact is that both are actually engaged in moving the train by the process of converting the potential energy stored in coal or oil into the movement of a train. If there were some process involved in the scheme of electrical transmission of power similar to the storage of coal, in other words, if the electricity was stored in one place, as oil or coal may be stored, and thus reconverted into potential energy, and then used out of the storage batteries, as in the case of an electric automobile, the situation might be analogous to that referred to in *C. B. & Q. R. R. v. Harrington*, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, but under the agreed facts there is no storage whatever. This case cannot be distinguished in principle from the case of *Southern Pacific Co. v. Industrial Accident Com.*, 174 Cal. 8, 161 Pac. 1139, L. R. A. 1917E, 262, where a line-man was killed while engaged in removing a telephone wire which had fallen on a "trolley wire of the same line involved in this proceeding." The power transmission line was but an extension of the trolley wire, as much a part of the system as feed wires along the track, or the span wires supporting the trolley wires.

I concur: MELVIN, J.

(36 Cal. App. 319)

Ex parte JOHNSON. (Cr. 592.)

(District Court of Appeal, Second District, California. Feb. 19, 1918.)

1. INFANTS \Leftrightarrow 16—JUVENILE DELINQUENCY—JUVENILE COURT LAW—PROBATIONARY COMMITMENT.

The juvenile court law, in case of an ordinary criminal information, permits the superior court to make a probationary commitment of a

minor to the custody of a parent, guardian, probation officer, or a state school, leaving in the court the right to change or modify its judgment at any time during the probationary term.

2. INFANTS \Leftrightarrow 16—JUVENILE DELINQUENCY—JUVENILE COURT LAW—PRESTON SCHOOL OF INDUSTRY.

The juvenile court law does not take away from the board of trustees of the Preston School of Industry the right to allow paroles or make discharges of inmates.

3. INFANTS \Leftrightarrow 16—JUVENILE DELINQUENCY—COMMITMENT TO SCHOOL OF INDUSTRY—DISCHARGE—STATUTES.

Under the juvenile court law (Stats. 1915, p. 1225) § 9, providing that any order made by the court in case of any person subject to its jurisdiction under the act may be changed, modified, or set aside, provided that nothing in the act shall be deemed to interfere with the system of parole and discharge provided by law or by rule of the board of trustees of the Preston School of Industry, in view of section 17 of the act providing for the establishment of the Preston School of Industry (St. 1889, p. 100, as amended by St. 1893, p. 39, St. 1909, p. 964, and St. 1915, p. 849), providing it shall be lawful for the board of trustees to give an honorable dismissal to any inmate, who shall thereafter be released from all penalties and disabilities resulting from the offenses and crimes for which he was committed, and that the magistrate or court shall thereupon dismiss the accusation pending against the discharged inmate, where a minor charged with grand larceny was convicted and committed to the Preston School of Industry "until he reaches the age of 21 years, unless sooner discharged by law," with an order that he should not be released except by order of court, but should be returned to court on attaining his majority, and such minor was honorably discharged by the trustees of the school of industry, and given a certificate thereof, he was released from all penalties and disabilities resulting from the offenses for which he was committed, and entitled to discharge from the custody of the sheriff who had rearrested him, the court assuming jurisdiction on the ground that it had been retained under the commitment issued to the school of industry.

In the matter of the application of Leslie Johnson for writ of habeas corpus. Petitioner ordered discharged from custody.

Arthur E. T. Chapman, of Los Angeles, for petitioner. Thomas Lee Woolwine, Dist. Atty., and Wm. J. Clark, Deputy Dist. Atty., both of Los Angeles, for respondent.

JAMES, J. Habeas corpus. Petitioner seeks to secure his discharge from the custody of the sheriff of Los Angeles county. In July, 1916, petitioner was convicted before a jury of the crime of grand larceny. The court determined his age at that time to be 19 years, and that he was a fit subject for commitment to the Preston School of Industry. The following judgment was then entered:

"It is ordered that the said Leslie Johnson be and he is hereby committed to the said Preston School of Industry, at Ione, Cal., until he reaches the age of 21 years, unless sooner discharged by law, provided, however, the said minor is not to be released or discharged except by order of this court, first had and obtained, but to be returned to court upon attaining majority."

On January 6, 1918, the authorities at the school of industry to which petitioner was

committed gave him an honorable discharge, certificate of which has been here exhibited. Thereafter, upon petitioner's return to Los Angeles county, he was rearrested, the court assuming jurisdiction on the ground that such jurisdiction had been retained under the commitment theretofore issued to the Preston school. Thereafter the court made its order determining that petitioner had violated conditions of his probation, and thereupon sentence was imposed that petitioner be imprisoned in the state prison for not less than one nor more than 10 years.

[1-3] It is first contended in behalf of petitioner that, as petitioner was regularly tried and convicted under an ordinary criminal information, when the court determined that he should be committed to the school of industry it exhausted its right of control of the minor. Under the express terms of the act (Stats. 1889, p. 100, as amended Stats. 1893, p. 39, as amended Stats. 1909, p. 964, as amended Stats. 1915, p. 849), this conclusion would seem to follow. However, counsel for respondent sheriff contends that the juvenile court law permits the superior court in such a case to make probationary commitment, leaving in the court the right to change or modify its judgment at any time during the probationary term. Such undoubtedly is the condition, of the law respecting ordinary proceedings under the juvenile act. Acting under the authority of that law, the superior court in proper cases has the right to repose the custody of a minor during the probationary period in the parent or guardian or probation officer or to commit such minor to a state school. Stats. 1915, p. 1225. Section 25 of the act provides that its provisions shall supersede the provisions of the act relating to the Preston School of Industry as to the "mode of commitments" to that institution. However, there is another provision important to be considered, and that is found in section 9 of the same law. It is as follows:

"Any order made by the court in case of any person subject to the jurisdiction of the court under the provisions of any of subdivisions one to thirteen inclusive of section one of this act may at any time be changed, modified or set aside as to the judge may seem meet and proper; provided, however, that nothing in this act contained shall be deemed to interfere with the system of parole and discharge that is now or may hereafter be provided by law, or by rule of the board of trustees of the Whittier State School, the Preston School of Industry or the California School for Girls, or any similar state institution or institutions, respectively, for the parole and discharge of wards of the juvenile court committed to the said schools or to any similar state institutions hereafter created, or with the management of the said schools, save that the court committing a ward to any of said schools may thereafter change, modify or set aside said order of commitment upon ten days' notice of the hearing of the application therefor being served by United States mail upon the superintendent of the said school to which said person has previously been committed, and providing that the court shall not then change, modify or set aside said order without due consid-

eration of the effect thereof upon the discipline and parole system of said school or institution."

An express condition of this subdivision is that nothing in the act shall be deemed to interfere with the system of parole and discharge that may be provided by law or rule of the board of trustees of the school of industry. There is the proviso that the court may change and modify its order of commitment upon ten day's notice to be given to the superintendent of the school. The latter condition of course presupposes that at the time such modification is sought to be made the person affected has not been theretofore discharged from the institution. Conceding, as we must, then, that the juvenile court law does not take away from the board of trustees of the school of industry the right to allow paroles or make discharges of inmates, we have to examine the law creating the school and providing for the authority given respecting paroles and discharges therefrom. Section 17 of the act providing for the establishment of the Preston School of Industry (hereinbefore referred to) provides as follows:

"It shall be lawful for the board, whenever it may deem any inmate of said institution to have been so far reformed as to justify his discharge, to give him an honorable dismissal, and to cause an entry of the reasons for such dismissal to be made in the book of records prepared for that purpose. All persons thus honorably dismissed, and all those who shall have served the full term of their respective sentences, shall thereafter be released from all penalties and disabilities resulting from the offenses or crimes for which they were committed. Upon the final discharge of any inmate, as in this section provided, the superintendent shall immediately certify such discharge in writing, and shall transmit the certificate to the magistrate or court by which such inmate or boy was committed. Said magistrate or court shall thereupon dismiss the accusation and the action pending against said person."

At the time this petitioner received his discharge from the school no change had been made pursuant to the provisions of the juvenile court law in the order of commitment. That order of commitment was that the minor be there committed "until he reaches the age of 21 years, unless sooner discharged by law." Under the terms of the juvenile court law there was reserved to the board of trustees of the institution mentioned the right to parole petitioner or give him a discharge from the institution. This right we think could not be affected by the conditional order made in the judgment to the further effect that the minor should not be released except by order of court, but should be returned to court upon attaining majority. If the board of trustees had the right to make the discharge as they did, then the discharge must be given the full effect provided to be given to it by the act, to wit, it released the petitioner from all penalties and disabilities resulting from the offense for which he was committed. This being true, it follows that petitioner is entitled to the relief sought under the writ.

It is ordered that petitioner be and he is discharged from the custody of the sheriff of Los Angeles county.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(36 Cal. App. 275)

STINNETT v. SUPERIOR COURT IN AND FOR MERCED COUNTY et al.
(Civ. 1824.)

(District Court of Appeal, Third District, California. Feb. 15, 1918.)

1. NEW TRIAL ¶163(2), 170, 171—EFFECT—AMENDMENT.

Where defendant's motion for new trial was granted, the judgment was in effect set aside, and the court could then allow an amendment to the cross-complaint, hear the case, make findings, and enter judgment thereon.

2. CERTIORARI ¶5(1) — RIGHT TO REMEDY — EXISTENCE OF OTHER REMEDIES.

Where plaintiff had decree for divorce and defendant's motion for new trial was granted and thereafter he was granted a divorce, plaintiff had the right to appeal from the second judgment and to review of the proceedings subsequent to the judgment in her favor, which was a plain, speedy, and adequate remedy, which, under Code Civ. Proc. § 1068, precluded a right to writ of review.

Writ of Review to Superior Court, Merced County; E. N. Rector, Judge.

Petition by Florence Elliot Stinnett against the Superior Court of Merced County and the judge thereof to review a judgment of such court in an action by petitioner against George Stinnett. Writ denied.

Terry W. Ward, of San Francisco, for petitioner.

PER CURIAM. This is a proceeding for a writ of review. It appears by the petition that petitioner brought an action against George Stinnett, her husband, for a divorce. On October 9, 1917, defendant in that action filed answer and cross-complaint. On October 22, 1917, plaintiff in the action filed her answer to said cross-complaint, and on November 2, 1917, the cause was tried and submitted to the court for decision. On November 15, 1917, the court signed findings and conclusions of law and on the same day entered judgment, awarding a divorce to defendant in the action and on the same day plaintiff in the action served and filed her notice of intention to move for a new trial. On November 24, 1917, defendant served and filed notice of intention to move for a new trial on certain stated special issues, to wit, whether or not at the commencement of the action plaintiff was a resident of Merced county and had been such resident for one year continuously preceding the commencement of the action, and whether or not plaintiff is the wife of said defendant, and that said motion will be made on the ground that the court made no findings on said issues. On November 26, 1917, the court made an order grant-

ing defendant's motion for a new trial on said special issues and denied plaintiff's motion for a new trial.

On December 7, 1917, plaintiff in the action filed notice of appeal "from said judgment and interlocutory decree of divorce made and entered" November 15, 1917, "and from the whole thereof." On December 12, 1917, defendant filed motion for leave to file amendment to his said cross-complaint, that said plaintiff was at the commencement of the action and for one year preceding thereto had been and was such resident continuously, and that on said day he by leave of court filed said amendment, that on said 17th day of December, 1917, the court "tried the special or particular issues," hereinbefore specified, and received evidence in proof of the allegations contained in the amended cross-complaint and on said day "and before the trial of said particular issues, your petitioner, acting through her attorney, Terry W. Ward, objected to said court proceeding with said trial, or proceeding or performing any further judicial act, function, or action, upon that ground that petitioner had on the 7th day of December, 1917, filed her notice of appeal from the judgment rendered in said action on the 15th day of November, 1917, and that said court therefore was without jurisdiction to proceed further in said action; that said court proceeded to try said particular issues, and thereafter on the 16th day of January, 1918, signed and filed its findings of fact and conclusions of law," and on said day made and entered its interlocutory decree awarding said George Stinnett his decree of divorce from said plaintiff. It is alleged that the court was without jurisdiction to render said judgment and decree on the ground that the court had no jurisdiction "to perform any judicial act in said cause from and after the date of the filing of petitioner's notice of appeal from said judgment and decree made and entered by said court on the 15th day of November, 1917."

The situation, briefly, is this: Judgment was entered; both parties moved for a new trial; the motion was denied as to plaintiff and was granted as to defendant; after these orders were made, plaintiff gave notice of appeal from the judgment; shortly thereafter defendant, by leave of court, filed an amendment to his cross-complaint alleging residence of the plaintiff, and the court, over plaintiff's objection, proceeded to take evidence upon the special issue referred to in defendant's motion, made and filed findings of fact and conclusions of law, and entered judgment awarding defendant a divorce. The question is: Had the court jurisdiction to proceed in the case after notice of appeal from the judgment?

[1] The proceedings for a new trial are independent and collateral to the judgment for,

"under our system, from the entry of the verdict or filing of the findings of the court, the motion for new trial is a kind of episode, or in a certain sense, a collateral proceeding—a proceeding not in the direct line of the judgment; for the judgment may be at once entered and even executed, while a motion for a new trial is pending in an independent line of proceeding, which ends in an order reviewable on an independent appeal." *Spanagel v. Dellinger*, 38 Cal. 278, 294; 1 Hayne on New Trial and Appeal (Revised Ed.) p. 15.

The granting of defendant's motion for a new trial had the effect to set aside the judgment and the court had the power thereafter to allow defendant's proposed amendment to his cross-complaint and to hear and determine the case, make findings, and enter judgment thereon.

[2] Furthermore, plaintiff had her right to appeal from this second judgment and to move for a new trial and thus bring up for review these later proceedings. This right furnished a plain, speedy, and adequate remedy which, under the statute, precludes her right to a writ of review. Code Civ. Proc. § 1068.

For the foregoing reasons, the writ is denied.

(38 Cal. App. 316)

DOWNEY v. CAVASSO. (Civ. 2322.)

(District Court of Appeal, First District, California. Feb. 19, 1918.)

PLEADING \S 192(2)—DEMURRER — INDEFINITENESS OF COMPLAINT.

Where complaint did not reveal whether the cause of action was on the theory that the contract involved was made by plaintiff and defendant as members of an existing corporation, or was made after dissolution of the copartnership and when defendant was retiring as a stockholder of the corporation, which was created to take over the copartnership, demurrer was properly sustained.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by J. C. Downey against I. L. Cavasso. From a judgment for defendant, plaintiff appeals. Affirmed.

Edward R. Ellassen, of Oakland, for appellant. M. J. Rutherford, of Oakland, for respondent.

LENNON, P. J. This is an appeal from a judgment entered in favor of the defendant after an order sustaining a demurrer to the plaintiff's second amended complaint without leave to further amend. The demurrer was grounded upon the sufficiency of the facts stated to constitute a cause of action and the uncertainty and unintelligibility of the averments of the complaint.

The plaintiff's complaint, when disentangled, discloses that the gist of the plaintiff's grievance arises out of a set of facts which,

concretely stated and in the order in which they are rightly related, are these: On and for some time prior to the 2d day of January, 1913, the plaintiff and defendant were copartners, doing business in the city of Oakland under the firm name of the "Downey-Cavasso Glass & Paint Company." On that date the plaintiff and defendant caused to be created, out of the assets of, and for the purpose of enhancing the conduct of, the business of the copartnership, a corporation under the former firm name. All of the issued corporate capital stock, save one share reserved for the purpose of qualifying the necessary third member of the corporation, was owned and held in equal shares by the plaintiff and defendant until October 31, 1914, when the defendant sold all of his stock in the corporation to the plaintiff for a consideration which, in part, was the promise and agreement of the defendant, expressed in writing, that he would not, for a period of five years thereafter, engage in business in the city of Oakland in competition with either the plaintiff or the corporation. This agreement was violated by the defendant to the plaintiff's alleged damage in the sum of \$1,000. The prayer of the complaint was for judgment in that amount, and for injunctive relief.

The complaint is, beyond doubt, unintelligible in its purported statement of a cause of action, because it cannot be ascertained therefrom, with any degree of certainty, whether the plaintiff's cause of action proceeded upon the theory that the contract in controversy was made by and between the plaintiff and the defendant as members of an existing corporation which was about to be dissolved, or whether it was made some ten months subsequent to the dissolution of the copartnership and at a time when the defendant was retiring as a stockholder of the corporation which was created for the purpose of absorbing and conducting the business of the copartnership. Upon this ground alone the demurrer was well taken and rightly sustained, even though the complaint somewhere within its averments hazily hints at a cause of action upon the theory contended for by counsel for the plaintiff, viz.: That the plaintiff and defendant by agreement between themselves, at the time of and subsequent to the creation of the corporation, continued and sustained toward one another the relation of copartners, and that, as a consequence, the contract in suit, even though made at the time of or after the corporate absorption of the copartnership assets, is not controlled by the statutory inhibition of section 1673 of the Civil Code against contracts in restraint of trade, but falls within the exception thereto provided by section 1675 of the same Code, which declares that:

"Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof."

Perhaps if it had unequivocally appeared from the allegations of the complaint that the plaintiff and defendant had, by agreement, express or implied, continued their relations as copartners in conjunction with their relation as stockholders of the corporation, the law would take cognizance of such dual relationship and deal with "the parties in the light of their agreement, independently of their corporation" (*Shorb v. Beaudry*, 56 Cal. 446), and if, in fact, such had been the relationship of the parties, to plead it with perspicuity would, it seems to us, have been a very simple matter.

The judgment is affirmed.

We concur: BEASLY, Judge pro tem.; KERRIGAN, J.

(36 Cal. App. 280)

CALIFORNIA TROJAN POWDER CO. v. GARNSEY et al. (Civ. 1972.)

(District Court of Appeal, Second District, California. Feb. 18, 1918.)

STATUTES §117(8) — TITLE — INDEMNITY AGAINST MECHANICS' LIENS.

The title of St. 1897, p. 202, as amended by St. 1911, p. 1422, "an act to secure the payment of claims of materialmen, mechanics and laborers employed by contractors upon state, municipal or other public work," is, under Const. art. 4, § 24, sufficiently broad to include a claim for material furnished a subcontractor.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by the California Trojan Powder Company against Leigh G. Garnsey and others, doing business as Kautz & Gabler, and another. Judgment for defendants, and plaintiff appeals. Reversed.

Ervin S. Best, of San Francisco, and Isidore B. Dockweiler, of Los Angeles (Thomas A. J. Dockweiler, of Los Angeles, of counsel), for appellant. Scarborough & Bowen, of Los Angeles, for respondents.

CONREY, P. J. This is an appeal by the plaintiff from a judgment dismissing the plaintiff's action as to the defendants Leigh G. Garnsey and Globe Indemnity Company upon plaintiff's refusal to amend its complaint after an order sustaining the demurrer thereto of those defendants. The plaintiff furnished materials to a subcontractor, whose contract was with the defendant Garnsey. Garnsey was the contractor in the principal contract, which was made between him and the state of California for the construction and completion of a portion of the state highway in Ventura county. The materials furnished by the plaintiff were used by the subcontractor upon a part of the work in-

cluded in the principal contract. On obtaining his contract with the state, Garnsey, together with defendant Globe Indemnity Company, executed a bond for the purpose and in the terms required by an act of the Legislature of the state of California, entitled "An act to secure the payment of claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal, or other public work," and an act amendatory thereof. Stats. of 1897, p. 202, and Stats. of 1911, p. 1422. If under the statute as in force during the year 1914, when the contract and undertaking were made, such an undertaking covered the matter of payment for materials furnished to a subcontractor to be used and which were used in the performance of the work described in the principal contract, then the complaint stated a cause of action against the defendants who executed that undertaking. In the case of *Associated Oil Co. v. Commery-Peterson Co.*, 32 Cal. App. 582, 163 Pac. 702, the facts were similar to the case at bar and the same question was presented. It was there held that the statute in question is not confined to the engagements of the contractor. "It was manifestly intended to cover all labor and all material contributing to the improvement, whether furnished directly to the contractor or indirectly through a subcontractor." In the absence of any controlling decision in this state, the court discussed a number of decisions rendered in other jurisdictions. A petition for a rehearing of that cause in the Supreme Court was denied.

Notwithstanding the authority of the decision mentioned above, counsel for respondents insist that a different ruling should be made; their argument being based upon a point not suggested in the former case. They admit that the language of the statute, exclusive of its title, is broad enough to include the claim of the plaintiff; but they say that the title thereof (which we have quoted supra) is so limited that the statute does not cover the claims of any persons except those employed by the principal contractor. In support of this contention they rely upon article 4, § 24, of the Constitution of this state.

"Recognizing the mandatory effect of the provision regarding the substance of the titles given legislative acts, the decisions have construed that provision in various cases. It has been said that the purpose of requiring the title to express the subject of the act was that legislators themselves, as well as the public, might not be deceived by false, misleading, or deceitful titles, and so permit mischievous legislation to be unwittingly enacted. A liberal rule of construction has been adopted, however, in the interest of protecting meritorious legislation from being declared void through inartificially constructed titles. 'The main object of this provision is to prevent legislators and the public from being entrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under the title of another.' * * * It seems to be well settled that it is not necessary that the title of an act should embrace an abstract or catalogue of its

contents.' *Abeel v. Clark*, 84 Cal. 226 [24 Pac. 383]. Where the body of an act embraces provisions which are germane to the general subject stated in its title, the title will be held sufficient to comprehend all of the provisions of the act itself; and, where the title suggests to the mind the field of legislation which the text of the act includes, the title will not be held misleading or insufficient, or the act restricted in its operation." *People v. Jordan*, 172 Cal. 391, 394, 156 Pac. 451, 453.

Applying the principles above stated, it appears clear to us that the provisions contained in the text of the statute here under consideration do not extend beyond the field of legislation naturally suggested to the mind by the words "materialmen * * * employed by contractors upon state, municipal, or other public work." It is our opinion that the complaint stated a cause of action.

The judgment is reversed.

We concur: JAMES, J.; WORKS, Judge pro tem.

(36 Cal. App. 288)

GENTRY v. CITRON et al. (Civ. 2304.)

(District Court of Appeal, Second District, California. Feb. 18, 1918.)

LANDLORD AND TENANT §291(2)—UNLAWFUL DETAINER—SERVICE OF NOTICE.

Service on one of two tenants who as lessees had bound themselves together as coparties to the lease is sufficient within Code Civ. Proc. § 1161, subd. 2, declaring a tenant guilty of unlawful detainer, where he continues in possession after default in rent, pursuant to the lease, and three days' notice, in writing, requiring its payment, shall have been served on him.

Appeal from Superior Court, Los Angeles County; W. H. Thomas, Judge.

Action by F. V. Gentry against U. Citron and another. From an adverse judgment, defendants appeal. Affirmed.

Paul W. Schenck and Jos. Citron, both of Los Angeles, for appellants. Alfred W. Allen and Fred W. Heatherly, both of Los Angeles, for respondent.

WORKS, Judge pro tem. This is an action for unlawful detainer, in which the defendants appeal from a judgment against them.

The defendants together occupied the premises which are the subject of the action, under a written lease executed by the plaintiff. Before the commencement of the action the plaintiff served upon one of the lessees the three days' notice to quit which is provided for in subdivision 2, § 1161, Code of Civil Procedure; the notice having been addressed to both lessees. The statute mentioned requires service of the notice upon "the tenant," and the appellants contend that a service upon one of two tenants situated as they are is insufficient. The point is untenable. As the lessees had bound themselves together as coparties to the lease, standing thus in opposition to the respondent,

ent, the lessor, they occupied as between themselves and as to him a relationship kindred to that of copartners, if, in fact, they might not actually have been regarded by him as copartners (*Spencer v. Barnes*, 25 Cal. App. 139, 142 Pac. 1088), which latter point we do not, however, decide. A notice to one of copartners binds the partnership (*Burritt v. Dickson*, 8 Cal. 113), and we can see no reason why the spirit and justice of the rule do not require its application to such a case as is here presented. In fact, it has been determined in other jurisdictions that, where two or more tenants hold either jointly or in common a service of notice to quit upon one of them is sufficient to terminate the tenancy of all. 16 R. C. L. p. 1176; 24 Cyc. p. 1332.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(36 Cal. App. 351)

CUNEO v. DAVIS et al. (Civ. 2199.)

(District Court of Appeal, First District, California. Feb. 21, 1918.)

ATTORNEY AND CLIENT §162 — COMPENSATION — ACTION BY ASSIGNEE — TIME FOR BRINGING SUIT.

Action by the assignee of an attorney's claim for services in defending an action, under a contract for payment if the attorney should defeat the action and prevent recovery, or if as a result of the action a lesser amount should be recovered than that claimed, was prematurely brought pending appeal in the action from a judgment for defendant; for until a final judgment on appeal has been obtained in favor of defendant, or until the case is otherwise finally determined in his favor, or a judgment shall have become final for a lesser amount than that prayed for in the action, the attorney has not defeated the action or prevented a recovery.

Appeal from Superior Court, City and County of San Francisco; El. P. Shortall, Judge.

Action by E. Z. Ouneo against Thomas E. Davis, Jr., and another. From a judgment for plaintiff, defendants appeal. Reversed.

S. W. Molkenbuhr and Thos. W. Firby, both of San Francisco, for appellants. James H. Boyer and Frank J. Golden, both of San Francisco, for respondent.

BEASLY, Judge pro tem. The facts of this case are very simple. For some time previous to the 8th day of September, 1916, James H. Boyer, an attorney at law and the assignor of plaintiff, had represented the appellants in certain litigation for which, it is claimed by plaintiff, Boyer had not been fully paid. At the last-mentioned date an action was pending between the Pacific Coast Casualty Company and Thomas E. Davis in the superior court of the city and county of San Francisco, and Boyer entered into an agreement with the Davises, defendants herein, by which he undertook to defend that action

and to pay the costs of defending the same. The provision of that contract which is under consideration here is that, in case Boyer should defeat that action and prevent any recovery against the Davises therein, then the Davises would pay to him the entire amount prayed for by the Pacific Coast Casualty Company in that action; or if, as the result of said action, a lesser amount should be recovered than that claimed the difference should be paid to Boyer by the Davises, such payment, as the case might be, to be in settlement, of what Boyer claimed was coming to him for his services previously rendered in other matters as well as for his services in the pending action.

Boyer defended the action of Pacific Coast Casualty Co. v. Davis, and it resulted in favor of Davis; a judgment therein being entered in the superior court for his costs. Thereupon Boyer demanded that he be paid in accordance with the terms of the contract above recited. The Davises refused to pay him, and he brought this action against them, without waiting for the determination of an appeal taken by the Casualty Company in the action in question. There are other facts appearing in the transcript, but these are the only facts essential to the decision of the case at bar.

The obvious claim that this action was prematurely brought must be sustained; for it is apparent that Boyer has not defeated the action he undertook to defend nor prevented a recovery therein until a final judgment on appeal has been obtained in favor of Davis, or until the case is otherwise finally determined in his favor, or by a judgment which shall have become final for a lesser amount than that prayed for in that action.

The judgment is reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

(38 Cal. App. 338)

LEFURGEY et al. v. PRENTICE et al.
(Civ. 1772.)

(District Court of Appeal, Third District, California. Feb. 20, 1918. Rehearing Denied by Supreme Court April 17, 1918.)

1. ESTOPPEL \S 77—TRANSFER OF STOCK.

Defendant in possession of the property of a mining corporation under a stock transfer agreement with plaintiff, the principal stockholder, upon termination of the agreement, because of default in payment of price, cannot deny plaintiffs' right to recover possession on ground that title to the property is in the corporation.

2. VENUE \S 5(3)—CHANGE OF.

Where the main stockholder of a mining corporation sold his stock, and gave buyer possession of the corporate property, and upon default in the payment of price sued to recover the property, and to have a mortgage placed thereon in violation of the contract declared invalid, such action was local under Code Civ. Proc. \S 392, providing that actions for the re-

covery of real estates, etc., shall be tried in the county where the land lies.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by O. B. Lefurgey and another against J. O. Prentice and others. Defendants' motion for a change in the place of trial denied, and they appeal. Affirmed.

Bradley V. Sargent and Vincent Surr, all of San Francisco, for appellants. J. P. O'Brien and H. M. Anthony, both of San Francisco, for respondents.

CHIPMAN, P. J. This is an appeal from an order denying defendants' motion for a change in the place of trial from Tuolumne county to the city and county of San Francisco. It is not disputed that at the commencement of the action defendants Prentice and Duke had their residence in said city and county, where also was the principal place of business of the defendant corporation; the defendant Craig resided in Alameda county and the defendant Kinsey resided in San Mateo county, the two latter consenting that the cause might be transferred to the city and county of San Francisco. The question presented is whether the action was personal or local in its nature as involving real property. The complaint was filed in July, 1914; the motion to change the place of trial was denied on September 28, 1914, and the transcript on appeal was filed October 1, 1914. No briefs were filed in the case until after its transfer to this court in November, appellants' brief having been filed November 20, 1917, and respondents' January 14, 1918.

The following facts alleged in the complaint will perhaps be sufficient to indicate the character of the action: The defendant corporation was, at the commencement of the action, the owner of certain mining property in Tuolumne county, and plaintiff Lefurgey was then the owner of a large majority of its capital stock, and at the time of the execution of the agreement hereinafter referred to controlled its board of directors, and by virtue of such ownership and control had the management and control of the business and property of the corporation; on February 1, 1913, Lefurgey entered into an agreement with defendant Prentice, by which the former agreed to sell to the latter 240,000 shares of his stock, and to deliver possession of the mining properties of defendant company to defendant Prentice, and to cause four out of the five directors of the corporation controlled by Lefurgey to resign and to elect in their place four other directors to be nominated by Prentice, thereby Lefurgey surrendering control of the property to Prentice. It was also agreed that Prentice should have the right to work, operate, and develop the properties, and to extract and remove the minerals therefrom, provided all work

was done in a good and minerlike manner, and was to be done at Prentice's sole cost and expense, and he also agreed to keep the premises and property free and clear of all liens and incumbrances. The agreement also fixed the purchase price to be paid by Prentice, and the times and manner of payment, and that Prentice would arrange with other stockholders to pay them their proportion of minerals extracted from the mining property. The agreement also provided that on Prentice's failure to pay the purchase price or any part thereof when it became due and payable, and he should fail to keep or perform any of the conditions of the agreement, the agreement should thereupon terminate and end, and that Prentice should immediately deliver to Lefurgey the possession of the property which he obtained under said agreement from Lefurgey, and also would procure the resignation of the directors nominated and controlled by Prentice who had theretofore been elected in place of those controlled by Lefurgey. It was also alleged in the complaint that Lefurgey delivered possession of the property to Prentice, and caused four directors to resign, and to be elected in their place four directors nominated by Prentice, in accordance with the terms of the agreement, and that Prentice accepted possession of the property and control of the corporation from Lefurgey, and operated the property under such possession and control, and did certain work upon the property, and then failed to comply with the conditions of the agreement, which by its terms thereupon terminated and ended; that thereafter Lefurgey demanded possession of the property free of all liens and incumbrances and the resignations of the directors theretofore nominated by Prentice, all of which defendant Prentice refused to do in violation of the conditions in said agreement. The complaint also alleged that while in possession of the property under said agreement and while Prentice was in control of the corporation through the directors nominated and controlled by him, he caused a mortgage to be executed by the corporation to him for moneys expended in working and operating the property, while he was in possession thereof under the agreement, and which, by the terms of the agreement, he agreed to pay as a part of the consideration for delivering possession of the property and control of the corporation to him, and it was alleged that this mortgage is fictitious and invalid, and constitutes a cloud upon the title of the property. It also appears that before the commencement of the action, plaintiff Lefurgey conveyed an interest in the cause of action to his coplaintiff Shepard.

The complaint goes into great detail in setting forth the matters of which the foregoing is a brief epitome. It was stated in the complaint that Prentice defaulted in all the progressive payments which he was to make for the purchase of the said stock; that he had

involved the corporation in a large indebtedness in the course of operating the mines and had caused a note and mortgage for \$20,000 to be executed by the corporation to him as covering a part of the expenditures made by Prentice in operating the mine, and contrary to the express terms of the agreement by which he was to operate the mine entirely at his own cost and expense and keep the mining property entirely free from all liens and incumbrances.

The prayer of the complaint is that the defendant J. A. Prentice be required to deliver immediate possession of said premises and property to the plaintiffs; that said alleged promissory note and mortgage be adjudged void and that they be surrendered by the defendant Prentice and canceled; that it be adjudged that the defendant Prentice has no claim against the said Stanislaus Gravel Mining Company for moneys expended by him upon the properties while in possession thereof under the terms of the agreement set forth in the complaint, and that all alleged proceedings of the directors of said mining company acknowledging or admitting any indebtedness of said company to defendant Prentice be adjudged invalid and void; that defendants Craig, Kinsey, and Duke be required to resign as directors of said mining company; also for judgment against the defendant Prentice for the amount of any indebtedness incurred by him while operating said properties and which indebtedness was not paid by him, and for attorney's fees and costs and such other and further relief as may seem meet and proper.

[1] Plaintiffs do not seek a money judgment against the defendants. The main objects of the action are first: To compel Prentice to return the possession of the real property to Lefurgey from whom he received the possession and this in strict accordance with the agreement under which Prentice went into possession; second, to have the incumbrance on the real property removed which was placed on the property under Prentice's direction, for his own benefit and in violation of the agreement under which he had possession and control of the property of the corporation. It is true that the title to the property is in the corporation, and that the business of the corporation is transacted through its directors. But it is alleged that Lefurgey, by reason of his owning a large majority of the shares of the corporation, did himself in fact control its acts; that in compliance with the agreement he caused his directors to resign and directors of Prentice's selection to be substituted, thus for the time passing control over to Prentice, subject, however, to the agreement that should Prentice fail to keep its covenants on his part to be performed he would cause his directors to resign and would surrender possession to Lefurgey. Having entered into possession under Lefurgey, Prentice is in no position to deny Lefurgey's right to possess

sion. *Garvey v. Lashells*, 151 Cal. 526, 532, 91 Pac. 498.

[2] The nature of the action is to be determined by the averments of the complaint and the nature of the relief that can be granted in the action, and not by the probable result in a trial upon the merits. Questions raised on the demurrer such as the legal sufficiency of the complaint, whether there is an improper joinder of actions or of defendants, are matters which do not properly arise in determining the motion. Section 392 of the Code of Civil Procedure declares that the following causes must be tried in the county in which the subject of the action or some part thereof is situated:

"1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property."

The gist of the action here is to recover possession of the land, and to have a mortgage lien fraudulently placed thereon canceled. These objects, we think, clearly characterize the action as local under section 392. The principle governing these cases is quite fully discussed in an opinion by Justice Burnett in *Robinson v. Williams*, 12 Cal. App. 515, 107 Pac. 705. See, also, *Donohoe v. Rogers*, 168 Cal. 700, 144 Pac. 958.

The order is affirmed.

We concur: BURNETT, J.; HART, J.

(36 Cal. App. 312)

MUNN v. ANTHONY et al. (Civ. 2102.)
(District Court of Appeal, Second District,
California. Feb. 19, 1918.)

1. FRAUD \Leftrightarrow 20—RELIANCE ON REPRESENTATIONS.

A buyer of an automobile may recover damages for false statement of seller's agent as to date of manufacture, though she had the car examined before buying, where such examination was as to the condition of the machine and batteries, and not as to its date.

2. FRAUD \Leftrightarrow 35—WAIVER — CONTRACTS IN WRITING.

Where written contract for sale of automobile waived all promises or agreements not specified therein, the buyer could not recover for false representation as to the year of manufacture, particularly in view of Civ. Code, § 1625, providing that written contracts supersede all the negotiations or stipulations preceding their execution.

3. FRAUD \Leftrightarrow 58(1)—DAMAGES—EVIDENCE.

In an action by a buyer, based upon misrepresentation of year of manufacture of an automobile, evidence held sufficient to sustain finding of trial court as to the difference between the value of the machine as it was and what it would have been if made in year represented.

Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Action by Charlotte P. Munn against Earle C. Anthony, Earle C. Anthony, Incorporated, and another. From a judgment for plaintiff, and from an order denying a new trial, defendant Earle C. Anthony, Incorporated, appeals. Judgment reversed.

E. W. Freeman and Paul Nourse, both of Los Angeles, for appellant. Olin Wellborn, Jr., and Stephen Monteleone, both of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered in favor of the plaintiff, and from an order denying to the defendant Earle C. Anthony, Incorporated (a corporation), a new trial. The action was based upon alleged misrepresentations made by an agent of appellant regarding the year of manufacture of a certain electric automobile.

Plaintiff negotiated with English, the agent of appellant, for the purchase of a second-hand electric automobile. She alleged, and the court found, that English represented that the automobile had been manufactured in the year 1913, when in fact it was a 1912 model. The car was offered to the plaintiff, with electric rectifier, for the sum of \$1,800. Plaintiff informed appellant's agent that she would not purchase it without the privilege of having an examination made by persons of her own selection. Agreeable to this suggestion, the machine was left with the mechanics designated by the plaintiff, where it remained for a day or so. These mechanics, being experienced in the handling of electric machines, examined the car and its batteries, and reported to the plaintiff that everything was in good condition, and that the car "looked to be a good buy." Plaintiff thereupon offered appellant the sum of \$1,700 for the car and rectifier, that being \$100 less than the proposed price. This offer was accepted, and thereupon a written contract was entered into and signed by both parties. The contract appears to have been made upon the blank form used for the purchase of new cars, except that the descriptive matter was written in before it was signed. The contract in its main parts was in the following form:

"November 24, 1913.

"In consideration of the placing at once of an order with the manufacturer, I hereby agree to purchase of the California Motor Company of Los Angeles.

One R & L Electric Model No. 2475..	Price
Sold for the account of Mrs. K. A. Kelley (as is).....	Price \$1700.00
Including one second-hand Westinghouse rectifier	Price
.....	Price
.....	Price
.....	Price
.....	Price State
.....	License
.....	2.00
.....	Total 1700.00

and to pay for the same the sum of \$1,700.00, said payment to be made at the garage of the California Motor Company, of Los Angeles, as soon as shipment from factory is received. All cars are sold under the standard warranty of the National Association of Automobile Manufacturers. All promises, verbal understandings, or agreements of any kind pertaining to this

purchase not specified herein, are hereby expressly waived.

"Subject to conditions on back.

"[Signed]

Charlotte P. Munn.

"Received of Charlotte P. Munn, Hotel Maryland, Pasadena, Cal., the sum of \$200, as deposit upon and to apply upon the purchase price of the above contract. All agreements contingent upon fires, strikes, delays in shipment, accidents, or other reasons beyond our control.

"California Motor Company,

"By E. Anthony."

[1, 2] There was a conflict in the evidence upon the question as to whether the false representations had been made, and this conflict having been resolved by the trial judge in favor of the plaintiff, appellant admits that the determination of that fact is beyond the reach of its appeal. However, two points are insisted upon: First, that the plaintiff was not entitled to rely upon any representations made regarding the automobile when she resorted to independent means before buying to ascertain its value and condition; second, that having finally entered into a written contract of sale, which contained terms excluding all previous negotiations and statements, the claim that false representations had been made by way of inducement could furnish no ground for a cause of action. As to the first proposition, we do not agree with appellant's contention, for the reason that the evidence does not show that the independent examination made at the instance of the plaintiff, went to the question at all as to the year of manufacture of the car. This examination looked only into the general condition of the machine and its batteries. As to the second point, we think the contention of appellant should be sustained. The written contract as entered into contained a description of the car, with its model number, and contained the limiting clause that:

"All promises, verbal understandings, or agreements of any kind pertaining to this purchase not specified herein, are hereby expressly waived."

It appears that the model number as used in the contract was descriptive to show the year during which the car was manufactured, for the witness Holbert testified that:

"The Rauch & Lang Company never designates the year of their models; they always just use the model number or model letter."

It seems quite plain that the limiting term incorporated in the contract was intended to save disputes and eliminate all question of representations as to kind and condition of machines sold. Our Civil Code (section 1625) provides that:

"The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

See, also, *Tockstein v. Pacific Kissel Kar Branch*, 33 Cal. App. 262, 164 Pac. 906.

The writing here considered appears to be intended to express the whole contract be-

tween the parties. *Kreuzberger v. Wingfield*, 96 Cal. 251, 31 Pac. 109.

[3] While appellant advances the further argument that the evidence was insufficient to sustain the finding that there was any difference in the value between a 1912 model electric and a 1913 model, both being in the same condition of repair, we are not prepared to agree with that contention. The evidence was not strong, but it was of such a nature as might well have been satisfactory to the trial judge. The value of the car as purchased by the plaintiff appears to have been established at a price not less than the amount she paid for it. She used the machine for about a year before discovering, as was found by the court, that the automobile was a 1912 instead of a 1913 model. The damage to her—that is, the difference between what the machine would have been worth had it been of the later model and the value of a machine of 1912 model—the court found to be \$150. We are satisfied that this judgment cannot be sustained, because of the condition of the contract by which plaintiff waived the representations made previous to the execution thereof. The law did not permit an appeal to be taken from an order denying a new trial at the time the appeal herein was perfected; hence as to the order attempted to be appealed from no judgment is required. *Watt v. Bekins Van Storage Co.*, 171 Pac. 832.

The judgment is reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(35 Cal. App. 776)

HUCKABY v. NORTHAM et al. (Civ. 2318.)
(District Court of Appeal, First District, California. Jan. 7, 1918.)

QUIETING TITLE ~~6~~53—APPEAL—REVERSAL.

Judgment for defendants in suit to quiet title must be reversed on appeal, where it is conceded that the evidence is insufficient as a matter of law to support a finding of title in defendants, and it is also conceded that plaintiff was in possession when suit was begun, and that such possession, as against a person who had no better title, or no title at all, should have compelled a finding in favor of plaintiff.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Vernon Huckaby against Elizabeth A. Northam and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded for new trial.

Theodore A. Bell, of San Francisco, for appellant. O. K. Bonestell and W. D. Crichton, both of Fresno, for respondents.

PER CURIAM. This was an action to quiet title, in which judgment was rendered in favor of the defendants, and the plaintiff appeals.

It is conceded by the respondents in open court that the evidence is insufficient as a

matter of law to support the finding of title in the defendants as made by the trial court; and it is also conceded that the plaintiff was in possession of the property in suit at the time the action was commenced, and that such possession, as against a person who had no better title, or no title at all, should have compelled a finding in favor of the plaintiff. That being so, there remains nothing for this court to do but to reverse the case upon that point alone.

The point decided being determinative of the entire case, there is no necessity to discuss the other points presented.

It is ordered that the judgment be and the same is hereby reversed, and the cause remanded for a new trial.

(36 Cal. App. 284)

BLOCHMAN COMMERCIAL & SAVINGS BANK v. KETCHAM. (Civ. 2072.)

(District Court of Appeal, Second District, California. Feb. 18, 1918.)

1. APPEAL AND ERROR §757(1) — **BRIEFS — TYPEWRITTEN TRANSCRIPT — ASSUMPTION AS TO RECORD.**

Under Code Civ. Proc. § 953c, requiring that parties who present a cause on appeal by the alternative method print in the briefs such portion of the record as they desire to call to the attention of the court, where only a typewritten transcript on appeal has been filed, the appellate court will assume that the parties have printed in their briefs such portions of the record as they desire to call to the attention of the court, and that its statement of facts should be confined to matters thus brought to its attention.

2. ALTERATION OF INSTRUMENTS §7, 12 — **NOTES — INSERTING PLACE OF PAYMENT — "MATERIAL ALTERATION."**

Where a promissory note reads, "I promise to pay to the order of myself at," there is an implied authority given the holder to fill the blank by designating a place of payment at his election, and such act by him is not a material alteration of the instrument within Civ. Code, § 1700, providing that such an alteration of a written contract extinguishes all executory obligations.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Material Alteration.]

3. CONTRACTS §147(1) — **CONSTRUCTION — INTENTION.**

In the interpretation of contracts, the intention of the parties, so far as ascertainable and lawful, controls under Civ. Code, §§ 1636, 3268.

4. EVIDENCE §81 — **PRESUMPTIONS — LAW OF FOREIGN COUNTRY.**

In the absence of contrary showing, presumably the law of Mexico, where the note in suit was drawn, is the same as that of California, where the suit was brought.

5. ALTERATION OF INSTRUMENTS §20 — **NOTE — PLACE OF PAYMENT — FILLING IN BLANK — EFFECT — WHAT LAW GOVERNS.**

Under Civ. Code, § 1646, providing that a contract is to be interpreted according to the law of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law of the place where it is made, where a promissory note was made in Mexico, with the place of payment left blank, and the payee, pursuant to its implied author-

ity, filled in a place of payment in California, the note was enforceable as a commercial instrument in California, being such under the laws of the state, though not in the form and substance required by the laws of Mexico.

Appeal from Superior Court, San Diego County; O. N. Andrews, Judge.

Action by the Blochman Commercial & Savings Bank against L. Y. Ketcham. From the judgment, defendant appeals. Affirmed.

Shreve & Shreve and Harry W. Horton, all of San Diego, for appellant. Sam Ferry Smith, of San Diego, and Laurence H. Smith, of San Francisco, for respondent.

CONREY, P. J. [1] The defendant appeals from the judgment. The action is based upon an alleged promissory note dated at Ensenada, Mexico. The case is presented upon printed briefs and without oral argument. Appellant contends that as to certain matters the evidence does not sustain the findings, and as to other matters that the court erred in its ruling at the trial. On both sides the briefs discuss portions of the evidence without furnishing us any quotations therefrom. Only a typewritten transcript on appeal has been filed. In such cases the rule is that we will assume that the parties have printed in their briefs such portions of the record as they desire to call to the attention of the court, and that our statement of facts should be confined to matters thus brought to our attention. Code Civ. Proc. § 953c; *Jones v. American Potash Co.*, 169 Pac. 397; *Stewart v. Andrews*, 169 Pac. 397. Therefore we shall discuss on the merits only those points which are illustrated by quotations from the transcript and those assertions of fact made by one party and definitely admitted on the other side, as being shown by the record.

The note as dated and delivered at Ensenada, Mexico, read, in part, as follows:

"Six months after date, without grace, I promise to pay to the order of myself at one thousand dollars, in gold coin of the United States of America, of the present standard value."

After the note had been delivered and after it came into the possession of the plaintiff, the plaintiff inserted in the blank line left therein, after the word "at," the words "Blochman Commercial & Savings Bank of San Diego, San Diego, California." The defendant claims that this was a material alteration in the instrument, and that for that reason no recovery can be had thereon. He further claims that had no place of payment been inserted in the note, questions concerning its execution and meaning would be determined according to the law of Mexico, under which, he asserts, he would be entitled to the equitable defenses set up in the answer. For the reason above suggested, he has not properly brought before us those equitable defenses or the rulings of the court. We find, however, in the respondent's brief

a quotation from the record which shows that at the trial the attorney for defendant stated, "I do not expect to go into that fraud proposition." We presume that this referred to those equitable defenses, whatever they were.

Section 1700 of the Civil Code provides that:

"The intentional destruction, cancellation, or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act."

Appellant relies upon certain decisions made in other states and upon *Pelton v. San Jacinto Lumber Co.*, 113 Cal. 21, 45 Pac. 12. In the *Pelton* Case it does not appear that any blank was left in the note with words indicating an undesignated place of payment. After its execution it was altered by adding thereto a stated place of payment in the state of New York, although the note was made in California. It was held that this alteration of the note was material. As it read before its alteration it was payable only in this state, but thereafter it was made payable at a designated bank in the state of New York.

[2] We are of the opinion, however, that where, as in the case at bar, there is a blank in the note preceded by the word "at," there is an implied authority given to the holder to fill that blank by designating a place of payment at his election. The act done by him under that authorization does not constitute a material alteration in the instrument.

[3,4] In the interpretation of contracts the intention of the parties, so far as ascertainable and lawful, will control. Civ. Code, §§ 1636, 3268. The modern trend of authority seems to be that where the place of payment is inserted in a blank of the kind above described, left in the note at the time it was signed or indorsed by the prior party sought to be charged, the holder will be permitted to recover. Some cases base this rule upon the doctrine of estoppel, but the doctrine of implied authority is also fully admitted; it being recognized, however, that an express understanding that no place of payment is to be inserted will in any event negative the implied authority. *Diamond Distilleries Co. v. Gott*, 137 Ky. 585, 126 S. W. 131, 31 L. R. A. (N. S.) 643. That case is also reported in 31 L. R. A. (N. S.) 643, where the authorities are collected in an extensive note. See, also, note in *Ann. Cas.* 1912B, 1010. Defendant in this case testified that at the time of the execution of the note nothing was said between himself and the persons to whom he delivered it as to whether or not the place of payment should be filled in. It is not claimed that there is any-

thing in the record to show that the Mexican law did not permit blanks in notes to be filled in by the owner.

Therefore, presumably the law of Mexico is the same as that of California, according to which, as we have stated, a blank space of the kind above described may be filled in by the holder of the note.

[5] Appellant further claims that under the laws of Mexico the note could not be enforced as a commercial instrument, and was void because it was not in the form and substance required by those laws. "A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." Civ. Code, § 1646. Our decision that the plaintiff was authorized to make the note payable at a place in California carries with it the conclusion, above stated, that such act of the plaintiff did not constitute an alteration which changed the legal import or effect of the instrument. Therefore the executory obligations of the note were not extinguished by that act, and the provisions of Civil Code, § 1700, are not applicable to this case.

The note is a valid obligation of the defendant. No contention is made that it is unpaid, or that the plaintiff was not shown to be the owner thereof.

The record as presented to us raises no other questions which we are called upon to consider.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

(36 Cal. App. 311)

BARKER BROS. v. JOOS et al. (BOWRING, Intervener). (Civ. 2054.)

(District Court of Appeal, Second District, California. Feb. 19, 1918.)

APPEAL AND ERROR 6757(1)—ALTERNATIVE METHOD—REVIEW—TYPEWRITTEN TRANSCRIPT.

Appellate courts will not look to the typewritten transcripts filed under the alternative method of appeal to determine whether ground exists for the reversal of the judgment appealed from, where no part of record is printed in brief, as expressly required by Code Civ. Proc. § 953c.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Barker Bros., a corporation, against J. Joe Joos and R. E. Joos, wherein Lynden Bowring intervened. From a judgment for the return of property to the intervener, or for the value, plaintiff appeals. Affirmed.

A. P. Michael Narlian and N. B. Nelson, both of Los Angeles, for appellant. Geo. S.

Hupp and Lynden Bowring, both of Los Angeles, for respondents.

PER CURIAM. It is stated in the brief of plaintiff in this case that the appeal is from a judgment for the return of certain personal property to the intervener-respondent, or for the value thereof. The appeal is taken under the alternative method. No portions of the record are printed in appellant's brief. References are made to the pages of the typewritten transcripts only. Section 953c, Code of Civil Procedure, requires that the parties who present a cause on appeal by the alternative method print in their briefs such portions of the record as they desire to call to the attention of the court. It has been repeatedly held that appellate courts will not look to the typewritten transcripts filed under the alternative method of appeal for the purpose of determining whether ground exists for the reversal of the judgment appealed from. *Jones v. American Potash Co.*, 169 Pac. 397; *Marcucci v. Vowinkel*, 164 Cal. 693, 130 Pac. 430; *Wills v. Woolner*, 21 Cal. App. 528, 132 Pac. 283; *Miller v. Oliver et al.* (Sup.) 163 Pac. 357; *Pasadena Realty Co. v. Clune*, 166 Pac. 1025; *McKinnell v. Hansen et al.* (Sup.) 167 Pac. 887; *California Sav. & Commercial Bank v. Canne* (Sup.) 169 Pac. 395; *Stewart v. Andrews*, 169 Pac. 397; *Huffaker v. McVey*, 169 Pac. 704; *Hepler et al. v. Wright et al.* 170 Pac. 667; *Anderson v. Recorder's Court*, 171 Pac. 812; *Blochman Commercial & Sav. Bank v. Ketcham*, Civil No. 2072, decided February 18, 1918, 171 Pac. 1084.

The judgment appealed from is affirmed.

(36 Cal. App. 306)

MacPHEE v. BOARD OF POLICE COM'RS OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 2122.)

(District Court of Appeal, First District, California. Feb. 18, 1918.)

1. MUNICIPAL CORPORATIONS ⇨ 185(4)—DISMISSAL OF POLICE OFFICER.

Under provision of city charter that office becomes vacant on conviction of incumbent of an offense in violation of duty and provision that police officer cannot be dismissed except upon trial before police commission after notice, where plaintiff police officer was convicted under Pen. Code, § 182, of a misdemeanor involving violation of official duty, the office became vacant ipso facto, and he would not be entitled to mandamus to compel commissioners to vacate dismissal made without notice to or hearing of plaintiff, although conviction had been reversed on appeal, and new trial ordered, and proceedings in lower court thereupon dismissed.

2. MUNICIPAL CORPORATIONS ⇨ 176(3)—PROVISIONS OF CHARTER—CONSTRUCTION.

As a charter provision that a member of a police force shall not be subject to dismissal for any cause except after notice and trial is not ir-

reconcilable with a provision that an office shall become vacant on incumbent being convicted of an offense in violation of duty, application of the rule that particular provisions prevail over more general ones is unnecessary.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Application for writ of mandate by Arthur F. MacPhee against the Board of Police Commissioners of the City and County of San Francisco and others. Application denied, and plaintiff appeals. Affirmed.

See, also, 26 Cal. App. 218, 146 Pac. 522.

Nathan C. Coghlan, E. V. McKenzie, and A. L. O'Grady, all of San Francisco, for appellant. Geo. Lull, City Attorney, of San Francisco, for respondents.

BEASLY, Judge pro tem. [1] On May 1, 1913, MacPhee was a police officer of the city and county of San Francisco. On that day an accusation was made against him before the police commission of that city for violating section 182 of the Penal Code of the state of California, in that he was charged with having joined other police officers in a conspiracy with a gang of confidence operators to protect the latter in their criminal activities. Certain specified charges of crimes committed in carrying out the conspiracy were embodied in the complaint filed against MacPhee, illustrative of which was one to the effect that one of the conspirators named Frank Ross had fleeced a victim of \$900, and that the police officers who were members of the conspiracy blackmailed him of \$700 of this amount as hush money, and, incidentally, that in the original bargain made by the conspirators the police officers were to have but 15 per cent. of the results of the confidence operations.

MacPhee had a hearing on these charges, which progressed to the point where the evidence of the complainants was before the commission, when he suggested that the grand jury were considering the matter, and asked for a continuance until that investigation should be concluded, which was granted. The grand jury did consider the matter, and indicted MacPhee and several others, and MacPhee was subsequently convicted and sentenced to confinement in the county jail. Thereupon the police commission, without notifying MacPhee and without hearing him, and apparently without reference to the charges made, dismissed MacPhee from the force. He appealed from the conviction in the criminal case, and this court reversed the judgment and granted him a new trial. Proceedings in the lower court were thereupon dismissed, and MacPhee subsequently demanded that the police commission proceed to set aside his dismissal on the accusation before that body and hear the charges

against him. This the commission refused to do, and he then applied to the superior court for a writ of mandate to compel them to act in accordance with his demand. That court denied the application, and MacPhee now appeals.

The appellant relies upon a section of the charter of the city and county of San Francisco which provides, generally speaking, that no member of the police department shall be subject to dismissal for any cause except after trial before the commission had upon notice to him of the time and place of hearing. Charter, art. 8, c. 7, § 3. But there is another provision of this charter which must be construed with the section above referred to so as to reconcile them, if possible, with each other, namely, section 10 of article 16, which provides that an office becomes vacant when the incumbent thereof dies, resigns, is adjudged insane, convicted of a felony or of an offense in violation of his official duty, or is removed from office, ceases to be a resident of the city and county of San Francisco, or absents himself from the state without leave for more than 60 consecutive days. Upon first reading, these two sections of the charter appear, as contended by the appellant, to be irreconcilable, but a closer reading shows that section 3 of chapter 7 of article 8 refers to trials generally for breach of duty or misconduct and other cases before the commission; while section 10 of article 16 specifically makes a rule by which offices of the city and county become vacant under certain specified and carefully defined conditions.

[2] Viewing the first section above cited as providing a rule governing the dismissal of a member of the police department, and the latter section as designating a condition under which an office, either in the police or any other department of the city government, shall become vacant, there is no irreconcilable conflict between these two sections of the charter; and it therefore becomes unnecessary to apply the rule invoked by the appellant that particular provisions prevail over more general provisions of a statute. This being so, the case of McKannay v. Horton, 151 Cal. 711, 91 Pac. 598, 13 L. R. A. (N. S.) 661, 121 Am. St. Rep. 146, covers this case, where it is held that by section 10 of article 16 of the charter of San Francisco an office ipso facto becomes vacant on the conviction of the incumbent of a felony. Here the conviction was of a misdemeanor, but it was a misdemeanor of such character as involved a violation of official duty, and therefore comes within the section of the charter upon which the case of McKannay v. Horton rests.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(36 Cal. App. 815)

**TAYLOR v. BOARD OF POLICE COM'RS
OF CITY AND COUNTY OF SAN
FRANCISCO et al.** (Civ. 2123.)

(District Court of Appeal, First District, California. Feb. 18, 1918.)

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge. Application by Charles H. Taylor for writ of mandate against the Board of Police Commissioners of the City and County of San Francisco and others. Application denied. Plaintiff appeals. Affirmed.

Nathan C. Coghlan, E. V. McKenzie, and A. L. O'Grady, all of San Francisco, for appellant. Geo. Lull, City Atty., of San Francisco, for respondents.

BEASLY, Judge pro tem. This case is identical in all respects with that of MacPhee v. Board of Police Commissioners et al., 171 Pac. 1086, and upon the authority of that case the judgment herein is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(36 Cal. App. 278)

NORRIS v. WRIGHT. (Civ. 2312.)

(District Court of Appeal, First District, California. Feb. 16, 1918. Rehearing Denied by Supreme Court April 16, 1918.)

FRAUD §58(1)—EVIDENCE.

In the absence of showing of fraud, misrepresentations, incapacity, minority, or confidential relationship, the court cannot relieve against a sale of an heir's interest, purporting to be made for its full value, out of which she received but a small part of its value on account of excessive commissions, interest, and expenses charged for loans made to such heir by the purchaser.

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by Hazel P. Norris against Eli Wright. Judgment for defendant, and plaintiff appeals. Affirmed.

J. C. Black, of San Jose, for appellant. H. A. Hardinge, of San Jose, for respondent.

KERRIGAN, J. This is an action to recover damages alleged to have been sustained by the plaintiff in conveying certain property interests to the defendant, said transfer being charged to have been procured by means of false and fraudulent representations made by the defendant.

The plaintiff was the owner of a one-quarter interest in a certain estate in course of probate, and soon after she had acquired such interest the defendant made to her at short intervals of time six loans of comparatively small amounts, taking from her at each transaction a grant, bargain, and sale deed of her said one-quarter interest as security for the repayment of the sum then loaned, with interest, commission, and costs. On the first of this series of transactions the defendant took plaintiff's note for \$85, with interest at 2 per cent. per month, for which she received from him in cash \$50, which was the amount she desired to borrow; the balance of the note

(§35) representing so-called expenses, and being the amount charged by defendant for his trouble in ascertaining whether or not the loan might be safely made. On the occasion of each of the other loans, the defendant, in addition to deducting interest at the rate of 2 per cent. per month on the previous loans, also deducted 10 per cent., by agreement with the plaintiff, as a commission for making the loan. When the indebtedness of the plaintiff to the defendant thus created reached the sum of \$900, and the defendant had received six several conveyances of the plaintiff's said interest (which it is not disputed were in effect mortgages given to secure the repayment of the loans), the defendant refused to advance plaintiff any further money on her interest in said estate, but agreed to purchase her said interest for a total sum of \$1,550, which he did, the purchase price being made up of the \$900 owed as aforesaid by plaintiff to the defendant; \$100 paid by defendant, with the consent of plaintiff reluctantly given, to an attorney who represented her interest in said estate; \$75 paid by defendant with her consent for searching and perfecting title to the property covered by the conveyance; \$75 charged by the defendant as a commission for making this sale to himself; and finally, the sum of \$400 paid by defendant to plaintiff. According to the appraisal made in the estate in which the property in question figured and other evidence in the case, \$1,550 appears to have been about the market value of the plaintiff's interest thus sold to the defendant, although evidence was also introduced placing its value at a much higher figure. It also appears that on the occasions of her transactions with the defendant, plaintiff was accompanied by her husband, who approved of them.

It is perfectly apparent that the plaintiff was unfamiliar with business affairs, and that the defendant imposed unconscionable burdens upon her; but it is not claimed that at the time of the transactions she was an infant, or incompetent, or that the relations between her and the defendant were confidential. No evidence was introduced to show that the defendant made any misstatements or misrepresentations of fact to the plaintiff, or that he practiced upon her any deceit or fraud. It follows that this appellate court is powerless, as was the court of first instance, to afford the plaintiff any relief against this modern Shylock.

Some criticism is made of the findings. While they cannot be commended for clearness, still under all the circumstances of the case they cannot be regarded as seriously defective.

Judgment affirmed.

We concur: LENNON, P. J.; FLOOD, Judge pro tem.

(36 Cal. App. 280)

GLOBE INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.
(Civ. 2414.)

(District Court of Appeal, First District, California. Feb. 16, 1918. Rehearing Denied by Supreme Court April 16, 1918.)

MASTER AND SERVANT — §373 — WORKMEN'S COMPENSATION — INJURIES — ARISING OUT OF EMPLOYMENT.

Where one employed as a bookkeeper and clerk crossed a public street to mail a letter written for his employer according to custom and was injured by an automobile driven by a third party, the injury arose out of the employment.

Application by the Globe Indemnity Company for writ of certiorari to review an award of the Industrial Accident Commission and others. Petition denied.

D. Hadsell, Jos. G. Sweet, and E. A. Ingalls, all of San Francisco, for petitioner. Chris. M. Bradley, of San Francisco, for respondents.

BEASLY, Judge pro tem. This application for a writ of certiorari to review an award of the Industrial Accident Commission against the petitioner is denied upon the following considerations:

The applicant for compensation, Roberts, was a bookkeeper and clerk of one C. H. Koblicke at the time the accident happened. Among his duties was to write letters for his employer and to take these letters to the nearest mail box, which was at the corner of Valencia and another street, in doing which it was necessary for him to cross Valencia street and this he did in performing this duty perhaps once each working day of the month. On the day of the accident he took two letters to the mail box for the purpose of posting them. The letters were written for his employer in the course of his duty. He crossed the street, posted the letters, and while on his way back recrossing Valencia street was struck by an automobile driven by one E. S. Kimberly, Jr., who was in no way connected with any of the parties to this proceeding. When struck Roberts was between the sidewalk and the street car track which runs up the middle of the street. There is no testimony showing or tending to show that the point where the accident occurred was any different or more dangerous than any other section of Valencia street or any other street in San Francisco. He was not loitering along the street, was not diverging in the least from his duty, and was strictly in the course of his employment when this accident happened.

It is conceded by petitioner that Roberts was so in the course of his employment at the time he sustained the injury, but it contends that this injury did not arise out of the employment.

We take the opposite view, and hold that it did arise out of his employment.

The general rule is laid down very clearly in *Kimbol v. Industrial Accident Commission*,

173 Cal. 351, 160 Pac. 150, L. R. A. 1917B, 595, Ann. Cas. 1917E, 312, thus:

"The injury arises out of the employment when there is apparent to the rational mind upon consideration of all the circumstances a causal connection between the conditions under which the work is required to be performed and the resulting injury."

The conditions under which the work here was required to be performed took Roberts upon the street. He was subjected to the perils of the street in the course of such employment in exactly the same manner as that in which a factory hand is subjected to the dangers of the factory while in the course of his employment. There is a direct causal connection here between the fact that the man was on the street and the fact that he was injured. The accident was a natural accident of his work resulting from the exposure occasioned by the necessity of his going upon the street while performing such work. He was not exposed to this danger of the street "apart from his employment." The causative danger was peculiar to the work, in that, had he not been upon the street in the course of his duty, he would not have been injured.

Petitioner cites the English cases as opposed to this view, and also cites some California cases. *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164, and *Fishering v. Pillsbury*, 172 Cal. 690, 158 Pac. 215, are not in point, because there the applicant for compensation was injured by the skylarking of a fellow employé—an injury which did not arise out of his employment in any manner, and to which an agency not in any manner connected with his employment contributed, namely, the agency of a fellow employé engaged in horseplay.

Neither do the English cases, we think, support the contention of the petitioner when the facts of those cases are carefully examined—at least most of them do not do so. As an instance, take the case of *Andrew v. Industrial Society*, 2 K. B. Div. 1904, p. 32, where an employé was killed by being struck by lightning. He might have been struck by lightning had he been on the street or in his home or any other place. He was not struck by lightning because of the fact that he was engaged in a peculiar kind of work, while Roberts was run down and injured while in the performance of an act in the course of his duty, and was placed in his position of peril by that very performance. The person injured by the dropping of a stone in a railroad cab while the engine was passing under a bridge, and the woman injured while attempting to ward off a cockchafer that flew into the open window of the place where she was employed—the other English cases cited—are upon the same footing as the California cases cited by petitioner. And so of the case of *Kelly v. Los Angeles County*, 3 Decisions of the Industrial Accident Commission, 539, where a laborer was struck by a stray bullet from a boy's gun.

On the other hand, it seems to us that the case of *Kimbol v. Industrial Accident Commission*, above cited, in principle covers this case completely. In the case of *Balboa Amusement Co. v. Industrial Accident Commission*, 171 Pac. 108, the injured person was not in the course of his duty when injured. While waiting for an assignment as a moving picture actor, he crossed the street to change his coat, and on his way back stopped to talk with another employé. Manifestly, while so stopping he was not in the line of his duty.

The petitioner contends that, because Roberts was exposed only to the ordinary perils of the street to which any other person on the street is exposed, he does not fall within the rule which awards compensation for an injury arising out of the employment of the injured man. When the logical result of the application of the rule for which petitioner is contending is considered, the justice of treating this case as one arising out of Roberts' employment is apparent. Consider the case of a messenger boy. He is in no greater peril on the street than any other person there. He carries perhaps his message in his pocket, leaving his arms disengaged and perfectly free to move about. But he is on the street constantly in the course of his employment. To hold that Roberts is not entitled to compensation would be to hold that this messenger boy would likewise not be entitled to compensation for an injury caused to him by the perils of the street. The illustration might be extended further to truck drivers, teamsters, and numerous other classes of employment whose followers use the streets in the regular course of their duty, and whose peril on the streets is no greater than that of any other person, but who would not be injured but for the fact that their duty takes and keeps them on the street. It does not seem to us that the Legislature ever intended that these persons should be excluded from the benefit of industrial accident compensation.

The petition is denied.

We concur: LENNON, P. J.; KERRIGAN, J.

(36 Cal. App. 385)

CRAIG v. LEE et al. (Civ. 1973.)

(District Court of Appeal, First District, California. Feb. 20, 1918. Rerearing Denied by Supreme Court April 17, 1918.)

1. LIMITATION OF ACTIONS §53(1)—ACCOUNT STATED—ACCRUAL OF CAUSE OF ACTION.

The limitation of two years prescribed by Code Civ. Proc. § 339, subd. 1, for action on a liability not founded on writing, applicable to an account stated by reason of an acknowledgment not in writing of the debt, begins to run from the date of such settlement.

2. ACCOUNT STATED §6(1) — ACKNOWLEDGMENT—"ADJUST."

There is not the absolute acknowledgment or admission of a certain sum due, necessary for

an account stated, where, to letters sending bill for services, the recipients answered that they expected money soon, and then would endeavor to adjust the account forthwith and agreeably to the parties; "adjust" meaning to settle or bring about a satisfactory state, so the parties will agree in a result, as to adjust accounts (quoting Words and Phrases, Adjust).

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by J. Early Craig against James A. Lee and another. Judgment for defendants, and plaintiff appeals. Affirmed.

M. H. Hernan and John A. Hoey, both of San Francisco, for appellant. N. E. Wretman, of San Jose, and Houghton & Houghton, of San Francisco, for respondents.

KERRIGAN, J. This is an appeal from a judgment rendered in favor of the defendants in an action brought by plaintiff to recover the sum of \$650, alleged to be due from them upon an account stated for legal services.

On April 22, 1912, plaintiff sent to the defendants by mail a statement of his account showing a balance due from them of \$650. This letter or statement was not answered. On August 14, 1913, the plaintiff again wrote to the defendants in reference to the account; but this letter was not received by them and was returned to the plaintiff. On the 18th of that month the plaintiff wrote another letter to the defendants, being a copy of the letter of the 14th, and inclosed with the letter a bill for \$650, together with a promissory note for that amount, payable in 90 days, which he requested the defendants to execute. On August 22d this letter was answered by the defendant James A. Lee to the effect that he expected to receive some money at an early date, and that when funds were available he would endeavor to adjust the account. Respecting the request for a note, the letter states: "The time is so short that I do not deem it necessary to issue any note at this time." There were two other letters from the plaintiff to the defendants concerning the amount claimed to be due from them, but they have no bearing upon the points to be decided. Later on in the same year plaintiff again wrote to the defendants asking for a settlement of his bill of \$650, to which the defendants shortly thereafter replied, stating that, while they were anxious to pay all their just debts, they at that time were without funds, but that in the near future they expected to receive some money, in which case they would endeavor "to adjust the account forthwith." In addition to these letters, there was a conversation between the plaintiff and the defendants, in which the latter said that within a certain number of days they would perhaps be able to "settle up." It is conceded, as of course it must be, that this conversation did not create an account stated.

[1] 1. As to the letter of April 22, 1912, written by plaintiff to the defendants inclosing his bill for \$650, assuming that be-

cause it remained unanswered it became an account stated on that date, still the statute of limitations had run against it when the present action was commenced. Where the acknowledgment of a debt is not in writing, the statute begins to run against the account stated from the date of the settlement, and an action must be brought within two years after such settlement. Code Civ. Proc. § 339, subd. 1; *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371.

[2] 2. From the other correspondence we think it cannot be held that an account was stated between the parties.

"An account stated presupposes an absolute acknowledgment or admission of a certain sum due or adjustment of accounts between the parties, the striking of a balance, or an assent, express or implied, to the correctness of the balance. If the acknowledgment or admission is qualified and not absolute, or if there is but an admission that something is due without specifying how much, there is no account stated, nor does an account stated exist if there is but a partial settlement of accounts without arriving at a balance, or if there is a dissent from the balance as struck." 1 *Corpus Juris*, p. 695, par. 2871; *Coffee v. Williams*, 103 Cal. 556, 37 Pac. 504.

From the letters of August and November, 1913, we think there was no meeting of minds respecting the amount which was to be paid to plaintiff for his services; and the language of Lee's letter of August 22d, as well as that contained in the letter of both defendants of November 26th, negatives any construction or presumption of a promise to pay the full amount of the bill. According to the language of the letter of August 22d, the account rendered was to be "adjusted * * * agreeably" to the parties interested; and, according to the language of the letter of November 26th, the defendants would endeavor to adjust the account when they received certain money which they expected shortly.

The word "adjust," as defined in volume 1 of *Words and Phrases*, p. 194, means "to settle or bring about a satisfactory state, so the parties will agree in a result, as to adjust accounts." When losses under policies of insurance are adjusted, the amount of the loss is ascertained and determined. *Miller v. Consolidated, etc.*, 113 Iowa, 211, 84 N. W. 1049; *Ruthven v. American Fire Ins. Co.*, 102 Iowa, 550, 71 N. W. 374.

Excepting from consideration, for the reason already stated, the letter of April 22, 1912, and defendants' failure to reply to the same, it would appear from the other correspondence that they never intended to pay in full the amount of plaintiff's claim, but expected at some time, perhaps in the near future, to agreeably adjust or settle the account. There was therefore no account stated between them, which would leave plaintiff's claim barred by the statute as pleaded.

The judgment is affirmed.

We concur: **LENNON, P. J.**; **BEASLY**, Judge pro tem.

(38 Cal. App. 222)

PEOPLE v. PERA. (Cr. 406.)

(District Court of Appeal, Third District, California. Feb. 18, 1918. On Rehearing, March 20, 1918.)

1. INTOXICATING LIQUORS \S 236(9)—CRIMINAL PROSECUTION—WEIGHT AND SUFFICIENCY OF EVIDENCE—COMMISSION OF ACTS.

Evidence held sufficient to justify the conclusion that defendant kept a supply of alcoholic liquors at his place within no-license territory for general sale.

2. INTOXICATING LIQUORS \S 236(3)—CRIMINAL PROSECUTION—SALE—EVIDENCE OF LOCAL OPTION TERRITORY.

Testimony of the county clerk that the town in which defendant had his public resort for sale of intoxicating liquor was outside of incorporated cities and towns, and within a certain supervisory district which had voted no-license and not since held an election on the question, held sufficient.

3. CRIMINAL LAW \S 695(4)—RECEPTION OF EVIDENCE—OBJECTION.

In a prosecution for the keeping of a public saloon within no-license territory, the objection to a map of the county introduced in evidence, and authenticated as copy of official map did not show the no-license district, was insufficient to require its exclusion; the presumption under Code Civ. Proc. \S 1963, subd. 32, being that the boundaries of such district have not changed.

4. CRIMINAL LAW \S 442—EVIDENCE—PROOF OF SIGNATURE.

The introduction in evidence upon trial for violation of local option law, of written application of defendant to the United States revenue office for federal liquor license, was improper without evidence that the signature was defendant's; the application not being under seal.

5. CRIMINAL LAW \S 400(3)—INCORPORATION OF TOWN—RECORD.

In a prosecution, under the local option law (St. 1911, p. 599), for the keeping of saloon within the Fifth supervisory district, it was proper and competent for the county clerk to testify, when he had no knowledge, except from examination of the records and common notoriety, that the town of Dos Palos was not incorporated.

6. CRIMINAL LAW \S 304(7), 1144(1/2)—JUDICIAL NOTICE—INCORPORATION OF CITY—PRESUMPTION.

The courts may take judicial notice of the incorporation of cities, and in a prosecution for violation of local option law, where defendant's guilt depends upon whether his saloon was in an incorporated town, it will be presumed that if the town had been incorporated, the court would have taken notice thereof.

7. CRIMINAL LAW \S 372(2)—EVIDENCE—PRIOR ACTS.

In a prosecution for violation of local option law, the testimony of witness as to another sale of liquor made 14 days previous was properly admitted for the purpose of showing that defendant kept a public resort for sale of liquor.

8. CRIMINAL LAW \S 656(9)—TRIAL—CONDUCT OF JUDGE—EXPRESSION AS TO WEIGHT OF EVIDENCE.

In prosecution for violation of local option law, where counsel objected to the competency of a map in evidence, court's remark, "Well, we have other evidence here," was not an expression on the weight of the evidence.

9. INTOXICATING LIQUORS \S 131—OFFENSES—INTENTION.

It is not necessary for consummation of crime of running public saloon in no-license territory that the intent of the defendant to

commit the act be proved; the local option statute not requiring scienter.

10. CRIMINAL LAW \S 1172(2)—INSTRUCTIONS—HARMLESS ERROR.

An instruction that the possession by defendant of a federal liquor license could not legally operate as a shield to a person shown to have kept a public liquor resort within no-license territory, being a correct statement of law, could not have caused a miscarriage of justice, even though written application for such license may not have been introduced according to rules of evidence.

On Rehearing.

11. INTOXICATING LIQUORS \S 242—CRIMINAL PROSECUTIONS—PUNISHMENT.

A sentence to imprisonment for one month and under Penal Code, \S 1205, to a fine of \$600, and in default of payment, imprisonment not exceeding one day for each \$2 thereof, is void as to imprisonment for nonpayment of fine, as violating Local Option Law, \S 19, limiting imprisonment to 7 months.

12. CRIMINAL LAW \S 1191—APPEAL—POWER TO MODIFY JUDGMENTS.

The Court of Appeals before a judgment becomes final, or the cause is transferred to the Supreme Court, upon petition still possesses right and jurisdiction to modify its judgment.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

G. Pera was convicted for keeping a place of public resort for sale of alcoholic liquor in no-license territory, motions in arrest of judgment and for new trial were denied, and accused appeals from judgment and orders denying motions. Judgment reversed in part, and affirmed in part, order denying new trial affirmed, and appeal from order denying motion in arrest of judgment dismissed.

L. J. Schino, of Merced, and Terry W. Ward, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. Defendant was informed against by the district attorney of the county of Merced for the crime of keeping a place of public resort in no-license territory for the purpose of sale in no-license territory of alcoholic liquor. The jury returned a verdict of guilty as charged in the information. Defendant made a motion in arrest of judgment and a motion for new trial, both of which motions were denied. Judgment was pronounced and, as entered in the minutes of the court, read as follows:

"It is ordered, adjudged and decreed that said defendant, G. Pera, be, and he is, fined in the sum of \$600, said sum to be paid to the clerk of this court, immediately, and in default of said payment of fine, said defendant to be imprisoned in the Merced county jail for a term not exceeding one day for each \$2 of such fine so remaining unpaid. It is further ordered, adjudged and decreed that said defendant be, and he is hereby, sentenced to serve a term of one month in the Merced county jail."

The appeal is from the judgment, the order denying the motion in arrest of judgment, and the order denying the motion for a new

trial. Appellant contends that the "judgment is excessive, void, and unintelligible."

It appears from the record that, at the time of pronouncing judgment, the court imposed the fine of \$600, with the alternative of imprisonment, and then the following colloquy ensued:

"The Court: Now, Mr. District Attorney, of course I don't think there is any question but what the court has the right to go ahead, after this kind of a judgment, and impose a sentence of imprisonment."

"Mr. McCray: I will just read the section."

"The Court: This imprisonment, of course, is only in default of the payment of the fine, that's all, and there is no imprisonment at all except for a default in the payment of the fine, that is only to compel the payment of the fine, that is all. It is therefore ordered, adjudged and decreed that you be imprisoned in the county jail of the county of Merced for the term of one month."

It is the contention of appellant that, under the first part of the judgment, imposing a fine of \$600, or imprisonment for one day for each \$2 of the fine, he may be compelled to serve 300 days, while, in addition, under the second part of the judgment, he must serve one month without the alternative of a fine, a total of 330 days. Section 19 of the local option act (Stats. 1911, p. 604), under the provisions of which the defendant was tried and convicted, provides:

"Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding six hundred dollars, or by imprisonment in the county jail not exceeding seven months, or by both such fine and imprisonment."

Section 1205 of the Penal Code reads as follows:

"A judgment that a defendant pay a fine may also direct that he be imprisoned until the fine be satisfied. But the judgment must specify the extent of the imprisonment, which must not exceed one day for every two dollars of the fine, nor extend in any case beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted."

It is manifest that the penal clause of the local option statute limits the power of the court to impose punishment by imprisonment to a term of 7 months, and that, therefore, the alternative punishment by imprisonment imposed by the court in this case for default in the payment of the fine of \$600 imposed would, in case the fine were not paid, be in excess of the power of the court to inflict. Section 1205 of the Penal Code originally read as follows:

"A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for every dollar of the fine."

The Supreme Court, in *Ex parte Rosenheim*, 83 Cal. 388, 23 Pac. 372, construing said section as it then read, held, quoting the syllabus:

"When the court sentences a defendant to a term of imprisonment, and also to pay a fine, there can be no further imprisonment for non-

payment of the fine, under section 1205 of the Penal Code, that section not applying to cases in which the judgment is for a fine coupled with a sentence of imprisonment."

The Attorney General has cited us to no case giving section 1205 a different construction from that given it in the above case. He contends, however, that the amendment of the section by the Legislature of 1891 (St. 1891, p. 52) so changed the section as to make the construction given it in the *Rosenheim* Case inapplicable or without controlling force in determining the true meaning thereof as it now stands. The section as amended, it will be noted, besides changing the rate per day at which a fine shall be satisfied by imprisonment from \$1 to \$2, adds the following language to the section:

"* * * Nor [the imprisonment in case of fine] extend in any case beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted."

We feel frank enough to say that the *Rosenheim* Case went to the extreme limit in holding section 1205 inapplicable to cases where "the court has imposed a term of imprisonment and also a fine." It seems to us that the section may justly be interpreted to mean that, where the law of the violation of which a person has been convicted authorizes the imposition of a sentence of imprisonment and also a fine, both a fine and a sentence of imprisonment may be imposed and the alternative of imprisonment ordered to satisfy the fine, provided the fine is such that the imprisonment for the nonpayment thereof, taken alone or together with the sentence of imprisonment, will not have the effect of extending the imprisonment beyond the maximum term of imprisonment prescribed by the statute. But, as stated, the *Rosenheim* Case, *supra*, goes further and holds that section 1205 has no application to such a case, and since, as declared, our attention has been called to no subsequent decision of the Supreme Court overruling that case upon the point under consideration, this court is bound by the conclusion therein announced, assuming that there is no such change in section 1205 by reason of its amendment by the Legislature of 1891 as to justify us in holding, as the Attorney General undertakes to point out, that the said amendment has rendered the *Rosenheim* decision without force in its application to said section. But, accepting, as we are required to do, the construction given section 1205 in the *Rosenheim* Case, we perceive nothing in the language added to the section which warrants the conclusion that it should be given a different construction from that to which it is subjected in the case named, or (in other words) that makes it any the less inapplicable now than before its amendment to cases where a fine, in addition to a sentence of imprisonment, has been imposed. Indeed, it seems to us that the purpose of the amendment was merely to make it plain

that in no case should the alternative of imprisonment for default in the payment of a fine be such as would make the imprisonment extend beyond the maximum term of imprisonment which is prescribed for the offense of which the defendant is convicted. However, under the rule laid down in the *Rosenheim Case*, we are constrained to hold that that portion of the judgment in this case whereby a fine of \$600, with the alternative of imprisonment in the county jail for a period of time not exceeding one day for each \$2 of such fine, was imposed, is void. But that portion of the judgment sentencing the defendant to a term of one month in the county jail is undoubtedly valid, and will have to stand.

[1, 2] It is next urged that the evidence was insufficient to justify the verdict, in that there is a failure of proof of the following essential facts: (1) That on or about the 4th day of February, 1917, defendant kept a place of public resort, where the alcoholic liquors specifically designated in the information were kept for the purpose of sale and distribution; (2) that the said town of North Dos Palos was not on said date within the boundaries of any incorporated city or town; (3) that said supervisorial district was not then and there "no-license territory."

The testimony upon which the verdict was predicated may briefly be stated as follows:

J. R. Ryan, a deputy sheriff of Merced county, testified that he met the defendant at his place in South Dos Palos on Sunday, the 4th day of February, 1917; that he and Claud Wills, another deputy sheriff, had gone there with a search warrant "to search for liquor in the place." He testified:

"I went into a house. * * * This room has a bar in it; it has a big safe in it, and in this safe there is a whole lot of cases; there might be 8 or 9 cases in there; soda water, ginger ale, and stuff on that order."

He described the bar and fixtures, and stated that, on the rack end of the bar, he found a half bottle of whisky. This bottle was produced and identified and admitted in evidence. The witness said that he saw a woman, afterward proven to be the wife of the defendant, in the back of the house who had two pitchers and was pouring something into the sink; that Mr. Wills took the pitchers from her and emptied the contents into two bottles, and these bottles, containing wine, were also received in evidence. The witness testified that:

About ten minutes after he reached the premises, "the defendant drove into the yard, and Mr. Wills addressed him in my presence. He asked him if he was Mr. Pera, and he said he was; there was a little shed there (afterward proven to be about 60 feet from the house), and Mr. Wills asked him if that was his shed, and he said it was, and it had a lock on it, and Mr. Wills lifted the lock out and opened the door, where we found this stuff in there, and he asked him if that was his, and he said it was, and we proceeded to take it out and check it up to see how much was there. * * * While we were checking this stuff up Mr. Pera walked up within probably 6 or 8 feet of me,

and he had his hand laying on a little girl's shoulder, or head, I don't remember which, and he said to her, 'What do you know about these fellows;' he said, 'They are taking the bread away from you.'"

There were identified, as having been taken from the shed, 53 bottles containing various liquors, and a case containing 33 bottles of beer, all of which were admitted in evidence. The witness further said that defendant said that the house and shed and the liquors were his.

Claud Wills corroborated generally the testimony of witness Ryan. He said that when they searched the shed and found liquor there the defendant said that it was his, and that it was "for the family use"; that he also said, "I don't deny selling any whisky;" that he said that he had sold liquor to one Wegner, "but Wegner did not have no bottle of his."

W. M. Morrison testified that, in December, 1916, and January, 1917, he was engaged as foreman of the construction of a school building at South Dos Palos, and that W. L. Wegner was a carpenter at work on said building; that some time between the 7th and 25th of January, 1917, he and Wegner went to a building and into a room which he said he supposed had been a saloon, because it had a bar, and that Wegner purchased and paid for a drink for each of them, and that he (witness) drank beer. He said that he did not know the defendant, and he indicated the house in which he had the beer by drawing a diagram on the blackboard.

W. L. Wegner was sworn as a witness and identified the building referred to by witness Morrison and indicated on the diagram drawn by him, and said that defendant told him that that property belonged to him. He corroborated the testimony of Morrison as to the purchase of drinks in the house, and said that defendant sold them. A bottle of whisky was received in evidence which the witness said he had bought of defendant on the 21st of January, 1917. He described the building, and stated that in front of it was a sign reading: "Hotel and Saloon. G. Pera, Proprietor."

That the town of South Dos Palos was not, on the 4th day of February, 1917, situated within the boundaries of an incorporated city or town was sufficiently shown by the testimony of P. J. Thornton, the county clerk of Merced county, who first produced the record of the board of supervisors showing that, on November 5, 1912, the Fifth supervisorial district outside of incorporated cities and towns voted in favor of no license and declaring that 90 days thereafter such territory should be "no-license territory," and then testified that since the said 5th day of November, 1912, there had been no "wet and dry election" in said district; that South Dos Palos was within the boundaries of the Fifth supervisorial district, and that

the town of Los Banos was the only incorporated city in the district. While, it would seem, the prosecution could directly and more clearly have shown that South Dos Palos was not at the time mentioned within the boundaries of an incorporated city or town, still, as above stated, it was sufficiently shown by the statement of the county clerk that the town of Los Banos was then the only incorporated town situated within the boundaries of the Fifth supervisorial district. It was not attempted to be shown, nor was it claimed, that South Dos Palos is situated within the incorporated limits of Los Banos, or is a part of that municipal corporation, and the fact that the two towns bear and are known by and under different names warranted the jury in concluding that South Dos Palos was no part of Los Banos, and that, the latter town having been shown to be the only incorporated town within said supervisorial district, the former town was not incorporated and formed no part of any incorporated town.

The contention that the evidence failed to show that the place kept by defendant in South Dos Palos was a public resort, at which alcoholic liquors were kept for sale and distribution, is not borne out by the record. As already shown, there was testimony tending to prove that in near proximity to the date of the arrest of the defendant, alleged in the information as about the time he sold and distributed intoxicating liquors at his place, the defendant sold various kinds of liquors to the parties giving that testimony; that, on the 4th of February, 1917, the officers who searched his premises found a large supply of various kinds of liquors on his premises and in his possession; that the defendant admitted to the witness Wegner that he owned the place; that on the exterior of the building there was attached thereto a sign, bearing the words, "Hotel and Saloon"; that the defendant admitted to the witness Wills that he sold whisky there.

The foregoing was sufficient to justify the conclusion that the defendant kept a supply of alcoholic liquors at his place for the purpose of selling the same to any one desiring to purchase them. Of course, it will not be disputed that a "public resort," within the contemplation of the statute, means any place, whatever the character of the building, where the public may purchase and obtain alcoholic liquors at any time they may be asked for. It may be true, and doubtless is generally true, that where the traffic in such liquors is forbidden, and, therefore, illicit, the business of dispensing the liquors may be carried on in a clandestine manner, and that, in some instances, in the exercise of caution, lest arrest and prosecution for the unlawful act may follow, the dispenser may refuse to make the illicit sales to some certain individuals; but even so, the place is nevertheless a public resort within the meaning of the law

if there be sales of such liquors to any part of the public. It is, in brief, a place of public resort if it be a place to which any part of the public are offered the opportunity to resort for the purpose of purchasing alcoholic liquors.

[3] It is claimed that it was prejudicial error for the court to have admitted in evidence a map purporting to be the official map of Merced county. The objections to it were that the document offered as the map was only an unauthenticated copy thereof, and that, the original having been made in the year 1909, it could not show the Fifth supervisorial district as it existed at the time of the alleged commission of the offense charged. As to the first objection, it is to be answered that by the county clerk the map received in evidence was shown to be a copy of the original map as prepared by the county surveyor and accepted as the official map of the county by the supervisors. As to the second ground of objection, it is to be remarked that if the purpose of introducing the map in evidence was to show the boundaries of the Fifth supervisorial district, and it failed to show such boundaries as they are now established, or if there was a difference between the boundaries as delineated on the map and as they actually existed at the time the crime charged is alleged to have been committed, and such difference was of material importance to the defendant, then the latter's counsel, in their objection to the map on that ground should have specifically pointed out such difference and called the trial court's attention thereto. The mere objection, as counsel stated it, that "the map of itself would not naturally show the supervisorial district in 1917," was not in our opinion sufficient to require the trial court to order the map excluded. There is no presumption that the boundaries of said district now or at the time the crime charged is alleged to have been committed are any different from what they are shown to be by the map. Indeed, if a presumption is allowable at all with reference to the fact, we think it should be that the boundaries of the district continued to be precisely as they were when the map was made and as they are delineated thereon. Code Civ. Proc. § 1963, subd. 32. Moreover, if the map showed that South Dos Palos was not situated within the boundaries of said supervisorial district, the effect of allowing the map in evidence would then more likely be to assist rather than to injure the accused, or at least not to prejudice him.

[4] It is claimed that the court seriously erred in admitting in evidence a document, offered by the people, purporting to be a written application by the defendant to the United States revenue office at San Francisco for a federal liquor license. While the document bore a certificate purporting to be that of the chief deputy revenue collector, setting forth that it was an exact copy of a docu-

ment on file in his office, and that it was "executed by G. Pera," it is very doubtful whether it was competent proof of the intent of the defendant or of the character of the business he was carrying on, since there was no proof that the name, "G. Pera," subscribed to the purported application, was signed or written by the defendant or that it was his signature, and since, furthermore, the purported certificate is not sealed or under a seal, and there is no proof that the person signing his name thereto as "Chief Deputy Collector" attached his name thereto, or that such name is his signature. But, in view of the other evidence in the case, of which a brief résumé is given above, and which is amply sufficient to support the verdict, we cannot say, after considering the entire record, that the result of the error in admitting the document in evidence, if error it was, has resulted in a miscarriage of justice. Const. art. 6, § 4½.

[5, 6] We think the testimony of the county clerk that there was no other incorporated town within the limits of the Fifth supervisorial district was a proper and competent method of proving that fact. He stated, it is true, that he had no knowledge of that fact except such as he had obtained from an examination of "the records." We can conceive of no "records" which will affirmatively disclose that a particular town or city is not incorporated, but no doubt the witness knew from common notoriety that South Dos Palos was not incorporated, and we think upon such knowledge it was proper for him to state the fact. But the courts may take judicial notice of the fact that a town or city is incorporated, if such be the fact, and in this case the court judicially knew that Los Banos was incorporated, and we may assume would have taken such notice of the fact of the incorporation of South Dos Palos, if it were an incorporated town, and have declared such knowledge to the jury, as it would have been its duty to do. No such declaration was made by the court to the jury, nor was there any request by the defendant that the court state to the jury that said town was incorporated. We are authorized to assume that if, in point of fact, the town of south Dos Palos was an incorporated town at the time the offense charged is alleged to have occurred, the defendant would have asked for an instruction to that effect. In the absence of such an instruction, the jury, without any consideration of the testimony of the county clerk upon that question, were warranted in finding that South Dos Palos was not an incorporated town at the time mentioned in the information, or at the time referred to in the evidence.

[7] It is also complained that the court erred in allowing the witness Wegner to testify that, on January 21, 1917—14 days prior to the date of the alleged commission of the offense—the defendant, at his place, in South

Dos Palos, sold him whisky, for which he paid the defendant the sum of 35 cents. This testimony was properly admitted, not for the purpose of proving another and distinct offense from that charged, but to show the character of the place and the purpose of the defendant. *People v. Cavallini*, 29 Cal. App. 526, 531, 156 Pac. 73. The information, as has been shown, charges the defendant with keeping a place of public resort in the designated no-license territory for the purpose of sale and distribution therein of certain specifically enumerated alcoholic liquors, and the sale by defendant to Wegner was so near the time at which the offense charged is alleged to have been committed that most clearly testimony of said sale tended to prove that the defendant did keep such public resort at or about the time named in the information.

[8] At the close of the case for the people, counsel for the defendant moved the court to advise the jury to acquit on the ground that the state had failed to present sufficient proof to justify a verdict of conviction. The particular point upon which counsel relied for the support of their motion was that there was a fatal paucity of proof of the location of the defendant's alleged place of public resort within the boundaries of the Fifth supervisorial district, counsel asseverating that the only proof upon that subject was in the purported map of said district above referred to, and that said map failed to show that the place was within said supervisorial district. Replying to this statement by counsel, the court remarked, "Well, we have other evidence here." Counsel excepted to the remark as improper and as tending to indicate to the jury that the court was of the opinion that "the other evidence" was such as to warrant a finding that the defendant's place was situated in said district. There is no merit in this point.

Necessarily, the court was compelled to determine, in passing upon the motion, whether there was sufficient evidence in the record upon all essential points to justify the submission of the case to the jury. This would have been the necessary effect of a denial of the motion even if the court had merely denied the motion without expressing any opinion in the presence of the jury as to whether there was evidence in proof of the fact stated other than that to which counsel called special attention. But the court had the right to express its views upon the motion and its reasons for holding it to be without a substantial basis, and a party making such a motion must expect this. Unless there is plainly and obviously a total failure of proof upon some essential element of the offense charged, the defendant, when making such a motion, merely takes a chance on the allowance of the motion and himself must assume responsibility for and abide by the consequences of a denial of the motion and the incidents

attending the ruling thereon, assuming, of course, that the court, in its ruling, if it denies the motion, does not trench upon the province of the jury by discussing and expressing an opinion upon the weight or evidentiary value of the testimony. In this instance, however, it will be observed that the court made no comment or expressed or intimated no opinion upon the weight or the effect of "the other evidence" to which it referred. It merely stated that there was other evidence addressed to the point and very properly left to the jury the question whether such "other evidence" was of sufficient probative force to satisfy their minds of the existence of the fact to which it related. Besides, had counsel for defendant, previously to making and arguing their motion, requested the court to exclude the jury from the courtroom during the argument on the motion, such request would undoubtedly have been complied with, and there could have been no possibility of the jury hearing anything which might be prejudicial to defendant.

[9] It is complained that the court erred and thus seriously prejudiced the rights of the accused by instructing the jury that it was not necessary to the consummation of a crime of the character of the one with which the defendant is here charged that there should exist and be shown an intent to commit the act, and that, therefore, all that the jury were required to find, to reach a verdict of guilty, was that the defendant kept a place of public resort for the purpose of selling and distributing alcoholic liquors within no-license territory—that the specific intent with which the act was done was immaterial. We think the rule as declared by the instruction is correct, in so far as it relates to a case of this character. The decisions appear to be quite uniform upon the proposition that where, in invoking and applying the police power, the Legislature has prohibited certain acts and denounced them as criminal, the mere commission of such acts, regardless of the intent with which they were committed, is sufficient to constitute the crime so denounced. There are, perhaps, certain exceptions to this rule, as, for instance, where the statute itself uses language in describing or defining the crime indicating that scienter or a specific intent to do the act was essential to constitute it a crime. But particularly in cases interdicting the traffic in intoxicating liquors the rule generally is that the mere commission of the act is sufficient to consummate the offense, and in the present case the law authorizing the establishment of "no-license territories" uses no language indicating an intention in the Legislature to make the intent with which the act of keeping a resort for the purpose of selling intoxicating liquors is committed an ingredient of the offense. In *Commonwealth v. Holstein*, 132 Pa. 357, 19 Atl. 273, the

court, having before it a case in which the defendant had been convicted of the unlawful sale of alcoholic liquor, said:

"It is not necessary to sustain a conviction for selling intoxicating liquors under the act of 1887 for the commonwealth to prove a criminal intent. It is enough to show the sale, when the defendant may, if he can, shield himself behind a license. If the sale is contrary to law, the intent has nothing to do with it. A contrary ruling would fritter away the act of 1887, and convictions under it would be rare."

[10] The instruction in which it was stated to the jury that the payment of a federal license tax required by any law of Congress to be paid by a person "for carrying on any trade or business" does not exempt such person from any penalty or punishment provided by the laws of the state for carrying on such trade or business within such state, etc., was manifestly intended to bear upon the testimony purporting to show that the defendant applied to the United States internal revenue office for a liquor license, no such license having been introduced in evidence. It is claimed that the instruction was not pertinent to the case and prejudicial to the defendant. While we have expressed a doubt as to the competency of the written application by the defendant for a federal liquor license, because it was not shown to have been genuine, yet, as applied to that testimony, the instruction was pertinent, inasmuch as the jury might have inferred from that proof that the accused did secure and possess such a license. Assuming, however, that that testimony was not for the reason suggested admissible, and that, therefore, the instruction was out of place, still, as we have shown, there is sufficient competent testimony which, if believed by the jury, as obviously it was, justified the verdict, and, moreover, the court in plain and readily understandable language instructed the jury that a conviction could not legally be had, unless the evidence satisfied them beyond a reasonable doubt that the accused sold alcoholic liquor at a place of public resort kept by him in no-license territory; and the instruction complained of here was abstract in form and abstractly correct in the statement of the principle declared therein. In view of all these considerations, we cannot justly say that the mere statement to the jury that the possession by the defendant of a federal liquor license could not legally operate as a shield to any person shown to have committed the act charged here against the penal consequences thereof—a perfectly sound proposition of law—could have had the effect unduly of influencing the jury in arriving at a verdict, or, at any rate, of producing a miscarriage of justice.

The defendant complains of other instructions given and of the action of the court in disallowing a number proposed by him. We have carefully examined all these assignments and find nothing in them calling for

special notice. The general charge of the court contained generally a full, fair, and pertinent statement of all the principles of law essential to an enlightened consideration by the jury of the evidence.

We have found no errors militating against the substantial rights of the accused and, accordingly, that portion of the judgment whereby the defendant was sentenced to imprisonment in the county jail of Merced county for the term of one month and the order denying the accused a new trial are affirmed. That portion of the judgment imposing upon the defendant a fine of \$600, with the alternative of imprisonment for default in the payment thereof at the rate of one day for every \$2 of such fine, is reversed. There is no appeal from an order denying a motion in arrest of judgment, and the pretended appeal from said order is therefore dismissed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Rehearing.

HART, J. [11] The Attorney General, in a petition for a rehearing of this case, has called our attention to two cases (*People v. Brown*, 113 Cal. 35, 45 Pac. 181, and *People v. Kerr*, 15 Cal. App. 273, 114 Pac. 584), not cited in the original briefs, which bear upon the question whether the court in this case exceeded its jurisdiction in adjudging that the defendant, upon defaulting in the payment of the fine imposed, should be imprisoned for one day for every \$2 of said fine until the same is satisfied. It will be observed that, in the original opinion, we construed the broad language used in the case of *Ex parte Rosenheim*, 83 Cal. 388, 23 Pac. 372, as declaring or implying that section 1205 of the Penal Code had no application whatever to a case where a term of imprisonment and also a fine were imposed. The cases above mentioned do not appear to give that construction to said section. They seem to hold that the *Rosenheim* Case merely meant to hold that in a case where both a fine and an imprisonment are authorized to be imposed and a sentence of imprisonment is adjudged, the court, while having authority also to impose a fine, is without legal power or authority, in case the fine be not paid by the defendant, to impose the alternative of imprisonment at the rate of one day for every \$2 of such fine until the same is so satisfied. We say that this appears to be the construction the *Brown* and *Kerr* Cases, *supra*, put upon the language and the decision in the *Rosenheim* Case. We have, upon careful reconsideration of the *Rosenheim* Case, concluded that its language is reasonably susceptible of that construction, and that, as so construed, it gives the

true meaning of section 1205 of the Penal Code. At any rate, it is very clear that the *Brown* and *Kerr* Cases, which were decided after the *Rosenheim* Case, hold that, in cases in which the law authorizes the imposition of both a fine and an imprisonment, the defendant may be subjected to both a fine and an imprisonment, but that in such case the court has no authority to impose the alternative of imprisonment to satisfy the fine if the defendant defaults in the payment thereof. That part of the judgment imposing the fine nevertheless, however, constitutes a lien upon the defendant's realty in like manner as a judgment for money rendered in a civil action, and its payment may be enforced by due proceedings. Pen. Code, § 1206; *People v. Brown*, 113 Cal. 35, 45 Pac. 181.

It follows that the judgment in this case imposing an imprisonment of 30 days in the county jail and also a fine of \$600, except that part thereof providing that in default of the payment of the fine the defendant shall be imprisoned until the same be satisfied, is perfectly valid.

[12] The point herein discussed constitutes the sole and only ground upon which a rehearing is asked by the Attorney General. In view of that fact and of the further fact that we are now firmly convinced that our former judgment in the respect herein considered is erroneous, and, inasmuch as the result sought to be obtained by the application for a rehearing may as well be brought about by a modification of the judgment heretofore rendered by this court herein, we can perceive no good reason for reopening the case for the further consideration of said point, and so defer the final disposition of the case. Of course, it will not be questioned that this court, before its judgments become final or before the causes in which such judgments are rendered are transferred to the Supreme Court upon petition, still has the right or jurisdiction to modify its judgments or, indeed, set them aside, if for good reasons such a course is required.

Accordingly, the petition for a rehearing is denied; but the former judgment rendered herein by this court is hereby modified so as to read as follows:

"That portion of the judgment appealed from by the defendant providing that the defendant, in default of the payment of the fine imposed shall be 'imprisoned in the Merced county jail for a term not exceeding one day for each \$2 of such fine so remaining unpaid,' being void, is reversed. The remaining portion of the judgment appealed from and the order denying the defendant a new trial are affirmed. There is no appeal from an order denying a motion in arrest of judgment, and the pretended appeal from said order is therefore dismissed."

We concur: CHIPMAN, P. J.; BURNETT, J.

(36 Cal. App. 265)

**AMOK GOLD MINING CO. v. CANTON
INS. OFFICE, Limited. (Civ. 1909.)**

(District Court of Appeal, First District, California. Feb. 14, 1918. Rehearing Denied by Supreme Court April 15, 1918.)

1. APPEAL AND ERROR §930(1), 1002 — REVIEW OF VERDICT—PRESUMPTION.

Where the evidence is conflicting, the jury's finding is conclusive, and it must be assumed that the jury adopted that construction most favorable to plaintiff, in order to sustain the verdict.

2. INSURANCE §665(4)—MARINE INSURANCE—FAILURE TO DELIVER GOODS.

In action on marine insurance policy, evidence held insufficient to show that vessel ever reached destination.

3. INSURANCE §646(6) — MARINE POLICY — STRANDING—BURDEN OF PROOF.

In action on marine policy, the plaintiff has the burden of proving that the ship stranded.

4. INSURANCE §412 — MARINE POLICY — "STRANDED."

The word "stranded" means that the vessel must remain stationary for a time, and implies a settling of the vessel and an interruption of the voyage under extraordinary circumstances.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Stranded.]

5. EVIDENCE §10(5) — INSURANCE §658 — MARINE POLICY—STRANDED—JUDICIAL NOTICE.

In determining whether vessel stranded, the jury may consider that she had only a foot of water under her at high tide, and that the tide rises and falls 14 feet, the state of the tide being a matter of judicial notice, that the vessel drifted for an entire day, and that the condition of her bottom showed that she had pounded on the beach or rocks.

6. TRIAL §142—QUESTIONS FOR JURY—CONSTRUCTION OF TESTIMONY.

The jury are always the judges of the meaning of language employed by witnesses unless the language admits of no substantial doubt.

7. INSURANCE §665(4) — MARINE POLICY — LOCATION OF GOODS—EVIDENCE.

Evidence held to sustain finding that goods covered by marine policy were under deck at the time of the loss so as to warrant recovery.

8. INSURANCE §646(2) — MARINE POLICY — BURDEN OF PROOF.

In action on marine policy, where insurer contended that the consignee refused to accept the goods the burden of proof on such issue was on the insurer.

9. INSURANCE §665(3) — MARINE POLICY — EVIDENCE—SUFFICIENCY.

In action on marine policy, evidence held insufficient to show that the consignee refused to accept delivery of the goods insured.

10. INSURANCE §668(10)—MARINE POLICY—SALE OF VESSEL—QUESTIONS FOR JURY.

Whether the master of the vessel was forced by circumstances to sell after a partial wreck, held for the jury.

11. INSURANCE §481 — MARINE POLICY — RIGHT TO SELL.

Under a marine policy, the right to sell as well as the right to abandon must be determined by the vessel's master in the light of facts available, and he cannot await developments before deciding what to do.

12. INSURANCE §481 — MARINE POLICY — RIGHT TO SELL.

The mere fact that a vessel on which goods under a marine policy were shipped was repaired after being sold did not establish that the sale was unnecessary.

13. INSURANCE §413 — MARINE POLICY — PROXIMATE CAUSE OF LOSS.

Where a vessel carrying goods insured under marine policy encountered a storm, which carried away some of her sails and rendered her unmanageable, such storm was the proximate cause of the loss, though she afterwards stranded near the destination and was sold, and the consignee of the goods could recover under the policy.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Amok Gold Mining Company against the Canton Insurance Office, Limited. Judgment for plaintiff, and defendant appeals. Affirmed.

Andros & Hengstler and Golden W. Bell, all of San Francisco, for appellant. Ira S. Lillick, of San Francisco, for respondent.

BEASLY, Judge pro tem. This is an action upon a policy of marine insurance. In which plaintiff recovered a verdict of \$1,923, interest and costs, and defendant appeals from the judgment entered thereon.

By the policy the defendant insured mining supplies consisting of 1,500 feet of fuse, 5 drums of gasoline, 1 ton of sacked coal, 7 tons of dynamite, and 1M blast caps, "in the power schooner Harold Blekum, at and from Seattle, Wash., to Uyak, Alaska." Subject to the effect of certain conversations between the master of the schooner and the owner, it is conceded that the underwriters were liable upon the policy until the goods could be discharged and safely landed at Uyak, Alaska; and the first question on which counsel disagree is the meaning to be attached to the words "to Uyak."

To persons unacquainted with the remote coasts and harbors of the Alaskan peninsula and the conditions existing there this would seem an easy question; but it is not so under the facts of the case, and in view of the varied adventures which befell the schooner on its unlucky voyage. The facts are such that these words must be defined in view of all the surrounding circumstances and conditions; and some light may be shed upon their meaning by another question, namely, Where was it intended that the goods should be landed from the Harold Blekum?

Uyak Bay is a deep inlet from the Shillikof Strait into Kodiak Island. There was in January, 1915, when the Harold Blekum arrived there, a cannery, a store, and a post-office situate near the mouth of the bay, and marked "Uyak" on the maps in evidence at the trial. There were other canneries and also mines at various points on Uyak Bay, and among the mines that of plaintiff, situate some 12 or 15 miles up the harbor. One witness testified that there is no such thing as a town at Uyak. In the busy season of the cannery there were 400 or 500 people there, but in winter there was a caretaker and three or four other persons who lived in the neighborhood. The evidence

discloses that the plaintiff had been shipping for 10 or 12 years up there; that their cargo was always marked "Uyak," and that the ships, to use the language of one of the witnesses, "came right to our place, Uyak. They stopped at the cannery on the way back," and that the manager of the mining company expected that the captain would bring the cargo up to the mine, "and," said one of the witnesses, "the mine is as much a part of Uyak as the cannery is a part of Uyak." There is no public landing at the cannery, but only a private wharf of the cannery company. Upon this the cargo insured by the defendant could not be discharged; and this "point on the map," as it is called by one of the witnesses, is on the opposite side of the bay from the Amok mine, and distant 12 or 15 miles therefrom. The bay is from 1 to 5 miles wide, and is a deep water harbor up to the mine. The Harold Blekum was not permitted to tie up to the cannery wharf, but having done so without permission, temporarily, was promptly ordered away.

Another incident bears on the question of the destination of this freight. The Harold Blekum had on board as merchandise 13,000 feet of lumber, and this lumber the manager of the Amok mine, while the schooner was off the cannery, agreed to purchase, it being clearly intended by both him and the captain of the schooner that this lumber should be delivered at the mine.

[1] Counsel for the defendant accumulates much persuasive evidence in support of his contention that the terminus ad quem of this voyage was the cannery; but while we might so find if it were left to us, we must, nevertheless, under the well-known rule, leave the defendant to the finding of the jury on this point, which, to support the verdict, must be presumed to have been that the terminus ad quem as to the insured cargo involved in this case was the mine and not the cannery.

[2] But conceding that the destination was the cannery, it is still not apparent that the Harold Blekum ever actually reached that port in the sense in which this policy contemplates. She arrived off the cannery wharf in the roughest kind of wintry weather; she tied up to the wharf for a very brief space of time without permission, and was promptly ordered away. She was never in a position in which cargo could be unloaded. Where she lay, as the witnesses testified, it was impossible to discharge the cargo, and this was in part on account of injuries which the schooner had sustained by reason of a storm which she had encountered, and in part by reason of the position in which she lay. She was compelled, as we shall hereafter see, to leave the bay without discharging this cargo, and to proceed to Kodiak, and she never returned to the bay. To have reached the terminus ad quem of the voyage, as it concerned this insured cargo, she must

have come into a position in Uyak harbor at least from which this cargo could have been discharged and at which the owners could have received it; in other words, to a place where the master of the ship had a right to demand that the owner of the cargo should receive it at his hands. She never came into such a position.

The history of this voyage throws light on all the questions involved in this case. The Harold Blekum departed from the port of Seattle on the 1st day of December, 1914, bound ultimately for Unga, Alaska, where she had cargo to discharge, and with the insured cargo on board. On December 26th, while at Karluk anchorage, the schooner encountered heavy weather off the entrance to Karluk bay. A black squall with snow struck her, and she pitched bows under, and, being at the time at anchor, started to drag towards the shore. The master and crew, fearing an explosion of the caps which formed a part of this cargo, jettisoned them. The vessel cleared soon after, and the master put her before the wind for Uyak; but two hours later, in a terrific woolly, she lost much of her rigging. She was finally again brought to anchor in 14 fathoms, but the heavy weather snapped her moorings and she went adrift. The mainsail still held, though much damaged, and it was set, and an attempt made to beat up to the cannery wharf, but the snow blinded the crew, and she got too close to the west shore, missed stays, and to save the vessel three iron rails were jettisoned on the end of the fore deck with ropes attached. One parted and the other two held. The vessel was then right amongst the rocks. The crew, fearing that when she started to pound at low tide the dynamite might be exploded, and also with the indication of a dirty night, refused to remain on board and landed on the beach.

The subsequent history of the schooner's adventures can be best discussed after understanding the question for the consideration of this court which arose from them, namely, whether the schooner stranded. It is conceded that if the vessel stranded the warranty was opened.

The question whether she stranded is earnestly presented on both sides, the defendant contending that there is no evidence that the vessel ever stranded, and that as a matter of law it appears from the evidence that she did not strand; and the plaintiff asserting that there was sufficient evidence that the vessel did strand to warrant the jury in finding the fact, and that the whole question is one of fact for the jury.

[3] The burden of proof of the stranding is, as contended by appellant, upon plaintiff.

On the morning following the abandonment of the vessel the master and mate, with one Peter Petrofskey, found the vessel, quoting the log, "on east shore of the bay, with two irons still down and one foot of water under her at high water." There was no evidence

as to whether it was then high water or not. They pumped her out, and the master and mate, using the anchor and line of Petrofskey's launch, kedged her into deep water, slipping the lines on the irons.

The contest of counsel is over the meaning of the words "on east shore," found in the log of the schooner. Defendant contends that this expression means that she was found near the east shore, but still afloat. Plaintiff contends that the words, taken with other evidence, were sufficient to justify a jury in finding that she had stranded. The other evidence is found in a survey of the vessel subsequently made at Kodiak, and which showed the false keel of the schooner to be torn off 65 feet abaft the fore rigging, and the main keel considerably bruised and battered, the stern started, and the bolts driven inwards over a distance of about six inches, six butts on the bottom and the stanchions on the port side started, and 30 feet of the rail crushed inward; the deck strained and the rigging badly battered; the windlass strained, the spindle bent, and all the anchors missing. There was no evidence that the ship had been aground at any time between the occasion when she was kedged into deep water from her position on the morning of the 27th of December and the time when she was surveyed at Kodiak, nor any evidence that this damage was done before the crew abandoned her on the afternoon or evening of December 26th.

[4] The meaning of the word "stranded" is well settled. The vessel must remain stationary for a time. Stranding implies a settling of the vessel, some rest or interruption of the voyage under extraordinary circumstances. If the ship merely touch and go she is not stranded, but a settling of the ship on land, be it rocks or bar or shore, so that she be stationary for even a brief period, is a "stranding." 26 Cyc. 654. Neither the master nor any member of the crew was a witness. Probably after the lapse of time between the catastrophe and the trial they were unavailable.

[5] Some of the considerations which the jury may have taken into account in construing this language are obvious. A ship left unattended, and with so slight a fastening as the two jettisoned railroad irons, in a wintry season, with a storm so severe as to cause the crew and the master to abandon her, might reasonably be supposed to have drifted until she came up against something solid enough to hold her; and the only substantial thing here was the east shore of the bay. The jury had a right to consider the state of the tide as a matter of judicial notice; but, in addition to this, the rise and fall of the tides at Uyak bay appear to some extent from the maps in evidence. The fact that she had only a foot of water under her at high tide; that the tide rises and falls 14 feet at that point; that the vessel drifted

from early in the afternoon of the 26th to the morning of the 27th at a time when the daylight hours were very short in that latitude, and the condition of her bottom when surveyed, which was such as to show that she had pounded on the beach or rocks for a considerable period—all were circumstances which the jury had a right to consider in construing the words "on east shore of the bay."

[6] Where language such as this, somewhat technical in character, or, if not technical, at least colored by the manner of expression of seafaring men, with which landsmen are more or less unacquainted, is to be construed it is far safer to leave the meaning thereof, with all the circumstances in mind, to the jury, than for courts to lay down a hard and fast rule as to what the language means; and, indeed, this is in line with the authorities on this point of practice. The jury are always the judges of the meaning of language employed by witnesses unless the meaning admits of no substantial doubt. *Carpenter v. Fisher*, 175 Mass. 9, 55 N. E. 479; *Snyder v. Bougher*, 214 Pa. 453, 63 Atl. 803; *Reel v. Elder*, 62 Pa. 308, 1 Am. Rep. 414. In view of this rule, we do not feel that we can disturb this finding.

Another question earnestly debated is whether the goods were stowed under deck.

[7] The insurance was on the goods while "under deck" only. The defendant insists that there was no evidence that these goods were under deck; and here again counsel disagree as to the construction to be placed upon a particular part of the evidence. Mr. Erskine, a business man of Kodiak, who purchased the schooner at her sale, was examined as to the condition of the cargo. In the course of his examination by counsel for plaintiff he was asked if, from his examination of the cargo made at Kodiak, he could state whether or not the damage from salt water had occurred 10 or 15 days before the cargo was discharged at Kodiak, and answered that he could do so. The court, interrupting counsel, then asked him how he could do this, and he answered as follows: "For instance, the sugar and some of the flour was mouldy. It was not very wet at the time we received it; it had been wet and had dried to some extent, and the mould had started." Thereupon counsel for plaintiff, resuming his examination, asked the following question: "Where was that particular cargo in the hold of the vessel with reference to the parts of the deck that were open?" The witness answered, "Well, it was under the damaged part of the deck." The court then again took the examination on itself and asked two or three questions. This, in effect, is the only direct evidence in the record on the question of whether the goods were under or above deck. It is very evident to any one with even a sometime passenger's knowledge of the sea that with weather such as that encountered by the schooner

no cargo such as this stowed on deck would remain fast. At least, it must be said that the jury from these physical facts might have inferred that this cargo was under deck, since it remained on the schooner until it reached Kodiak. In addition to this, no other reasonable construction can be given to the question asked of the witness by counsel above quoted than that both he and the witness referred to the particular part of the cargo involved in this action; that is, to the cargo insured by the defendant for the plaintiff here. The court, it is true, interjected a question of its own in the course of the examination; but counsel's examination was directed to ascertaining where this particular cargo, namely, the cargo which was the subject of this action, was stowed, and the witness answered that it was under the damaged part of the deck.

It seems to us that any other construction than that placed upon the evidence by the jury would have been strained indeed; and it certainly does not lie with this court to say that the jury could not have understood counsel and the witness to refer to the cargo involved in this action, and not to the sugar and flour mentioned by the witness in answering a question incidentally propounded by the court in the course of the examination. We will let this finding stand.

[8] Chronologically at this point the question arises whether the insured refused to receive the cargo while the schooner was at Uyak. Counsel for defendant claim such refusal, which claim is contested by plaintiff's counsel.

We have seen that the jury must have found that the cargo did not reach its destination; but certain conversations and circumstances in which Cornell, the mining company's manager, and Captain Timm, the master of the schooner, figured while the vessel was off the cannery, is the basis for the defendant's claim that the plaintiff refused to accept delivery of the cargo.

Here again we think the conversation open to two constructions, of which it must be assumed that the jury adopted that most favorable to the plaintiff. Let it be noted that here the burden is upon the defendant.

[9] Cornell met Capt. Timm at the cannery on the morning of the 27th of December. He testified positively that no time was given him in which to discharge the cargo if he had tried; that he could not have done so without the consent of the captain; that he could not have taken it off in the condition in which the schooner lay at that time, and also that he had no men at the mine whom he could have sent out to get the cargo if it could have been discharged where the schooner lay. The caps had been jettisoned, as we have seen, and could not be delivered. There are two or three versions of these events in the transcript. The captain told Mr. Cornell

that he had jettisoned the caps. The latter then said that the powder was of no use to him and he could not receive it without the caps. The captain then volunteered to get other caps. He went to Kodiak, which was only eight or ten hours journey by launch from the cannery; but instead of returning and taking the cargo up the bay, as he and Cornell evidently expected that he would, the captain brought back a launch from Kodiak and towed the schooner to that port. That there was a misunderstanding between the two men is possible—even probable; but there is no evidence here from which the jury was bound to find that Cornell refused to receive this cargo. Two letters of Cornell to the president of the mining company, and a letter from the latter to the agents of the underwriters, give slightly different versions of this conversation from that contained in Cornell's testimony; but the burden of proof resting upon defendant to show the refusal of the plaintiff to accept delivery was not sustained—at least we cannot say that the jury were wrong in determining that it was not.

[10, 11] After she had been hauled off shore the schooner was taken to Kodiak, and after survey and notice she was sold. And here we meet the next question in the case, and that is whether the master was justified in taking her to Kodiak and making the sale.

There can be no question that the storms had greatly damaged the rigging and hull of the vessel. Her crew had abandoned her. She was, it is fair to say, in a dangerous condition. The extent of her damage was not known or ascertainable at Uyak. She could tie to no wharf there; there was no dock in which she could lie. The master was no doubt justified in concluding that his ship could not safely sail from there under her own power. Her crew refused to serve her further without a survey to ascertain the extent and character of her damage. The law requires that in such cases the master must communicate with the owners; and Capt. Timm accordingly went to Kodiak, the nearest port from which such communication was possible. When there he at once wired the owners reporting the wreck and the condition of the vessel, and received the reply "to use his best judgment and to act for all concerned." He arranged accordingly to have the vessel towed to Kodiak, where there were ship's carpenters, seamen, and others competent to make survey of her damage, and repairs if possible. That this was the only course that the master could in reason pursue seems very clear to us. It is easy to argue what might have been the better or more economical course; but this master faced the perils of the sea in a high latitude, subject to terrific storms on a treacherous coast, in the depth of winter, with a vessel which was practically a wreck. We cannot say now that he did not exercise his best judgment in doing what he did.

The right to sell as well as the right to abandon must be determined by the master in the light of the facts available at the time, and he may not await the development of subsequent facts before deciding what to do (*Fuller v. Insurance Co.*, 31 Me. 325); and, of course, the question of whether a sale was necessary was a fact for the jury (*Insurance Co. v. Winter*, 38 Pa. 176; *Robinson v. Ins. Co.*, 3 Sumner, 220, Fed. Cas. No. 11,949).

[12] Nor does the fact that this schooner was subsequently repaired by the purchaser show that the sale was not necessary. *Fuller v. Ins. Co.*, supra; *Hale v. Insurance Co.* (C. C.) 37 Fed. 371; *In re Sarah Ann*, 2 Sumner, 206, Fed. Cas. No. 12,342. And conceding that counsel's contention is correct, and that the question of necessity is one of law and not of fact (which we are not willing to hold), we think the course pursued by the master in this case was necessary.

[13] One other matter may be briefly mentioned. It appears plainly that Cornell did not consent to the schooner being taken to Kodiak. The owners received nothing from the sale of the ship or cargo. The storm which was encountered near the entrance to Uyak bay was the proximate cause of its loss, as all the subsequent events depended upon and flowed from the injury to the vessel caused by that storm. These considerations entitle the plaintiff to recover.

Some criticisms are offered upon the instructions of the trial judge. We have read them with care in the light of the strictures made upon them in the briefs of the appellant, and we find no reason to quarrel with them. They were clear and definite, and presented the questions of fact upon which the jury must find very plainly to them, and the court seems to have committed no error of law of any moment in these instructions.

From what has been said it is clear that the demurrer to the complaint was properly overruled, and the motion for a nonsuit properly denied.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

CITY OF MUSKOGEE et al. v. NICHOLSON et al. (No. 7777.)

(Supreme Court of Oklahoma. Feb. 26, 1918. Rehearing Denied April 16, 1918.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS §341, 444 — SPECIAL ASSESSMENT—VALIDITY—CONTRACT FOR IMPROVEMENT.

The failure to have made by the city engineer and submitted to the council or commissioners of a city an estimate of the cost of a street improvement, as required under the provisions of section 602, Rev. Laws 1910, renders a contract for such street improvement, entered into in the absence of such preliminary estimate of cost, void, and the assessments against

the abutting property to pay the cost of improvements so contracted for are likewise void.

2. MUNICIPAL CORPORATIONS §513(5)—SPECIAL ASSESSMENT—ACTION TO SET ASIDE—LIMITATIONS.

The period of limitation provided in section 644, Rev. Laws 1910, within which an action may be brought to set aside a special assessment made against lots abutting upon a street to pay the cost of paving said street, is not applicable as a bar to an action to enjoin the collection of such assessment when the proceedings upon which it is based are void.

3. INJUNCTION §113—RECOVERY—LACHES.

In an action for injunction where the facts in the case are such as to appeal to the conscience of a court of equity, the laches of the plaintiff does not necessarily bar a recovery.

4. MUNICIPAL CORPORATIONS §513(6)—SPECIAL ASSESSMENTS—ACTION FOR INJUNCTION—PARTIES.

In an action to enjoin the collection of taxes or special assessments, where such action will lie, the county treasurer or the officers charged with the collection of such taxes or special assessments are the proper parties defendants. Holders of certificates or bonds for the payment of which such taxes or special assessments are levied are not necessary parties to such action.

Commissioners' Opinion, Division No. 1. Error from District Court, Muskogee County; R. P. De Graffenried, Judge.

Action by Sam P. Nicholson and others against the City of Muskogee and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Chas. A. Moon, City Atty., and Furry & Motter, all of Muskogee, for plaintiffs in error. B. B. Wheeler and Wm. Neff, both of Muskogee, and Geo. B. Rittenhouse, of Oklahoma City, for defendants in error.

RUMMONS, C. This action was commenced in the superior court of Muskogee county by the defendants in error, hereinafter styled plaintiffs, against the plaintiffs in error, hereinafter styled defendants, to enjoin the collection of special assessments against the real estate of the plaintiffs for street improvements consisting of paving in improvement district No. 45. The cause was thereafter transferred to the district court and tried by the court, resulting in a judgment for the plaintiffs permanently enjoining the defendants from collecting the assessments complained of. The petition of plaintiffs alleges several jurisdictional defects in the proceedings taken by the defendant city of Muskogee in ordering the improvements of the streets, in letting the contract, and in assessing the benefits. The petition also alleges fraud and collusion between the city engineer and the contractor, by which fraud and collusion the contractor was awarded bonds in payment for a large quantity of work in paving said streets, which work was not actually performed.

[1] The defendants assign error of the court in overruling their demurrer to the petition of plaintiffs; they also assign error of the

court in rendering a judgment for plaintiffs which was not sustained by the evidence introduced in the case. Both of their assignments of error may be considered together. As we view this case, we deem it unnecessary to specifically set out the allegations of the petition of plaintiffs. It is only necessary to say that the petition alleges that no preliminary estimate of the cost of the improvements involved in this case was ever prepared by the engineer of the city and submitted to the commissioners of the city of Muskogee, as required by section 602, R. L. 1910.

The trial court made the following findings of fact:

"In order to aid counsel in arguing the case, the court now makes its findings as to certain of the facts proven in this case so that counsel may present argument as to the legal effect of these findings. The court finds that only a little over 7,000 yards of excavation were actually done in the street improvement district involved in this action, but that through fraud practiced by the contractor and the city engineer, who were in collusion with each other, the cost of over 19,000 yards of excavation was charged against the property of the district; that by like fraud and collusion a pavement and curb and gutter was put down of such inferior quality that the same is now practically worthless, but that the plaintiffs did not learn of any such fraud and collusion and of said fraudulent charges until at or after the commencement of this action. The undisputed evidence shows, and the court further finds, that the assessment levied is at least three times the amount of the benefits any of the plaintiffs' property received from said improvement. The court further finds that the evidence of the city clerk, which is the only evidence introduced upon the question, shows that there is no record in his office showing that any preliminary engineer's estimate of cost of the improvement was ever presented to council of defendant city or filed in his office. As the questions raised regarding the ownership of the property represented by the petitions upon which the paving was based are mainly questions of law, no findings are made upon these questions until the argument is had."

[2, 3] It is urged by counsel for defendants that this action is barred by section 644, R. L. 1910, which is as follows:

"No suit shall be sustained to set aside any such assessment, or to enjoin the mayor and council from making any such improvement, or levying or collecting any such assessment, or installment thereof, or interest or penalty thereon, or issuing such bonds, or providing for their payment, as herein authorized, or contesting the validity thereof on any ground, or for any reason other than for the failure of the city council to adopt and publish the preliminary resolution provided for in cases requiring such resolution and its publication, and to give the notice of the hearing on the return of the appraisers, unless such suit shall be commenced not more than sixty days after the passage of the ordinance making such final assessment: Provided, that in the event that any special assessment shall be found to be invalid or insufficient in whole or in part, for any reason whatsoever, the city council may, at any time, in the manner provided for levying an original assessment, proceed to cause a new assessment to be made and levied, which shall have like force and effect as an original assessment."

This action was commenced long after the expiration of the 60-days limitation provided

in the foregoing section. It is urged, however, by counsel for plaintiffs, that, inasmuch as the proceedings under which the city of Muskogee made the assessment complained of were void, the 60-days limitation provided for in section 644 had no application to the instant case. Counsel for plaintiffs rely upon the case of *Morrow v. Barber Asphalt Co.*, 27 Okl. 247, 111 Pac. 193. In that case it was held that a contract entered into by a city for paving, at a price in excess of the estimate made by the engineer of its probable cost was void, and that a special assessment against real estate to pay the costs of improvements contracted for under such a contract was also void. It was further held that the limitation provided for in section 644, supra, was not a bar to the maintaining of an action to enjoin the collection of an assessment when the proceedings upon which it was based were void. The case of *Morrow v. Barber Asphalt Co.* has been cited by this court in many cases where the special limitation provided in section 644, supra, was considered. It has been distinguished in many of these cases, but has never been overruled. In the case of *City of Chickasha v. O'Brien*, 159 Pac. 282, relied upon by defendants, it is held that the limitation provided in section 644, R. L. 1910, is a bar to an action to enjoin the collection of assessments on the ground that the work was not performed according to contract because of fraud on the part of the contractor and the city officials. Mr. Justice Hardy, who delivered the opinion of the court, says:

"In *Morrow v. Barber Asphalt [Asphalt] Co.*, 27 Okl. 243, 111 Pac. 193, it was held that this rule did not apply to bar an action by a lot owner to enjoin the collection of an assessment upon his property, when the proceedings upon which it is based are void. In the case at bar the city acquired jurisdiction of the proceedings in the proper way, and did everything that was required up to and including the making of the contract, the passage of the assessment ordinance, and the issuance of the bonds. The findings of the court show that these proceedings were regular in every particular; therefore the city acquired jurisdiction and the contract was not void as found by the court; and in so finding the court committed error.

In the case of the *City of Ardmore et al. v. Appollos*, 162 Pac. 211, the case of *Morrow v. Barber Asphalt Co.* was distinguished. In that case it was complained by the plaintiffs that while the contract price for the street improvements were, in the aggregate, less than the estimate of the probable cost of such improvements, as to two of the items entering into the improvements the contract price was in excess of the estimate, and therefore the whole contract was void. The plaintiffs were denied relief because of their laches and because, as was said in *Kellogg, Treasurer, v. Ely*, 15 Ohio St. 64:

"It is not for every threatened violation of the legal rights of a party that a court of equity will intervene with its preventive remedy by injunction, even in cases where the remedy

would be efficient. A party appealing to a court of equity must make a case which commends itself to the conscience of the court."

The trial court found that the contract for paving in the instant case was let without a preliminary estimate of the cost having been before made by the engineer and presented to the commissioners. It is contended by counsel for defendants that this finding of the court is not supported by the evidence. The city clerk testified that he could find no preliminary estimate of the cost of this paving in his office, and that there was no record of any preliminary estimate having been presented to the city commissioners. The defendants produced the city engineer as a witness in their behalf, who produced an estimate of the cost of this paving which was offered in evidence. Upon further examination of the city engineer, it developed that the estimate presented by him and offered in evidence was an estimate made after the work had been commenced for the purpose of advising the commissioners in making settlement with the contractor. The city engineer then testified that he could find in his office no estimate of the cost made prior to the commencement of the work. This was practically all of the evidence with reference to a preliminary estimate of the cost. It is true that there is a presumption that the city commissioners obeyed the law in the letting of this contract, and the burden was upon the plaintiffs to rebut this presumption. Upon this state of the record, it being made to appear that no preliminary estimate was on file either in the office of the clerk or the city engineer and that there was no record of any such preliminary estimate ever having been presented to the commissioners, and the defendants having been unable to find any estimate of the cost except a final estimate after the work had been begun, we are unable to say that the finding of the trial court upon this point is against the weight of the evidence.

Upon the authority of *Morrow v. Barber Asphalt Co.*, supra, this neglect and failure to comply with the plain provisions of the statutes rendered the proceedings which culminated in the assessments absolutely void. The finding of the court as to the fraud and collusion between the contractor and city engineer in the performance of the work provided for in the contract seems to be supported by the record, and while, under the authority of *City of Chickasha v. O'Brien*, supra, an action could not be maintained to enjoin the collection of assessments because of such fraud and collusion after the expiration of the 60-days limitation provided in section 644, supra, yet the facts found by the trial court present a case which should appeal to the conscience of a court of equity so as to relieve plaintiffs from being barred because of their laches and to relieve them of the rule applied in *City of Ardmore v. Appollos*, supra,

and cases there cited. We are of the opinion that the limitation relied upon by the defendants is no bar to the action of the plaintiffs in the instant case, since it has been frequently held by this court that the special statute of limitation relied upon by the defendants is not applicable to an action maintained to enjoin collection of a void assessment. *Morrow v. Barber Asphalt Co.*, supra; *Flanagan v. Tulsa*, 155 Pac. 542.

[4] It is, however, urged by the defendants that this case should be dismissed by this court for the reason that the plaintiffs did not join with them in their action the contractor and the holders of the bonds issued to pay for the paving in the instant case; it being urged by the defendants that such contractor and bondholders are necessary parties in a proceeding to enjoin collection of assessments levied to pay such bonds. Counsel for defendants present a number of authorities that seem to support this contention; but we are of the opinion that it has been determined by this court that, in an action to enjoin the collection of taxes or special assessments, the county treasurer or the sheriff, as the case may be, are the proper parties. *Rogers v. Bass & Harbour Furniture Co.*, 47 Okl. 786, 150 Pac. 706, and cases there cited; *Harn v. Oklahoma City*, 47 Okl. 639, 149 Pac. 868.

We therefore conclude that neither the contractor nor the holders of the bonds were necessary parties to this proceeding. The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

WILSON v. VANDER MOLEN et al.
(No. 8545.)

(Supreme Court of Oklahoma. April 2, 1918.)

(Syllabus by the Court.)

MECHANICS' LIENS §315 — CONTRACTOR'S BOND—ASSIGNMENT OF LIEN—LIABILITY OF SURETY.

Where a contractor makes bond conditioned for the faithful performance of his builder's contract and to hold obligee free and harmless from all labor and materialmen's liens occasioned upon the order of said obligor or his agents, as well as all costs, including attorney's fee, enforcing payment and collection of any claim incurred thereon, and providing that the bond is made for the use and benefit of all persons who may become entitled to liens under said contract according to the provisions of law covering the same, and may be sued upon by them as if made directly to them, held that, where liens are filed and assigned, and suit is brought upon said bond to enforce their payment, the said obligor and his sureties are liable for a reasonable attorney's fee in enforcing the payment and collection of same.

Commissioners' Opinion, Division No. 2. Error from District Court, Pawnee County; W. M. Bowles, Judge.

Action by John W. Wilson against J. L. Vander Molen and others. Judgment for de-

fendants, and plaintiff brings error. Reversed.

Edwin R. McNeill, of Pawnee, for plaintiff in error. Horace Speed, of Tulsa, for defendants in error.

WEST, C. This is an appeal from the judgment of the district court of Pawnee county wherein John W. Wilson was plaintiff and J. L. Vander Molen, G. W. Sutton, and Samuel Byrne were defendants, and the parties will be referred to as they appeared below.

It appears that E. C. Mullendore employed Vander Molen to build a certain two-story brick house, and that the latter had executed a bond in the sum of \$5,000 for the faithful performance of his builder's contract, and also to hold the said Mullendore harmless against all liens for labor and material furnished. Upon the completion of said building it appears that a number of laborers and materialmen had filed liens against said building as provided by statute, and that they had assigned their lien claims to plaintiff, John W. Wilson, who brought a suit upon the contractor's bond to compel the payment of these claims. In the court below, on motion of defendants, Mullendore was made a party defendant, and the evidence tends to show that he had not settled in full with the contractor, and that upon the trial of the cause below he stated that he was due \$1,423.29, and paid that sum into court to be applied on plaintiff's claims, and the other defendants then consented that judgment should be rendered against them for \$1,694.42, the balance of amount sued for. At the time of the payment of the money into court by Mullendore and the rendition of said judgment against defendants the question of attorney's fee as provided in said bond was reserved by the court for further consideration, and at a later date, upon a trial of this issue, the court held that plaintiff was not entitled to an attorney's fee, and from this finding of the court plaintiff has perfected his appeal, and comes up on the question of attorney's fee alone; and this question involves the construction of two paragraphs of said bond, which are as follows:

"Now, if the said J. L. Vander Molen, principal obligor, shall well and truly perform such contract, and complete said building according to said contract and the plans and specifications of the architect and his drawings of same, together with any alterations, changes, conditions made thereto or extra work ordered same to be under the orders of superintendent W. N. Meredith and shall pay and discharge all indebtedness incurred under said contract, and shall hold said obligee free and harmless from all claims, demands, and liens arising therefrom on the part of laborers or subcontractors and the furnishers of material, in the employ of or from the order of said obligor or his agents, as well as all costs, including attorney's fees in enforcing the payment and collection of any claim incurred thereon, and shall perform said contract within the time therein specified, then

this obligation to be null and void; otherwise to be and remain in full force and effect.

"This bond is made for the use and benefit of all persons who may become entitled to liens under the said contract according to the provisions of law governing same, and may be sued upon by them as if made directly to them."

Section 3872, R. L. 1910, is as follows:

"Assignment of Liens.—All claims for liens and rights of action to recover therefor * * * shall be assignable so as to vest in the assignee all rights and remedies herein given, subject to all defenses thereto that might be made if such assignment had not been made. Where a statement has been filed and recorded as herein provided, such assignment may be made by an entry, on the same page of the mechanics' lien docket containing the record of the lien, signed by the claimant, or his lawful representative, and attested by the clerk; or such assignment may be made by a separate instrument in writing."

It appears that under the provisions of the statute supra, the lienholders had a right to assign their lien to plaintiff, and he had a right to bring this suit. The bond provided that it was made for the use and benefit of all persons who might become entitled to liens under said contract according to the provisions of law governing the same, and might be sued upon by them as if made directly to them.

In other words, the plaintiff, who was the assignee of the original lienholders, had two remedies: (1) By foreclosing his liens which were fixed upon the property, and have the same sold; or (2) to resort to the bond to compel the payment of their liens. This latter course was the one pursued. The question as to liability of the bondsmen to the lienholders for the amount due them seems to be very plain from the very terms of the bond hereinbefore set out, and also that it was intended that the bond was to cover an attorney's fee. The parties to the bond had the conceded right to make their contracts in what form they pleased, provided they conformed to the law of the land, and, besides, it is eminently just that a creditor who has incurred an expense in the collection of his debt should be reimbursed by the debtor by whom the action was made necessary and the expense entailed. Our courts have upheld the validity of a stipulation in a contract to pay attorney's fee; that is, they have held that a note containing the provision for the payment of attorney's fee is both valid and negotiable. Defendants in their brief contend that the provision for the attorney's fee is unconstitutional, but the cases cited to support their contention are cases wherein the statute undertook to tax the losing party with an attorney's fee. In the present case the parties were not attempting to proceed against the property upon which their lien had been fixed in order to collect the amount due them, but were resorting to the terms of the contractor's bond, and in this bond it specifically provided that the defendants would pay an attorney's fee.

There seems to be no more reason why

that kind of a contract could not provide for an attorney's fee than there is that a promissory note could not stipulate for the same obligation. This is not a matter of the enforcing a statutory provision for the payment of an attorney's fee, but is a matter of enforcing a contract providing for the payment of an attorney's fee.

In case of *United States Fidelity & Guaranty Co. v. American Blower Co.*, 41 Ind. App. 620, 84 N. E. 555, the syllabus is as follows:

"A materialman suing on a bond conditioned on the contractor performing his contract and paying laborers and materialmen and stipulating that all payments contracted to be made shall be made with attorney's fees is entitled to recover reasonable attorney's fees."

In the body of the opinion the court uses the following language:

"Where such a bond has been required by statute, the courts have recognized and given effect to its dual nature, and the right of a materialman to recover against the surety on a building contract is separate and independent of any right of action vesting in the obligee of such contract. Therefore alterations in the contract which of themselves might release the surety as to the obligee will not affect the right of the materialman to proceed upon the bond. Statutes requiring such bonds are for the purpose of providing security for laborers and materialmen and to give them protection upon which they may rely. *Dewey v. State ex rel.*, 91 Ind. 173, 185; *Conn. v. State ex rel.*, 125 Ind. 514, 25 N. E. 443; *U. S. ex rel. v. Nat. Surety Co.*, 92 Fed. 549, 34 C. C. A. 526; *U. S. Fid. & Guar. Co. v. Omaha Bldg. & Const. Co.*, 116 Fed. 145, 53 C. C. A. 465.

"There is every reason for applying the same rule in the present case. The bond was not required by a statute, but it expressly provided for security to materialmen. The contract was for the installing of a heating plant in a public school building upon which there should be no right to a mechanic's materialman's lien. *Jeffries v. Myers*, 9 Ind. App. 563, 37 N. E. 301; *Townsend v. Cleveland Co.*, 18 Ind. App. 568, 47 N. E. 707; *Fatout v. Board*, 102 Ind. 223, 1 N. E. 389."

Defendants in their brief contend that the evidence did not show that the assignee had agreed to pay or had paid an attorney's fee, but in the trial of the case below this contention was not urged. It appears from the record that it was conceded that plaintiff was liable for an attorney's fee, and the only question that seems to have been passed upon by the court or contested in the trial below was whether or not the assignee of these lienholders could collect the attorney's fee provided in said bond.

There was evidence tending to show what a reasonable attorney's fee under the circumstances would be, and it was not contended below by the defendants that an attorney's fee had not been paid or agreed to be paid, but seems to have been conceded that plaintiff was liable for an attorney's fee, and the only question that was contested and passed upon was the right of plaintiff to collect the same under the terms of the bond. We are of the opinion that the court was wrong in

holding that the assignee of the lienholders was not entitled to an attorney's fee as provided by the contract, it being conceded that the bond was liable for the debt of plaintiff.

On account of the error of the court in holding that the assignee of the lienholder could not collect an attorney's fee, we are of the opinion that this cause should be reversed.

PER CURIAM. Adopted in whole.

(88 Or. 541)

DE WAR v. FIRST NAT. BANK OF ROSEBURG.

(Supreme Court of Oregon. May 14, 1918.)

1. BANKS AND BANKING — 133—LIABILITY FOR DEPOSIT.

If a bank depositor authorized another to withdraw her money from the bank and lend it, she cannot recover the deposit from the bank, but if she did not so authorize the other, the character in which he got possession of the deposit, whether as president of the bank or as a common burglar, is immaterial as to the bank's liability to the depositor.

2. BANKS AND BANKING — 154(9)—WITHDRAWAL OF DEPOSIT—QUESTION FOR JURY.

In a bank depositor's action to recover her deposit, whether the depositor authorized the president of the bank to withdraw her deposit and lend it *held* for the jury on conflicting testimony.

3. BANKS AND BANKING — 154(7)—DEPOSITOR'S ACTION—EVIDENCE.

In such action a schedule consisting of a tabulated list of promissory notes taken over from defendant bank by another bank, including a note for \$5,000, signed by the person to whom it was claimed plaintiff depositor authorized the president of the bank to lend her deposit, was inadmissible as immaterial.

4. APPEAL AND ERROR — 1050(1)—HARMLESS ERROR—EVIDENCE.

The admission of such evidence was harmless to defendant bank, being free from probative value.

5. TRIAL — 251(1)—INSTRUCTIONS OUTSIDE ISSUES.

Instructions outside the issues were properly refused.

6. TRIAL — 260(1)—INSTRUCTIONS—REPETITION.

Requested charges whose substance was fully given to the jury by the court in its own instructions were properly refused.

7. TRIAL — 188—INSTRUCTION—EVIDENCE.

In a bank depositor's action to recover her deposit, the bank's requested instruction that, if the jury found that when it was claimed plaintiff's money was loaned by the bank's president to another, and for some time thereafter, plaintiff was looking to the president to collect the interest and the principal, and made no application to the bank or any of its officers other than the president for the return of the money, that would be a circumstance the jury would have a right to consider bearing on the question of the bank's liability, was properly refused as advising the jury of the effect of particular acts which constituted the *cynosural* facts of the case.

8. PRINCIPAL AND AGENT — 166(1)—RATIFICATION—KNOWLEDGE.

The principal's acts relied on to establish ratification must have been performed with full knowledge of what had been done by the agent and of the surrounding facts and circumstances.

9. TRIAL \Rightarrow 203(3) — INSTRUCTIONS — SUMMARIZING EVIDENCE.

It is not a part of the duties of trial courts to summarize the evidence as viewed from the conflicting viewpoints of the adversary parties.

10. APPEAL AND ERROR \Rightarrow 1066—HARMLESS ERROR—INSTRUCTION—SUMMARIZING EVIDENCE.

In a bank depositor's action to recover her deposit, the trial court's instruction, which did not purport to instruct the jury on any question of law involved in the controversy, but was merely a fragment of the court's summary of the evidence, as viewed from the conflicting viewpoints of the several parties, although disapproved, was not reversible error.

11. BANKS AND BANKING \Rightarrow 154(9)—ACTION BY DEPOSITOR—INSTRUCTION.

In a bank depositor's action to recover her deposit, where the bank claimed that plaintiff had authorized its president to withdraw her deposit and lend it on her behalf, plaintiff's testimony, on the question of the president's authority to act for her, that she told him she would not mind putting her money out on interest if she could get good security, etc., justified the language of an instruction stating the basic principle that not even the president of a bank can withdraw a depositor's money without authority, and that, if he does so, the bank will be held liable for his wrongful act.

12. BANKS AND BANKING \Rightarrow 112—WITHDRAWAL OF DEPOSIT—AUTHORITY OF PRESIDENT.

The president of a bank cannot withdraw the money of a depositor without her authority, and the bank is liable for his wrongful act in doing so.

Department 1. Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Action by Marie De War, also known as Mrs. W. T. De War, against the First National Bank of Roseburg, Or., a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

This is the second appeal in this case. The pleadings are set out at length in the opinion of this court in the former appeal, and it is therefore unnecessary to repeat them here. *De War v. First National Bank*, 80 Or. 260, 156 Pac. 1038. Upon the first trial there was a verdict and judgment for plaintiff, from which defendant appealed, and the judgment was reversed, and the cause remanded for a new trial which has been had, resulting as before, and defendant again appeals.

O. P. Coshow, of Roseburg, for appellant.
B. L. Eddy, of Roseburg, for respondent.

BENSON, J. [1, 2] The issues made by the pleadings are very simple and clear. The complaint alleges a deposit of money in the defendant bank and the refusal of the latter to repay it upon demand. The answer denies the allegations of the complaint, and then pleads two affirmative defenses, the first of which is that the plaintiff authorized T. R. Sheridan, as her agent, to withdraw \$3,000 of her deposit and lend it for her, which he did, to one A. M. Kelsay, taking the latter's note therefor, which was afterward delivered to plaintiff at her request. The

second defense is a plea of estoppel based upon a letter written by the federal bank examiner, R. W. Goodhart, to plaintiff, which is fully discussed in the former opinion herein, and will not now receive further notice. The reply admits that Sheridan, who was president of defendant, withdrew plaintiff's money, but denies that he had any authority for such action. It will therefore be observed at once that, since the plea in estoppel was eliminated by the former opinion in this case, *De War v. First National Bank*, supra, there remained but one fundamental issue in the pleadings, which is: Did the plaintiff authorize T. R. Sheridan to withdraw her money from the bank and lend it? If she did, she cannot recover in this action. If she did not, then the character in which he withdrew it is of no consequence, and whether he got possession of it in his capacity as president of the bank, or as a common burglar, would not in any degree affect the bank's liability to its depositor. Upon this issue the plaintiff testifies quite positively that she did not authorize Sheridan to withdraw her deposit, while he with equal certainty asserts that she did. This presents a question exclusively for the determination of the jury, which by its verdict has decided the issue in favor of plaintiff. In the light of this situation let us consider the assignments of error.

[3, 4] Defendant urges that the court erred in the admission in evidence of the contract of sale between the defendant and the Douglas National Bank. The record discloses that the offer was expressly limited to a page of the exhibit called "Schedule D," consisting of a tabulated list of promissory notes taken over by the latter bank, including a note for \$5,000, signed by A. M. Kelsay. The document is undoubtedly immaterial, without any remote tendency to establish any of the issues in the case, but it is apparently so free from any probative value as to be harmless.

[5] It is next urged that the court committed error in refusing six several instructions requested by the defendant. Those numbered 1 and 6 are to the effect that national banks have no authority to lend money for other than themselves, and that, if Sheridan loaned her money, he did it as her agent, and not as president of the bank. As to these instructions it is enough to say that there is no issue upon the question of the bank having loaned plaintiff's money, and, being outside of the issues, they were properly refused.

[6] Regarding the requested charges numbered 3 and 4, it may be said that the substance of both of them was fully given to the jury by the court in its own instructions.

[7] The requested instruction No. 5 is as follows:

"If you find from the evidence that at the time it is claimed the plaintiff's money was loaned by T. R. Sheridan to A. M. Kelsay, and for some time thereafter the plaintiff was looking to Mr. Sheridan to collect the interest and the principal and return the same to the plaintiff, and that she made no application to the defendant or any of its officers other than Mr. Sheridan for the return of such money, principal or interest, that would be a circumstance which you would have a right to consider bearing upon the question of defendant's liability."

This paragraph represents a class of requests which has been condemned by this court many times. In *Saratoga Inv. Company v. Kern*, 76 Or. 243, 148 Pac. 1125, this court says:

"The law neither raised nor declined to draw an inference from the transactions alluded to by the court, and it was error to advise the jury of the effect of particular acts which, because of the nature of the controversy, constituted the cynosural facts, when there was evidence in the case which could rightfully be considered in the same relation."

The cases there cited may be profitably examined upon the same subject. The request was properly refused.

[8] The instruction numbered 7, which goes to the question of ratification of the alleged agent's acts, is subject to the same criticism, and the further one that it omits an essential feature of ratification, which is that the acts which are relied upon to establish ratification must have been performed with full knowledge of what had been done, and of the surrounding facts and circumstances, and it was not error to refuse it.

[9, 10] It is also urged that the court erred in giving three specified instructions, the first of which is as follows:

"It is claimed also in this case that the evidence tends to show that the transaction by Sheridan was fraudulent in its nature; that is, that he, as president of the bank, had control of plaintiff's money, and that he used this position—that is, the president of the bank—in getting this money out without her authority, and that he loaned it or gave it over to a person who was worthless, financially insolvent, and that the money was turned back into the bank, crediting a worthless or poor account in the bank, and it is claimed that this was a fraud upon the plaintiff, and that it was only a means or device used by Sheridan, using his position there in the bank, to get plaintiff's money."

Defendant contends that this portion of the charge instructs the jury upon the subject of fraud, and that it is erroneous because fraud is not pleaded. The court preceded this paragraph in his address to the jury with the following:

"The court will call your attention to what is claimed by the respective parties to be the evidence in this case, gentlemen, not for the purpose of telling you what the facts are, or giving you any impression of the court as to the facts, but in order that you may better apply the law as the court shall give it to you upon the facts as they appear in this case, or as you may find them to appear. You are the judges of the facts entirely. It is only the duty of the court to instruct you as to the law applicable to the facts."

It will be seen that the paragraph which is challenged does not purport to instruct the jury upon any question of law involved in

the controversy, but merely to be a fragment of the court's summary of the evidence as viewed from the conflicting viewpoints of the adversaries. It is unfortunate that trial courts should indulge in this practice. It is in no sense a part of their duties, and we wish to record our disapproval, but in *State v. Brown*, 28 Or. 147, 41 Pac. 1042, it was held not to be reversible error, and this view has never since been abandoned.

[11, 12] It is next urged that it was error to give the following instruction:

"I further instruct you that in this case, if you find from the evidence that the plaintiff authorized the defendant bank through its president to find a good loan or loans for the plaintiff, that fact would not of itself authorize the president of the bank to sign the name of the plaintiff to a memorandum check or other check withdrawing plaintiff's funds from the bank or transferring it to the credit of another. No one could lawfully withdraw plaintiff's funds from the bank or transfer them to the credit of another unless expressly authorized so to do, and if her funds were so withdrawn or transferred without plaintiff's authority by T. R. Sheridan, as president of the defendant bank, then the bank itself is chargeable with knowledge of the fact that Sheridan had no such authority for the reason that the knowledge, as president of the bank, was the bank's knowledge, and his act was the act of the bank."

Defendant argues that this is misleading in that it tends to impress upon the jury that the plaintiff authorized the bank, through its president, to find a loan, and that the bank is chargeable with the acts of Sheridan as its president, and that it is contrary to the evidence. The testimony of the plaintiff upon the question of authority is as follows:

"I happened to be in the bank, and we were talking—we got started to talking about the money, and I will not say, or could not say, how it was, but he advised me to put it out on interest. He said it is laying there and not doing any good, and I told him I would not mind putting it out on interest, provided I could get good security and where it was perfectly safe, and he said, 'We are having calls every day, where it is just as good as gold,' and they could put my money out, and there was nothing stated then. I told him I would not put it anywhere without consulting my husband, and only for a short time if I put it out at all, and I must have good security; and I considered good security would be a mortgage on some property, that it would be equal or better than the value of the amount. Q. Did you tell Mr. Sheridan at that time or at any other time that he might draw your money out and make a loan? A. No, sir; I supposed, if we come to an agreement, I would have to take the money out. Q. Did you ever take it out? A. No, sir; I never did. I never was asked to."

This testimony, in our opinion, justifies the language of the instruction, which, as a whole, simply states the basic principle that not even the president of a bank can withdraw the money of depositor without her authority, and that, if he does so, the bank will be held liable for the wrongful act of its officer. The instruction is not erroneous.

Defendant also challenges the correctness of the following paragraph of the charge:

"I instruct you that, if defendant, through its president, undertook to find a good loan for

plaintiff, and then, without further authority, said president transferred plaintiff's funds to another account for the use and benefit, in full or in part, of the president of the defendant bank, defendant is still liable for any deposits of plaintiff's so transferred, unless you should find that plaintiff, with full knowledge of the facts, has ratified or sanctioned such transfer of funds, and that bears upon the question of ratification: you are to bear in mind the instructions already given you upon that subject."

What has been said about instruction No. 9 is a sufficient answer to the criticism of this instruction.

Finding no reversible error in the record, the judgment is affirmed.

McBRIDE, O. J., and BURNETT and HARRIS, JJ., concur.

(68 Okl. 123)

STATE ex rel. DAVIS v. BARNETT et al.
(No. 9542.)

(Supreme Court of Oklahoma. March 12, 1918.
Rehearing Denied April 16, 1918.)

(Syllabus by the Court.)

1. PROHIBITION \S 3(1) — OTHER ORDINARY AND USUAL REMEDIES.

Prohibition, being an extraordinary remedy, cannot be resorted to when ordinary and usual remedies provided by law are available.

2. PROHIBITION \S 5(3) — LOWER COURT'S EXERCISE OF JURISDICTION.

The district court entered judgment in strict conformity to the opinion and mandate of the Supreme Court, and thereafter, pursuant to statute, a new action was commenced by the losing party, within time, for the purpose of setting aside such judgment. "For fraud practiced by the successful party in obtaining the judgment." Held that, the district court having jurisdiction of the person and subject-matter of the action, the Supreme Court will not interfere by prohibition with the exercise of such jurisdiction, especially where it appears that the inferior court was not asked in any form to refrain from proceeding with the trial of said cause.

Original application for writ of prohibition by the State of Oklahoma, on the relation of J. Warren Davis, executor, etc., against Willard J. Barnett and others. Writ denied.

Embry, Crockett & Johnson, of Oklahoma City, for plaintiff. H. H. Smith, Baldwin & Carlton and W. N. Maben, all of Shawnee, for defendants.

KANE, J. This is an original application in the Supreme Court for a writ of prohibition against the district court of Pottawatomie county. It seems that after the mandate affirming the judgment of the trial court in *Re Nichols' Will, Phebus et al. v. Vinson et al.*, 166 Pac. 1087, not yet officially reported, was received by the trial court, the same was spread of record and judgment rendered in pursuance of said mandate. Thereupon the losing parties in that cause commenced an action against the prevailing parties to set aside the judgment rendered against them, "For fraud practiced by the successful party in obtaining the judgment," pursuant to sec-

tion 5267, Rev. Laws Okl. 1910. After the petition was filed and the summons served in this latter action, J. Warren Davis, executor of the last will and testament of Harriet Nichols Cook, deceased, commenced this original proceeding in prohibition in the Supreme Court.

[1, 2] We are of the opinion the writ should be denied. There can be no question—indeed, it is conceded by counsel for both sides—that by virtue of the foregoing statute the district court has power to vacate or modify its own judgments and orders at or after the term at which such judgment or order was made "for fraud practiced by the successful party in obtaining the judgment," and therefore the district court has jurisdiction of both the person and subject-matter of the action sought to be prohibited. In these circumstances, counsel for defendant contend that it is a well-settled rule that, where an inferior court has jurisdiction of the subject-matter and the parties, and an appeal will lie from any order or judgment that may be rendered, pending which appeal such order or judgment may be superseded, a writ of prohibition will not lie, even though such court may make an erroneous application of the law to the facts alleged. In support of this doctrine, they cite the following authorities which seem to sustain their contention: *Pioneer T. & T. Co. v. City of Bartlesville*, 27 Okl. 214, 111 Pac. 207; *Pendley v. Allen*, 45 Okl. 510, 145 Pac. 1157; *Mose v. District Court of Marshall County*, 46 Okl. 654, 149 Pac. 240; *Morrison v. Brown, Judge, et al.*, 26 Okl. 201, 109 Pac. 237; *Hirsh et al. v. Twyford et al.*, 40 Okl. 220, 139 Pac. 313. It is also contended that, by a rule generally observed by the courts, an application for a writ of prohibition, restraining an inferior court from proceeding in a cause, will not be entertained, unless a plea to the jurisdiction has been filed and overruled in the lower court, or, at any rate, until lack of jurisdiction of the cause is called to the attention of the lower court in some manner. In support of this proposition, they cite *Mays v. Breckenridge*, 43 Okl. 711, 142 Pac. 407; 32 Cyc. 624.

On the other hand, counsel for plaintiff contend for the application of a rule, the purport of which may be gathered from the following excerpt from their brief:

"Touching the second, third, and fourth contentions in defendant's brief, that the district court has jurisdiction to set aside a judgment obtained by fraud, practiced by the successful party; that the relator has a plain, speedy, and adequate remedy at law; and that relator did not make application to the district court to dismiss the action which he seeks to prohibit—we submit, as before, that proceedings to set aside a judgment affirmed by this court so far involves the jurisdiction of the district court that the Supreme Court, upon application for writ of prohibition, may inquire into such proceedings to see if it is an unwarranted interference with the judgment. And we submit further that if the petition in the district court

does not state a cause of action, and is virtually admitted, such is certainly an unwarranted interference with a judgment solemnly affirmed by this court."

As supporting this rule, counsel cite *State ex rel. v. Superior Court, Spokane County*, 8 Wash. 591, 36 Pac. 443; *People ex rel. v. Lake County District Court*, 26 Colo. 386, 58 Pac. 604, 46 L. R. A. 850; *City of Charleston v. Littlepage, Judge*, 73 W. Va. 156, 80 S. E. 131, 51 L. R. A. (N. S.) 353; 16 Enc. Pl. & Pr. 1115-1118. We find the rule contended for succinctly stated in 32 Cyc. 609, under the head of "Prohibition," as follows:

"The writ will lie to restrain the court below from interpreting the decisions of the appellate court and enforcing decrees different from those rendered by it. And of course where a cause has been appealed and a judgment rendered by the appellate court, interference therewith on the part of the lower court by any proceeding in the cause other than such as is directed by the appellate court will be prohibited."

State ex rel. v. Superior Court, supra, is the only case cited in support of the text. In that case the proceeding prohibited was in the nature of a bill of review which some of the authorities hold cannot be commenced without first obtaining permission of the appellate court. It was held that the jurisdiction of the lower court was involved in a case like that to the extent that on an application for a writ of prohibition the Supreme Court might look to the cause of action for the purpose of determining whether the suit or proceeding sought to be prohibited is in fact an unwarranted interference with a judgment rendered by it. This principle was recognized by this court in *St. L. & S. F. R. Co. v. Hardy*, District Judge, 45 Okl. 423, 146 Pac. 38, where the district court was required by mandamus to enter a judgment in accordance with the mandate of the Supreme Court. In the case at bar, however, it must not be lost sight of that the district court entered the judgment sought to be vacated in strict compliance with the mandate of the Supreme Court, and that thereafter a new action was commenced pursuant to a statute to set aside this judgment for fraud practiced by the successful party in obtaining the same. In these circumstances, we find no justification in any of the authorities cited for an application of the rule invoked by plaintiff for the purpose of prohibiting the district court from exercising jurisdiction in this class of actions. Nor do we feel called upon to examine the petition filed in that action for the purpose of determining whether the same states facts sufficient to constitute a cause of action in advance of action by the district court. This is a matter for the district court in the first instance, and if it was determined in that tribunal that the petition did not state facts sufficient to constitute a cause of action, under our liberal statute for amending pleadings, the trial court would

probably grant leave to amend. Moreover, in one of the cases cited by counsel for plaintiff, *City of Charleston et al. v. Littlepage, Judge, et al.*, supra, the justice of the rule which requires an applicant for a writ of prohibition to first make application to the lower court for a vacation or modification of the proceeding complained of is recognized; the court holding that this rule ought to prevail unless it appears that the inferior court has acted deliberately, or has considered the question of its jurisdiction and intends to proceed. In the case at bar no application for relief of any kind was presented to the trial court for its consideration, but immediately upon the petition being filed counsel resorted to this court for a writ of prohibition.

For the reasons stated, the writ should be denied. It is so ordered. All the Justices concur.

(68 Okl. 95)

ALEXANDER GRAIN CO. v. SCOTT.
(No. 8663.)

(Supreme Court of Oklahoma. April 2, 1918.)

(Syllabus by the Court.)

APPEAL AND ERROR ¶773(2) — FAILURE TO FILE BRIEF—DISMISSAL.

Where plaintiff in error has filed no brief on the day the cause is set for submission, nor asked for an extension of time within which to file brief, the appeal will be dismissed.

Error from County Court, Kiowa County.

Action between Alexander Grain Company and John A. Scott. Judgment for the latter, and the former brings error. Dismissed.

Mounts & Davis, of Frederick, for plaintiff in error. J. W. Mansell, of Oklahoma City, for defendant in error.

PER CURIAM. Under the rules of this court, brief of the plaintiff in error should have been filed January 12, 1918, but on that day an extension of 20 days was granted plaintiff in error in which to file its brief. The cause was duly set for submission February 12, 1918, and, the plaintiff having failed to file its brief or ask for a further extension of time, the appeal is dismissed. All the Justices concur.

ELLIOTT et al. v. ORTON et al. (No. 8542.)
(Supreme Court of Oklahoma. April 2, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ¶154(1)—ACQUIESCES IN JUDGMENT—RIGHT TO APPEAL.

A party who voluntarily acquiesces in or ratifies, either partially or in toto, a judgment against him, cannot appeal from it.

2. APPEAL AND ERROR ¶162(1) — RECOGNITION OF JUDGMENT—WAIVER OF RIGHT OF APPEAL.

Any act on the part of the appellants by which they impliedly recognize the validity of the judgment below against them operates as a

waiver of the appeal therefrom or to bring error to reverse it, and, where some of the appellants accept and appropriate residue of money received from the sale after the satisfaction of appellees' claim, which had been appealed from, and thereupon motion to dismiss such appellants' appeal on account of such action being timely filed, should as to such appellants be sustained and their appeal dismissed.

3. ATTORNEY AND CLIENT — 175 — ATTORNEY'S LIEN—STATUTE.

Under section 247, Rev. Laws 1910, an attorney has a lien upon his client's affirmative cause of action only, and this statutory lien cannot be extended to services which merely protect an existing right or title of his client's property. He cannot impress such property with such statutory lien.

Commissioners' Opinion, Division No. 2. Error from District Court, Pawnee County; Conn Linn, Judge.

Suit to enforce an attorney's lien by L. V. Orton and another against Maria Elliott, the First National Bank of Ralston, Okl., and another. Judgment for plaintiffs, and defendants bring error. Judgment as to the bank reversed, and court below ordered to modify its decree.

Redmond S. Cole, of Oklahoma City, for plaintiffs in error. L. V. Orton, of Pawnee, for defendants in error.

WEST, C. This suit was instituted in the district court of Pawnee county, Okl., on the 21st day of April, 1915, by defendants in error, plaintiffs below, against plaintiffs in error, defendants below, to impress and enforce an attorney's lien on certain lots situated in the town of Ralston in said county and state. Parties will be referred to hereinafter, as they appeared in the court below.

It appears that: Some time in 1911 Mary Elliott and J. W. Elliott were sued by one Stroud to dispossess and quiet title to the lots in controversy, and that plaintiffs were employed to defend said suit. That, at the time of the institution of this suit and before the employment of plaintiffs, Elliotts had executed a mortgage to John A. Stuart on said property for the sum of \$150. During the progress of the suit, plaintiffs indorsed, "Attorney's lien claimed," upon the answer filed to the Stroud suit. That in 1914 the Elliotts executed a mortgage to the First National Bank of Ralston for \$325. This included the Stuart mortgage for \$150 which had been assigned by Stuart to the Bank of Ralston, which was succeeded by the First National Bank, and some other sums which were due by Elliotts to the bank. After the disposition of the Stroud suit, which was decided in favor of the Elliotts, plaintiffs undertook to impress an attorney's lien upon the lots by this suit, claiming that they had a statutory lien, and in addition that the Elliotts had promised to execute them a mortgage upon the lots to secure their attorney's fee. Elliotts filed answer to the suit setting up the fact that the lots were a

homestead, that the lots sought to be impressed were not the lots in controversy in the Stroud suit, and that they had executed a mortgage upon said lots to the First National Bank which was a superior and prior lien to any lien which the plaintiffs might have, and further that under the attorney's lien law the plaintiffs could not maintain their suit for the reason that the statutory lien sought to be enforced could only attach to the cause of action and not to the subject-matter of the action. The First National Bank filed a separate answer which was practically the same as the answer filed by the Elliotts; cause was tried to the court on the 5th day of January, 1916; and a judgment rendered in favor of plaintiffs, giving them the lien upon the property sought to be impressed therewith, subject to the \$150 represented by the Stuart mortgage. From this action of the court defendants perfected their appeal, and plaintiffs below, defendants in error, have filed motion to dismiss said appeal for the reason that said cause has become a moot question on account of the acts and conduct of the defendants since their appeal herein.

[1, 2] The ground of said motion is in effect that, after the appeal was taken, no supersedeas bond having been filed, plaintiffs had order of sale issued and property sold to satisfy the judgment, and that the same was bought in by John A. Stuart, the president of the First National Bank, for the sum of \$190, subject to the \$150 which was represented by the original mortgage given him and included in the \$325 mortgage claimed by the bank; and that, after the satisfaction of the judgment of plaintiffs, there remained something over \$52 which the Elliotts accepted, thereby ratifying said judgment and sale. We are of the opinion that said motion is well taken.

In the second paragraph of the syllabus in case of Barnes et al. v. Lynch et al., 9 Okl. 11, 59 Pac. 995, the following rule is announced:

"A party who voluntarily acquiesces in or ratifies, either partially or in toto, a judgment against him, cannot appeal from it. Where plaintiffs brought action, claiming to be the owners of certain lands praying a decree for absolute title, and for the quieting of the same, and the decree was for the defendant, decreeing that the defendant was the owner of the lands, from which decree plaintiffs appealed, and, pending appeal, on supplemental petition in the trial court plaintiffs claimed to have expended individual moneys in the purchase of the lands under circumstances that would entitle them to an equitable lien for the amount expended, and had a referee appointed to make an accounting of the moneys so expended, and asking that the amount so found should be decreed an equitable lien upon the land, held, that such subsequent proceeding, being inconsistent with the assertion of absolute ownership and title, was an acquiescence in and ratification of the judgment, and that their appeal should be dismissed."

In the body of the opinion the court announced and adopted the following rule:

"No rule is better settled than that the right to appeal may be waived by acts of the party which are inconsistent with the assertion of that right. A party who voluntarily acquiesces in or ratifies, either partially or in toto, a judgment against him, cannot appeal from it."

In case of *City of Lawton v. Ayres*, 40 Okl. 524, 139 Pac. 963, first paragraph of the syllabus is as follows:

"Any act on the part of a defendant by which he impliedly recognizes the validity of a judgment against him operates as a waiver to appeal therefrom or to bring error to reverse it."

In the body of the opinion the court uses the following language:

"A preliminary question decisive of the cause is presented by counsel for defendant in error by a motion to dismiss the appeal. It seems that, subsequent to the rendition of the judgment against it, the city of Lawton commenced a proceeding for the purpose of funding its warrant and judgment indebtedness, wherein it included the judgment herein as one of the items of valid indebtedness against it; that said funding proceeding culminated in a bond issue which was approved by the Attorney General, as required by law, in which said judgment was included as one of the items funded. The contention of the movant is that this proceeding constitutes a recognition on the part of the city of the validity of the judgment rendered against it, and a waiver of its right to appeal therefrom or to bring error to reverse it. We think this position is well taken. The rule is 'that any act on the part of the defendant by which he impliedly recognizes the validity of a judgment against him operates as a waiver to appeal therefrom, or to bring error to reverse it.' 2 Cyc. 656."

Applying the rule announced in the foregoing cases, it is apparent that, when the Elliots by their attorney accepted the \$52, the excess that the property brought after satisfying the judgment of plaintiff, they thereby acquiesced in said judgment and ratified the same in part and in effect ratified the judgment entered by the district court in foreclosing the liens of plaintiff. We are therefore of the opinion that the Elliots became estopped to deny the validity of said judgment and are bound thereby, and that their appeal should be dismissed, and it is so ordered.

[3] However, we are of the opinion that the other plaintiff in error, the First National Bank, is not in the same attitude as the Elliots, for the reason that the foreclosure of said lien was made subject to the \$150 contained, and which the court found was superior and paramount to the liens of the plaintiff, and will therefore be necessary to determine whether or not their mortgage is superior to the lien claimed by plaintiffs, and this necessarily calls for construction of section 247, Rev. Laws 1910, which is as follows:

"Lien Shall Attach When—To What Extent."

—From the commencement of an action, or from the filing of an answer containing a counterclaim, the attorney who represents the party in whose behalf such pleading is filed shall, to the extent hereinafter specified, have a lien upon his client's cause of action or counterclaim, and same shall attach to any verdict, report, decision, finding or judgment in his client's favor, and the proceeds thereof, wherever found, shall

be subject to such lien, and no settlement between the parties without the approval of the attorney shall affect or destroy such lien, provided such attorney serves notice upon the defendant or defendants, or proposed defendant or defendants, in which he shall set forth the nature of the lien he claims and the extent thereof; and said lien shall take effect from and after the service of such notice, but such notice shall not be necessary provided such attorney has filed such pleading in a court of record, and indorsed thereon his name, together with the words, 'Lien claimed.'"

There is some contention as to whether or not the lots sought to be impressed by the attorney's lien claimed by plaintiffs are the identical lots which were in controversy in the Stroud suit. While it is true that the numbers are not the same, we are of the opinion that the evidence discloses it was the identical property which was owned and claimed by the Elliots in the town of Ralston, and which was in controversy in the Stroud suit, and are the lots upon which plaintiffs attempt to impress their lien and foreclose the same; and this statute, *supra*, seems to have never been construed by the Supreme Court of this state, that is, with reference to just how far the lien reaches and to what it attaches. Before the enactment of this statute, there does not seem to have been any attorney's lien law in force in the state of Oklahoma, and in the absence of some statutory provision an attorney has only a retaining lien and has no charging lien on the naked cause of action or the res of the action.

Sections 364 and 386, *Corpus Juris*, reported in volume 6, pages 766 and 778, respectively, treat this subject as follows:

"364. 3. Charging Lien—a. In General. The special or charging lien of an attorney is an equitable right to have the fees and costs due to him for services in a suit secured to him out of the judgment or recovery in that particular suit, the attorney, to the extent of such services, being regarded as an equitable assignee of the judgment. It is based on the natural equity that the plaintiff should not be allowed to appropriate the whole of a judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment. It is an exception to the general rule in that it lacks the element of possession which is essential to ordinary liens, and for this reason such lien, strictly speaking, did not exist at common law. In fact the use of the term 'lien' in this connection has been criticized as inaccurate, and the right of the attorney has been said to be merely a claim to the equitable interference of the court. The existence of the lien was, however, recognized in several early English cases, and it now exists in most jurisdictions either by statute or by virtue of judicial decision. In some jurisdictions, however, the charging lien is not recognized."

"386. b. Cause of Action, Counterclaim, etc.

—(1) In General. In the absence of some statutory provision, an attorney has no lien upon the naked cause of action of his client. By statute, however, in some jurisdictions, an attorney has a lien upon his client's cause of action, claim, or counterclaim, which attaches to a verdict, report, decision, judgment, or final order in his client's favor, and the proceeds thereof. The existence of any such lien depends upon the attorney's authority to begin the suit. The effect of such a provision as to an attorney for a plain-

tiff, is: (1) That he has a lien from the commencement of an action or special proceeding upon his client's cause of action or claim; and (2) that such lien attaches to the verdict, report, decision, judgment, or final order in his client's favor. As to an attorney for a defendant, the effect of such a provision is: (1) That he has a lien from the time of the service of an answer containing a counterclaim, upon his client's counterclaim; (2) that such lien attaches to the verdict, report, decision, judgment, or final order in his client's favor. To give rise to a lien the counterclaim must result in an affirmative judgment for defendant, where no affirmative relief is claimed no lien exists, except as to a judgment for costs. Such a statute does not purport to give a general lien upon all moneys belonging to the client. Being conferred upon the cause of action, it is not lost by a settlement of such cause of action. It attaches to the proceeds of such action, although the action never reaches a verdict, report, decision, or judgment. But where there is no cause of action, claim, or counterclaim involved the lien does not attach."

Arkansas has a statute somewhat similar to that of Oklahoma, and in case of *Hershey v. Duval*, 47 Ark. 86, 14 S. W. 469, the court lays down this rule, and holds that the lien is limited to cases where there has been an actual recovery and cannot extend to professional services which merely protect an existing title or right of property. It seems by the Oklahoma statute that the attorney only has lien upon his client's cause of action or counterclaim which attaches to any verdict, report, decision, findings, or judgment in his client's favor, and the proceeds thereof wherever found. It seems to indicate that in order for the lien to become effective that there must be affirmative relief in favor of his client, and that any services which he may render that merely protect his client in the possession and right to his property are not covered by the attorney's lien law. In other words, that the attorney has no lien upon the res of the action, but only upon any affirmative judgment rendered in his client's favor. This being true, we are of the opinion that, inasmuch as the lien of plaintiffs could not and did not attach to the res of this action, it could not have been enforced as against the Elliotts, except for the fact that they had accepted benefits under the judgment declaring and fixing the lien, and acquiesced therein, and therefore could not as between the plaintiffs and the bank affect the validity of the bank's mortgage, and would not therefore be paramount and superior to the same; but that it would be, under the status of this case, a valid and subsisting lien against Elliotts, subject to the interest of the bank as evidenced by their mortgage.

It is therefore ordered that said judgment as to the plaintiff in error the bank be reversed, and that the court below modify said decree awarding plaintiff's lien on the property in controversy subject to the mortgage of the bank, and it is so ordered.

PER CURIAM. Adopted in whole.

(68 Okl. 120)

PRIEST v. QUINTON. (No. 8478.)

(Supreme Court of Oklahoma. March 5, 1918.
Rehearing Denied April 16, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR 966(1) — CONTINUANCE 7 — DISCRETION OF TRIAL COURT.

The granting or refusing of a continuance rests within the sound discretion of the trial court, and unless it is made to appear that such discretion has been abused, the refusal of a continuance does not constitute reversible error.

2. APPEAL AND ERROR 171(3) — VARIANCE — WAIVER — REVIEW.

Where the defense to an action on a promissory note is that the defendant made payment to a person as agent of the plaintiff, and where the defendant introduced evidence for the purpose of proving such agency, and the case is tried as though the agency was in issue, the defendant will not be permitted to urge for the first time in this court that the agency was admitted by the pleadings, but the point will be considered as waived:

Error from the District Court, Sequoyah County; John H. Pitchford, Judge.

Action by Lucy Quinton against John F. Priest. Defendant's motion for continuance denied, and verdict instructed for plaintiff, and defendant brings error. Affirmed.

McCombs & McCombs, of Sallisaw, for plaintiff in error. T. F. Shackelford, of Sallisaw, for defendant in error.

RAINEY, J. The parties to this action will be designated as they appeared in the district court. The action was commenced in a justice of the peace court of Sequoyah county, by Lucy Quinton, to recover a judgment against the defendant, John F. Priest, upon a promissory note in the sum of \$100. Answering the plaintiff's bill of particulars, the defendant admitted the execution of the note, and as a defense thereto attempted to plead payment by the following allegations:

"Further answering, defendant states the facts to be: That Dave Quinton, the husband of this plaintiff, came to him and they entered into a series of transactions, in which this defendant paid Dave Quinton, as the agent of the plaintiff Lucy Quinton, the following sums, to be credited and applied on these notes, to wit: One horse, value \$125; note on Geo. Faulkner, value \$167.50; cash, value \$135; hay, value \$98; saddle, value \$20; cash, value \$51; corn, value \$20—total, \$618. That Dave Quinton, acting as such agent, agreed and promised to pay this indebtedness out of the above-stated payments, and also promised to bring the notes in question to town, mark them paid, and turn them back to this defendant."

To this answer plaintiff filed a reply, denying that Dave Quinton was her agent, or that the defendant had paid the said Dave Quinton "any money, or delivered to him any horse, saddle, note on George Faulkner, hay, or corn or anything else to be applied in payment of his said note to this plaintiff." On the same day the instant action was filed, the plaintiff filed in the same court another action against the defendant, John F. Priest, wherein she sought to recover on a note in

the sum of \$200. As stated in the briefs and as appears from the record, the defense in that action was the same as in this action. The plaintiff recovered judgment in both actions in the justice of the peace court, and the cases were appealed to the district court of Sequoyah county. There the case involving the \$200 note was first called for trial, and the defendant secured a continuance of that cause on account of the absence of one George Faulkner, by whom it was alleged in his motion for continuance defendant expected to prove that George Faulkner had executed his note to the defendant, John F. Priest, in the sum of \$155, and that he (the defendant) had transferred said note to Dave Quinton, as agent of Lucy Quinton, in part payment of the indebtedness sued on, and that later the said George Faulkner paid in full to Dave Quinton the amount due on the \$155 note, and that by reason thereof defendant Priest should have credit for said amount and interest. The case involving the \$200 note, and in which the continuance was granted, was No. 1683 in the district court, and the instant action was No. 1684. When the case at bar was called for trial counsel for defendant, in open court, made this statement, "Now we make the same motion for a continuance as we did in 1683," and immediately filed a copy of the motion for continuance already filed in case No. 1683. The court overruled the motion, on the ground that defendant had pleaded the \$155 payment as a credit in cause No. 1683; that the continuance had been granted in that case, in order that the defendant might have the benefit of the absent witness' testimony; and that defendant was not entitled to the credit in both actions. We do not believe that this was an abuse of discretion on the part of the court, but in addition thereto we have examined the motion for continuance and are of the opinion that the motion does not comply with the provisions of section 5045, Rev. Laws of Oklahoma of 1910, in that it fails to give the place of residence of the said George Faulkner, or the probability of procuring his testimony within a reasonable time. For aught that appears from the motion for the continuance, the witness Faulkner may have been a resident of another county than the one in which the action was pending, in which event it would have been the duty of the defendant to have taken his deposition.

The motion for continuance also alleged that one Tom Teague was a material witness in said cause, but it was further disclosed therein that the said witness was a nonresident of Oklahoma, residing in Ft. Smith, Ark., although it was alleged that said witness had agreed to be present at the trial. Of course, defendant relied upon his promise at his peril, and this would not be a sufficient ground for a continuance.

[1] This court has often held that the granting or refusing of a continuance rests within the sound discretion of the trial

court, and that unless it is made to appear that such discretion has been abused, the refusal of a continuance does not constitute reversible error. *Kennedy v. Pulliam*, 158 Pac. 1140; *Schafer et al. v. Lee*, 166 Pac. 94; *Daugherty et al. v. Feland*, 157 Pac. 1144; *Jones v. Thompson et al.*, 154 Pac. 1139; *Elliott v. Coggsell*, 155 Pac. 1146; *Comanche Merc. Co. v. Waymire*, 155 Pac. 542; *N. S. Sherman Machine & Iron Works v. R. D. Cole Mfg. Co.*, 151 Pac. 1181; *Walton v. Kennamer*, 39 Okla. 629, 136 Pac. 584.

[2] After the motion for continuance was overruled trial was had to a jury, at the conclusion of which the court instructed a verdict for the plaintiff. The execution of the note being admitted, the defendant attempted to prove payment made by him to Dave Quinton, and that Dave Quinton was the agent of the plaintiff, Lucy Quinton. The trial court was of the opinion that the evidence was insufficient to prove the agency alleged and attempted to be established. We have examined the evidence, and are of the opinion that the trial court did not err in holding the evidence insufficient to prove the agency, for the reason that there is not any evidence tending to prove that Lucy Quinton ever authorized Dave Quinton to act for her in any transaction with the defendant.

But it is contended that it was unnecessary to prove the agency in this case, for the reason that it was admitted in the pleadings. The plaintiff filed an unverified reply, denying the agency alleged in the defendant's answer. Assuming, without deciding, that the allegations in defendant's answer are sufficient to plead that Dave Quinton was the agent of Lucy Quinton, we do not think the defendant is in a position to raise the question here for the reason that he voluntarily assumed the burden of proof under the issues. Immediately upon impaneling the jury, counsel for defendant, in open court, said:

"I believe under the pleadings the burden would be on the defendant. He pleads payment. We admit the execution of the note and plead payment, and the burden as I take it shifts to us."

"The Court: Well, you are probably correct."

The defendant proceeded to try the case upon the theory that the burden of proving agency and payment was upon him, and offered evidence in support thereof, and we do not think he should be permitted to urge in this court for the first time that the agency was admitted by the pleadings. The cases of *Kaufman v. Bolsmier et al.*, 25 Okl. 252, 105 Pac. 326, *Hoopes v. Buford & George Implement Co.*, 45 Kan. 549, 26 Pac. 34, *Warner v. Warner*, 11 Kan. 121, and *Johnson v. J. J. Douglass Co.*, 8 Okl. 594, 58 Pac. 743, seem to be in point. In the last-named case it was held that although the allegation of the existence of a partnership, made in the pleadings of a case, was admitted, unless the same was denied under oath by the opposite party, his agent or attorney, where the parties proceeded to trial and without objection evi-

dence was introduced by the plaintiff tending to prove the partnership, and contrary evidence by the defendant, and the case was tried as though the partnership was in issue, the Supreme Court would treat the point as waived.

Finding no error in the record, the judgment of the trial court is affirmed. All the Justices concur.

BELL v. NORTHROP-BELL OIL & GAS CO. et al. (No. 8829.)

(Supreme Court of Oklahoma. April 2, 1918.)

(Syllabus by the Court.)

1. CORPORATIONS — 187—CONTRACT BETWEEN STOCKHOLDERS—LIABILITY OF CORPORATION.

A contract between certain stockholders of a corporation, to which the corporation is not a party, does not bind the corporation, and no demand can arise out of such contract against the corporation.

2. CORPORATIONS — 614(5)—RECEIVERSHIP—PETITION—DEMURRER TO EVIDENCE.

The evidence of the plaintiff examined, and held insufficient to sustain the allegations of plaintiff's petition, and that the court properly sustained the demurrer thereto.

Commissioners' Opinion, Division No. 3. Error from District Court, Tulsa County; Conn Linn, Judge.

Action by Thomas A. Bell against the Northrop-Bell Oil & Gas Company and others. Demurrer to plaintiff's evidence sustained, and judgment rendered for defendants, and plaintiff brings error. Affirmed.

H. B. Martin and R. A. Reynolds, both of Tulsa, for plaintiff in error. West, Sherman, Davidson & Moore, of Tulsa, for defendants in error.

PRYOR, C. This action was commenced by the plaintiff in error, Thomas A. Bell, against the Northrop-Bell Oil & Gas Company, a corporation, Mary S. Northrop and Murray S. Northrop, asking that the defendants be restrained from disposing of the property belonging to the Northrop-Bell Oil & Gas Company; that a receiver be appointed to take charge of the assets and effects of the said corporation; that a judgment be rendered dissolving the corporation, winding up all its affairs, its debts be paid, and the property distributed among the shareholders.

The petition of plaintiff states in substance that the capital stock of the corporation is \$10,000 divided into 100 shares of the par value of \$100 each; that Mary S. Northrop is the owner of 98 shares of the capital stock of the corporation, and that the plaintiff and Murray S. Northrop are the owners of one share each; that the assets of the corporation consist of oil property in Tulsa county producing oil, which cost the sum of \$35,000; that the \$35,000 paid for said property was advanced by Mary S. Northrop; that on about the 15th day of April, 1915, the

plaintiff and the defendants Mary S. Northrop and Murray S. Northrop entered into a contract whereby it was agreed that out of the profits and earnings of the corporation, defendant Mary S. Northrop should be reimbursed the \$35,000 advanced by her to said corporation for the purchase of the above-described property; and when the said Mary S. Northrop was so reimbursed, that in consideration of the services rendered and to be rendered by the plaintiff Thomas A. Bell and Murray S. Northrop, she should deliver to them 24 shares each of such capital stock; or in the event that said property should be sold, after reimbursing Mary S. Northrop for the \$35,000 advanced, the balance of the proceeds should be divided between the parties, 52 per cent. to Mary S. Northrop, and 24 per cent. each to Thomas A. Bell and Murray S. Northrop.

Plaintiff alleges that the defendants Mary S. Northrop and Murray S. Northrop are attempting to convey said property by deed of conveyance with intent to defeat the rights of the plaintiff, and are attempting to dissolve said corporation for the purpose of defrauding plaintiff and destroying his interest in the profits of said corporation. Plaintiff prays that the defendants and their agents be temporarily enjoined from executing any conveyance or assignment of the property of the Northrop-Bell Oil & Gas Company, and upon trial be permanently enjoined; that a receiver be appointed to take charge of the property and effects of said company; that said corporation be dissolved, and the debts of said company discharged, and the property distributed among the shareholders according to their interests. At the conclusion of the plaintiff's evidence the defendants interposed a demurrer thereto, which was sustained by the trial court, and judgment rendered for the defendants denying the relief sought by the plaintiff.

[1, 2] The only question for determination on appeal is whether or not the court properly sustained the demurrer of the defendants to the evidence of the plaintiff. Whatever claim or right the plaintiff has and attempts to establish is his claim or right under and by virtue of the contract set out in the plaintiff's petition. The defendant corporation is not a party to said contract, and no liability or cause of action could arise against the corporation in favor of plaintiff by reason of said contract, or by reason of the breach of same. The violation of plaintiff's rights under said contract could not operate as grounds for the appointment of a receiver for said company, or for enjoining the company from taking whatever action it might see fit in regard to its property; neither could it be a ground for the distribution of the property and assets of the company. Whatever rights the plaintiff may have under said con-

tract are rights that are enforceable against the defendants Mary S. Northrop and Murray S. Northrop personally. There is not an attempt to establish any claim against them personally.

The trial court committed no error in sustaining the demurrer to the evidence. Wherefore the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

In re NORTHROP-BELL OIL & GAS CO.
(No. 8830.)

(Supreme Court of Oklahoma. April 2, 1918.)

(Syllabus by the Court.)

1. CORPORATIONS — 187 — CONTRACT BETWEEN STOCKHOLDERS—EFFECT.

A contract between certain stockholders of a corporation to which the corporation is not a party does not bind the corporation, and no demand can arise out of such contract against the corporation.

2. CORPORATIONS — 610(1) — DISSOLUTION — EVIDENCE.

The evidence in this cause examined, and held, sufficient to sustain the judgment of the trial court.

Commissioners' Opinion, Division No. 3. Appeal from District Court, Tulsa County; Conn Linn, Judge.

Application for the dissolution of the Northrop-Bell Oil & Gas Company, with objection by Thomas A. Bell, a shareholder. Objection overruled, and corporation dissolved, and Bell appeals. Affirmed.

H. B. Martin and R. A. Reynolds, both of Tulsa, for appellant. West, Sherman, Davidson & Moore, of Tulsa, for appellee.

PRYOR, C. This appeal arose out of an application made on the 30th day of March, 1915, for the dissolution of the Northrop-Bell Oil & Gas Company, and the objection to the dissolution of said company made by Thomas A. Bell, a shareholder in the company. The application states that at a regular meeting of all of the stockholders of the company on the 2d day of March, 1916, a resolution was passed by a two-thirds vote of the stockholders to dissolve said company. Thereupon notice was given of the application and hearing thereon. There is no objection made as to the regularity of the proceedings for the dissolution of said corporation.

Thomas A. Bell filed his objection, stating that he is a stockholder, and has a claim against the said company, and objects to the dissolution of the corporation on the ground that it would be in violation of his rights. The claim of Thomas A. Bell is based upon a contract entered into between Thomas A. Bell, Mary S. Northrop, and Murray S. Northrop. The contract provided in effect that whereas Mary S. Northrop had advanced the company \$35,000 with which it had purchased certain oil-producing property in

Tulsa county, and that Thomas A. Bell and Murray S. Northrop had agreed to bear the burden of the care, management, and control of said property, that the Northrop-Bell Oil & Gas Company should repay the said sum of \$35,000 to the said Mary S. Northrop, advanced by her in the purchase of said property, and that when said sum was repaid to her she should immediately deliver to the said Thomas A. Bell and Murray S. Northrop 23 shares each of the capital stock of said Northrop-Bell Oil & Gas Company, or in the event the property of said corporation was sold, that out of the proceeds she should be paid the \$35,000 advanced by her, and the remainder, if any, should be divided between the three parties in the proportion of 52 per cent. to Mary S. Northrop and 24 per cent. to each Thomas A. Bell and Murray S. Northrop. The capital stock of the corporation was \$10,000, divided into 100 shares of the value of \$100 each. Mary S. Northrop held 98 shares of the stock, and Murray S. Northrop and Thomas A. Bell held one share each.

The trial court overruled the objections of Bell, and rendered judgment dissolving said corporation. Bell appeals.

[1] Whatever right or claim the plaintiff attempted to establish in the trial of this cause arises out of and by virtue of the contract above referred to. This contract is between Thomas A. Bell, Murray S. Northrop, and Mary S. Northrop, and the corporation is not a party thereto, and no demand or claim could arise by virtue of the contract against such corporation which would prevent the dissolution of said corporation.

[2] Cause No. 8829, Thomas A. Bell v. Northrop-Bell Oil & Gas Co., 171 Pac. 1115, a corporation, Mary S. Northrop and Murray S. Northrop, was an action in the trial court whereby Thomas A. Bell attempted to establish a demand against said corporation involving the same contentions as to his rights as he seeks to establish in this cause. This cause and cause No. 8829 were tried together in the trial court. In that case the trial court held in effect that the plaintiff had no demand against said company, and refused to dissolve the corporation, and this court affirms that judgment. In this case the trial court held that the evidence of Thomas A. Bell in support of his objection to the dissolution of said corporation was insufficient to establish any demand or claim against said corporation such as would prevent the dissolution of said company.

There being no objection to the dissolution of this company other than the demand claimed by the said Thomas A. Bell, which was repudiated in the other action on the same evidence that was produced in this action, which the trial court and this court held insufficient to establish any claim, the judgment of the trial court dissolving the corporation should be affirmed.

PER CURIAM. Adopted in whole.

ANDREWS et al. v. THAYER. (No. 8510.)
(Supreme Court of Oklahoma. April 2, 1918.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER ⇨123—RESCISS-
SION OF CONTRACT—EQUITY JURISDICTION.

Where an action is in the main for the rescission of a contract for the purchase of real estate, but the return of the purchase price is also prayed for, the action is one of equitable cognizance, the controversy hinging upon the rescission of the contract, the recovery of the purchase price being a mere incident thereto.

2. APPEAL AND ERROR ⇨1175(7)—REVIEW—
FORM OF ACTION.

When, without objection, such cause is tried to a jury as a suit at law, and a general verdict returned, upon which judgment is rendered by the court, this court on appeal will consider the whole record and weigh the evidence, and, when the judgment of the court is clearly against the weight of the evidence, will render, or cause to be rendered, such judgment as the trial court should have rendered.

3. VENDOR AND PURCHASER ⇨123—ACTION
TO RESCIND CONTRACT—SUFFICIENCY OF EV-
IDENCE.

Evidence examined, and held that the judgment of the court is clearly against the weight of the evidence.

Commissioners' Opinion, Division No. 1.
Error from District Court, Oklahoma County; George C. Crump, Judge.

Action by Mabel Thayer against Calvin D. Andrews and Dora J. Andrews. Judgment for plaintiff, and defendants bring error. Reversed.

S. A. Horton, of Oklahoma City, for plaintiffs in error. L. H. Prichard and Crawford D. Bennett, both of Oklahoma City, for defendant in error.

RUMMONS, C. This action was commenced by the defendant in error against the plaintiffs in error, Calvin D. Andrews and Dora J. Andrews, to rescind a contract for the purchase of certain real estate in Oklahoma county, to cancel a deed from plaintiffs in error to the defendant in error, and to recover the purchase price paid for said real estate by the defendant in error, because of fraud. Calvin D. Andrews thereafter died, and the cause was revived against Dora J. Andrews as the administratrix of his estate. The parties will be referred to hereafter as they appeared in the court below.

[1] The cause was tried to a jury as an action at law, and among the errors complained of by the defendants are the giving and refusing of certain instructions to the jury. It is contended by counsel for plaintiff that this action was one of equitable cognizance, that the verdict of the jury was merely advisory to the court; and that the court having adopted the verdict of the jury as his findings of fact, by overruling the motion for a new trial and rendering judgment on the verdict, the cause should be treated as one in equity, and therefore all errors that may have occurred in the giving or refus-

ing of instructions would be immaterial and without prejudice.

We are inclined to agree with the view of counsel for plaintiff. After alleging the purchase by plaintiff of the real estate from an agent of the defendants, and the false and fraudulent representations alleged to have been made by such agent to induce such purchase, and the reliance on said representations by plaintiff, and the payment of the purchase price of said real estate, relying on said representations, and an offer to reconvey the real estate to the defendants, the petition "prays that the contract of purchase of the property as above described by her (from said defendants) be rescinded, that the deed to the property herein set forth be canceled, and that she recover judgment of and from said defendants and each of them in the sum of \$500, with interest." In *Howe v. Martin*, 23 Okl. 561, 102 Pac. 128, 138 Am. St. Rep. 840, this court says:

"A person induced by false and fraudulent representations to purchase or exchange for property has three remedies. He may, first, upon discovery of the fraud, rescind the contract absolutely, and sue in an action at law, and recover the consideration parted with upon the fraudulent contract, and in such a case he must restore, or offer to restore, to the parties sued whatever he has received by virtue of the contract; or, second, he may bring an action in equity to rescind the contract, and in such a case it is sufficient for plaintiff to restore, or make offer in his petition to restore, everything of value which he has received under the contract; or, third, he may affirm the contract, retain that which he has received, and bring an action at law to recover the damages sustained by reason of his reliance upon the fraudulent representations."

In the case of *Moore v. Kelly*, 157 Pac. 81, it is said:

"Where the action in the main is one for rescission, but the recovery of real property, the possession of which was obtained under said contract, is also prayed for, it is not error to refuse a jury trial when the controversy hinges upon the rescission of the contract, and the recovery of possession is a mere incident to the main action."

The petition in the instant case is so drawn that it evidently comes within the second of the three remedies set forth in *Howe v. Martin*, supra, and is an action in equity to rescind the contract and restore the parties to the status quo, the recovery of the money paid by plaintiff as the purchase price of the real estate being a mere incident to the rescission of the contract, which, as is said in *Moore v. Kelly* supra, is the main purpose of the action. In *Carter v. Prairie Oil & Gas Co.*, 160 Pac. 319, this court held that, where an action in equity was treated in the trial court as an action at law without objection, and tried to a jury, and a general verdict returned upon which judgment was rendered by the court, this court will, on appeal, consider the whole record and weigh the evidence, and render or cause to be rendered such judgment as the trial court should have rendered. Suc-

cess Realty Co. v. Trowbridge, 50 Okl. 402, 150 Pac. 898.

[2, 3] This being the state of the record, it becomes unnecessary for us to consider errors assigned in the giving and refusing of instructions, but we are compelled to weigh the evidence in order to determine whether or not the judgment of the trial court is against the weight thereof. The evidence shows that the defendant Calvin D. Andrews was the owner of 40 acres of land adjacent to Oklahoma City, which he desired to plat into town lots and place upon the market; that he entered into a written contract with George B. Stone and J. W. Ward, which, in effect, gave Stone and Ward, in consideration of the expenditure of \$2,000 for platting, improving, and grading the property, which was known as Morris Lawn Addition to Oklahoma City, the exclusive right to sell the lots in said addition within a period of three years from October 1, 1909, the date of the contract; the said Stone and Ward having an option to purchase the entire addition at any time during the term of the contract for \$35,000 and interest, and said Stone and Ward were to retain as their compensation, in event that they did not avail themselves of this option, all sums received on the sale of said lots in said addition in excess of said sum of \$35,000, Calvin D. Andrews agreeing to convey the lots to the purchasers thereof upon payment of the purchase price, the minimum of which was fixed in the contract. The contract also provided for the sale of lots upon partial payments, all contracts for lots sold to be the property of Calvin D. Andrews until the full sum of \$35,000 had been paid. There are other provisions in the contract which are unnecessary to be noticed in this opinion.

The plaintiff testified that one B. G. Glover, who was employed in the real estate office of G. B. Stone, approached her in the year 1910, and endeavored to sell her lots 31 and 32, block 5, Morris Lawn Addition; that he told her that said lots were located two blocks west of St. Mary's Academy; that she accompanied Glover to look at these lots; that he drove her to a point on the prairie two blocks west of St. Mary's Academy, and almost in line with the academy, and pointed out to her the lots he said he wanted to sell her; that these lots were upon high and level ground; that she informed Glover that she relied and depended upon him as to the location of the lots as well as the title; that upon her return home she decided to purchase the lots she had seen for the sum of \$500; that she gave Glover a check for \$150 as the initial payment upon the purchase price; that this occurred July 21, 1910. She testifies that Glover told her at that time that the lots belonged to the defendant Calvin D. Andrews. Plaintiff paid the subsequent installments of the purchase price, as they fell due, to G. B. Stone Realty Company, and on September 15, 1911, the defendants executed and delivered

to her a warranty deed for the two lots. The plaintiff testified that she did not discover that the lots conveyed to her were not the lots which Glover had shown her until over three years after she made the purchase; that in the meantime she had endeavored to sell the lots, and on the occasion when she discovered that fraud had been practiced upon her she had shown the lots which Glover had shown her to a man who had agreed to buy them, and she submitted to him a deed and abstract for examination; that on the next day he returned the deed and abstract, and informed her that she did not own the lots she had shown him, and refused to proceed with the trade. She testified that she then immediately made inquiry, and discovered that the lots conveyed to her were two blocks north of the ones shown her, and lying in low and swampy ground, and of very much less value than the lots she supposed she was buying. She testified that she then tendered a quitclaim deed to the lots to the defendant Calvin D. Andrews and demanded a return of her money; that Andrews referred her to G. B. Stone, and eventually refused to make restoration. Upon cross-examination, the defendants having pleaded that Glover was not their agent in making the sale to plaintiff, but that he was the agent of one H. Jacobson, who held a contract for the purchase of these lots upon installments, and who had listed them for sale with the G. B. Stone Realty Company, the plaintiff testified, upon being shown the contract for the purchase of these lots held by Jacobson with an assignment thereon to her by Jacobson, that the contract had never been delivered to her and that she had never seen it before. She said when she made the initial payment she received only a receipt and no contract, and that on the other payments made by her to G. B. Stone she only received receipts. She said that she was never told that the property had been sold to Jacobson or that she was buying his contract, and never heard of Jacobson. She said, however:

"Q. Did he give you any contract? A. If he did, they kept it down at the office. There was some sort of a contract they kept at the office, and whenever I made my monthly payments they would receipt me."

Glover testified for the defendant that he sold the lots to the plaintiff, and that he showed her the lots described in her deed; that he was employed by G. B. Stone, who had the sale of the addition in hand; that he was familiar with the location of the lots in the addition, and that the lots he showed the plaintiff were the lots he offered to sell her, and which were subsequently conveyed to her; that the lots had been previously sold to Jacobson, who held a contract for a deed; that he thought Jacobson had paid \$150 on the contract; that Jacobson had listed the lots with the G. B. Stone Realty Company for sale; that, upon the purchase by the plaintiff, Jacobson executed an assignment of his

contract for deed to the plaintiff, which was delivered to the plaintiff; that out of the money paid by plaintiff on the first installment Jacobson paid him a commission for making the sale to plaintiff. On cross-examination he was asked concerning his testimony at a former trial, and, while he says that he did not remember making the answers that were suggested to him by the questions on cross-examination, he persisted in his testimony that the assignment from Jacobson had been made as he testified to in chief.

Miss Lula Newkirk testified for the defendants that she was employed at the time of the transaction by G. B. Stone; that she wrote the assignment on the back of the Jacobson contract, and signed the name of G. B. Stone thereto, and that she had authority to so sign, and thinks that she gave the contract and assignment to the plaintiff, and that after plaintiff paid the purchase price in full the contract was surrendered by her and she received her deed; that Jacobson listed the lots with the G. B. Stone Realty Company for sale, and that when they were sold to plaintiff they were sold for him. On cross-examination she testified that she had no independent recollection of seeing Jacobson sign the assignment or when it was made, except as it appeared from the writing; that she believed that the contract was delivered to the plaintiff, because it was her usual manner of doing business, and that she had no recollection how much had been paid on the lots by Jacobson, but that the books of G. B. Stone would show. The contract with Jacobson was offered in evidence; it was executed on behalf of defendants by G. B. Stone. It contained an agreement to convey to Jacobson the lots conveyed to plaintiff in consideration of the sum of \$500, \$50 of which was paid at the time of executing the contract, the balance to be paid at \$25 per month, with interest at the rate of 8 per cent. on deferred payments. It provided, in event of default being made by Jacobson to make or complete any payment as therein stipulated, all money paid by him should be forfeited as liquidated damages, and provided that time is the essence of the contract. This contract was entered into on February 7, 1910. Indorsed on the back of the contract is the following:

"Oklahoma City, Okla., July 21, 1910.

"For value received I hereby assign and transfer to Mrs. J. D. Thayer all my right, title and interest to the within and foregoing instrument, who agrees to keep up all payments as specified during the life of this contract.

"H. Jacobson.

"Consented to by Calvin D. Andrews, by G. B. Stone."

The plaintiff was corroborated as to the representation made by Glover that the lots lay west of St. Mary's Academy, and within two blocks thereof, by a witness who heard the conversation between the plaintiff and Glover immediately before he took the plain-

tiff to see the lots. This is substantially all the material testimony bearing upon the issues in this case.

It is insistently urged by counsel for defendants that the judgment of the trial court is against the weight of the testimony and is unsupported by the testimony; that the evidence does not establish the agency of Glover for the defendants; that fraud must be established by testimony clear and convincing; and that the testimony in the instant case does not so establish it. On the other hand, counsel for plaintiff insist that defendants, having received the fruits of the transaction, are bound by any representations made by their agent, and that, this being an equity case, the rules that in equity the degree of proof required to establish fraud is not so great as in an action at law, and that in equity fraud may be presumed from the circumstances of the case, apply.

The most serious question that confronts us in the consideration of this cause is not whether the evidence is sufficient to support the finding of the trial court that the plaintiff was defrauded, but whether the evidence is sufficient to support the finding that the party making the alleged fraudulent representations was the agent of the defendants and acting for them in the transaction in which such representations were made. The record in this case does not contain all the testimony that might have been presented to elucidate the controverted issues of fact. However, the burden was upon the plaintiff to make out her case, and while it may be admitted that fraud may in an equity case be presumed from the circumstances of the case, and that so high a degree of proof thereof as is necessary in an action at law is not required, yet agency cannot be presumed upon any lesser degree of proof in equity than at law.

The only evidence on behalf of plaintiff that Glover was acting for the defendants in selling these lots to her is the undisputed fact that he was employed in the office of G. B. Stone, who was duly authorized to make sale of the lots in Morris Lawn Addition, and the testimony of plaintiff that Glover told her that the defendant Andrews was the owner of the lots in question. It may be added that it is undisputed that the defendants received the sum of \$500, with interest on deferred payments, for these lots, all of which, except the first payment of \$150, at least, was paid by plaintiff. On the other hand, the evidence of defendants that Jacobson held a contract for a deed to these lots at the time they were purchased by plaintiff is not rebutted. There is no evidence in the record that Jacobson was in default in the payments due upon the contract, or that his contract had ever been forfeited. While the testimony is in conflict as to whether the purported assignment upon the back of his contract was ever delivered to the plain-

tiff or that she had any knowledge thereof, yet it is clear that Jacobson, at the time these lots were sold to plaintiff, held a valid contract of sale for them. The authority given to Glover's employer to sell the lots in this addition must evidently have ceased as to any of the lots upon a sale thereof, so that, when the lots in question were sold to Jacobson, the authority of Stone to sell these particular lots for the defendants must have terminated, at least, until the sale to Jacobson failed in completion, or for any reason the contract with Jacobson was terminated.

That being the case, it seems clear to us that the weight of the testimony shows that when plaintiff purchased the lots Jacobson held a valid contract for deed to them, that he had listed them for resale with the G. B. Stone Realty Company, and that said Realty Company and their employé, Glover, were acting for Jacobson in making the sale. As against the evidence offered by defendants to this effect we have only the testimony of plaintiff that Glover told her that the lots were owned by the defendants, and the evidence that defendants received the balance of the purchase money from the plaintiff and executed to her a deed to the lots. As to the testimony of the plaintiff that Glover told her the lots were owned by the defendants, if that may be considered as amounting to a statement that he was acting for defendants in making the sale, the rule is elementary that agency cannot be established by declarations of the agent alone. If we consider the fact that defendants received the purchase money from the plaintiff, and the contention is made that they ratified the acts of Glover in making the sale, we must, in the absence of satisfactory evidence that Glover was acting for them in selling these lots to plaintiff, find, before they can be held to have ratified his unauthorized act, that they had knowledge of what had been done in the premises, and the record is entirely silent as to any knowledge of this transaction on the part of the defendants.

If the evidence in behalf of the defendants be true, and the contract of Jacobson was assigned to plaintiff, and her initial payment used to return to Jacobson the money paid by him on the contract, the receipt by defendants of the subsequent installments of the purchase price paid by plaintiff would be in compliance with their contract with Jacobson as assigned to plaintiff, and would give rise to no liability on the part of the defendants for any misrepresentations or fraud practiced in behalf of Jacobson.

The execution by the defendants of a deed to plaintiff stands in the same position. If plaintiff was the assignee of Jacobson's contract, upon completing the payment of the purchase price she was entitled to a deed, and defendants in executing a deed to her

were only carrying out the terms of this contract with Jacobson.

The record shows that Jacobson had a contract for the purchase of these lots, and, there being nothing in the record to show that the same was not still in full force and effect at the time that plaintiff negotiated for the purchase of these lots, we think the finding of the trial court that Glover, in negotiating the sale of these lots to plaintiff, acted as the agent of the defendants, is against the weight of the evidence, and, there being no evidence of circumstances sufficient to show any ratification of the act of Glover by the defendants, no responsibility therefor can be imposed upon the defendants.

The judgment of the trial court should be reversed.

PER CURIAM. Adopted in whole.

FIST et al. v. LA BATTE. (No. 5975.)
(Supreme Court of Oklahoma. April 2, 1918.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS §326—FOREIGN CONTRACT—LEGALITY—ENFORCEMENT.

A contract made in the state of Colorado and valid in that state, the consideration of which was the transfer of a saloon in Colorado, including a stock of intoxicating liquors, will be enforced by the courts of the state of Oklahoma when their jurisdiction is duly invoked and it is not shown that such contract contemplated a violation of the laws of Oklahoma.

2. CONTRACTS §141(1)—ILLEGALITY—PRESUMPTION AND BURDEN OF PROOF.

The presumption is that contracts, on their face lawful and made in apparent good faith, are valid, and a party to such contracts who seeks to avoid liability on the ground of bad faith or alleged unlawful nature of the transactions involved has the burden of alleging and proving the necessary facts to overcome such presumption.

Commissioners' Opinion, Division No. 1. Appeal from District Court, Osage County; R. H. Hudson, Judge.

Action by Julius Fist and Emanuel Fist, doing business under the firm name of Julius Fist & Co., against Edna La Batte. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions to render judgment for plaintiffs.

J. M. Worten and J. W. Arrington, both of Pawhuska, for plaintiffs in error. Grinstead & Scott, both of Pawhuska, for defendant in error.

STEWART, C. The plaintiffs commenced action against the defendant on a series of past-due promissory notes in a total sum of \$1,300 principal, bearing interest at 6 per cent. from January 21, 1910, secured by mortgage on land in Osage county, Okla., which notes and mortgage are alleged to have been executed in the state of Colorado in favor of Samuel Schwartz, and by him assigned and indorsed in due course to the plaintiffs. The defendant pleads as her sole defense that the

notes and mortgage were executed by her husband, John La Batte, and herself in consideration of sale to John La Batte by Samuel Schwartz of one-half interest in a saloon business in the state of Colorado, including a stock of intoxicating liquors, in contravention of public policy in that La Batte was a half-breed Sioux Indian, such sale being thereby in violation of the statutes of Colorado and of the act of Congress of June 30, 1897 (chapter 109, 29 Stat. 506 [U. S. Comp. St. 1916, § 4137]), prohibiting the sale of intoxicating liquors to an Indian; that such liquors were sold ostensibly to Milton Barnes, a white man, brother-in-law of La Batte, and bill of sale was executed by Schwartz transferring such property to Barnes for the purpose of consummating an illegal sale of such liquors to La Batte, and was an attempt to circumvent and avoid the statutes of Colorado and of the United States; and that the plaintiffs became indorsees of such notes and mortgage with full knowledge of such facts.

It developed in the testimony that the notes and mortgage were transferred to the plaintiff before maturity as collateral security for an indebtedness of \$656.34 owing by Schwartz to the plaintiffs. The trial court, after hearing the evidence, held that the amount of said notes in excess of such sum was void, and that the notes should be canceled as to such excess, reserving any holding as to the validity of such notes in the hands of the plaintiffs as to such sum of \$656.34. The court concluded, however, that neither the notes nor mortgage could be enforced by the courts of this state because of the public policy as expressed in our Constitution and statutes prohibiting the sale of intoxicating liquor in this state. Judgment was rendered canceling the notes for the excess above the sum of \$656.34, canceling the mortgage in toto, removing all cloud, because of such mortgage from the title of the defendant to the land involved, and adjudging that neither the plaintiffs nor Samuel Schwartz had any right, title, equity, or interest in or to said land. Plaintiffs duly appeal to this court.

[1] It is agreed by the parties that, if Schwartz, in good faith, sold the saloon, including the intoxicating liquors, to Barnes, the white man, and not to La Batte, the half-breed Indian, the contract was lawful in Colorado and could be enforced in that state under the law as it then existed. We may say in the outset that the trial court was wrong in holding that the courts of Oklahoma would not enforce the contract under consideration, if the same was valid in Colorado, where made. The same trial court, in another case, had previously held that an obligation arising for the purchase price of intoxicating liquors to be handled in Texas, bought by a resident of Texas from a resident of Ohio, could not be enforced in the courts of this state. At the time of the trial in the instant case, the former case had been appealed, but had not been determined by this court.

Since such time, however, the judgment in such former case has been reversed, it being held that, as the contract was valid, both under the laws of the state of Texas and of the state of Ohio and the transaction in no wise affected the prohibitory laws or other public policy of this state, the courts of the state of Oklahoma, having duly acquired jurisdiction of the parties, would enforce the obligation under the well-established rule that a contract good where made is good everywhere and a contract invalid where made is invalid everywhere. *Klein v. Keller*, 42 Okl. 592, 141 Pac. 1117, Ann. Cas. 1916D, 1070. Counsel for defendant in their brief seek to distinguish the facts in *Klein v. Keller*, supra, from the facts in the instant case, but an examination of the opinion rendered will lead to the inevitable conclusion that the same underlying principles of law are involved in each case. In the instant case it is not contended that the liquor was to be introduced into the state of Oklahoma or otherwise handled in violation of law. Unquestionably, the courts of this state will not lend their aid to enforce any contract having for its object in part or in whole the violation of law. However, under the comity of states and the federal Constitution, it would be the duty of the courts of this state to enforce any contract made in a sister state and valid under the laws of such state, but a contract having for one of its objects the violation of a law of the state of Oklahoma, or which would necessarily result in such violation, would, we think, neither be enforceable in the state of Oklahoma nor in the state where made.

[2] It being admitted that the *lex loci* permitted the sale of intoxicating liquors to a white man, we will now assume, without deciding, that the notes and mortgage in question would be invalid, under the law as applied to the facts in the instant case, if the sale were made to La Batte, the Indian, and not to Barnes, his white brother-in-law, and we will consider whether or not the testimony sustains the finding that the liquor was not sold to Barnes, but to La Batte. The defendant has admitted in the answer that the legal title of the property was placed in Barnes, but charges that such was done as a subterfuge to avoid the force of the prohibitory statutes against such a sale to Indians. The burden of overcoming the presumption of validity and good faith and to establish the collusion rests upon the defendant. The trial court, on motion of the plaintiffs, properly required the defendant to assume the burden of proof, whereupon the defendant introduced the depositions of Samuel Schwartz and others taken by the plaintiffs in Colorado after which she testified in her own behalf. There was no other evidence introduced. The testimony of Schwartz was to the effect that he sold to Barnes; that Barnes had previously purchased a half interest in the business, and agreed that, if Schwartz would sell him the other half interest he would pay \$1,300 for

the same, and that La Batte and wife would secure the payment with a mortgage on Oklahoma land. He also testified that, after the transfer, the saloon was managed entirely by Barnes; that La Batte, so far as could be observed, had nothing to do with its management or control; that he did not know that Mr. and Mrs. La Batte were Indians; that he met Mrs. La Batte only at the time when she came to sign the mortgage, and that no discussion was had concerning the deal at that time. The testimony given by each of the plaintiffs was read, and they say that they had no knowledge of La Batte claiming any interest in the saloon, or of the saloon being sold to him, if such was the case, at the time they became the indorsees of the notes and mortgage. There is not a particle of testimony by any witness to show collusion or, even inferentially, to show that Schwartz sold the half interest in the saloon to any person but Barnes. Mrs. La Batte does not claim to have any personal knowledge of the transaction except the fact of signing the notes and mortgage. In answer to questions by her counsel she testified that she made the note and mortgage to pay for a half interest in a saloon which her husband was purchasing. She does not testify to any facts or circumstances tending to show why the bill of sale was made to Barnes and not to her husband. In answer to questions of counsel for plaintiffs, she testified that all she knew about the transaction was what her husband told her; that she did not have any conversation with Schwartz about the matter, did not discuss the same when she signed the mortgage, and based her testimony solely upon the information given by her husband. Plaintiffs moved to strike her testimony as to matters told her by her husband as hearsay. The motion should have been sustained, but was overruled by the court, the plaintiffs excepting. Such testimony was wholly incompetent, and was the only testimony offered by the defendant on the vital and decisive question as to whom the saloon was sold. There is not a semblance of competent testimony tending to support the allegations that La Batte was the real purchaser, or that shows that there was any subterfuge or bad faith on the part of Schwartz. The fact that La Batte and his wife gave notes and mortgage to secure the payment of the money is not evidence, under the issues in this case, to show that La Batte was the purchaser.

The defendant is an educated Osage Indian. It is admitted that a certificate of competency had been issued to her, and that she was not inhibited from incumbering the land for lawful purposes. The plaintiffs are entitled to judgment for the full amount due on the notes, and for foreclosure of the mortgage. By the terms of the mortgage the plaintiffs may be allowed a reasonable sum, not to exceed \$75, as attorney's fees, but they

failed to offer testimony as to the reasonable value of attorney's services. Following the precedent in *Holland Banking Co. v. Dicks*, 170 Pac. 253, in the absence of such testimony, or a provision in the contract for a specific sum as attorney's fees, we are unable to allow attorney's fees.

The judgment is reversed, and the cause remanded, with directions to render judgment in favor of the plaintiffs for the sum of \$1,300, with interest at 6 per cent. per annum from January 21, 1910, for costs and for foreclosure of the mortgage and sale of the land; the proceeds to be applied in satisfaction of the judgment and costs, the residue, if any, to be paid to defendant.

PER CURIAM. Adopted in whole.

MARSH MILLING & GRAIN CO. v. GUARANTY STATE BANK OF ARDMORE. (No. 8469.)

(Supreme Court of Oklahoma. April 2, 1918.)

(Syllabus by the Court.)

1. BANKS AND BANKING §96 — PURCHASE OF BILL OF LADING WITH DRAFT ATTACHED — ULTRA VIRES — STATUTE — "BUYING OR SELLING GOODS, CHATTELS, WARES OR MERCHANDISE."

A state bank, buying a draft, with a bill of lading for a car of merchandise attached, which bill of lading, together with the draft, is indorsed to it, is not engaging in trade or commerce by buying or selling goods, chattels, or merchandise in contravention of section 266, Rev. Laws 1910.

2. CARRIERS §56 — TRANSFER OF BILL OF LADING—TITLE TO PROPERTY.

When a bill of lading in favor of the drawer is by him indorsed to a bank with draft attached, and the draft paid to the drawer by the bank, such transaction has the effect to transfer the legal title of the property called for in the bill of lading to the bank.

3. CARRIERS §94(3)—CONVERSION OF GOODS —INTERVENTION—PROOF OF VALUE.

In an action against a railroad company for the conversion of a car of grain covered by a bill of lading held by a bank, the railroad company paid into court the amount demanded by the bank. A milling company intervened in said action, claiming an interest in the money so paid into court. *Held*, that the railroad company having confessed its liability to pay the amount demanded by plaintiff, as between the plaintiff and the intervener no proof of the value of said car of grain was necessary.

Commissioners' Opinion, Division No. 1. Error from County Court, Carter County; Thomas W. Champion, Judge.

Action by Guaranty State Bank of Ardmore, Okla., against the St. Louis & San Francisco Railway Company and others. Marsh Milling & Grain Company intervenes. Judgment for plaintiff, and intervener brings error. Affirmed.

Geo. S. March, of Madill, for plaintiff in error. J. A. Bass, of Ardmore, for defendant in error.

RUMMONS, C. On October 6, 1914, one J. N. Barrall delivered to the Gulf, Colorado & Santa Fé Railroad Company, at Davis, Okl., one car of oats for delivery at Madill, Okl. A bill of lading was issued by said railroad company to J. N. Barrall, with instructions to notify Marsh Milling & Grain Company at Madill, Okl. J. N. Barrall attached this bill of lading to a draft upon the Marsh Milling & Grain Company for the sum of \$582.85, which draft and bill of lading he negotiated and transferred by indorsement to the plaintiff, and received credit for the face value of the draft. Barrall thereafter drew from the plaintiff bank all of said funds except the sum of \$68. Upon the arrival of the car of oats at Madill, the St. Louis & San Francisco Railway Company delivered it to the intervener, Marsh Milling & Grain Company. Payment of the draft, upon presentation, was refused by Marsh Milling & Grain Company. The plaintiff then commenced this action against the St. Louis & San Francisco Railway Company to recover the sum of \$582.85 for the conversion of said car of oats, claiming to be the owner thereof because of the indorsement to it of said bill of lading. The railway company came into court and filed an affidavit reciting that it had in its possession the sum of \$582.85 paid to it by the intervener, and offered to pay said sum into court. The affidavit further recited that the intervener claimed an interest in the said sum of money, and that the money was paid to it, and turned into court without collusion between it and the intervener. Upon order of the court the money was paid into the registry of the court by the railroad company. Marsh Milling & Grain Company filed a petition of intervention denying that plaintiff was the owner of the car of oats or the owner and holder of the bill of lading, alleging that the plaintiff held said bill of lading and draft attached merely as a collecting agent for J. N. Barrall. The petition further alleges an indebtedness due the intervener from J. N. Barrall in the sum of \$462.95. The plaintiff moved to strike the petition in intervention from the files, which motion was overruled by the court, plaintiff excepting. Plaintiff, in reply to the petition in intervention, alleged the purchase of the bill of lading in good faith and in due course of business.

Upon the trial the cashier of the plaintiff testified that it had purchased the bill of lading by discounting a draft attached thereto in the sum of \$582.85 from J. N. Barrall; that Barrall was given credit for the face value of the draft upon his account with the plaintiff; that the draft has never been paid, and that Barrall had drawn out all of said sum except the sum of \$68. The intervener offered evidence tending to show that Barrall was indebted to it in the sum of \$462.95. At the conclusion of the testimony the court sustained the motion of the plaintiff to di-

rect a verdict in its favor. The intervener, having unsuccessfully moved for a new trial, brings this proceeding in error to reverse the judgment rendered upon such verdict.

[1] The only assignment of error argued in the brief of counsel for the intervener is that the court erred in overruling its motion for a new trial. Under this assignment it is urged that plaintiff was not entitled to recover because the transaction was ultra vires, being in contravention of section 266, R. L. 1910, which provides:

"No bank shall employ its moneys, directly or indirectly, in trade or commerce, by buying or selling goods, chattels, wares or merchandise."

Counsel for intervener, we think, misconceives the nature of this transaction. The plaintiff in the instant case did not purchase from Barrall the car of oats in controversy, but it did purchase from him the draft upon the intervener, to which the bill of lading, duly indorsed, was attached. The purchase of the draft carried with it the bill of lading as collateral security for the payment of the draft, and ownership of the bill of lading vested title in plaintiff to the car of oats covered by such bill of lading, under the provision of section 829, R. L. 1910. The purchase of this draft and bill of lading is clearly within the powers given by our statutes to a banking corporation. Section 259, R. L. 1910. Among the powers enumerated in that section is the power to buy and sell exchange, so that, even if the plea that the transaction was ultra vires as to the plaintiff may be interposed by intervener, which we do not determine, it is apparent that the contention is without merit.

[2] It is further contended by the intervener that ownership of the bill of lading did not transfer title to the oats to the plaintiff bank so as to entitle it to maintain an action for the conversion thereof. Unfortunately for the plaintiff, this court has determined this question adversely to its contention. In *State National Bank v. Wood*, 43 Okl. 251, 142 Pac. 1002, it is said:

"Where a bill of lading in favor of the assignor is by him indorsed to the bank with draft attached, and the draft paid to the assignor by the bank, held, that such a transaction had the effect to transfer the legal title of the property called for in the bill to the bank."

[3] The next contention by the intervener is that there was no evidence as to the value of the car of oats, and therefore no evidence warranting the court in directing a verdict in favor of the plaintiff in the sum of \$582.85. It is true the record contains no evidence as to the value of this car of oats, but it must be remembered that this action was commenced by the plaintiff against the St. Louis & San Francisco Railway Company. The railway company, being unwilling to defend, paid into court the amount alleged to be due plaintiff in its petition. The issue raised by the plea in intervention was the title of the plaintiff to the money so paid into court. The intervener claimed

to be entitled to the sum of \$462.95 of the money so paid into court, upon the theory that the money was the property of Barrall, and that he was indebted to it in that sum. No issue was presented in the pleadings as to the value of the car of oats. The only controversy was over the funds paid into court by the defendant railway company in satisfaction of its liability. The right of the plaintiff to recover having been determined, the amount of its recovery was fixed by the admission of the defendant whom plaintiff had elected to sue. *Goodrich v. Williamson*, 10 Okl. 617, 63 Pac. 974. The intervener had no interest in the fund except to establish its claim to a portion of it as the property of Barrall, and is not now in a position to question the amount of plaintiff's recovery, but could only question plaintiff's title to the funds.

Finding no error in the record, the judgment should be affirmed.

PER CURIAM. Adopted in whole.

(68 Okl. 96)

BEARMAN et al. v. HUNT, County Judge, et al. (No. 8637.)

(Supreme Court of Oklahoma. April 2, 1918.)

(Syllabus by the Court.)

1. PROCESS \S 118—EXEMPTION FROM SERVICE—WITNESS.

One who is in good faith attending court as a material witness, or as a suitor, in a county other than that of his residence, is exempt from service of summons in an action brought in that county, though his attendance is not in obedience to a subpoena.

2. PROCESS \S 19—SUMMONS—COUNTY.

If service of summons is not legally obtained on one of several defendants, in the county where the action is brought, a summons cannot be issued thereon to any other county, and there be legally served on any one or more of the codefendants.

Error from District Court, Wagoner County; Chas. G. Watts, Judge.

Suit by W. T. Hunt, County Judge of Wagoner County, Okl., trustee for Melissa Byrd, and by Melissa Byrd, in her own right, against J. A. Bearman and others. Judgment for plaintiffs, and defendants bring error. Reversed, with instructions.

F. B. Righter, of Broken Arrow, for plaintiffs in error. P. L. Newton, of Coweta, for defendants in error.

TISINGER, J. On December 8, 1914, defendants in error, W. T. Hunt, county judge of Wagoner county, trustee for Melissa Byrd, and Melissa Byrd, in her own right, filed suit in the district court of Wagoner county, against the plaintiffs in error, J. A. Bearman, A. L. Laws, L. T. Tryon, and F. B. Righter, as defendants, to recover on a joint and several promissory note given by the defendants to the county judge of Wagoner county, Okl.

On the same day the suit was filed, summons was issued out of said court and served on the defendants Bearman, Tryon, and Righter, and they each afterwards made special appearance and filed their separate motions to quash the issuance and service of such summons, on the ground that, at the time the summons was issued and served in Wagoner county, they were residents of Tulsa county, and were attending district court in Wagoner county, as material witnesses and parties litigant in cases pending in that court. The motion of each of said three defendants to quash the issuance and service of the summons on him was supported by his affidavit corroborating the allegations contained in his motion and was uncontroverted.

These facts show that all of the defendants were residents of the town of Broken Arrow in Tulsa county at the time they were served in Wagoner county with the summons on the 8th day of December, 1914. The defendant Bearman was at that time in attendance on the district court of Wagoner county, as one of the parties plaintiff in a case pending in that court, set for trial on that day. He was also in attendance on that court as a material witness in another case set for trial on the 7th and 8th days of December, 1914. The defendant Righter was also at that time in attendance on said court, as one of the parties plaintiff in a case pending in that court set for trial on that day. He was also in attendance on said court as a material witness in another case, pending in that court, and testified as such material witness on the 7th day of December, 1914. The defendant Tryon was at that time cashier of the Citizens' National Bank of Broken Arrow, and was in attendance on said court, and had with him the books and papers of the bank, for the purpose of using them and testifying as a material witness in a case pending in that court, set for trial and heard and disposed of on that day. The separate motions of these defendants, supported by their affidavits, were heard and overruled by the court. The defendants refused to further plead, and the court reserved final judgment in the case until after service of summons could be made on the remaining defendant, Laws. The defendant Laws was thereafter served with summons in Tulsa county, the county of his residence, and in due time entered his special appearance, and filed his separate motion supported by his affidavit, to quash the issuance and service of the summons on him, on the ground that the district court of Wagoner county had not acquired jurisdiction of the persons of his codefendants. The court overruled the motion of this defendant, and he refused to further plead. Whereupon the court adjudged all the defendants to be in default and rendered judgment in favor of the plaintiffs and against all the defendants as prayed for.

The legal questions involved in this suit may be stated as follows:

Can a person be sued, in an ordinary action, in a county other than the county of his residence, while he is in good faith attending court in such other county, either as a material witness, or as a party litigant in pending litigation, provided he in a proper manner and at the proper time claims his exemption and immunity from service of summons in such county?

Article 4, vol. 2, Rev. Laws 1910, relates to the venue of actions, and, after a number of sections dealing with various classes of actions, section 4679 is as follows:

"Every other action must be brought in the county in which the defendant, or some one of the defendants, reside or may be summoned."

That statute seems to be limited by section 5064, Rev. Laws 1910, which reads:

"A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county, while going, returning or attending, in obedience to a subpoena."

These statutes were a part of the Code of Civil Procedure of the state of Kansas, and were adopted by our territorial Legislature in 1893. They have remained a part of our statute law of Civil Procedure, unaltered and unchanged, until the present time.

[1] It is the common-law rule that when a person is in good faith attending court, either as a litigant or witness, in a county other than that of his residence, he is privileged from the service of a summons in an action brought in that county. This privilege is extended to him while attending court and for such reasonable time, before and after, as may enable him to come from and return to his home, on the ground that justice requires the attendance of witnesses cognizant of material facts and that no unreasonable obstacles should be thrown in the way of their freely coming into court to testify, and that parties litigant should be free to prosecute or defend their actions in jurisdictions other than the county of their residence without being embarrassed and hampered by having suits filed against them while attending court for such purpose.

In the well-considered case of *Underwood v. Fosha*, 73 Kan. 408, 85 Pac. 564, 9 Ann. Cas. 833, the Supreme Court of Kansas, construing the statutes of that state, identical with the two statutes of this state, hereinbefore set out, as applied to facts similar to the facts in the case at bar, says:

"It is a familiar rule of law, generally although not universally accepted, that apart from any statutory immunity all nonresidents of a county in which they are attending court proceedings, either as litigants or witnesses, are privileged from civil arrest or the service of summons while there upon that business. Cases bearing upon this question are collected in a note at page 721 of volume 25 of the *Lawyers' Reports*, Annotated, and under the title 'Process,' in volume 40 of the Century edition of the *American Digest*, sections 148 and 150. The reason of the rule is that the efficient administration of justice in the courts is promot-

ed by encouraging the personal attendance upon trials not only of the parties in interest but of other witnesses as well, the removal of the risk of being put to the inconvenience of defending a lawsuit away from home being manifestly a substantial contribution to this end. In this connection it was said, in *Ela v. Ela*, 68 N. H. 312, 36 Atl. 15: 'The right to take the deposition of a nonresident witness does not answer the requirements of justice. It is often indispensable to a just decision of a cause, and is always desirable, that testimony shall be given orally in open court. The triers are more likely to understand the testimony fully and correctly. The appearance of the witness aids materially in forming a correct judgment of the credibility and weight of his testimony. All the issues of fact that may arise at the trial can seldom be foreseen. A fact within the knowledge of a witness may appear to be so foreign to the case when his deposition is taken that it is not deemed worth while to question him upon it, and yet the course of the trial may be such that it is the fact which will control the verdict. See *Metcalf v. Gilmore*, 63 N. H. 174, 186-189. Every reasonable facility should therefore be provided for obtaining the attendance of witnesses in person.' These and other considerations have led to the establishment, quite generally, of the doctrine that nonresident witnesses are privileged from liability to be sued while attending the trial, and going to and returning from it.' Page 313 of 68 N. H. (36 Atl. 15)."

Continuing, the court says:

"There is no doubt that the later and just tendency of the courts is to extend rather than to restrict the privilege referred to. * * *

"The great weight of authority is to the effect that in the absence of an express statute controlling the matter the same protection is to be extended to one who comes voluntarily to give his testimony as to a witness brought in by process. See the cases already referred to, and also those cited in 16 A. & E. Encycl. of L. 42."

It is contended, however, by the plaintiffs in the instant case, that section 5064, Rev. Laws 1910, limits the exemption from suit in a county other than that of his residence to a person while going to, returning from, or attending court in such county in obedience to a subpoena.

This identical question was considered by the Kansas Supreme Court in the *Underwood v. Fosha* Case, supra, and, as the views therein expressed are in accord with the views of this court, we quote from it at length. The Kansas court quotes the Kansas statute (General Statutes 1901, § 4785), which is identical with section 5064, Rev. Laws 1910, and which reads as follows:

"A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county while going, returning or attending in obedience to a subpoena."

And says:

"There is obviously plausible ground for contending that this specific grant of immunity to a witness who is acting in obedience to a subpoena implies that a mere volunteer is to be excluded from the privilege. Such seems to be the interpretation placed upon the same statutory language in Kentucky and South Dakota. See *Currie Fertilizer Co. v. Krish*, 74 S. W. (Ky.) 268, and *Malloy v. Brewer*, 7 S. D. 587, 64 N. W. 1120, 58 Am. St. Rep. 856. In Kentucky, however, there are various other provisions of the statute relating to such exemptions, from which it may fairly be gathered that there

was a legislative purpose to cover the entire subject-matter, while a necessary corollary of the doctrine announced in *Bolz v. Crone*, 64 Kan. 570, 67 Pac. 1108, is that such is not the case here, but as suggested in *Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731, the section of the Code quoted must be held 'not to be an implied repeal of the common-law exemption, but a statutory declaration of it pro tanto.' The construction placed upon the statute by the South Dakota court in the case cited is influenced by other sections in terms making Code provisions exclusive in all matters to which they relate. But even in that case it was held that the section referred to had no application to nonresidents of the state, and that such persons were protected during their attendance as witnesses, although not under subpoena.

"On the other hand, expressions made use of by the courts of Nebraska and of North Dakota, in the statutes of each of which states the section quoted is found, seem to suggest a contrary view, although the question appears not to have been directly passed upon. See *Linton v. Cooper*, 54 Neb. 438, 74 N. W. 842, 69 Am. St. Rep. 727, and *Hicks v. Besuchet*, 7 N. D. 429, 75 N. W. 793, 66 Am. St. Rep. 665. In the Nebraska case a nonresident of the state was held to be exempt from the service of summons while voluntarily attending court as a witness. In the North Dakota case the same rule was applied to a resident of the state who was a nonresident of the county, but although spoken of as a voluntary witness the person concerned was also in fact a suitor. In neither case was this provision of the statute referred to.

"In *McAnarney v. Caughenaur*, 34 Kan. 621, 9 Pac. 476, it was held that a good service of summons might be made upon one who was attending a hearing in a United States land office contest in a county other than that of his residence; the action being for the recovery of damages for an assault and battery committed by him during such attendance. In the opinion reference was made to the fact that he was not under subpoena, but this consideration could not have been controlling, as the defendant was a suitor in the contest case as well as a witness. That the action was founded upon a wrong committed in the county where the action was brought, and during the period for which immunity was claimed, doubtless afforded sufficient ground for holding the service good. See, in this connection, *Mullen v. Sanborn & Mann*, 79 Md. 364, 29 Atl. 522, 25 L. R. A. 721, 47 Am. St. Rep. 421, and *Iron Dyke Copper Min. Co. v. Iron Dyke R. Co. et al.* (C. C.) 132 Fed. 208.

"We cannot believe that it was the purpose of the Legislature in adopting the section in question to restrict, instead of to preserve, the privilege of a witness living in Kansas, by denying him all immunity from process while voluntarily attending a trial outside of his own county, when but for such enactment he would enjoy the same exemption as a nonresident of the state could claim under the same circumstances. The reason for the rule that persons living outside of the state cannot be sued while here to give testimony before a court is that they may be encouraged to come into the state for that purpose voluntarily, inasmuch as they cannot be required to do so. *Henry B. Sherman v. W. L. Gundlach*, 37 Minn. 118, 33 N. W. 549.

"In *Christian v. Williams*, 111 Mo. 429, 20 S. W. 96, this principle was held not to apply to the case of a resident of the state who attends as a witness a trial outside of his home county, for the reason that in Missouri a subpoena may be issued to any county in the state. But in Kansas it applies with full force, for under our statute no one can be compelled to

leave the county of his residence in obedience to a subpoena in a civil case. In *re Hughbanks*, Petitioner, 44 Kan. 105, 24 Pac. 75."

The views expressed in this opinion are in harmony with the decisions of this court in the cases of *Clark v. Willis*, 44 Okl. 303, 144 Pac. 587; *Burroughs v. Cocke & Willis*, 156 Pac. 196, L. R. A. 1916E, 1170, not yet officially reported; *Hume et al. v. Cragin*, 160 Pac. 621, not yet officially reported; *Livengood et al. v. Ball et al.*, 162 Pac. 768, L. R. A. 1917C, 905, not yet officially reported; and *Commonwealth Cotton Oil Co. v. Hudson et al.* (No. 5483) 161 Pac. 535, not yet officially reported.

[2] Having determined that the motions of the defendants *Bearman*, *Tryon*, and *Righter*, to quash the issuance and service of summons on them, should have been sustained, it necessarily follows that the motion of the defendant *Laws* should also have been sustained, and the issuance and service of the summons as to him have been set aside.

Section 4706, Rev. Laws 1910, reads:

"Where the action is rightly brought in any county, a summons shall be issued to any other county against any one or more of the defendants, at the plaintiff's request."

As this action was, according to the views of this court, improperly brought in *Wagoner* county, and the three defendants served in that county with summons were illegally brought into court, it follows as a necessary corollary that the summons issued from the district court of *Wagoner* county and served on the defendant *Laws* in *Tulsa* county was not legally issued and served, and that the motion of the defendant *Laws* to quash the same should have been sustained.

The judgment of the trial court is therefore reversed, with instructions to quash the summons and the service thereof on each of the defendants. All the Justices concur.

(14 Okl. Cr. 421)

HUGGINS v. STATE. (No. A-3167.)

(Criminal Court of Appeals of Oklahoma.
April 20, 1918.)

(Syllabus by the Court.)

CRIMINAL LAW §1070—APPEAL—ABATEMENT—DEATH OF PARTY.

In a criminal prosecution, the purpose of the proceeding being to punish the accused, the action must necessarily abate upon his death, and where it is made to appear that plaintiff in error has died, pending the determination of his appeal, the cause will be abated.

Appeal from County Court, *Wagoner* County; J. C. Pinson, Judge.

Will Huggins was convicted of a violation of the prohibitory law, and he appeals. Judgment abated because of the death of the plaintiff in error.

Watts & Summers, of *Wagoner*, for plaintiff in error. The Attorney General and C. A. Summers, Co. Atty., of *Wagoner*, for the State.

DOYLE, P. J. The plaintiff in error, Will Huggins, was convicted in the county court of Wagoner county of a violation of the prohibitory law, and his punishment fixed at a fine of \$250, and confinement for 60 days in the county jail. From the judgment rendered on the verdict of the jury an appeal was perfected by filing in this court on October 11, 1917, a petition in error, with case-made.

Since the appeal was taken, and before the final submission of the cause, to wit, on April 15th, his counsel of record have filed a motion to abate the proceedings on the ground that the plaintiff in error, Will Huggins, has died; also an affidavit showing that the same was duly served on the Attorney General and county attorney of Wagoner county. In a criminal action, the purpose of the proceeding being to punish the defendant in person, the action must necessarily abate upon his death.

It is therefore considered and adjudged that the proceeding in the above-entitled cause, and especially under the judgment therein rendered have abated, and that the county court of Wagoner county enter its appropriate order to that effect.

ARMSTRONG and MATSON, JJ., concur.

(14 Okl. Cr. 405)

STATE v. WEST. (No. A-2388.)

(Criminal Court of Appeals of Oklahoma.
April 20, 1918.)

(Syllabus by the Court.)

OFFICERS §122 — MISAPPROPRIATION OF PUBLIC FUNDS—SUFFICIENCY OF INFORMATION.

An information charging a county treasurer with receiving interest and profit arising from the use of public funds in his hands as such treasurer held sufficient, and that the court below erred in sustaining the defendant's demurrer thereto.

Appeal from District Court, Comanche County; J. T. Johnson, Judge.

Ed. M. West was informed against for receiving money and profits arising from use of public funds in his hands as county treasurer. From a judgment sustaining a demurrer to the information, the State appeals. Reversed and remanded.

The Attorney General, R. McMillan, Asst. Atty. Gen., and G. C. Wamsley, Co. Atty., of Anadarko, for the State. A. J. Morris, of Anadarko, for defendant in error.

DOYLE, P. J. In this case the state appeals from a judgment of the district court of Comanche County, sustaining a demurrer to an information which, omitting formal parts, is as follows:

"That on the 7th day of May, in the year of our Lord one thousand nine hundred and thirteen, at and within said county and state, and within the jurisdiction of said court, one Ed. M. West, then and there being, did then and there

commit the crime of receiving interest and profit arising from the use of public money, and did then and there intentionally, unlawfully, willfully, feloniously, and corruptly, he, the said Ed. M. West, then and there being the duly elected, acting, and qualified county treasurer of Caddo county, state of Oklahoma, and having prior to the first day of April, 1913, received into his hands as such county treasurer the sum of twenty-five thousand dollars, public money belonging to the said Caddo county, and the said sum of money prior to the first day of April, 1913, having been by him, the said Ed. M. West, as such county treasurer duly deposited in the Anadarko State Bank, a banking corporation located at Anadarko, Caddo county, state of Oklahoma, to his credit as such county treasurer, and the said Anadarko State Bank being then and there one of the duly appointed and chosen and qualified county depositories of said Caddo county in which money belonging to the said county could be deposited up to the sum of twenty-five thousand dollars, received directly from the said bank, by way of a credit to him; the said Ed. M. West's, personal account in the said bank the sum of fifty-two and 08/100 dollars as interest and profit for the use of the said sum of twenty-five thousand dollars, public money as aforesaid, by the said Anadarko State Bank for the month of April, 1913, which said sum of fifty-two and 08/100 dollars was kept and retained by him, the said Ed. M. West, and appropriated to his own use, contrary to," etc.

It appears from the record that said information was duly filed by the county attorney of Caddo county in the district court of Caddo county, and that upon the application of the defendant for change of venue said cause was by the court duly transferred to Comanche county. It further appears that the defendant filed an application in the district court of Comanche county for leave of court to withdraw his plea of not guilty for the purpose of filing a demurrer to the information, and that the same was granted. The defendant then filed a demurrer on the ground that "said information fails to state facts to constitute a public offense," which demurrer was heard, and was by the court sustained, "upon the ground that said information does not show on its face that the laws of the state of Oklahoma have been violated," to which ruling of the court the state at the time excepted.

The prosecution in this case was based upon section 11, art. 10, of the state Constitution, providing as follows:

"The receiving, directly or indirectly, by any officer of the state, or of any county, city, or town, or member or officer of the Legislature, of any interest, profit, or perquisites, arising from the use or loan of public funds in his hands, or moneys to be raised through his agency for state, city, town, district, or county purposes shall be deemed a felony. Said offense shall be punished as may be prescribed by law, a part of which punishment shall be disqualification to hold office."

And Penal Code, § 2581, Rev. Laws 1910, which provides that:

"Every public officer of the state or any county, city, town, or member or officer of the Legislature, and every deputy or clerk of any such officer, and every other person receiving any money or other thing of value on behalf of or

for account of this state or any department of the government of this state or any bureau or fund created by law and in which this state or the people thereof are directly or indirectly interested, who either:

"First. Appropriates to his own use, or to the use of any person not entitled thereto, without authority of law, any money or anything of value received by him as such officer, clerk or deputy, or otherwise, on behalf of this state, or any subdivision of this state, or the people thereof, or in which they are interested; or

"Second. Receives, directly or indirectly, any interest, profit or perquisites, arising from the use or loan of public funds in his hands or money to be raised through his agency for state, city, town, district or county purposes; or, * * *

"Fifth. Willfully omits or refuses to pay over to the state, city, town, district or county, or their officers or agents authorized by law to receive the same, any money or interest, profit or perquisites arising therefrom, received by him under any duty imposed by law so to pay over the same, shall, upon conviction thereof, be deemed guilty of a felony, and shall be punished by a fine of not to exceed five hundred dollars, and by imprisonment in the penitentiary for a term of not less than one nor more than twenty years, and in addition thereto shall be disqualified to hold office in this state, and the court shall issue an order of such forfeiture, and should appeal be taken from the judgment of the court, the defendant may, in the discretion of the court, stand suspended from such office until such cause is finally determined."

Counsel for the state insist that the court erred in sustaining the demurrer, because the information charges all the essential elements of the crime as defined by the foregoing provisions.

The argument urged by counsel for the defendant in error is as follows:

"From the foregoing provisions of the Constitution and statutes the conclusion is inevitable that if the money for the use of which the defendant received the interest was not the property of Caddo county, and therefore not public funds, it was not a crime to receive the interest; and even if the funds did not belong to the county, they must also be in the hands of the officer, in order that it be a crime to receive the interest. This is the express language of the Constitution and statute, by which the condition is specifically attached that, to constitute a crime, the funds for the use of which interest is received by an officer must be public funds and must be in the hands of the officer at the time he receives the interest"

—and that the information is insufficient because:

"The defendant is not charged with having received more than is allowed him by law as his salary, including the interest he is alleged to have received, nor is he charged with having taken one penny of the interest the county was entitled to under the law and the bond of the bank, or that the county was deprived of one cent of its 2½ per cent. interest on the daily balances in the bank during the time mentioned in the indictment. And it is not charged that there was any agreement between the bank and defendant that he should leave the money on deposit therein and as compensation therefor he should receive the amount alleged as interest."

In our opinion the argument made is not well founded. Under the provisions of article 5, c. 16, Revised Laws, entitled "County Depositories," the legal title to the deposits

of the county treasurer is at all times in the county, and the same are public funds in his hands as such officer. Section 1540 provides that the county treasurer should deposit daily all the funds and money of whatsoever kind that shall come into his hands by virtue of his office as such county treasurer, in his name as such county treasurer in one or more responsible banks located in the county and designated by the board of county commissioners as the county depositories, that such bank shall pay interest on the average daily balances at the rate of 2½ per cent. per annum, and shall credit the same monthly to the account of such treasurer; that the county commissioner shall take from each such banks a bond in the sum equal to the largest approximate amount that may be deposited in each, respectively, at any one time, the conditions of said bonds shall be that such deposit shall be promptly paid on the check or draft of the treasurer of such county, and the bondsmen of said treasurer shall not be liable for such deposit. It is alleged in the information that the defendant, as county treasurer, made the deposit in his name and in his official capacity as such treasurer, and that he intentionally, unlawfully, willfully, feloniously, and corruptly received directly from said bank the sum of \$52.08 as interest and profit for the use of said deposit.

In our opinion, the information contains every material allegation required by the rules of pleading, and by its allegations the defendant was clearly informed of the nature and the character of the offense charged against him, and we think the objections made are destitute of merit.

For the reasons stated, the judgment of the district court of Comanche county, sustaining the demurrer to the information, is reversed.

ARMSTRONG and MATSON, JJ., concur.

(14 Okl. Cr. 410)

STATE v. WEST. (No. A-2389.)

(Criminal Court of Appeals of Oklahoma.
April 20, 1918.)

(Syllabus by the Court.)

OFFICERS — 122 — MISAPPROPRIATION OF PUBLIC MONIES — SUFFICIENCY OF INDICTMENT.

An indictment charging a county treasurer with receiving interest and profit arising from the use of public funds in his hands as such treasurer held sufficient, and that the court below erred in sustaining the defendant's demurrer thereto.

Appeal from District Court, Caddo County; G. T. Johnson, Judge.

Ed. M. West was indicted for receiving interest and profits arising from the use of public funds in his hands as county treasurer, and, from a judgment sustaining a de-

murrer to the indictment, the State appeals. Reversed and remanded.

The Attorney General, R. McMillan, Asst. Atty. Gen., and G. C. Wamsley, Co. Atty., of Anadarko, for the State. A. J. Morris, of Anadarko, for defendant in error.

DOYLE, P. J. In this case the state appeals from a judgment of the district court of Comanche county, sustaining a demurrer to an indictment, which, omitting merely formal parts, is as follows:

"That on the 6th day of December, in the year of our Lord one thousand nine hundred and eleven, at and within said county and state, and within the jurisdiction of said court, one Ed. M. West, then and there being, did then and there commit the crime of receiving interest and profit arising from the use of public money, and did then and there unlawfully, willfully, feloniously, and corruptly, he, the said Ed. M. West, then and there being the duly elected, acting, and qualified county treasurer of the county of Caddo, state of Oklahoma, and having at all times during the month of October, 1911, and November, 1911, in his hands as such county treasurer, more than the sum of eleven thousand (\$11,000.00) dollars, public money belonging to said Caddo county, and he, the said Ed. M. West, as such county treasurer, having kept on deposit of the said public money in the Anadarko State Bank, a banking corporation located at Anadarko, Caddo county, Okl., for and during the month of October, 1911, money to his credit as such county treasurer of the said public money belonging to Caddo county, the average daily balances of which amounted to the sum of \$10,500.00, and for the month of November, 1911, the sum of \$10,000.00, the said Anadarko State Bank then and there being one of the duly appointed, chosen, and qualified county depositories of said Caddo county in which money belonging to said Caddo county could be legally deposited by the said county treasurer, up to the sum of \$25,000.00, received directly from the Anadarko State Bank by way of a credit placed to the personal account of him, the said Ed. M. West, the sum of \$42.72, as interest, pay and profit for the use of the said moneys as aforesaid deposited in and used by the said Bank as aforesaid and public money as aforesaid, for the months of October and November, 1911, which said sum of \$42.72 received as aforesaid by him, the said Ed. M. West, was kept and retained by him, the said Ed. M. West, and appropriated to his own use and benefit, contrary to," etc.

It appears from the record that said indictment was duly presented by the grand jury in the district court of Caddo county, and that upon the application of the defendant for a change of venue said cause was by the court duly transferred to Comanche county. It further appears that the defendant filed an application in the district court of Comanche county for leave of court to withdraw his plea of not guilty for the purpose of filing a demurrer to the indictment, and that the same was granted. Defendant then filed a demurrer, on the ground that "said indictment fails to state facts sufficient to constitute a public offense," which demurrer was heard, and was by the court sustained, "upon the ground that said indictment does not show on its face that the laws

of the state of Oklahoma have been violated," to which ruling of the court the state at the time excepted, and to reverse the judgment the state appeals.

The question presented in this case is the same as in the case of *Stafe v. West*, 171 Pac. 1127, this day handed down. For the reasons given in the opinion in that case, we are of the opinion that the indictment is sufficient in every way, and that the court erred in sustaining the defendant's demurrer thereto.

The judgment of the district court of Comanche county, sustaining the demurrer to the indictment, is therefore reversed.

ARMSTRONG and MATSON, JJ., concur.

(14 Okl. Cr. 413)

PARKS v. STATE. (No. A-2840.)
(Criminal Court of Appeals of Oklahoma.
April 20, 1918.)

(Syllabus by the Court.)

1. ASSAULT AND BATTERY §80—INFORMATION—VARIANCE—ACQUITTAL.

Where the information attempts to charge an assault with a dangerous weapon as provided in section 2344, Rev. Laws 1910, and the proof both on the part of the state and the defendant shows the commission of the felonious degree of assault and battery as defined by section 2336, or some lesser grade of assault and battery, there is a fatal variance between the allegations and the proof, and upon proper motion the court should advise the jury to acquit upon the ground of variance, and direct a prosecution to be commenced for the higher grade of offense.

2. INDICTMENT AND INFORMATION §189(2), 191(6)—INCLUDED OFFENSES.

Where the information charges any grade of assault and battery, there may be a conviction of the same or any lesser grade of assault which is necessarily included in such a charge. But where the information merely charges a certain grade of assault, there may not be a conviction of that grade of assault and battery or of any lesser grade of assault and battery, because a charge of assault does not necessarily include a battery also.

Appeal from District Court, Lincoln County; Tom D. McKeown, Judge.

A. G. Parks was convicted of the crime of assault with a dangerous weapon and his punishment fixed at imprisonment in the penitentiary for a term of one year and one day, and he appeals. Reversed and remanded.

Erwin & Erwin, of Wellston, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. The defendant, Parks, was prosecuted in the District Court of Lincoln County under an information charging (omitting the formal parts) as follows:

"That A. G. Parks * * * did then and there willfully, unlawfully, and feloniously and with force and violence and without justifiable or excusable cause make an assault in and upon the person of one Wm. Gearhart with a dangerous weapon, to wit, a revolving pistol, with the

intent then and there of him, the said A. G. Parks, to do him, the said Wm. Gearhart, bodily harm."

This information evidently attempted to charge the crime of assault with intent to do bodily harm with a dangerous weapon, as defined by the first part of section 2344, Revised Laws 1910, which provides as follows:

"Any person who, with intent to do bodily harm, and without justifiable or excusable cause commits any assault upon the person of another with any sharp or dangerous weapon, or who, without such cause, shoots or attempts to shoot at another, with any kind of firearm or airgun, or other means whatever, with intent to injure any person, although without intent to kill such person or to commit any felony, is punishable by imprisonment in the penitentiary not exceeding five years, or by imprisonment in a county jail not exceeding one year."

But as a charge under said section, we believe said information to have been defective, in that it failed to allege the manner in which the said "revolving pistol" was used upon prosecuting witness. *Clark v. State*, 6 Okl. Cr. 100, 116 Pac. 200.

[1, 2] But in view of the disposition herein made of this case, it is not necessary to pass upon the question of whether or not the information is sufficient to sustain a conviction under section 2344, supra. It will be noted that the offense defined by this section is limited to various kinds of assaults. The language of said section is not broad enough to include an assault and battery. In construing a statute, the terms of which are identical with section 2344, supra, the Supreme Court of North Dakota in *State v. Marcks*, 3 N. D. 532, 58 N. W. 25, said the following:

"But it also clearly appears that the information embodies a charge against defendants of committing another offense, i. e., the common-law offense of assault and battery. The last-named offense is one which is independent of the statutory felony defined in section 6510, and does not constitute an element of that offense. It is true that the information charges, in effect, that the assault and battery was committed with dangerous weapons, and with the felonious intent stated in the statute; but, after striking out such averments as surplusage—and they are surplusage—there is still left a sufficient charge of the independent crime of assault and battery. It follows that the demurrer to the information, upon the ground that it stated more than one offense, was well taken, and it was therefore error to overrule the same. For this error the judgment of conviction must be reversed. The information being fatally defective, no conviction under it can be sustained. The question presented upon this branch of the demurrer arises upon section 7244, Comp. Laws, which reads: 'The indictment must charge but one offense.' We have quite recently had occasion to construe this statute. See *State v. Smith*, 2 N. D. 515, 52 N. W. 320. The case we are now considering is ruled by that cited. As prosecutions under the statute in question are frequent, we will, as a guide for future cases arising under it, dispose of one other assignment of error. As has been seen, the trial court instructed the jury, in effect, that if the evidence satisfied them beyond a reasonable doubt that the defendants were not guilty of the felonious charge, but were guilty of assault and battery, they could find defendants guilty of the offense of assault and battery. The jury re-

turned a verdict for assault and battery. An exception to the instruction was saved, and a motion for a new trial was made. We think, however, that the point could have been as well presented on a motion in arrest of judgment, which was also made. Code Cr. Proc. § 425; Comp. Laws, § 7452. We are of the opinion that it was error to overrule the motion in arrest of judgment, not simply alone, and because the information was invalid, in that it charged two offenses, but upon the further ground that no conviction for assault and battery can be had under an information charging the particular felony created by section 6510 of the statute. We are clear that assault and battery is not a lower degree of the statutory crime, and that it is not an essential element in the greater offense. A simple assault is necessarily a part of the aggravated assault, but an assault and battery is not. Under the statute of this state (section 7429, Comp. Laws), 'the jury may find the defendant guilty of any offense the commission of which is necessarily included in that upon which he is charged in the indictment.' *State v. Johnson*, 3 N. D. 150, 54 N. W. 547. Under the rule of exclusion, this section must be so construed as to exclude all offenses which are not necessarily included in the commission of the higher offense charged in the information or indictment. The offense described in section 6510 is one which can be, and often is, consummated without a battery, and hence assault and battery is an offense not necessarily included in the commission of the statutory felony. It matters not that in this case the information charges an assault and battery, when armed with dangerous weapons, and with intent to do bodily harm. These averments charge no offense other than simple assault and battery, which offense, as has been seen, is not an essential element of the felony charged in the information. *Turner v. Muskegon Circuit Judge*, 88 Mich. 359, 50 N. W. 310; *Territory v. Dooley*, 4 Mont. 295, 1 Pac. 747; *People v. Keefer*, 18 Cal. 637; *State v. White*, 45 Iowa, 325."

See, also, *State v. Barnes*, 29 N. D. 164, 150 N. W. 557, Ann. Cas. 1917C, 762; *State v. Cotton*, 36 S. D. 396, 155 N. W. 8.

It follows, a fortiori, that if simple assault and battery is not necessarily included within the terms of section 2344, supra, assaults and batteries of the higher grade defined by section 2336 are not included therein.

The first part of section 2344 makes it a felony to commit an assault upon a person with any sharp or dangerous weapon with intent to do bodily harm, and without justifiable or excusable cause; the second part makes it an offense to shoot at another, or to attempt to shoot at another, with any kind of a firearm or air gun or other means whatever, with the same intent and without intent to kill and without justifiable or excusable cause. The language of said section, therefore, cannot with reason be construed as broad enough to include assaults and batteries made with sharp and dangerous weapons, or by firearms, but such offenses would be included within section 2336, Revised Laws 1910, which provides as follows:

"Any person who intentionally and wrongfully * * * shoots at, or attempts to shoot at another, with any kind of firearm, air gun or other means whatever, with intent to kill any person, or who commits any assault and battery upon another by means of any deadly weap-

on or by such other means or force as is likely to produce death or in resisting the execution of any legal process, is punishable by imprisonment in the penitentiary not exceeding ten years."

The proof both on the part of the state and that of the defendant showed conclusively that the defendant shot at and hit the prosecuting witness with a bullet discharged from the revolving pistol which he then and there had and held in his hands. The evidence in our opinion, therefore, discloses the commission of an offense of a higher grade than that attempted to be charged in the information, to wit the offense defined in section 2336, *supra*. It is apparent, therefore, that the pleader should have charged the higher grade of offense defined by section 2336. See *Russell v. State*, 9 Okl. Cr. 692, 133 Pac. 475.

Section 2340, Revised Laws 1910, defines simple assault as follows:

"An assault is any willful and unlawful attempt or offer with force or violence to do a corporal hurt to another."

A battery is defined by section 2341, Revised Laws 1910, as follows:

"A battery is any willful and unlawful use of force or violence upon the person of another."

From such definitions, it is apparent that the assault oftentimes culminates in the battery. The attempt to injure is completed when the proof shows a battery. It follows, therefore, that the crime of assault and battery necessarily includes the assault leading up to the battery, and if assault and battery is charged in the information and the proof shows that there was only an unlawful attempt to injure, then there may be a conviction of simple assault; but not so where the charge in the information is merely that of an assault, because there can be no conviction of assault and battery where assault merely is charged, because the battery is not necessarily included within such charge.

It is advisable and necessary, therefore, for the pleader, where there is evidence to sustain the battery charge, to plead same in the information. If such be done, then no difficulty will be experienced if the proof merely shows any lesser degree of assault, and where it is evident that one person shoots another with a revolving pistol, as in this case, the county attorney should draw his information in the first instance under section 2336, Revised Laws 1910, and if that be done, then a conviction may be upheld under said section for any lesser and necessarily included assault, or assault and battery, as indicated in the opinion of this court in *Russell v. State*, *supra*.

At the close of the introduction of evidence on the part of the state, the defendant interposed what was styled a "demurrer to the evidence" on the grounds: "(1) That the evidence did not warrant the court in submitting the case to the jury for any offense

charged in the information; and (2) for the reason that there was a fatal variance between the information and the proof on the part of the state." We are of the opinion that the trial court, upon the presentation of said motion or demurrer, should have instructed the jury to return a verdict of "not guilty by reason of variance between charge and proof," as provided in section 5921, Revised Laws 1910, and should have ordered defendant held for trial under a new information, as provided by section 5930, Revised Laws 1910.

The judgment of conviction is accordingly reversed, and the cause remanded for further proceedings in accordance with this opinion. Mandate forthwith.

DOYLE, P. J., and ARMSTRONG, J., concur.

(14 Okl. Cr. 420)

ESTES v. STATE. (No. A-2863.)

(Criminal Court of Appeals of Oklahoma.
April 20, 1918.)

(Syllabus by the Court.)

1. CRIMINAL LAW §511(2) — WEIGHT AND SUFFICIENCY OF EVIDENCE — ACCOMPLICE'S TESTIMONY—CORROBORATION.

A verdict of conviction, based upon the testimony of accomplices, detailing at length the circumstances of the crime charged and supported by the testimony of numerous witnesses, clearly connecting the accused with the offense, is not contrary to the law and the evidence.

2. CRIMINAL LAW §741(1)—TRIAL—DIRECTED ACQUITTAL.

It is not error for the trial court to refuse to advise the jury to return a verdict of not guilty when there is any competent evidence tending reasonably to establish the crime charged.

Appeal from District Court, Custer County; Thomas A. Edwards, Judge.

C. R. Estes was convicted of burglary, and he appeals. Affirmed.

M. L. Holcombe, of Pawhuska, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error was convicted at the April, 1916, term of the district court of Custer county on a charge of burglary, and his punishment fixed at imprisonment in the state penitentiary for a term of two years.

The only assignment of error is based upon the contention that the verdict is contrary to the law and the evidence.

The information charged the plaintiff in error with burglarizing a Chicago, Rock Island & Pacific box car at Clinton in Custer county, on the 17th day of March, 1916, and taking therefrom certain merchandise, including a considerable quantity of Cascade whisky.

[1, 2] An examination of the record discloses the fact that the three accomplices,

one of whom is serving a term in the state penitentiary for his connection with this transaction, testified against this plaintiff in error and disclosed the facts and acts constituting the crime. In addition to the testimony given by the accomplices, there were a number of other witnesses who testified to incriminating facts amply sufficient to corroborate the accomplices' testimony and to prove beyond a reasonable doubt the guilt of the defendant. The court correctly refused to sustain the demurrer to the evidence and to advise the jury to return a verdict of not guilty, and was equally correct in refusing to set aside the verdict on the ground that the same was contrary to the law and the evidence. There is no law question raised.

The judgment of conviction is therefore in all things affirmed.

DOYLE, P. J., and MATSON, J., concur.

(31 Idaho, 347)

SHAW v. CITY OF NAMPA.

(Supreme Court of Idaho. March 20, 1918.)

1. WITNESSES ⇐209 — PRIVILEGE — PHYSICIANS.

Where a physician is employed to take an X-ray picture of a fractured arm, and helps to interpret the picture, and advises with the patient's regular physician as to the treatment, such physician should not be allowed to testify as to facts learned by him during such employment, if the patient claims the privilege granted by Rev. Codes, § 5958, par. 4.

2. APPEAL AND ERROR ⇐1002 — VERDICT — CONFLICTING EVIDENCE.

Where the evidence is conflicting, and there is substantial evidence to support the verdict, the judgment will not be disturbed.

3. DAMAGES ⇐132(8)—EXCESSIVE DAMAGES—INJURY TO ARM.

Where a lady 61 years of age received a fracture of the arm, and other injuries of a minor nature, which fracture resulted in a permanent stiffness of the arm, and kept her from work for about five months, during which time she suffered severe pain, \$2,000 damages is not excessive.

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action by Nettie L. Shaw against the City of Nampa to recover damages for personal injury. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. P. O'Connor, of Nampa, and Jackson & Walters, of Caldwell, for appellant. W. C. Bicknell, of Caldwell, and Rice, Thompson & Buckner, of Caldwell, for respondent.

DAVIS, District Judge. This action was instituted to recover damages for personal injuries received by the respondent. It appears from the evidence that while walking along a certain sidewalk with her daughter, the respondent fell over a loose board, thereby breaking her arm and bruising her body. The jury returned a verdict in her favor, assessing damages in the sum of \$2,000.

Judgment was entered, from which this appeal is taken.

Several errors are specified in the admission and rejection of evidence, all of which have been examined and are held to be without merit. The only one we deem necessary to discuss is that which deals with the subject of privileged communication.

[1] When the respondent was injured, she employed Dr. Kellogg as her physician. He immediately took her to Caldwell, where he employed Dr. Cole to take an X-ray picture of the broken arm. After the picture was taken and developed, Dr. Cole consulted with Dr. Kellogg relative to the interpretation of the picture and the treatment to be administered. Counsel for the respondent objected to Dr. Cole testifying as to any facts learned while he was thus employed, which objection was properly sustained. It appears from the evidence that Dr. Cole did more than perform mere mechanical work as a photographer, and that he used his knowledge and experience as a physician in interpreting the meaning of the picture, and advised with Dr. Kellogg as to what treatment should be given, the respondent paying Dr. Cole for his services. The trial court was justified in excluding such evidence as privileged communication, under Rev. Codes, § 5958, par. 4.

[2] The appellant assigns as grounds for the reversal of the judgment, that the evidence is insufficient to sustain the verdict. On this point it is contended by appellant that there was no evidence that it had direct information of any defect in the sidewalk, and that, on the contrary, the evidence showed that it did its full duty in inspecting and caring for such walk, and that no facts were shown to have existed from which it might be held that it had constructive notice that the sidewalk was so defective as to be dangerous. Appellant further contends that whatever weakness may have been shown to have existed in the sidewalk was a latent defect that it did not know of and could not have learned of by the exercise of reasonable care, and that therefore it is not liable for the injury resulting to respondent from such latent defect. There was evidence in the record from which the jury might have believed that another accident of a similar nature occurred near the same place a short time before respondent was injured; that the general reputation of the walk among the people residing in the part of town where it was located was that it was defective and bad; that at various other times boards and sections had been loose on the walk near the place where she was injured; that water frequently flowed under the walk and came up through the cracks between the boards when people walked upon it; that the walk was shaky and gave to the step of pedestrians, as if the sleepers were rotten; that the boards were decayed around the nails; that it was a wooden walk over 9 years old; that it was

a very poor walk; that the officers of the city had repaired it before and knew of its weakened condition from use, age, and decay; and that the injury complained of was due to the giving way of the material that held the nail or nails by which the board was originally secured, when respondent and her daughter were passing along the walk in the usual and proper way. While there is evidence tending to contradict much of the above, the vital point for this court to determine is whether or not there is such substantial evidence in the record as to justify the jury in considering the facts as constructive notice to appellant that the walk was weak and defective and needed repairs, in order to make it reasonably safe for persons who walked over. This court is of the opinion that there was sufficient evidence to submit to the jury, and that the verdict should not be disturbed.

[3] The appellant also assigns as error that excessive damages were awarded to the respondent under the influence of passion and prejudice. It appears that respondent was 61 years of age when injured; that her arm was broken near the shoulder; that she was bruised and hurt on the hip and body, which pained her severely for several weeks. She was not able to work for about 5 months, 3 months of which time she was under the doctor's care. Her arm was still stiff at the time of the trial and could not be used freely, and there was substantial evidence to show that such injury was permanent. It therefore cannot be said that the damages were so excessive as to justify this court in reversing or modifying the judgment.

The judgment is affirmed, with costs to respondent.

BUDGE, C. J., and MORGAN, J., concur.

(81 Idaho, 352)

WATKINS v. LORD.

(Supreme Court of Idaho. March 28, 1918.)

1. HUSBAND AND WIFE §347 — CRIMINAL CONVERSATION—ALLEGATION.

A cause of action for criminal conversation may be alleged by a continuando.

2. HUSBAND AND WIFE §347 — CRIMINAL CONVERSATION—ALLEGATION AND PROOF.

Proof thereunder may be given of the wrongful act in issue, committed on any date within the time stated in the pleading, and within the statute of limitations.

3. HUSBAND AND WIFE §341 — CRIMINAL CONVERSATION—GIST OF ACTION.

The gist or gravamen of the charge is the criminal conversation, the alienation of the spouse's affections being incidental and material only in so far as it affects the quantum of damages.

4. WITNESSES §52(1, 2)—COMPETENCY—HUSBAND AND WIFE.

Revised Codes, § 5958, precludes either a husband or a wife from testifying for the other, without the other's consent, and this rule admits

of no exceptions other than those expressly specified in the statute.

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by Lemuel Watkins against Thomas Lord for damages for criminal conversation. Judgment for plaintiff, and defendant appeals. Affirmed.

J. F. Colvin and J. C. Johnston, both of Boise, for appellant. J. R. Good and S. L. Tipton, both of Boise, for respondent.

BUDGE, C. J. This is an action of criminal conversation for debauching respondent's wife. Judgment for damages was awarded in the sum of \$2,500. From which judgment, and from an order denying a motion for a new trial, this appeal was prosecuted.

[1, 2] Appellant's brief contains 24 separate assignments of error, but it will not be necessary to discuss all of them.

The third assignment:

"(3) That the court erred in refusing to compel the plaintiff to furnish the defendant a specific bill of particulars of the dates, places, and times when the defendant carnally knew the plaintiff's wife, if at all"—

is not well taken. Respondent, after appellant answered, furnished a bill of particulars to which the proof is sufficiently responsive. We have no statute providing for a bill of particulars in cases of this character. There are authorities holding that in such cases a bill of particulars may be required. *Shaffer v. Holm*, 28 Hun (N. Y.) 264; *Tilton v. Beecher*, 59 N. Y. 176, 17 Am. Rep. 337. But these cases arose under a statute which we do not have. The prevailing view, however, is that a charge of this nature may be alleged by a continuando, and that "proof thereunder may be given of the wrongful act in issue, committed on any date within the time stated in the pleading, and within the period of the statute of limitations." *Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1006; 21 Cyc. 1629, 1630; *Yatter v. Miller*, 61 Vt. 147, 17 Atl. 850; *Long v. Booe*, 106 Ala. 570, 17 South. 716; *Johnston v. Disbrow*, 47 Mich. 59, 10 N. W. 79; *Lemmon v. Moore*, 94 Ind. 40; 5 Ency. Pl. & Pr. 617, 618. Moreover, there is nothing in the record to indicate that appellant was surprised or misled or in any wise prejudiced by the refusal of the court to require respondent to furnish an additional bill of particulars.

[4] The fourth assignment predicates error upon the refusal of the court to permit respondent's wife, over his objection, to testify against him. Section 5958, Rev. Codes, provides as follows:

"Sec. 5958. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: (1) A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the

marriage or afterwards, be, without the consent of the other examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other nor to a criminal action or proceeding for a crime committed by violence of one against the person of the other. * * *

California and many of the other states have this identical statute, and the decisions thereunder are uniformly to the effect that neither a husband nor a wife can testify against the other without his or her consent and that the rule admits of no exceptions other than those expressly specified in the statute.

The Supreme Court of Minnesota in an early case, construing a statute identical in this respect with our own, said:

"If this statute merely laid down the rule disabling the husband and wife from testifying for or against each other, it might be urged that it was only a statutory adoption of the common-law rule, and that it adopted also the common-law application of the rule, including the exceptions. But it also prescribes the application of, and defines and limits the exceptions to, the rule of disability. This excludes resort to the common law to determine how far the rule shall prevail, and what cases shall be excepted from it. So it is immaterial that the common law did or did not—though we know of no well-considered case holding that it did—admit the evidence of a wife against her husband, in a case like this. The statute does not." *Huot v. Wise*, 27 Minn. 68, 69, 6 N. W. 425; *Wolford v. Farnham*, 44 Minn. 159, 46 N. W. 295.

The statute has been similarly construed in the following cases: *Krueger v. Dodge*, 15 S. D. 159, 87 N. W. 965; *Zimmerman v. Whiteley*, 134 Mich. 39, 95 N. W. 989; *Knickerbocker v. Worthing*, 138 Mich. 224, 101 N. W. 540; *French v. Deane*, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387; *Bassett v. United States*, 137 U. S. 496, 11 Sup. Ct. 165, 34 L. Ed. 762 (construing Utah statute); *People v. Mullings*, 83 Cal. 138, 23 Pac. 229, 17 Am. Rep. 223; *Falk v. Wittram*, 120 Cal. 479, 52 Pac. 707, 65 Am. Rep. 184; *Humphrey v. Pope*, 1 Cal. App. 374, 82 Pac. 223. The numerous decisions cited by appellant in support of his position are under statutes essentially different from our own and have no application to the point here involved. The statutes of New York, Iowa, and Wisconsin, although similar in some respects to section 5958, supra, contain an express provision permitting the husband or wife to testify against the other in a civil action of this nature.

[3] Many of the errors assigned attack from various angles the sufficiency of the evidence to support the verdict, and it is also urged that the verdict is excessive. There is no merit in either of these contentions. The assignments predicated error upon the giving of certain instructions and the refusal to give certain others requested by appellant are equally without merit. The gist or gravamen of the charge laid in the complaint is, not the alienation of the wife's affections, but the criminal conversation; the

alienation of the wife's affections being incidental and material only in so far as it affects the quantum of damages.

We have carefully examined the entire record and are satisfied that no prejudicial error is disclosed therein. The judgment is affirmed. Costs are awarded to respondent.

MORGAN and RICE, JJ., concur.

(31 Idaho, 383)

LAMBRIX et al. v. FRAZIER.

(Supreme Court of Idaho. March 29, 1918.)

1. WATERS AND WATER COURSES ⇨249—PERMIT TO APPROPRIATE WATER—EXTENT OF RIGHT.

The holder of a permit to appropriate the waters of a stream, with a point of diversion on the main channel thereof, is, to the extent of his permit rights, entitled to the use of the water of the stream, notwithstanding a portion thereof, originally diverted to another branch, was returned to the main channel by the holder of a junior permit.

2. WATERS AND WATER COURSES ⇨247(2)—PERMIT TO APPROPRIATE WATER—INJUNCTION.

A writ of injunction will issue to protect the inchoate, contingent right to the use of water by the holder of a permit to appropriate it who has complied with the terms of the permit and has completed his works of diversion and application to such an extent that the water may be applied to a beneficial use.

3. WATERS AND WATER COURSES ⇨247(2)—PERMIT TO APPROPRIATE—INJUNCTION—PRIORITY OF RIGHT.

In an action for an injunction, wherein each of the parties asserts a superior right in himself as a ground for injunctive and general relief, findings of fact and decree establishing the prior right are consistent with the case made by the pleadings and with the issues joined.

4. JUDGMENT ⇨665—RIGHTS OF PARTIES—CONCLUSIVENESS.

A decree fixing the rights of parties litigant to the water of a stream is binding only on the parties and their privies.

Appeal from District Court, Elmore County; Edward A. Walters, Judge.

Action for injunction by George A. Lambrix and another against W. L. Frazier. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. C. Howie, of Mountain Home, and D. A. Dunning, of Boise, for appellant. Hawley & Hawley, of Boise, for respondents.

MORGAN, J. The permits of respondents and appellant, senior and junior respectively, call for the appropriation of the waters of Canyon creek, which stream divides, in its downward course, into two branches known as the East fork and West fork. Both places of diversion are located on the West fork which the trial court found to be the main channel. The findings of fact, being supported by evidence sufficient, if uncontradicted, to sustain them, will not be disturbed because of conflict. *Davenport v. Burke*, 30 Idaho, 590, 167 Pac. 481.

[1, 2] To the extent of their permit rights respondents are entitled to the use of the water of the creek flowing in the West fork, notwithstanding a portion of it, originally diverted therefrom to the East fork, was returned thereto by appellant. *Malad Valley Irr. Co. v. Campbell*, 2 Idaho, 411, 18 Pac. 52. Respondents, having substantially complied with the terms of their permit, are the owners of an inchoate, contingent right (*Speer v. Stephenson*, 16 Idaho, 707, 102 Pac. 365; *Basinger v. Taylor*, 30 Idaho, 289, 164 Pac. 522), and, having completed their works of diversion and application to such an extent that the water may be applied to the beneficial use intended, a writ of injunction was properly issued to restrain appellant from interfering with such use and from thereby preventing respondents from ripening their incipient interest into a complete appropriation. *Allen v. Dunlap*, 24 Or. 229, 33 Pac. 675; *Jackson v. Jackson*, 17 Or. 110, 19 Pac. 847. This is true even if an injury to respondents was nonexistent at the time. *Fischer v. Davis* (on rehearing) 19 Idaho, 501, 116 Pac. 414. In this respect respondents' right, though only a consent to construct irrigation works and acquire real property (*Speer v. Stephenson*, *supra*), partakes of the nature of a vested right (*Merritt v. City of Los Angeles*, 162 Cal. 47, 120 Pac. 1064; *Inyo Consol. Water Co. v. Jess*, 161 Cal. 516, 119 Pac. 934; *De Wolfskill v. Smith*, 5 Cal. App. 175, 89 Pac. 1001).

[3] Appellant's objection that the decree is one quieting title only is not well taken. In effect, the decree establishes nothing more than that the rights of respondents under their permit are prior in point of time and superior to the rights of appellant under his permit. Neither is appellant's contention correct that the trial court could not have established the respective rights of the parties. The granting of relief to respondents depended upon the priority of their right being found. Such priority was alleged in the complaint, and both injunctive and general relief were prayed for. The appellant answered with a denial, asserting a prior right in himself, and asking counter relief of the same character. The findings and decree are consistent both with the case made by the complaint and with the issues joined. Section 4353, Rev. Codes; *Stocker v. Kirtley*, 6 Idaho, 795, 59 Pac. 891.

[4] The decree is unnecessarily broad. It is not objectionable upon the ground that it is general in terms, for the rule is that decrees fixing rights of parties to the waters of a stream, though general in form, are binding only upon the parties and their privies. *Stocker v. Kirtley*, *supra*; *State v. Stelner*, 58 Wash. 578, 109 Pac. 57. The decree, however, must be construed in the light of the pleadings upon which it rests and the law

governing the rights of holders of permits issued by the state engineer.

The relief to which respondents are entitled, under the complaint and findings of the court, is freedom from interference with the completion of their works, and the application of the water claimed to the beneficial use specified in the permit. They are entitled to freedom from interference only so far and so long as, in compliance with the law, they continue with their work and proceed to make beneficial application of the water.

The court found that respondents had constructed a reservoir and necessary conduits, canals, and ditches, leading from it to the lands upon which the water was intended to be used under the permit, of sufficient size and dimensions to carry and convey the water to the lands. In view of that finding the decree, though not exact in its terms in defining the rights of the parties, is not so objectionable as to require reversal.

The judgment appealed from is affirmed. Costs awarded to respondents.

BUDGE, C. J., and RICE, J., concur.

(31 Idaho, 387)

BREYER v. BAKER.

(Supreme Court of Idaho. March 30, 1918.)

WATERS AND WATER COURSES §130—WATER RIGHTS—SEEPAGE—APPROPRIATION.

Seepage water from a canal having its source in a watershed other than that in which the seepage occurs is subject to appropriation under the provisions of Rev. Codes, § 3246.

Appeal from District Court, Elmore County; James R. Bothwell, Judge.

Action by Edward J. Breyer against Andrew J. Baker. Decree for defendant, and plaintiff appeals. Affirmed in part, and reversed in part.

W. C. Howle, of Mountain Home, for appellant. E. J. Dockery, of Boise, and Daniel McLaughlin, of Mountain Home, for respondent.

RICE, J. The appellant brought this action to quiet title to the waters of Dixie creek, in Elmore county, alleging ownership of 162.9 acres of land and an appropriation of 3.2 cubic feet per second of water from the said creek, with date of priority in March, 1903. The respondent answered and filed a cross-complaint, alleging ownership of approximately 160 acres of land and an appropriation of certain seepage water, with date of priority some time in the spring of 1908, and a subsequent appropriation of the waters of Dixie creek, with date of priority some time in the year 1913.

It is admitted that the 1913 appropriation of respondent is subsequent to the appropriation of appellant, but respondent maintains that he has a first right to the

seepage water appropriated. The court found that the appellant owned 60.8 acres of land, which was susceptible of gravity irrigation from Dixie creek and required artificial irrigation, and decreed the appellant $1^{27}/_{125}$ second feet of water from the creek prior to any right of the respondent therein. The court decreed the respondent 1 second foot of the waters of the creek, with date of priority subsequent to that of the appellant. The evidence is substantially conflicting upon the question as to how many acres of land the appellant irrigated, and there was no dispute as to the proper duty of water. The decree with reference to appellant's water right, therefore, should not be disturbed. No question is raised as to respondent's right to the 1 second foot of water from the creek as decreed.

The only remaining question in the case is as to the right to the seepage water alleged to have been appropriated by the respondent and awarded to him by the decree. The record shows that the seepage water claimed by respondent escapes from the canal of the Great Western Beet Sugar Company, which began to carry water in the year 1908. There is no allegation in the respondent's cross-complaint as to the source of supply of this canal. The court cannot take judicial notice of the source of supply of a canal.

If the Great Western Beet Sugar Company's canal has its source in Dixie creek at a point above the point of diversion of appellant's irrigation ditches, the claim of respondent to prior appropriation of the seepage water from said canal may present a grave question. There are statements in the record, however, from which we infer that the canal may have its source in another watershed than that from which Dixie creek obtains its supply.

If this fact had been alleged and established in this case, the judgment in favor of respondent would have been correct. In that case the seepage water from the canal would not be water which appellant appropriated, or which was subject to his appropriation. On the other hand, it would be water clearly within the provisions of Rev. Codes, § 3246, which is as follows:

"All ditches now constructed or which may hereafter be constructed for the purpose of utilizing seepage, waste or spring water of the state, shall be governed by the same laws relating to priority of right as those ditches, canals, and conduits constructed for the purpose of utilizing the waters of running streams."

For a case somewhat analogous, see *Ripley v. Park Center Land & Water Co.*, 40 Colo. 129, 90 Pac. 75.

The decree awarding to appellant $1^{27}/_{125}$ second feet of the waters of Dixie creek, and to respondent 1 second foot thereof, is affirmed. The decree awarding to respondent $30/_{50}$ of a second foot of the seepage water from the canal of the Great Western Beet

Sugar Company is reversed, with directions to the trial court to permit respondent to amend his cross-complaint and submit proof as to the source of supply of the canal. Should the court find that the canal has its source in a watershed other than that from which Dixie creek obtains its supply, judgment should thereupon be entered in favor of respondent on his cross-complaint for the use of the seepage water from said canal. Each party shall pay his own costs on this appeal.

BUDGE, C. J., and MORGAN, J., concur.

(31 Idaho, 365)

KINZELL v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Idaho. March 26, 1918.)

COMMERCE §27(8) — FEDERAL EMPLOYERS' LIABILITY ACT—EMPLOYED IN "INTERSTATE COMMERCE."

A laborer employed in the construction of a fill beneath a wooden trestle, which when completed was intended to take the place of the trestle and to support the track of a railroad company engaged in the transportation of both intrastate and interstate commerce, is not engaged in "interstate commerce" so as to entitle him to maintain an action for personal injuries under the federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1916, §§ 8657-8665).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Appeal from District Court, Shoshone County; William W. Woods, Judge.

Action by William Kinzell against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, with instructions to dismiss the action.

Geo. W. Korte, of Seattle, Wash., and Robt. H. Elder, of Cœur d'Alene, for appellant. John P. Gray, of Cœur d'Alene, W. D. Keeton, of St. Maries, W. F. McNaughton, of Cœur d'Alene, and Jas. A. Wayne, of Wallace, for respondent.

RICE, J. William Kinzell brought this action to recover damages for personal injuries received by him while in the employ of a railway company engaged in both intrastate and interstate commerce. The injuries complained of were received in the state of Washington while appellant was engaged in constructing a dirt fill beneath a wooden trestle, known as bridge No. 140 near the town of Ewan, Wash., which fill was intended eventually to support the track. The material with which the fill was being constructed was obtained from new construction work entirely within the state of Washington, and no question of interstate commerce was thereby involved. The fill had progressed to the extent that it had in places reached the railroad ties, and it had become necessary, after dumping the cars of dirt, to use what is known as a "bulldozer" to spread

the dirt away from the track and thereby widen the fill. The bulldozer employed in this case was a flat car, with adjustable wings extending on either side from a point slightly over each rail and spreading out toward the back of the car.

The principal duty of respondent was to adjust these wings, and at times when they were waiting for another trainload of dirt, he and Hyram Lee, another employé upon the dozer, used shovels to clean out the rocks that lodged between the tracks. The dirt was being brought to the fill by means of two trains of about 25 "air dump" cars each. When the train approached the bridge, it would couple onto the dozer and proceed to the place where the dirt was to be dumped. After dumping the dirt the cars would be righted and the train would start back, pulling the dozer after it. The wings of the dozer would level down the dirt dumped, spreading it away from the track and thus widen the fill.

At the time of his injury, respondent was standing on the front of the dozer waiting for the dirt train to couple on. While he was waiting he was looking over the fill to determine where this trainload of dirt should be dumped. He contends that through negligence of the appellant, the train was going at so great a rate of speed when it coupled onto the dozer that it broke his hold on the cross rods and crank shaft and threw him violently to the ground between the wheels of the head car and injured him severely.

Before the trial of this case appellant moved to have the respondent make an election of remedies, and respondent elected to bring his case under the federal Employers' Liability Act, 35 Stats. at L. p. 65, c. 149 (U. S. Comp. St. 1916, §§ 8657-8665), the material part of which is as follows:

"That every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharfs, or other equipment."

While a number of errors are assigned which appear to be worthy of careful consideration, the question which will dispose of the case, according to the conclusion we have reached, is whether respondent was within the terms of the act at the time the injury occurred. The other matters presented will not therefore be discussed in this opinion.

Respondent suggests that the act is remedial in its character, and should be so construed as to prevent the mischief and advance the remedy (citing *St. Louis, etc., R. Co. v. Conley*, 187 Fed. 949, 110 C. C. A. 97; *Bolch v. C., M. & St. P. R. Co.*, 90 Wash. 47, 155 Pac. 422). The construction of the

act, however, does not admit of any discretion on the part of the court, nor are the rules of strict or liberal construction applicable.

The sole question presented by this feature of the case is whether respondent was engaged in interstate commerce at the time the accident occurred, and therefore has a cause of action arising under the federal statute, or whether he must seek his remedy under the Workmen's Compensation Act of the state of Washington (Laws 1911, p. 345). *Raymond v. C., M. & St. P. R. Co.*, 243 U. S. 43, 37 Sup. Ct. 268, 61 L. Ed. 583.

Many cases have arisen in which the courts have been called upon to lay down rules by which this question shall be determined. It is held that the employé must, at the time of his injury be employed in interstate commerce. *Ill. Cent. R. Co. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; *Shanks v. D., L. & W. R. Co.*, 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797. In the last-cited case it is said:

"Having in mind the nature and usual course of the business to which the act relates, and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see *Swift & Co. v. U. S.*, 196 U. S. 375, 398; 49 L. Ed. 518, 525; 25 Sup. Ct. Rep. 276), and that the true test of employment in such commerce in the sense intended is, Was the employé at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

Applying the test, it is held that one engaged in repairing or keeping in usable condition a roadbed, bridge, engine, car, or other instrument then in use in such transportation is engaged in interstate commerce. *Pedersen v. D., L. & W. R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; *San Pedro, etc., R. Co. v. Davide*, 210 Fed. 870, 127 C. C. A. 454; *Phila., etc., R. Co. v. McConnell*, 228 Fed. 263, 142 C. C. A. 555; *Southern Ry. Co. v. McGuinn*, 240 Fed. 649, 153 C. C. A. 447; *Cincinnati Ry. Co. v. Hall*, 243 Fed. 76, 155 C. C. A. 606.

So, also, one engaged in an act incidental to his employment in interstate transportation comes within the provisions of the act. *Erie R. Co. v. Winfield*, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057; *Louisville, etc., R. Co. v. Parker*, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. Ed. 119; *N. Y. C. R. Co. v. Carr*, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298; *Lamphere v. O. R. & N. Co.*, 196 Fed. 336, 116 C. C. A. 156, 47 L. R. A. (N. S.) 1.

But one engaged in an employment upon an article which may ultimately become an element of interstate commerce, but which is too remote to be directly connected therewith, or incidental thereto, is not engaged in interstate commerce within the meaning of the act. *D., L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed.

1397; *C., B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941; *Lehigh, etc., R. Co. v. Barlow*, 244 U. S. 183, 37 Sup. Ct. 515, 61 L. Ed. 1070; *Shanks v. D., L. & W. R. Co.*, supra; *Minn. & St. L. R. Co. v. Winters*, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358; *N. Y. C. R. Co. v. Carr*, supra.

It is well settled that new construction of either roadbed or equipment, designed ultimately to be used in interstate commerce, is not, while in the process of building, an instrument of interstate commerce, and one injured while employed about the same is not within the terms of the act. *Raymond v. C., M. & St. P. R. Co.*, supra; *Bravis v. C., M. & St. P. R. Co.*, 217 Fed. 234, 133 C. C. A. 228; *Minn. & St. L. R. Co. v. Nash*, 242 U. S. 619, 37 Sup. Ct. 239, 61 L. Ed. 531; *N. Y. C. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; *C. & E. R. Co. v. Steele*, 183 Ind. 444, 108 N. E. 4; *McKee v. Ohio, etc., R. Co.*, 78 W. Va. 131, 88 S. E. 616.

In the case of *Louisville, etc., R. Co. v. Parker*, supra, it is said:

"The business upon which the deceased was engaged at the moment was transferring an empty car from one switch track to another. This car was not moving in interstate commerce, and that fact was treated as conclusive by the Court of Appeals. In this the court was in error, for if, as there was strong evidence to show, and as the court seemed to assume, this movement was simply for the purpose of reaching and moving an interstate car, the purpose would control and the business would be interstate." *N. Y. C. R. Co. v. Carr*, supra.

We are of the opinion that constructing a fill to take the place of a trestle which is being used in interstate commerce is new construction, and that the fill does not become part of the railroad until it is completed and the track is placed upon it instead of upon the trestle. *U. S. v. C., M. & P. S. R. Co. (D. C.)* 219 Fed. 632; *Dickinson v. Industrial Board of Illinois*, 280 Ill. 342, 117 N. E. 438. *Columbia P. R. Co. v. Sauter*, 223 Fed. 604, 139 C. C. A. 150, is not to the contrary, for in that case the main purpose of the work was directly connected with the transportation of interstate commerce.

It is suggested that the material composing the fill necessarily added support to the trestle in the course of the construction thereof. This is an inference which does not follow from the testimony in the case. But if it were true, it is but an incident to the work of making the fill, and not a purpose in view in its construction. It is true one of the duties of respondent was to remove dirt and rocks from the track, which lodged thereon when the cars were dumped, and which might, if allowed to accumulate, interfere with interstate commerce. This, however, was but an incident to the work of constructing the fill, and did not change the character of the employment.

The object of the work, as pointed out in the *Parker Case*, is controlling.

It follows that respondent does not come within the provisions of the federal statute, and that the action cannot be maintained. The judgment is reversed, with instructions to dismiss the action. Costs awarded to appellant.

BUDGE, C. J., and MORGAN, J., concur.

(31 Idaho, 358)

BLAINE COUNTY v. FULD et al.

(Supreme Court of Idaho. March 26, 1918.)

1. STATUTORY DUTIES OF COUNTY TREASURER.

It is the duty of the county treasurer, under the provisions of the state depository law, to deposit public funds in his control in banks which have qualified as depositories, and he is forbidden to withdraw sums so deposited except for the payment of warrants legally drawn, or for the purpose of depositing the same according to law in other banks likewise qualified, and the violation of these requirements is made a felony. Section 2019, Rev. Codes.

2. DEPOSITARIES ~~AND~~—PROCEEDS OF SCHOOL DISTRICT BONDS—DEPOSIT BY COUNTY TREASURER—CREDIT TO CLERK OF SCHOOL DISTRICT.

Where the proceeds of a school district bond sale were paid to the county treasurer, and by him deposited in a bank, which had complied with the provisions of the depository law, no part of the fund could thereafter be legally withdrawn and redeposited in the savings department of the same institution to the credit of the clerk of the school district, and regardless of the acts and intentions of the parties to such transaction the fund must be held to have remained in the custody of the county treasurer.

3. DEPOSITARIES ~~AND~~—COUNTY TREASURER—FUNDS—DEPOSIT WITHOUT PROTECTION OF DEPOSITORY LAW.

Money properly in the control of the county treasurer and deposited in a depository bank according to law must be held to be placed on general deposit in accordance with the provisions of the depository law, and no effect can be given to an unlawful attempt on the part of the county treasurer and county auditor to take such funds out of the protection of the depository law and place them on deposit in the same bank without the security of the depository's bond.

Appeal from District Court, Blaine County; James R. Bothwell, Judge.

Action by the County of Blaine against Joseph Fuld and others, as receivers of the Idaho State Bank, E. B. Johnson, as Treasurer of Blaine County, Idaho, and School District No. 7, Blaine County, Idaho. Judgment for defendants, and plaintiff appeals. Affirmed.

Wyman & Wyman, of Boise, for appellant. Sullivan & Sullivan, of Halley, for respondents.

BUDGE, C. J. This is an action brought by Blaine county against the receivers of the Idaho State Bank, E. B. Johnson, as county treasurer, and school district No. 7, of Blaine county, to have certain public funds which were deposited in the bank decreed a trust

fund and a preferred claim. The facts appear in the amended complaint, to which a demurrer interposed by the receivers and the school district was sustained. This is an appeal from the judgment of dismissal.

It is alleged in the amended complaint that the bank was conducting a general banking business at Hailey, and was the official depository for Blaine county. Johnson was county treasurer from January, 1909, to January, 1915. On September 25, 1909, the school district received \$20,356 as the proceeds of a bond sale to build a schoolhouse. This money was paid to Johnson as treasurer, by him credited upon his official books to the bond fund of the school district and deposited in the bank. About December 11, 1909, the school district caused an order for a warrant to be drawn on Johnson, as treasurer, payable to H. C. Beamer as clerk of the district out of said bond fund for \$10,000. This order was countersigned by the county superintendent and presented to the auditor, who drew a warrant for the amount upon the treasurer, payable to Beamer as clerk of the school district out of the bond fund, and this warrant was presented to Johnson as treasurer, who thereupon executed and delivered to Beamer a check for the amount, payable to Beamer as clerk, out of the bond fund. Beamer deposited the same in the savings department of the bank in the name of "H. C. Beamer, clerk of school district No. 7," under an agreement with the bank that he might draw checks against the fund for the use and benefit of the district, and that the sum so deposited should draw interest for the use and benefit of the district.

It is further alleged in the amended complaint: "That the said check was received by the said Idaho State Bank with full notice and knowledge that the same and the money represented by it belonged to said school district No. 7, and did not belong to said H. C. Beamer or to said H. C. Beamer as clerk of said school district, and that the same were received by said bank from and so deposited by said H. C. Beamer as clerk of said school district and not otherwise; and said check and the money represented by it was received by the said bank with full knowledge that said check and the money represented by it was drawn, presented, and deposited under all the facts and circumstances as hereinbefore in this petition set forth, and that said deposit was not made pursuant to law, nor was it at any time secured by any bond or other securities in any manner or at all." That about the 20th of August, 1910, the district caused a warrant to be drawn by the county auditor upon Johnson, as treasurer, for one Coxhead, in payment of services rendered by him in connection with the building of the schoolhouse, in the sum of \$2,844.02, properly payable out of the bond fund. The warrant and the order therefor were countersigned by the county

superintendent, and Beamer, acting for the contractor, presented the warrant to Johnson, as treasurer, and received from him his check as county treasurer upon the bank as county depository, payable to Coxhead, which check was by the latter deposited in the bank to his own credit. At the same time Beamer drew a check upon the account of H. C. Beamer, clerk of school district No. 7, for a like sum, payable to Johnson, as treasurer. The latter check was not presented to the bank for payment, and has never been paid. That on August 31, 1910, the bank was closed by the state bank examiner and placed in the hands of a receiver.

It is further alleged that at the time the order and warrant for the \$2,844.02 were drawn there were no funds on deposit by the county treasurer to the credit of the school district in its bond or building fund upon which the warrant was drawn, "but that the said warrant was paid by said Idaho State Bank out of the general funds of Blaine county on deposit in said bank"; that no part of the same has ever been repaid to or received by Johnson or this appellant save the sum of \$426. A demand has been made upon the receivers to have the amount due paid or listed as a preferred claim, and a demand has been made upon the school district to take action against the bank and the receivers to collect and recover this sum as such preferred claim, and to join appellant in so doing, but defendants have refused so to do. The prayer seeks to have the balance of \$2,417.42 decreed a preferred claim against the cash and assets of the bank, and that the district and Johnson, as treasurer, be required to set forth their rights and claims to the fund.

It is the contention of appellant that the \$10,000 which was taken out of the school fund and placed to the account of Beamer as clerk of the district must be regarded as a special deposit of public funds within the meaning of the previous decisions of this court, for the reason that the same was not deposited in accordance with the county depository law, nor protected in the manner therein provided; that the county was not estopped by the negligence of the county treasurer in failing to present the check given him by Beamer as clerk of the district. On the other hand, respondents contend that inasmuch as the county would not be entitled to a preference if the \$10,000 had remained on deposit in the school bond fund, it should have no greater rights by reason of the fact that the \$10,000 was illegally deposited, in view of the further fact that the rights of general creditors and depositors will be to that extent impaired if the preference is allowed. That in accepting the check from Beamer as clerk of the district, Johnson, as treasurer, was acting in his official capacity and pursuant to the requirements of section 644 of the Revised Codes that "all moneys

arising from the sale of said bonds must be paid forthwith into the treasury of the county"; that the action is, in fact, brought for the benefit of Johnson and his bondsmen, in order that they may escape liability arising from the fact that Johnson paid a warrant drawn on the school fund out of the general fund.

[3] We are not in accord with the contentions of either the appellant or respondents. In fact the deposit by Beamer of the \$10,000 was not, as contended, an illegal deposit, but was no deposit at all. All of the parties to the transaction had notice that the entire fund was a public fund, the deposit of which was provided for by law, that it had been deposited according to law, and was protected by the bank's bond given in pursuance of the depository law. Whatever the actual intent of the parties may have been, the whole transaction amounted to an unlawful conspiracy, the object of which was to enable the district to obtain interest on the attempted withdrawal and deposit of the moneys placed to Beamer's credit on the books of the bank in direct violation of law. Rev. Codes, §§ 644, 650, 1991, and 2013. In contemplation of law the fund was not withdrawn from the control of the county treasurer, and there was no time when the bank was not bound to recognize the control of the treasurer over the fund. In view of the knowledge of all the parties of the unlawful character of the transaction, and that it was expressly prohibited by statute, the only thing accomplished was a mere entry on the books of the bank, and the bank cannot be heard to say that it had knowingly withdrawn the fund from the protection of its bond.

State v. Thum, 6 Idaho, 323, 55 Pac. 858, and First Nat. Bank v. Bunting, 7 Idaho, 27, 59 Pac. 929, 1106, were cases where public funds were attempted to be deposited in the bank on general deposit. The law declared the placing of public funds in a bank, otherwise than on special deposit or as otherwise authorized by law, to be a felony. The court held that notwithstanding the felonious intent of the state treasurer and the officers of the bank receiving the deposit, the law must prevail, and that in law the bank received the fund as trustee because it could only be received lawfully as a special deposit, and it was held that the state did not become a general creditor of the bank, for in that event the court would have to give effect to a violation of the statute.

[1, 2] In the present case it was made the duty of the county treasurer under the law to deposit public funds in his control in banks which have qualified as depositories, and he is forbidden to withdraw sums so deposited except for the payment of warrants legally drawn, or for the purpose of depositing the same in accordance with the law in other banks likewise qualified, and the viola-

tion of these requirements is a felony. Rev. Codes, § 2019. Following the principle announced in the Thum Case, we are led to the conclusion that in this case the law must prevail, and regardless of the acts and intent of the parties to this transaction, the fund must be held to have remained in the custody of the county treasurer and on general deposit to his credit under the protection of the bank's bond. If an attempted general deposit of such funds in a bank, when not authorized by law, becomes ipso facto a special deposit because the deposit of such funds otherwise would be in violation of the criminal statute (Rev. Codes, § 6975), as held in the Thum Case and in the case of In re Bank of Nampa, 29 Idaho, 166, 157 Pac. 1117, on the same reasoning it must necessarily follow that money properly in the control of the county treasurer, and deposited in a depository bank, must be held to be placed on general deposit in accordance with the provisions of the depository law, and no effect can be given to the unlawful attempt to take funds out from under the protection of the depository law and place them on deposit in the same bank without the security of the depository's bond. The failure of the treasurer to cash the check for \$2,844.02, given him by Beamer, is a matter of no consequence, for to have done so would not have placed the money represented by the check under his control to any greater extent than it was.

The judgment is affirmed. Costs awarded to respondents.

MORGAN and RICE, JJ., concur.

CARLTON v. CAMFIELD et al. (No. 8921.)
(Supreme Court of Colorado. April 1, 1918.)

CORPORATIONS \S 123(4) — UNREGISTERED PLEDGES OF STOCK—RIGHTS OF CREDITOR OF INSOLVENT ESTATE OF STOCKHOLDER.

Registration of transfers and pledges of corporate stock required by Rev. St. 1908, § 870, is not for protection of creditors of a stockholder until they proceed under sections 3618, 3619, prescribing manner of making levies on stock, and they can be registered at any time, even after insolvent estate of pledgor is in hands of an executor, and claims of simple creditors have been allowed.

En Banc. Error to Weld County Court; Herbert M. Baker, Judge.

Proceedings by A. E. Carlton against John A. Camfield and Lottie A. Camfield, executors of the last will and testament of Daniel A. Camfield, deceased, and the Union National Bank of Greeley, Colo., to have a claim allowed as a secured claim. From a judgment for defendants, plaintiff brings error. Reversed and remanded.

John T. Jacobs, of Greeley, for plaintiff in error. Charles F. Tew and Walter E. Bliss, both of Greeley, for defendants in error. N.

Walter Dixon and Thomas J. Dixon, both of Denver, amici curiæ.

TELLER, J. This cause comes before us on error to the county court which disallowed the claim of plaintiff in error as a secured claim against the estate of D. A. Camfield, deceased. There is no dispute as to the facts, the matter having been heard upon a stipulation, or agreed case. It appears that, on February 10, 1912, D. A. Camfield became personally liable on a promissory note to secure which he delivered to the payee of said note certificates for 100 shares of stock in the Farmers' Bank & Trust Company, of Greeley, Colo., on which certificates was indorsed an assignment thereof, in blank, with power of attorney to transfer said shares; that within 60 days thereafter the plaintiff in error became the holder and owner of said note, and the holder of said stock certificates; that no note of said pledge was made or attempted to be made on the books of said company within the 60 days allowed therefor by section 870, R. S. 1908; that on the 9th day of November, 1914, said D. A. Camfield departed this life, and thereafter defendants in error John A. Camfield and Lottie A. Camfield, duly qualified as executors of the last will and testament of said decedent; that on October 9, 1915, the plaintiff in error made demand upon said company that a memorandum of said pledge, as required by said statute, be made on its books; that said demand was refused; that the refusal of said company to note on its books said memorandum was not requested by any creditor of the estate of said decedent, but was requested by the said executors; that said estate is insolvent; and that no attempt has been made by any creditor of said estate to levy upon or attach said shares of stock.

It further appears that defendant in error, the Union National Bank, having an allowed unsecured claim against said estate, was permitted to intervene and object to the granting of plaintiff in error's petition for leave to sell said pledged shares, the attorneys for said executors appearing also for said intervenor.

For plaintiff in error it is urged that the executors have no right to act for creditors of an estate in bringing about an intervention, as in this case; while the executors contend that they were but performing a duty to protect the estate in the interest of all the creditors. In the view we take of the case, it is unnecessary to determine the question thus raised.

That part of section 870, R. S. 1908, which provides for noting pledges of stock, reads as follows:

"And any and every such stockholder, creditor or representative shall have a right to make extracts from such books, and no transfer of stock shall be valid for any purpose whatever except to render the person to whom it shall be transferred, liable for the debts of the company ac-

cording to the provisions of this act, unless it shall have been entered therein, as required by this section, within sixty days from the date of such transfer, by an entry showing to and from whom transferred; or, in case of the pledge of any such stock, a memorandum be made upon the books of said company, showing to whom and for what amount the stock has been pledged."

It is conceded that under this statute an unregistered transfer of shares is valid as between the transferor and the transferee; also, that it is not valid as against attaching or execution creditors, unless the transferee has done all in his power to procure the registration of the transfer.

The question here presented is as to the validity of an unregistered transfer of shares as against creditors of an insolvent estate whose claims have been allowed before an attempt was made to register such transfer. The position of defendants in error is that, upon the appointment of the executors, the estate was taken into the custody of the court for the benefit of creditors. It cannot be said, however, that the executors had any rights which their testator did not have at the time of his death. Since he could not have recovered possession of the certificates without paying the debt, they cannot do so. They stand in his shoes, and are bound by the transfer. *Shires v. Allen*, 47 Colo. 440, 107 Pac. 1072. Clearly, then, these shares were not in custodia legis in any practical sense. The pledgee's rights were not changed by the death of the pledgor, and the executors had only the right to redeem the shares, or to receive any surplus that there might be on their sale as a pledge. If, then, the pledgee could have had the registry made, after the 60 days, while Camfield was living, he could do it also after Camfield's death. Counsel cite cases holding an unregistered transfer void as against creditors of the transferor, and assume that the term "creditor" includes all persons to whom debts are owing. An examination of the cases shows that in every instance the court was dealing with a lien creditor. Our statutes do not, by express provision, make an allowed claim a lien; and no authority is cited to show that it is ever so considered in the absence of a statute to that effect. We find in the statute under consideration nothing which indicates that it was intended for the protection of a creditor who has no lien.

One purpose of the statute is evident when it is considered with sections 3618 and 3619, R. S. 1908. The first-named section requires officers of a corporation to furnish an attaching officer a certificate showing the number of shares owned by the debtor; and it would be of little effect if transfers were not recorded so as to show the ownership. The next section authorizes a levy on shares standing in the name of the defendant in an action, and prescribes the method therefor. Without a requirement that the transfer be

recorded, these sections might have no practical effect, since a levy might prove to have been made on shares already transferred.

It should be observed that section 870 does not provide for a record which is to be public, and so operate as a notice to the world. The right to inspect the transfer record is given only to stockholders and creditors of the corporation. It gives no information to creditors of a stockholder, and they can ascertain from it what, if any, shares a debtor owns only when they have begun litigation and become entitled to levy on or attach the property of their debtor. The record seems therefore not intended for the benefit of simple creditors, but of litigants who are taking steps to collect their debts. Such records are not public unless the statute obliges the corporation to expose them to public inspection. 2 Thompson, Corporations, § 2411. In *Thurber v. Crump*, 86 Ky. 408, 6 S. W. 145, it was held that a statute which made a transfer of shares invalid if not entered on the books of the corporation was for the protection of the corporation and purchasers, and that it did—

"not operate as a registration law in the interest of creditors of stockholder, for the reason that the books of the company are not required to be kept open for the inspection of the public."

In *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30, it is held that a transferee of shares not transferred on the corporation books has full title as against the transferor, but only an equitable title as against the corporation, which title, however, the corporation is bound to recognize and permit to be ripened into a legal title, when the transferee presents himself, before any effective transfer on the books has been made, to do the acts required by the charter or by-laws in order to make a transfer. The case further holds that a corporation is liable in damages to the transferee of an unregistered certificate if, with knowledge of such transfer, it issues certificates to a subsequent purchaser from the original transferor. Under this authority the trust company was bound to make the requested record of the pledge of the shares in question.

We are of the opinion that creditors without liens have no standing to protest the registry of transfers or pledges of shares. Plaintiff in error had done all in his power to secure the registry of the stock pledged to him, and his rights were the same as if the registry had been made. *Weber v. Bullock*, 19 Colo. 214, 35 Pac. 183. He was therefore entitled to have his claim allowed as a secured claim.

The judgment is reversed, and the cause remanded for further proceedings in harmony with the views above expressed.

Judgment reversed.

WHITE, J., not participating.

SHAW et al. v. BOND, County Treasurer, et al. (No. 8908.)

(Supreme Court of Colorado. April 1, 1918.)

1. APPEAL AND ERROR ⇨916(3)—SCOPE OF REVIEW—PRESUMPTION.

After judgment on defendant's motion for judgment on the pleadings, the court must assume that the allegations of the complaint are true and that no allegations of new matter in the answer are true.

2. TAXATION ⇨64 — WATERS AND WATER COURSES — IRRIGATION — CANALS—EXEMPTIONS.

Under Const. art. 10, § 3, and Laws 1902, p. 47, § 17, prohibiting taxation of canals used for irrigating land of the canal owners, canals owned and used exclusively for irrigation of lands owned by the owners of the canals cannot be separately taxed from the land on which the water is used, though the canals are not exempt from taxation.

3. TAXATION ⇨64 — WATERS AND WATER COURSES — IRRIGATION — CANALS—EXEMPTIONS.

Under such sections, a supply canal and reservoir dam containing water used for irrigating land of stockholders in corporation owning the canal and reservoir dam could not be separately taxed from the land on which the water was used.

4. TAXATION ⇨64 — WATERS AND WATER COURSES — IRRIGATION — CANALS—EXEMPTIONS—"LAND"—"REAL ESTATE."

Under such sections, the land on which the dam and the reservoir stand is not subject to taxation separate from the land on which the water was used, since "land" is a term more restricted than real estate and means the solid part of the earth's surface, while "real estate" includes the land and improvements thereon and water rights, and under the revenue act real estate for purposes of taxation includes land, minerals, improvements, and water rights.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Land; Real Estate.]

5. TAXATION ⇨608(6) — WRONGFUL LEVYING—REMEDIES—INJUNCTION.

Where tax on irrigation company on the face of the record appeared valid and constituted a cloud on the title, but the tax was wholly void and unauthorized because the property was not subject to separate taxation, the company was entitled to injunction restraining assessment of such tax.

En Banc. Error to District Court, Jefferson County; H. S. Class, Judge.

Injunction by Alva Shaw, as receiver of the Reservoir Company, and others, against Frank J. Bond, as Treasurer of Jefferson County, and others. To review a judgment dismissing the cause and overruling motion for new trial, plaintiffs bring error. Reversed and remanded.

This suit in equity by injunction is brought by plaintiffs in error against the assessor, treasurer, and board of county commissioners of Jefferson county to have certain taxes assessed and levied against the dam, the dam and reservoir site, and the inlet ditch or canal of Standley Lake reservoir, declared and adjudged invalid; and to restrain the collection of the tax and the issuance of a tax deed. By the dam and reservoir site is

meant the surface of the earth upon which the dam and banks stand, and the basin or bed of the reservoir inundated.

The complaint alleges that the reservoir and irrigation company, one of plaintiffs in error, was organized to construct, operate, and maintain a system of ditches, canals, and reservoirs in Denver, Adams, Arapahoe, Jefferson, Boulder, Gilpin, Grand, and Weld counties, Colo., for the purpose of diverting, storing, and distributing to its stockholders, only, water for the irrigation of lands owned by its stockholders; that it is a mutual ditch company organized for the purpose of constructing, operating, and maintaining a system of ditches, canals, and reservoirs for the distribution of water for irrigation to its stockholders or members only; that its properties have at all times been owned and used exclusively for such purposes; that its ditches and canals and reservoirs are owned and used exclusively by individuals or corporations who are stockholders of the company, for irrigating lands owned exclusively by such individuals or corporations, or the individual members thereof, and are not subject to taxation separate from the taxation of the land upon which the water right is applied; that it owns ditches, canals, and reservoirs for collecting and conveying water from one county to be distributed in another county or counties; that it owns a certain reservoir called Standley Lake and its inlet ditch called Croke canal, situated in Jefferson county, which are integral parts of the irrigation unit and were constructed and are operated and maintained for the purpose of diverting and collecting water in Jefferson county to be conveyed and distributed in that and other counties for irrigating the lands of its stockholders in that and other counties; that the other plaintiff in error, Alva Shaw, is the duly appointed and acting receiver of the company; that in 1909 the county assessor, notwithstanding the property was exempt from separate taxation, listed, valued, and assessed for taxation purposes in Jefferson county, the dam, dam site, and reservoir site or bed of the reservoir, which taxes were extended upon the assessment roll for that year; that the dam and reservoir sites were listed at the value of \$18,440, and the dam was listed and valued at \$40,000; that in 1910 the county treasurer sold the property en masse for the taxes of 1909 for the sum of \$1,723.46, and issued a tax certificate to the purchaser and threatens and is about to issue a single tax deed therefor; that the property was again assessed in like manner for the taxes of 1910 and 1911, which were for those years paid by the holder of the tax certificate; that Croke canal extends from its headgate in Clear creek to the reservoir, and was assessed for taxation for the years 1910, 1911, and 1912; that in 1910 it was valued for taxation at \$22,530 and the tax was \$682.93, in 1911 it was valued at the same amount

and the tax was \$684.67, in 1912 it was valued at \$30,040 and the tax was \$842.79, and on December 23, 1912, it was sold for taxes and bid in by the county and a certificate issued to the county; that the time of redemption of the reservoir from tax sales will expire December 24, 1913; that August 2, 1913, the treasurer published the usual notice that the holder of the certificate had made application to him for a treasurer's or tax deed, that the time for redemption would expire December 24, 1913, and unless redeemed on or before that date a deed would be issued and delivered as provided by law; that the treasurer threatens and is about to issue a deed to the holder of the certificate; that the assessments, levies, taxes, and tax sales embrace and apply to the reservoir and the ditch used to divert water from Clear creek into the reservoir, called Croke canal, and to no other land or property; that these county officers continue to assert the right to assess the canal and reservoir and to collect the tax by the sale of the properties; that the levy of the tax has created a cloud upon, and the issuance of a deed will cast a cloud upon, the title of the company to the ditch and reservoir and result in irreparable damage for which there is no plain, speedy, or adequate remedy at law; that it will be harassed by a multiplicity of suits and a tax deed will disturb its occupancy of the properties and deprive it from maintaining and operating the ditch and reservoir to the irreparable injury of its consumers and stockholders; that it is, and at all times has been ready, willing, and able to and offers and tenders such amount, if any, of the taxes as the court may find to be due and owing. Prayer that the assessments, levies, and tax sales be adjudged invalid, and that the issuance of a tax deed be enjoined.

After answers and replications had been filed, the case came on for trial before the court, whereupon defendants moved the court for judgment on the pleadings, which motion the court sustained and ordered the cause dismissed. January 26, 1916, the court overruled the motion for a new trial and entered a final judgment of dismissal on the pleadings in favor of defendants, and plaintiffs bring the case here on error.

Smith, Brock & Ferguson and John P. Akolt, all of Denver, for plaintiffs in error. William A. Dier and J. W. Barnes, both of Golden, and John F. Mail and George B. Campbell, both of Denver, for defendant in error.

GARRIGUES, J. (after stating the facts as above). 1. The Constitution provides:

"Ditches, canals and flumes owned and used by individuals or corporations, for irrigating land owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purposes."

The statute is substantially the same. Section 3, art. 10, Constitution; section 17, p. 47, Revenue Laws 1902. The statute also provides that the term "real estate" includes: First, land; second, minerals under the land; third, improvements upon the land. And that the term "improvements" shall include all buildings, fences, and water rights. Section 13, p. 45, Revenue Laws 1902.

[1] The judgment being upon defendants' motion for judgment on the pleadings, we must assume for the purposes of the case that the allegations of the complaint are true, and that no allegations of new matter in the answer are true. The first point involved is whether the ditch and reservoir were subject to taxation separate from the lands upon which the water right is used, and, the second, whether plaintiffs are entitled to injunctive relief.

[2] We will first dispose of the question of taxation of the canal, then of the dam, and then of the dam and reservoir site. The Constitution and statute provide that canals, ditches, and flumes owned by corporations and used exclusively to irrigate their lands or the lands of individual stockholders thereof, or owned by individuals and used exclusively to irrigate their lands, shall not be separately taxed so long as they shall be owned and used exclusively for such purpose. This constitutional provision does not exempt such properties from taxation. It provides that they shall not be separately taxed, and in *Empire Canal Co. v. Board*, 21 Colo. 244, 40 Pac. 449, we held this to mean that the canal shall not be taxed separately from the land upon which the water is used; that the exemption from separate taxation applies to: (a) Canals owned by one or more individuals, used exclusively to irrigate their lands; (b) canals owned by corporations used exclusively to irrigate their lands or the lands of their stockholders; (c) canals owned in part by individuals and partly by corporations used exclusively to irrigate lands of either or both. In other words, canals owned and used exclusively for irrigation of lands owned by the owners of the canals.

[3] The Farmers' Reservoir & Irrigation Company owns the ditch and reservoir in question. They are used exclusively by its stockholders for the irrigation of their lands, the stock representing the consumer's interest in the canal and reservoirs; the complete ownership thereof being vested in the corporation. The question is whether they are subject to taxation separate from the land upon which the water right is applied. So far as Croke canal is concerned, it comes within the rule announced in *Empire Co. v. Board*, supra, and is not subject to separate taxation.

In *Kendrick v. Twin Lakes Co.*, 58 Colo. 281, 144 Pac. 884, we held a reservoir dam which impounded water in a reservoir for the use of stockholders in a mutual ditch and

reservoir company for irrigation could not be separately taxed as an improvement upon the land upon which the dam stands; that the dam had no distinct value as an improvement upon the land on which it stood, but was a burden; that whatever value the dam possessed was represented and included in the water rights, which constituted the essential thing of value, and that such water rights, under our revenue laws for taxation purposes, are to be listed and valued like real estate, as improvements on the land upon which the water is used. So neither the Croke canal nor the reservoir dam of the Standley Lake reservoir are subject to separate taxation.

[4] The inquiry now goes a step further, and we must determine whether the land upon which the dam stands and the land inundated by the water in the reservoir, that is, the bed of the reservoir, is subject to separate taxation, or whether their value is included in the water right similarly to ditches, dams, and headgates.

"Land" is a term narrower and more restricted than real estate and means the solid part of the earth's surface. "Real estate" is a broader term, including the land and improvements thereon. Fences and buildings are real estate, but not land. So are water rights. Under our revenue act for the purposes of taxation, real estate includes land, minerals under the land, and improvements on the land, and water rights are declared to be improvements on the land where they are used; hence it follows that water rights are real estate and must be listed and valued like buildings, apart from the land, but as improvements on the land where the water is applied. Land comprising the bed of a reservoir, or the bed of the dam like this, storing water for irrigation, is as much an integral part of the whole system as the land comprising the bed of the ditches and dam of the reservoir. Water rights of mutual ditch and reservoir companies embrace and include the value of the land comprising the bed or site of the reservoir and dam, and the stock represents the consumer's interest therein, though the title to the property vests in the corporation. Ordinarily, the value of a mutual irrigation system depends upon the cost of the enterprise as a whole, which controls to some extent the value of the water rights, and this value includes and embraces, not only inlet and outlet ditches, headgates, and dams, but the land upon which they stand and the bed of the reservoir as well. When water rights are taxed in connection with the land they irrigate, the unit is taxed as a whole. The situs for taxation is declared by statute to be upon the land where the water is used. There can be no material distinction, for purposes of separate taxation, between the ditch, the headgate, and dam, and the bed of the dam and reservoir which supplies the water to be

carried through the ditch, where all are owned by a mutual irrigation company and the water used exclusively by its stockholders to irrigate their lands. The same rule which holds that the value of the canal, headgate, and dam is represented and included in the value of the water right, applies with equal force to the land upon which the dam stands and the bed of the reservoir. We therefore conclude that the bed of the reservoir and the land upon which the dam stands are not subject to separate taxation.

[5] 2. The second point is whether plaintiffs are entitled to injunctive relief. This tax was not merely irregular, erroneous, or illegal. The property was not subject to separate taxation, and the tax imposed was therefore unauthorized. On the face of the record, however, it appeared to be valid, which constitutes a cloud upon the title if not corrected by judicial decree, and, unless the assessment of taxes on the property in the future is restrained, there will be nothing to prevent its repetition. The object of the action is not only to rectify the error in this particular instance, but to establish, as well, the correct rule relative to similar cases in the future.

We think a tax assessed where no tax is authorized is void, and, if this does not prima facie appear from the face of the record, a suit in equity will lie to have it so declared. Where an exemption from taxation has been established, for property used exclusively for religious worship, schools, or charitable purposes, we have never hesitated to grant an injunction restraining the collection, and the same rule should apply to mutual ditch and reservoir companies. We are therefore of the opinion that plaintiffs were entitled to injunctive relief.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

LEE v. GUNBY. (No. 8998.)

(Supreme Court of Colorado. April 1, 1918.)

1. APPEAL AND ERROR §1002 — REVIEW — QUESTION OF FACT.

A judgment based on conflicting testimony will not be disturbed, if there is sufficient evidence to support it.

2. APPEAL AND ERROR §1050(1)—HARMLESS ERROR—ADMISSION AND EXCLUSION OF EVIDENCE.

In a suit to recover a certain sum, with interest, based on defendant's stopping payment of a check drawn by him to plaintiff, where the court fully understood the nature of the evidence rejected and admitted, and it was cumulative, and not such as to necessarily require different findings, the rulings, if erroneous, were not prejudicial.

Error to District Court, Morgan County; H. S. Class, Judge.

Action by L. T. Lee against W. J. Gunby.

Judgment for defendant, and plaintiff brings error. Affirmed.

Johnson & Robison, of Ft. Morgan, and Ray E. Lee, of Cheyenne, Wyo., for plaintiff in error. Floyd E. Pendell, of Casper, Wyo., for defendant in error.

BAILEY, J. This was a suit by plaintiff, Lee, to recover \$500.00 and interest, claimed to be due from defendant, Gunby, because the latter stopped payment on a check drawn by him for that amount to plaintiff. The case was tried to the court with general findings for defendant, with a judgment of dismissal. Lee brings the case here for review on error.

The facts are in substance that Lee was negotiating an exchange of his equity in certain land with one Hayden, for the equity of Hayden in other real property. They had placed with Gunby, a real estate broker, who held a mortgage on the Hayden land, two checks, one by Lee for \$1,000.00, and the other by Hayden for \$500.00. The checks were drawn to the order of Gunby, with the understanding that if the deal was completed the amount so deposited was to be placed to the credit of Hayden upon the mortgage debt which the latter owed Gunby. It is claimed by Lee that these checks were not to be deposited for collection, unless and until, the exchange of land was consummated, and then only upon the joint order of himself and Hayden. Gunby claims that he was to use the checks upon notification of either of the parties that the deal was closed. Gunby was notified by Hayden that the trade had been made, and he accordingly deposited the checks for collection. Afterward, but before the checks were paid in regular course, Lee notified Gunby that the deal had been abandoned. Thereupon Gunby gave Lee a check for \$1,500.00 but later took back this check and gave in exchange one for \$500.00. Lee stopped payment on his original check for \$1,000.00, and Hayden stopped payment on his for \$500.00. Gunby then stopped payment on the check for \$500.00 which he had given Lee, who thereupon began this suit, to recover that sum with interest.

It is claimed that the Hayden check for \$500.00, deposited in escrow, was in reality money belonging to Lee, and that Gunby knew this fact, and held it as a trustee for Lee. Gunby contends that the entire transaction between himself and Lee was simply a convenient way to make settlement between the parties, after the proposed trade between Lee and Hayden had fallen through, and that the check involved was given without consideration. Lee sets up the return of the check for \$1,500.00 by him to defendant as a consideration for the \$500.00 check given to him by Gunby.

[1] The questions involved are all of fact, and were in dispute. The findings of the

court are in substance that the check sued upon was accepted with full knowledge that the payment of it was contingent upon the payment of the Hayden check; that plaintiff knew of, and acquiesced in, all the proceedings leading up to the receipt of this check by himself; and that such check was without consideration.

The conclusion reached by the trial court is based upon and supported by the testimony adduced. Much of it, especially as to the controlling points, was in direct conflict, and the court resolved the issues in favor of Gunby. There is nothing in the record, either of law or fact, which necessitates a different conclusion. It is well settled that upon conflicting testimony a judgment will not be disturbed if there is sufficient evidence to support it. *Copeland v. Kilpatrick*, 38 Colo. 208, 88 Pac. 472; *Wadsworth Ditch Co. v. Brown*, 39 Colo. 57, 88 Pac. 1060; *Downing v. Ernst*, 40 Colo. 142, 92 Pac. 230; *Alamosa Creek Canal Co. v. Nelson*, 42 Colo. 140, 93 Pac. 1112; *Petterson v. Payne*, 43 Colo. 184, 95 Pac. 301; *Farrel v. Garfield Co.*, 49 Colo. 165, 111 Pac. 839; *White v. Nuckolls*, 49 Colo. 176, 112 Pac. 329; *German Co. v. Herbertson*, 49 Colo. 217, 112 Pac. 690; *Denver Co. v. Young*, 49 Colo. 500, 113 Pac. 499.

[2] Certain testimony offered by Lee was excluded, and certain other testimony offered by Gunby was admitted over objection by Lee. Both of these rulings are assigned as error. The court, however, fully understood the nature of the testimony so rejected and received. Both that so received and that rejected was cumulative, and not of a character to necessarily require different findings, so that the rulings, even if erroneous, were not in any event prejudicial.

The findings of the trial court are supported by sufficient competent, pertinent and credible testimony, and there appears to be no error in the record. Furthermore, we have critically examined the whole record, including the testimony offered by plaintiff, Lee, which the court excluded, and are firmly convinced that Gunby had no actual interest in the transaction, but acted merely as a depository; and that he should not be saddled with any liability whatsoever in the matter. The judgment rendered metes out evenhanded justice, and should be affirmed. Judgment affirmed.

HILL, C. J., and ALLEN, J., concur.

DILLEY v. PRIMOS CHEMICAL CO. (No. 8907.)

(Supreme Court of Colorado. April 1, 1918.)

1. MASTER AND SERVANT §241 — SELECTION OF DANGEROUS METHOD.

Plaintiff, a mining workman of several years' experience and of usual intelligence, who, instead of walking along by a tram car without

brakes to steady it on its progress down the grade, got on it to ride down and took no precautions, was contributorily negligent, having knowingly selected the more dangerous method of doing his work.

2. MASTER AND SERVANT §190(7)—SUGGESTION OF FELLOW SERVANT — LIABILITY OF MASTER.

Plaintiff, who rode a tram car at the suggestion of his tramping partner, did not do so upon any assurance binding the master; plaintiff and his partner being "fellow servants."

3. MASTER AND SERVANT §247(1)—ACTION FOR INJURY—CONTRIBUTORY NEGLIGENCE.

Assuming that the master was negligent in care and construction of tram car track, if plaintiff servant by the exercise of ordinary care could have avoided the consequences of the master's negligence, he cannot recover.

4. TRIAL §165 — NONSUIT—DUTY OF COURT.

Where it affirmatively appears from plaintiff's evidence that the want of due prudence on his part was the cause of the injury complained of, it is the duty of the court upon motion for nonsuit to decide as a question of law that the action cannot be maintained or direct a verdict for defendant.

Error to District Court, Montrose County; Thos. J. Black, Judge.

Action by E. E. Dilley against the Primos Chemical Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Catlin & Blake, of Montrose, for plaintiff in error. Goudy, Twitchell & Burkhardt, of Denver, L. W. Allen, of Telluride, and F. B. Goudy, of Denver, for defendant in error.

ALLEN, J. This is an action wherein the plaintiff in error seeks to recover damages against the defendant in error on account of the latter's alleged negligence. The cause was tried to a jury. At the conclusion of plaintiff's evidence the trial court, on motion of defendant, instructed the jury to return a verdict in favor of the defendant. One of the grounds of the defendant's motion for a directed verdict, and the ground upon which the trial court granted the motion, was that the "evidence shows that plaintiff was guilty of negligence directly contributing to the injury."

The principal question presented for our determination is the propriety of the directed verdict under the evidence and the circumstances of the case. We will therefore review so much of the evidence as is relevant to the matter of plaintiff's contributory negligence.

On April 14, 1914, the plaintiff below, plaintiff in error here, obtained employment from the defendant, a corporation, at its mine which it was then operating. The plaintiff was a workman of several years' experience, and of usual intelligence. During the first eight or ten shifts that the plaintiff worked, he was engaged in tramping ore, with the aid of another employé, in tunnel No. 5 of the mine. The two men conducted the car, when loaded with ore, from the breast of the tunnel to the ore bin by pushing. Plaintiff was next transferred by the defendant's shift

boss to tunnel No. 7. After working one shift in the stope, the shift boss directed him to tram ore, and on the second shift in that tunnel the plaintiff and another workman acted as trammers. At this time they had the use of a tram car which was provided with a brake. On the following shift they had the use of a car which had no brakes. They noticed the absence of brakes on this car, but made no objection, and proceeded to tram. On the first two trips with this car the plaintiff's tramping partner rode the car while it passed over that part of its course which was down a steep grade. When it became time to make the third trip with the car, the plaintiff's working partner suggested that he (plaintiff) ride the car. In this connection the plaintiff testified as follows:

"And I stepped on and went with the car. I stepped on what would be the coupling, * * * with one foot, and hung onto the hind end of the car with my two hands, and the other foot suspended in the air in similar manner as partner rode on first two trips."

At the foot of the downgrade part of the tramping course were curves, and then a short upgrade over which the cars had to be pushed by the two men. The plaintiff was injured on the first trip that he rode the car. In this connection he testified as follows:

"I went downgrade all right, but I didn't get out of the tunnel. The car jumped the track at one of the curves at or near the foot of the grade, and I found myself sitting in the track between the rails, * * * and the car was standing on its front end on the track."

[1] The evidence does not show any rule or direction by the employer or his agents that the plaintiff should ride the car, but does show that there was no necessity for riding the car. The plaintiff had the choice of pursuing a safer method of doing his work. As a reasonable and prudent person he could have observed that the object of placing two men in charge of the tram car was that both might travel with the car, their hands on the same, in an effort to check the speed and steady the car on its progress down the grade, and prevent an accident of the kind that happened in this case. Before the accident the plaintiff made 12 to 15 round trips over the tramping course in question, and knew where a loaded car would go down grade. He could have known, as a reasonable and prudent person, of the danger of riding the car without brakes as it went over what he himself designated as "steep downgrade." He was not obliged to act on the suggestions of his tramping partner, and by riding the car he knowingly selected the more dangerous method of doing his work. This court, in *Colo. & So. Ry. Co. v. Reynolds*, 51 Colo. 231, 116 Pac. 1043, said:

"Where a person has a choice of two methods of performing his work, the one safe and the other dangerous, and is aware of this fact, it is his duty to choose the safe method. If he does not, and chooses the method which necessarily exposes him to danger, which would have been avoided had he chosen the other, and is injured, he cannot recover for such injury."

In 18 R. C. L. 636, § 132, it is said:

"If the employé having an opportunity of acting in any one of two or more ways, one of which is less safe than another, and knowingly chooses the less safe mode, he is to be deemed negligent and disentitled to recover although the employer may also have been negligent."

See, also, 29 Cyc. 520.

It is true that, to constitute contributory negligence, the act or omission of the person injured must be one which he could reasonably anticipate would result in his injury. 29 Cyc. 520. But the plaintiff's act comes within this rule. This view is supported by the opinion in *Miller v. Union Pacific Ry. Co.* (C. C.) 4 Fed. 768, where it is said:

"In the second place, if the car on which plaintiff was riding when injured was known as a push car, and had no brakes or apparatus for controlling its movements, and if the plaintiff, knowing this, got on the car and rode down the grade, this was negligence, and the plaintiff cannot recover. * * *

"If he knew * * * that it could be controlled only by walking along by it and holding it back, and, knowing that, he got into it with a number of other people to ride on a downgrade, he took his chances. It was a clear case of contributory negligence."

To the same effect is *York v. K. O., O. & S. Ry. Co.*, 117 Mo. 405, 22 S. W. 1081.

Not only did the plaintiff choose the less safe way of working, but after getting on the car he took no precautions for his safety, and did not attempt to get off the car as the speed increased. He admitted that he could have stepped off before the car attained increased momentum, and that he knew from what he had seen before that the car gained a great deal of speed in going downgrade.

[2] At, or just before the plaintiff mounted the car, his tramping partner, according to the testimony, spoke to him as follows:

"It is useless for me to ride all the time and you walk; you go with the car this time."

Whether this language be regarded as a suggestion, a command, or as assurance of safety, it is not binding upon, nor can it fix any responsibility upon, the defendant, under the undisputed facts existing in this case. The tramping partner was a fellow servant of equal grade with plaintiff, not a vice principal nor an agent of the master with any authority over plaintiff. The plaintiff in riding the tram car did not, therefore, do so by the direction, or upon any assurance of safety, given by the master or a vice principal.

[3] The act of the plaintiff, in riding the ore car at the time of the accident, directly contributed to the production of the injury complained of; and without it the injury would not have happened. Assuming, but not deciding, that the defendant was negligent in the care or the construction of the tram car track, the plaintiff, nevertheless, by the exercise of ordinary care under the circumstances, might have avoided the consequences of the defendant's negligence. The circumstances therefore disclose contributory negligence on the part of the plaintiff, by

reason whereof he is not entitled to recover damages. *Colo. Central R. Co. v. Holmes*, 5 Colo. 197; *Jackson v. Crilly*, 16 Colo. 103, 26 Pac. 331.

[4] The facts are not in dispute, and plaintiff's contributory negligence is evident and unquestionable. In such case the court may declare the fact established as a matter of law. *Colo. Central R. Co. v. Holmes*, supra. Where it affirmatively appears from the plaintiff's own evidence that the want of due prudence on his part was the proximate cause of the injury complained of, it becomes the duty of the court, upon a motion made for nonsuit, to decide, as a question of law, that the action cannot be maintained. *Behrens v. K. P. Ry. Co.*, 5 Colo. 400. Or the court may in such case direct a verdict for the defendant. *Guldager v. Rockwell*, 14 Colo. 459, 24 Pac. 556.

There was no error in directing a verdict for defendant in the instant case. The judgment of the district court will therefore be affirmed.

Affirmed.

HILL, C. J., and BAILEY, J., concur.

(54 Mont. 524)

TETRAULT v. INGRAHAM, Sheriff, et al.
(No. 3899.)

(Supreme Court of Montana. April 1, 1918.)

1. EXECUTION — 287 — SHERIFF'S SALE — FAILURE OF TITLE—REMEDIES.

Where title to personalty sold by a sheriff under execution failed, because the debtor claimed exemption and replevined the property, the purchaser was, under Rev. Codes, § 6844, confined to the remedy of having the original judgment revived for his benefit, so that he could proceed against the debtor, and he could not proceed against the sheriff and the creditor as for money had and received at common law, since sections 8060 and 8061 abrogate the common law where specific statutes apply.

2. EXECUTION — 471—SALE—FAILURE OF TITLE—EVIDENCE.

In action by purchaser at execution sale against sheriff for failure of title, because the property was taken in claim and delivery by the debtor who claimed exemption, evidence held insufficient to show that the property was exempt, so as to require a nonsuit.

3. EXEMPTIONS — 126—SELECTION.

Where debtor owns more property of a given class than Rev. Codes, §§ 6824, 6825, exempt, he must identify the particular property which he claims to be exempt, and segregate it from the portion liable to seizure.

4. EXEMPTIONS — 93—NATURE OF RIGHT—WAIVER.

The right to claim property as exempt is a personal privilege, and may be waived, and is waived when the property itself is sold by the debtor, since one cannot claim exemption in property which is not his own.

5. FRAUDULENT CONVEYANCES — 172(1)—EFFECT AS BETWEEN PARTIES.

Though a sale by a judgment debtor of his property was void as against the creditor, it was valid as between the parties, and operated to transfer title, and could be set aside only to the extent of the creditor's claim; the balance belonging to the purchaser.

6. FRAUDULENT CONVEYANCES — 181(1) — PROPERTY SUBJECT—EFFECT OF PRIOR SALE.

Under Rev. Codes, § 6128, where a judgment debtor sold personalty, but retained possession, his vendee took the title subject to the claim of the judgment creditor, and the property was subject to execution.

Appeal from District Court, Flathead County; T. A. Thompson, Judge.

Action by A. D. Tetrault against A. J. Ingraham, Sheriff of Flathead County, and another. Judgment for plaintiff, and order denying new trial, and defendants appeal. Reversed and remanded.

C. W. Pomeroy, of Kallispell, for appellants. G. H. Grubb, of Kallispell, and F. D. Lingenfelter, of Havre, for respondent.

HOLLOWAY, J. In 1912 the Kallispell Mercantile Company recovered judgment against Clyde Drollinger, and caused an execution to be issued thereon and placed in the hands of the sheriff for service. The sheriff levied upon two horses found in the possession of Drollinger, and, after due notice, sold them at public auction to A. D. Tetrault for \$340, which amount was paid over and the judgment satisfied. Immediately prior to the sale Drollinger made claim that the property was exempt, and notified the sheriff, who in turn notified the judgment creditor. An indemnifying bond was given and the sale proceeded, but when the property was exposed for sale no mention was made of the fact that the property was claimed as exempt, and Tetrault had no notice of the fact until after he had paid over the purchase price. On the same day, but after the sale, Drollinger commenced an action in claim and delivery against Tetrault, and such proceedings were had that a judgment was rendered in that action in favor of Drollinger for the return of the horses. Tetrault then commenced this action against the sheriff and the Mercantile Company.

In addition to the foregoing facts, it is alleged that the property sold by the sheriff and purchased by Tetrault "was at all said time exempt by law from execution and sale under and by virtue of the laws of the state of Montana." It is further alleged that the sheriff and the Mercantile Company failed, refused, and neglected to make known the fact that an exemption claim had been made, but kept such fact secret, "for the purpose of injuring and defrauding this plaintiff and the public, and did defraud this plaintiff" out of \$340. Issues were joined and the cause tried, resulting in a judgment for plaintiff. Defendants have appealed from the judgment, and from an order denying them a new trial.

[1] The complaint presents something of a dual character, for money had and received and for damages for deceit; but the theory upon which the trial court proceeded is not left in doubt. By instruction No. 1 the court

told the jury that the action was upon the common-law count for money had and received. The court also refused defendants' offered instructions 6 and 8, which presented the question of defendants' liability for damages for deceit. In support of the theory adopted by the trial court, counsel for respondent cite *Dresser v. Kronberg*, 108 Me. 423, 81 Atl. 487, 36 L. R. A. (N. S.) 1218, Ann. Cas. 1913B, 524. Whatever may be the rule in other jurisdictions, it is established in this state by statute. Section 6844, Revised Codes, provides a remedy in the nature of an action for money had and received, but by its express terms it is applicable only to a sale of real estate. It also furnishes an additional remedy in case title to any property, real or personal, sold at sheriff's sale, fails. It provides that the purchaser may have the original judgment revived for his use and benefit and that he may proceed against the judgment debtor. Since this statute provides alternative remedies for the purchaser of real property, title to which fails, and but a single remedy for the purchaser of personal property, it must be held that the remedy thus provided was intended to be exclusive in all cases wherein failure of title alone furnishes the ground for complaint. *U. S. ex rel. Arant v. Lane*, 245 U. S. 166, 38 Sup. Ct. 94, 62 L. Ed. —. The common-law action for money had and received cannot be maintained in this instance. "In this state there is no common law in any case where the law is declared by the Code or the statute." Section 8060, Rev. Codes. "The Code establishes the law in this state respecting the subjects to which it relates." Section 8061. Whether this complaint can be made to state a cause of action for damages for deceit is not now before us.

[2] In the trial of the action the court also proceeded upon the theory that the question whether the property sold by the sheriff was exempt was in issue and was to be determined independently of the evidence furnished by the judgment roll in the claim and delivery action. Instructions 6 and 9, given by the court, presented this question fully, and the ruling of the court upon the admission of the judgment roll limited its evidentiary value to establishing the fact that the horses had been retaken from Tetrault. Upon the theory thus adopted, the court erred in overruling defendants' motion for nonsuit. There is not any substantive evidence in this record which even tends to show that the property was exempt. On the contrary, the evidence is uncontradicted that in December, 1911, Clyde Drollinger, then the owner of thirteen horses and considerable other personal property, gave a chattel mortgage upon all of it to the Bank of Commerce; that in October, 1912, the debt was discharged and the mortgage satisfied; that a few days later, and on October 19th, Clyde Drollinger sold all the property previously

mortgaged to B. P. Drollinger, the consideration being the payment of the mortgage debt; that this sale was not accompanied by an immediate delivery followed by an actual and continued change of possession, but that the possession remained in the vendor; that on October 24th the sheriff seized 2 of the horses under the execution in favor of the Mercantile Company and noticed them for sale for October 30th; and that immediately before the sale Clyde Drollinger served upon the sheriff an affidavit and notice of exemption.

[3, 4] We shall not stop to consider whether, if the two horses seized by the sheriff had been the only horses owned by Clyde Drollinger at the date of the sale by him to B. P. Drollinger, the transaction would fall under the ban of section 6128, Revised Codes. That is not this case, and the rule adverted to in *Cushing v. Quigley*, 11 Mont. 577, 29 Pac. 337, has no application. Neither is it material to determine whether a debtor must specify the particular property which he claims as exempt, when his entire holdings do not exceed the amount allowed by law as exempt. By sections 6824 and 6825, Revised Codes, only three of the thirteen horses could be claimed as exempt. Where a debtor owns more property of a given class than the law exempts, it is necessary for him, in order to secure the benefit intended to be conferred, to identify the particular property to which his claim attaches; that is, to segregate it from the portion liable to seizure, for under such circumstances the statutes above do not undertake to impress the seal of exemption upon any individual animals or articles of property. *Field v. Ingraham*, 15 Misc. Rep. 529, 37 N. Y. Supp. 1135; 11 R. C. L. 549, 550. The right to claim property as exempt is a personal privilege conferred by statute. It may be waived, and is waived when the property itself is sold. *Wyman v. Gay*, 90 Me. 36, 37 Atl. 325, 60 Am. St. Rep. 238. The interest of the vendor in it ceases, and it is elementary that one cannot claim exemption in property which he does not own. 18 Cyc. 1382; *Bohn v. Weeks*, 50 Ill. App. 236.

[5] Though the sale by Clyde Drollinger to B. P. Drollinger was void as against the Mercantile Company, it was valid as between the parties to it, and operated to transfer title to B. P. Drollinger. It could only be set aside to the extent of the creditor's claim, and the overplus realized at the sheriff's sale belonged to B. P. Drollinger, not the fraudulent vendor. 20 Cyc. 617, 622.

[6] Counsel for respondent contend that, if title had passed to B. P. Drollinger, then the horses were not subject to seizure in satisfaction of Clyde Drollinger's debt. It may be conceded, as a general rule, that the property of one person may not be subjected to the satisfaction of the debt of another; but to that rule section 6128 above has made an exception, and where, as in this case, there

has been a sale of personal property, not accompanied by an immediate delivery and followed by an actual and continued change of possession, the vendee takes title subject to the claim of the vendor's creditor; so that there is not any inconsistency involved in appellants' contention that title to these horses passed to B. P. Drollinger, so as to defeat Clyde Drollinger's claim of exemption, and that they were liable to seizure at the instance of Clyde Drollinger's creditor.

It is not necessary to consider appellants' other specifications of error. The judgment and order are reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

(102 Kan. 797)

DOWNES et al. v. ROGERS. (No. 21437.)
(Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

PRINCIPAL AND AGENT — 23(1) — SALES — 359(3) — RELATION — COLLECTION OF PRICE — EVIDENCE.

Record examined, and the evidence held sufficient to prove that the vendor of a farm tractor was the plaintiffs' agent; that the agent received from the purchaser the price of the machine; and plaintiffs' action against defendant to collect payment a second time was properly defeated.

Appeal from District Court, Reno County.

Action by P. J. Downes and J. A. Keating, partners, etc., against W. A. Rogers. Judgment for defendant, and plaintiffs appeal. Affirmed.

C. M. Williams and D. C. Martindell, both of Hutchinson, for appellants. Aaron Coleman, of Hutchinson, for appellee.

DAWSON, J. The plaintiffs brought this lawsuit to compel the defendant, a Reno county farmer, to pay a second time for a farm tractor purchased by defendant from the plaintiffs' sales agent at Hutchinson.

Plaintiffs contended below, and still contend, that the sales agent had no authority to sell the tractor or to accept payment therefor; that the sales agent was only a bailee of the tractor, and that he could only part with it after procuring the consent of a Hutchinson bank; and that such consent would only be forthcoming upon the payment of the wholesale price to the plaintiff's account in the bank. Whatever may have been the private or confidential business relations between the plaintiffs and the sales agent, the defendant showed by competent evidence, amply sufficient to sustain the verdict and judgment, that the plaintiffs had established the sales agent in Hutchinson to sell tractors, and that they had held him out to defendant and to the general public in that community as their agent. Defendant

was not apprised of any restriction placed by plaintiffs on the agent's authority. It would utterly destroy the foundations of all business confidence between dealers and customers to countenance a claim like the one set up in this case.

A quibble is raised that the agent did not sell the tractor to defendant, but traded it to him for some mules. The defendant told the plaintiffs' agent that if he, the defendant, could sell some mules he would buy the tractor. The agent brought a mule buyer, who purchased \$450 worth of mules from the defendant. The check for the mules and the defendant's check for the balance of the price of the tractor were then delivered to and cashed by plaintiffs' agent, and the defendant received the tractor pursuant thereto.

By rights this case should be disposed of in a per curiam, for no shadow of error appears in the record nor is anything presented which is worthy of comment.

Affirmed. All the Justices concurring.

(102 Kan. 896)

STATE v. PERRY. (No. 21641.)

(Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

1. CRIMINAL LAW — 245 — SUFFICIENCY OF PRELIMINARY EXAMINATION — OBJECTION.

Where a defendant joins issue on several charges set forth in an information by a plea of not guilty, and proceeds to a trial of such charges without raising a question as to the sufficiency of a preliminary examination, and that no examination had been held on one of the charges, an objection upon that ground after conviction comes too late.

2. INTOXICATING LIQUORS — 236(1, 5) — UNLAWFUL SALE — UNLAWFUL POSSESSION — SUFFICIENCY OF EVIDENCE.

The evidence in the case held to be sufficient to sustain the conviction.

Appeal from District Court, Cowley County.

Tom Perry was convicted of selling intoxicating liquors, and of having such liquor in his possession, and he appeals. Affirmed.

Hackney & Moore, of Winfield, for appellant. S. M. Brewster, Atty. Gen., and J. L. Hunt and S. N. Hawkes, both of Topeka, for the State.

JOHNSTON, C. J. Tom Perry was arrested upon a complaint charging him with: (1) A felonious sale of intoxicating liquor; (2) having intoxicating liquor in his possession; and (3) maintaining a nuisance. A preliminary hearing was had, after which he was bound over to the district court. In the order of the justice of the peace the offenses mentioned for which the defendant was to be held for trial were the unlawful sale and the maintaining of a nuisance, but the offenses were referred to as being those charged in the second and third counts of the complaint. The information upon which defendant was

tried in the district court set forth three counts corresponding to those of the complaint. The defendant went to trial without objection to the information, and joined issue on all the offenses charged by plea of not guilty. Upon the evidence the jury returned a verdict finding the defendant guilty as charged in the first and second counts of the information; that is, for the unlawful sale, and for having intoxicating liquor in his possession.

[1] In his appeal defendant contends that he was convicted of an offense for which he did not have a preliminary examination. There was some confusion in the record of the examining magistrate in that he found that a felonious sale had been committed by defendant as charged in the second count, whereas that charge was contained in the first count. Then he held him for keeping a place for the sale of intoxicating liquors, which was charged in the third count, and, as we have seen, the jury found him guilty on the first and second counts, which charged a sale and the keeping of liquors in his possession. Since the magistrate expressly held him for a felonious sale, the error in naming the count containing that charge could not have misled or prejudiced the defendant. Only one sale was alleged, and he was bound over for a sale. He was held for trial on the third count for keeping a place where liquors were sold, rather than for keeping liquors in his possession, and of the latter offense he was not convicted; but as the liquor which he sold was necessarily in his possession, he was probably not surprised to find that count in the information. At any rate he did not file a plea in abatement, or question in any way the propriety of charging him with all three offenses. Having joined issue on the offenses set out in the information and of which he was convicted, without raising the objection that he had not been allowed a preliminary examination, he must be held to have waived it. *State v. Bowman*, 80 Kan. 473, 103 Pac. 84. In no event could he have been prejudiced so far as the second count is concerned, since the sentence imposed upon that count runs concurrently with that imposed for the felonious sale, and the penalty was therefore not enlarged by the conviction on the second count.

[2] The remaining objection is that the evidence did not warrant a conviction of any offense. A witness testified in effect that she saw the defendant make frequent trips with strangers to a ravine in which there was underbrush near her residence several times during a certain day, and that in one instance she saw him hand to another a whisky bottle almost full of liquor and exchange it for coin given him by the other. In this place, to which he made frequent trips during the day, accompanied by strangers, a number of whisky bottles were found, and quite a number were also found in an outhouse at his resi-

dence. While the witness did not taste or smell the contents of the whisky bottle, she was close to the parties, and said that she was sure it was whisky that was exchanged for money. Taking the testimony and the surrounding circumstances together they appear to be sufficient to support the verdict.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 710)

WACKER v. HESTER. (No. 21011.)

(Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

BROKERS — 54 — RIGHT TO COMMISSION — SERVICES.

Rule followed that a real estate agent has earned his commission when he procures a purchaser ready, willing, and able to buy upon terms which the owner has accepted or agreed to accept.

Appeal from District Court, Kiowa County. Action by Henry W. Wacker against Mark V. Hester. Judgment for plaintiff, and defendant appeals. Affirmed.

R. F. Crick, of Pratt, for appellant. John W. Davis, of Greensburg, for appellee.

PORTER, J. This is an appeal from a judgment against the defendant for a real estate agent's commission.

The defendant, who resides in California, owned a farm in Kansas which he listed with plaintiff for sale, fixing the price at \$21,000, subject to a mortgage of \$7,500. On January 15, 1915, the plaintiff sent him the following telegram:

"Offered nineteen thousand dollars for land south of Joy. All cash except mortgage. Possession August first. Commission two hundred dollars. Wire answer my expense."

The defendant replied by wire refusing to take less than the original offer. The plaintiff then wrote him at length advising that he accept the offer and asking him to reconsider and wire authority to let the land go at \$19,000. He received the following telegram in answer:

"Yes will sell nineteen thousand cash less seven thousand seven hundred. Mills lease is subject to sale possession any time. Buyer to settle with him. Three arbitrators if necessary. He is advised not to interfere again. He wrote he had done so. Send deed."

The plaintiff thereupon signed a sale contract with the purchaser, which he sent to the defendant January 27th, and a few days later forwarded a deed for execution. On February 13th, the defendant wired the plaintiff: "Sale off. Telegram offer and sale contract are very different." To which the plaintiff replied by a telegram insisting upon the contract being carried out and upon his right to a commission. It appears that the party who agreed to purchase the land brought a suit against the defendant for specific performance of the contract, but failed to recover because of the lack of authority

of the agent to execute a written contract binding the defendant. It developed on the trial of this case that, a short time before the defendant sent the telegram declaring the transaction off, he had received an offer of \$20,000 for the land. There was no substantial conflict in the evidence. The court found that the only objection the defendant made to completing the contract was that stated in his telegram, and that other grounds urged at the trial were therefore waived. The court found also that the telegram of January 27th fixed the terms of the sale and authorized the purchaser to make settlement with defendant's tenant. There is no ambiguity in the contract embraced in this telegram and the reply thereto, and the court properly determined the meaning of the writings. The fact that the land had been leased to a tenant prior to the date it was listed with the plaintiff was fully known on both sides, and the reply which the defendant sent to the telegram authorized the buyer to settle with the tenant. It is useless to contend that the contract made by defendant's agent did not comply with the original terms upon which the property was listed. The plaintiff found a purchaser who was ready, willing, and able to buy upon the terms which the owner accepted in the subsequent contract, and that is all he was required to do to earn his commission.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 791)

GUARANTY INV. CO. v. GAMBLE et al.
(No. 21431.)

(Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

1. EVIDENCE §441(11) — PAROL — VARYING WRITTEN INDORSEMENT.

A claim by the payee and indorser of certain negotiable promissory notes that it was orally agreed that if she sold the notes for 50 cents on the dollar—which she did—she would never be called on to pay or be held responsible, is a variance from the written indorsement and constitutes no defense.

2. BILLS AND NOTES §469—BILL OF PARTICULARS—CAUSE OF ACTION.

A bill of particulars, setting out such notes with proper allegations to show liability except an averment of notice of dishonor or waiver thereof, states no cause of action against the indorser.

3. BILLS AND NOTES §469—ORAL AGREEMENT—BILL OF PARTICULARS—JUDGMENT.

It was error to render judgment for the plaintiff on such bill of particulars and a statement of the oral agreement referred to in the first paragraph thereof.

Appeal from District Court, Cowley County.

Action by the Guaranty Investment Company against S. A. Gamble, Maude Monsey, and others. Judgment for plaintiff on the pleadings, and defendant Maude Monsey appeals. Reversed and cause remanded.

C. T. Atkinson, of Arkansas City, for appellant. John Parman, of Arkansas City, for appellee.

WEST, J. The plaintiff sued on six promissory notes indorsed by the payee before maturity. The bill of particulars alleged the execution, indorsement before maturity, and the failure to pay when due, setting out copies. On reaching the trial on appeal in the district court, the attorney for the payee stated that when she sold the notes to the plaintiff it was with the express oral agreement that if she sold them at 50 cents on a dollar, which she did, she would never be called upon to pay or ever be held responsible. The plaintiff moved for judgment on the pleadings and statement of counsel, which motion was sustained, and the payee and indorser appeals.

[1] Of course, the alleged oral agreement constituted no defense, being a plain variance from the terms of the written indorsement which bound her upon its dishonor and notice to pay the "amount thereof." Gen. Stat. 1915, § 6593, on Negotiable Instruments Act.

[2, 3] It is contended by the counsel for the plaintiff that the question of want of notice of dishonor was not raised in the court below, but in what is called the abstract and brief of the appealing defendant it is recited that:

"The defendant, Mrs. Maude Monsey, through her lawyer stated that the bill of particulars did not state a cause of action against her for the reason that she was given no notice as required by the statutes of Kansas. * * *"

We have sent for the transcript, and the opening statement therein shown contains no reference to the notice of dishonor or lack thereof.

Section 6617 of the General Statutes of 1915 provides that, when a negotiable instrument has been dishonored by nonpayment, any indorser to whom such notice is not given is discharged.

In the cited case of *Brenner v. Weaver*, 1 Kan. 456, (*488), 83 Am. Dec. 444, the indorsement was in these words: "For value received, I promise to pay the within mentioned money to Hartman & Weaver." This was held to be an absolute undertaking and not a guaranty. The indorsement was not made by the payee but by a third party.

Section 6593 provides that an indorser without qualification warrants that on due presentment the note shall be paid, and then, if it be dishonored "and the necessary proceedings are taken," he will pay.

There is nothing on the face of the note or in the bill of particulars to indicate that notice of nonpayment had ever been given or waived. Hence it was error to enter judgment on the pleadings and statement of the counsel. *Malott v. Jewett*, 1 Kan. App. 14, 41 Pac. 674; 3 R. C. L. 1147, § 362; *Hough*

et al. v. State Bank, 61 Fla. 290, 55 South. 462, Ann. Cas. 1912D, 1200.

The judgment is reversed, and the cause remanded for further proceedings. All the Justices concurring.

(102 Kan. 900)

STATE v. PETERSON. (No. 21692.)

(Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

CRIMINAL LAW §721½(1), 1186(4) — ARGUMENT—APPEAL—REVERSAL.

In an argument to the jury in a criminal action, it is error for the county attorney to refer to the fact that the defendant's wife did not testify; but, before a judgment of conviction will be reversed, it must appear that some substantial right of the defendant was affected by the error.

Appeal from District Court, Douglas County.

Alberry Peterson was convicted of robbery, and he appeals. Affirmed.

Gorrill & Asher and John J. Rilling, all of Lawrence, for appellant. S. M. Brewster, Atty. Gen., and J. B. Wilson, of Lawrence, for the State.

MARSHALL, J. The defendant appeals from a conviction on a charge of robbery. To supply the place of a transcript, the trial court made such a record as is necessary to present the question argued by the defendant. The material parts of that record are as follows:

"In his opening argument to the jury, Mr. J. B. Wilson, county attorney, made, in substance, the following remarks to the jury:

"He has taken the stand himself, and he has brought here his father and mother to testify that he was at home that day. His wife, even, isn't here to testify.

"The attention of the court was called to this remark a few moments after it was made by one of counsel for defendant who approached the bench and stated in a whisper that he desired the remark made a part of the record. The court stenographer was not in the room at the time the argument in question was made.

"The defense in this case was an alibi. The father and mother of the defendant testified that he was at home for supper, and the testimony of two or three other witnesses being that he was in their company or seen by them later in the evening.

"The crime was alleged to have taken place between 8 and 9 o'clock in the evening, and the defendant was alleged to have been at Linwood, Kan., on a freight train, and to have ridden the same to Lawrence, where the alleged crime was testified to have been committed; i. e., that the theft was from the person of a brakeman on said train as it stood on the track at the city. The circumstances of the case were such that the defendant could not have been at home for supper, at the time he claimed to have eaten supper, and at Linwood."

The defendant complains of the conduct of the county attorney, and asks that the judgment be reversed, and that a new trial be granted. Section 215 of the Code of Criminal Procedure (Gen. St. 1915, § 8130), in part, reads:

"That no person on trial or examination, nor wife or husband of such person, shall be required to testify except as a witness on behalf of the person on trial or examination: And further provided, that the neglect or refusal of the person on trial to testify, or of a wife to testify in behalf of her husband, shall not raise any presumption of guilt, nor shall that circumstance be referred to by any attorney prosecuting in the case, nor shall the same be considered by the court or jury before whom the trial takes place."

It has been held error for the county attorney to refer to the fact that the defendant did not testify. State v. Balch, 31 Kan. 465, 2 Pac. 609; City of Topeka v. Myers, 34 Kan. 500, 8 Pac. 726; State v. Tennison, 42 Kan. 330, 22 Pac. 429. By the same reasoning and under the same statute and decisions, it must be, and is, held error for the county attorney to refer to the fact that the defendant's wife did not testify.

Section 293 of the Code of Criminal Procedure (Gen. St. 1915, § 8215) must be read in connection with section 215. Section 293 reads:

"On an appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties."

Under this statute, it has been repeatedly held that to cause a reversal of a judgment in a criminal action, the error committed must affect a substantial right of the defendant. In State v. Brooks, 74 Kan. 175, 85 Pac. 1013, this court said:

"To justify a reviewing court in ordering a new trial in a criminal case because of the infraction of the statutory rule that the omission of the defendant to testify shall not be considered by the jury, it must conclusively appear that the jury or some one of them in arriving at a verdict gave weight to the fact that the defendant did not take the stand in his own behalf, as a circumstance tending to establish his guilt." Paragraph 2, syl.

This rule was followed in State v. Dreiling, 95 Kan. 241, 147 Pac. 1108. In State v. Fleeman, 102 Kan. 670, 171 Pac. 618, this court said:

"The Code of Criminal Procedure was framed to supersede the common law with a more rational system. While it is defective in many respects, and in many others exhibits a conservatism which contrasts strongly with its general liberality, it is distinctly modern. The tradition of the common law, however, was so strong that it came near superseding the Code. In time the Code was rediscovered, and it is the purpose of the court to interpret and apply it according to its true intent and spirit."

Under all the circumstances, it is highly improbable that the verdict of the jury was influenced by the remark of the county attorney. It does not appear that the jury was so influenced, and, therefore, the judgment will not be reversed. State v. Balch, 31 Kan. 465, 2 Pac. 609, City of Topeka v. Myers, 34 Kan. 500, 8 Pac. 726, and State v. Tennison, 42 Kan. 330, 22 Pac. 429, are overruled in so far as they hold that a judgment of conviction must be reversed—notwithstanding that the error does not preju-

dicially affect any substantial right of the defendant—for a mere reference by the county attorney to the fact that the defendant has not testified.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 784)

SCHOOL DIST. NO. 36 OF MONTGOMERY COUNTY v. BOARD OF EDUCATION OF CITY OF INDEPENDENCE. (No. 21420.)

(Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

SCHOOLS AND SCHOOL DISTRICTS §—37(3, 4)—ANNEXATION OF TERRITORY—APPLICATION—NOTICE.

Under section 9129 of the General Statutes of 1915, territory outside a city of the second class but adjacent thereto may be annexed to the city school district on application of a majority of the electors in the territory proposed for annexation; and it is not necessary to exclude from such annexation any particular tract in such territory merely because no person owning or residing thereon joined in the application for annexation; nor is the validity of the proceedings affected by the fact that the school district from which the territory was detached had no notice of the application nor of the resolution annexing it to the city school district.

Appeal from District Court, Montgomery County.

Action by School District No. 36 of Montgomery County, State of Kansas, against the Board of Education of the City of Independence, Kansas. From an order sustaining defendant's demurrer, plaintiff appeals. Affirmed.

J. D. Brown, of Independence, for appellant. S. H. Piper and Walter L. McVey, both of Independence, for appellee.

DAWSON, J. The plaintiff brought this action to annul certain proceedings of the defendant board whereby certain territory adjacent to the city of Independence was annexed to the city school district in 1911. The proceedings were undertaken pursuant to section 9129 of the General Statutes of 1915, which, in part, reads:

"Territory outside the city limits, but adjacent thereto, may be attached to such city for school purposes, upon application to the board of education of such city by a majority of the electors of such adjacent territory; and upon the application being made to the board of education, they shall, if they deem it proper, and to the best interests of the schools of said city and territory seeking to be attached, issue an order attaching such territory to such city for school purposes, and to enter the same upon their journal; and such territory shall from the date of such order be and compose a part of such city for school purposes only, and the taxable property of such adjacent territory shall be subject to taxation, and shall bear its full proportion of all expenses incurred in the erection of school buildings and in maintaining the schools of the city."

Plaintiff's petition, which was filed in March, 1917, set up a copy of the application of a majority of the electors of the territory

adjacent to Independence which was sought to be attached. A copy of the resolution of the defendant board was also attached. It recited that the application had been signed by more than three-fourths of the electors owning property and residing upon the territory affected. The resolution granted the application and changed and enlarged the boundaries of the city school district accordingly. The county superintendent was notified and recorded the change of boundaries. All these matters were completed in September, 1911.

Plaintiff alleged: That defendant's acts were without authority of law. That part of the territory annexed was in Independence township, and part in Drum township; in the latter a quarter section of land was worth \$11,000, and with railroad and pipe line property, etc., located therein worth \$48,000. That no notice of the proposed change of boundaries was given to the plaintiff. (The petition infers, but does not specifically allege, that the land affected by the annexed territory, or the particular quarter section complained of, had theretofore been part of school district No. 36.) The petition alleged:

That the application for the change of boundaries "was not signed or claimed to be signed by any elector or voter or resident or property owner residing within school district No. 36 or within Drum Creek township, Montgomery county, Kan. That no person signing the said petition had any interest, directly or indirectly, in said 160-acre tract or any property located thereon. That each and every person signing the petition resided on territory north of the city of Independence and north of school district No. 5 [the city district], while the said 160-acre tract is located east of the city of Independence and east of school district No. 5."

The prayer of the petition was for a recovery of the taxes collected on the quarter section in question, and for a decree annulling the annexation proceedings. Defendant's demurrer was sustained, and that ruling is here for review.

This mere statement of the cause of action virtually disposes of plaintiff's case. The defendant board had statutory authority to annex the territory. Section 9129, *supra*. The board had power to determine whether the application was sufficiently signed by the persons concerned. *State ex rel. v. City of Atchison*, 92 Kan. 431, 140 Pac. 873, Ann. Cas. 1916B, 500; *State ex rel. v. City of Harper*, 94 Kan. 478, 146 Pac. 1169, Ann. Cas. 1917B, 464; *State ex rel. v. City of Victoria*, 97 Kan. 638, 156 Pac. 705.

The fact that the application was not signed by any person residing on the particular quarter section whose annexation by the defendant so greatly depleted the plaintiff's revenues did not affect the defendant's power to attach that quarter section. The statute does not limit the annexation to the lands of those desiring annexation; a majority is sufficient. So long as the territory proposed for annexation is an integral tract of land

adjacent to the city, it may be lawfully annexed, if a majority of the electors of the territory affected so desire, at the option and discretion of the board of education, and with due regard to the welfare of the schools under the board's control. The statute authorizing annexation does not intimate that the board of education may annex part of the territory which is proposed for annexation and leave out isolated tracts here and there throughout its extent, because the owners may object, or because some such tracts may have no resident electors; nor need the board of education concern itself that the territory to be annexed may lie in different townships or in different school districts. If the latter have any redress, it is by appeal from the proceedings of annexation; and it does not lie in an independent action by the school district begun several years afterwards. The state alone may challenge the proceedings in such an independent action. *Telephone Co. v. Telephone Ass'n*, 94 Kan. 159, syl. par. 1, and pages 162, 163, and citations, 146 Pac. 324, L. R. A. 1916B, 1083. The statute authorizing the annexation makes no provision for notifying a school district of a proposal to detach part of its territory for the purpose of annexing it to a city school district. Probably the law is lame in that respect but its crudeness or inconsiderateness does not necessarily render it void nor vitiate proceedings taken in compliance with its terms.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 842)

ROBINSON v. SMALLEY et ux. (No. 21453.)
(Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF §56(8)—"CONTRACT FOR THE SALE OF AN INCORPOREAL HEREDITAMENT"—CONTRACT TO EXECUTE LEASE.

A contract to execute an oil and gas lease granting the right to explore, and, if mineral be found, to produce and sever, is a "contract for the sale of an incorporeal hereditament," within the meaning of the sixth section of the statute of frauds. Gen. St. 1915, § 4889.

2. FRAUDS, STATUTE OF §74(1)—CONTRACT—WRITING.

A contract by a husband, whereby for a consideration he agrees to procure his wife to sign an oil and gas lease of the character described, need not be in writing to be actionable.

Appeal from District Court, Cowley County.

Action by J. O. Robinson against J. L. Smalley and wife. Judgment for defendants, and plaintiff appeals. Reversed, and cause remanded for trial.

Campbell & Campbell, of Wichita, for appellant. J. E. Torrance and O. W. Torrance, both of Winfield, for appellees.

BURCH, J. The action was one to recover damages for breach of contract. An objection to the introduction of evidence in sup-

port of the petition was sustained, judgment was rendered for the defendants, and the plaintiff appeals.

The defendants are husband and wife. They agreed orally to execute and deliver to the plaintiff an oil and gas lease covering part of their homestead. J. L. Smalley did execute the lease, but his wife declined to do so.

[1] The plaintiff argues that the agreement to make the lease did not relate to an interest in land, but merely gave the right to explore, and, if oil and gas were found, to produce and sever them. It is conceded that the lease authorized an invasion of the homestead for the purpose of prospecting and for the prosecution of oil and gas operations, and would be void without joint consent of husband and wife; but it is insisted no contract for the sale of land, or any interest in land, was made, within the meaning of the statute of frauds, and consequently that an action lies on the oral promise to execute the lease. While the court has held that an oil and gas lease of the kind under consideration does not constitute a conveyance, will not support a mechanic's lien, does not operate as a grant and severance of mineral in place, and creates no estate proper in the land itself, it does create an incorporeal hereditament. A contract for the sale of hereditaments, whether incorporeal or corporeal, is within the sixth section of the statute of frauds. Gen. Stat. 1915, § 4889.

[2] In the petition damages were claimed from J. L. Smalley on another ground. The lease lacked nothing but the wife's signature to make it effective, and it was alleged that J. L. Smalley, for a consideration, contracted to procure his wife's signature to the lease.

The statute of frauds applies to the contract between vendor and vendee. This was not a contract by which Smalley agreed to sell anything, or by which his wife agreed to sell anything, or by which the plaintiff agreed to sell anything. The contract was purely one of employment to produce a stated result, and consequently the statute of frauds has no application. The employment was somewhat analogous to employment of an agent to negotiate a purchase of land. In such a case the court said:

"The contract between the plaintiff and the defendant, constituting the defendant the agent of the plaintiff, was not 'a contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them,' but it was simply a contract making the defendant an agent to negotiate for the purchase of lands, tenements and hereditaments, and interests in and concerning them." *Rose v. Hayden*, 35 Kan. 106, 112, 10 Pac. 554, 558 [57 Am. Rep. 145].

No question of public policy is involved. The wife was competent to bargain respecting her homestead rights, it was perfectly lawful for her to do so, and it was perfectly lawful for her husband to deal with her,

as agent of a prospective purchaser, respecting her homestead rights. Therefore, to the extent indicated, the petition stated a cause of action.

The judgment of the district court is reversed, and the cause is remanded for trial. All the Justices concurring.

(102 Kan. 896)

ROBB v. KNAPP, State Auditor. (No. 21658.)
(Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

STATES 675—STATE TREASURER—FEES.

Section 10 of chapter 291 of the Laws of 1913 (Gen. St. 1915, § 10223) requires the fees received by the state board of chiropractic examiners to be deposited with the state treasurer in his official capacity, and not with him as an agent of the board.

Original mandamus by W. J. Robb against Fred Knapp, as Auditor of State. Writ denied.

Crane, Hayden & Hayden, of Topeka, for plaintiff. S. M. Brewster, Atty. Gen., and S. N. Hawkes and J. L. Hunt, both of Topeka, for defendant.

BURCH, J. The action is one to require the state auditor to issue a warrant for the expenses of a member of the board of chiropractic examiners. The question is whether or not the fund which the warrant would reach is in the hands of the state treasurer as a special depository, or is in his official custody as a state officer. If the fund be a treasury fund, its appropriation by the Legislature has lapsed.

The question presented is to be solved by an interpretation of section 10, chapter 291, of the Laws of 1913 (Gen. Stat. 1915, § 10223), which reads as follows:

"(a) All examination fees received by the state board of chiropractic examiners under this act shall be paid to the secretary-treasurer of said board, who shall at the end of each year deposit the same with the state treasurer, and the said state treasurer shall place said money so received in a special fund of the state board of chiropractic examiners and shall pay the same out on warrants drawn by the auditor of the state thereof, upon vouchers issued and signed by the president and the secretary-treasurer of said board. Said moneys so received and placed in said fund may be used by the state board of chiropractic examiners in defraying their expenses in carrying out the provisions of this act. (b) The secretary-treasurer shall keep a true and accurate account of all funds received and all vouchers issued by the board; and on the first day of December of each year he shall file with the Governor of the state a report of all receipts and disbursements and the proceedings of said board for the fiscal year. (c) The members of said board shall receive a per diem of ten (\$10) dollars per each day during which they shall be actually engaged in the discharge of their duties, and mileage at the rate of three (3) cents per mile for each mile necessarily traveled in going to and from any meeting of said board. (d) Such per diem and mileage and such other incidental expenses necessarily connected with said board shall be

paid out of the fund of the state board of chiropractic examiners and not otherwise."

The plaintiff argues that the state treasurer as an individual was constituted an agent of the board to keep the fund and pay it out under prescribed formalities. The state was to be under no liability for the services and expenses of the board, which was to be supported by the fees which it was authorized to collect. These fees were to be systematically accounted for, were to be kept in a special fund by a custodian designated for the purpose, and were to be available for use whenever needed. The decision in the case of *State v. Stover*, 47 Kan. 119, 27 Pac. 850, is cited, in which a distinction was drawn between the state treasurer and a person holding the office of state treasurer, as the custodian of public money.

The auditor draws opposite conclusions from the same premises. If the individual who happens to be state treasurer were custodian of the fund, there would be no purpose in designating it a special fund. The only purpose of such designation is to distinguish the fund from other funds in the treasury. The method of drawing upon the fund is the usual method of getting money out of the treasury. Use of the term, "state treasurer," in connection with public business indicates a state official rather than a board agent, and the Legislature of 1913 frequently used the designation, "state treasurer," or "treasurer of state," where official capacity and conduct were clearly intended. In the case cited by the plaintiff it was said that money in the possession of the person who was treasurer of state was rightfully in his hands as state treasurer, and consequently was rightfully in the state treasury.

The auditor presents a question of public policy. The money is public money, received and paid out for public purposes. It ought to be secured by official bond, and handled as funds of like character which are required to go into the treasury. Without clear expression to the contrary, an intention to establish an unusual practice, fraught with danger and subject to abuse, ought not to be imputed to the Legislature.

The court agrees with the state auditor, and the writ is denied. All the Justices concurring, except WEST, J., who did not sit.

(102 Kan. 785)

ATCHISON, T. & S. F. RY. CO. v. YOUNG
et al. (No. 21469.)

(Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

1. CARRIERS 630 — SCHEDULE OF FREIGHT RATES—EFFECT.

A schedule of freight rates duly filed and published by a railroad company, and not disapproved by the interstate commerce commission, has the force of a statute, binding alike on shipper and carrier.

2. CARRIERS —30 — ACTION TO RECOVER FREIGHT UNDERCHARGE—EVIDENCE.

In an action to recover the amount of undercharges for freight shipments, computed according to schedule in force governing the subject, it is error for the court to receive and consider proof that the commodities shipped were not classified in the schedule according to correct principles.

Appeal from District Court, Reno County.

Action by the Atchison, Topeka & Santa Fé Railway Company against W. S. Young and H. W. Young, partners, etc. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions to enter judgment for plaintiff.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, for appellant. Warren White, of Hutchinson, for appellees.

BURCH, J. The action was one to recover the amount of undercharges for freight on two mixed carloads of commodities known as "digester tankage" and "meat scraps." The defendant recovered, and the plaintiff appeals.

The following facts were agreed to:

"(5) That the published tariffs and classifications of the plaintiff company, duly filed with the interstate commerce commission and in force and effect at the times of the aforesaid shipments, do not specifically list the commodity 'meat scraps' by such name under any item of any classification.

"(6) That there was in force and effect at the time the cars mentioned in plaintiff's petition moved, western classification No. 52 and certain tariffs all of which had been filed with the interstate commerce commission and the provisions of these classifications and tariffs so far as they related to the shipments in question are as follows:

"The tariffs provided for a charge of 40 cents per hundredweight on fourth-class matter, and for a charge of 12 cents per hundredweight on shipments in carload lots of matter rated as class E.

"Western classification No. 52 was in effect and provided on page 209, item 12, as follows:

"Packing House Products.

"Digester Tankage, Blood Meal, Meat Meal, and Blood Flour:

In bags, barrels or boxes, L. C. L. 4
In packages named, straight or mixed C. L.,
Min. Wt. 30,000 lbs. E

"If this provision is applicable to the shipment in question, then the freight charges originally collected are correct, and the plaintiff cannot recover.

"(7) Said classification No. 52, item 11, page 73, was as follows:

"Animal and Poultry Foods and Medicines.

"Animal and Poultry Foods, Not Otherwise Indexed by Name. Tonics and Regulators, Dry, Prepared:

Invoice value not exceeding 10 cents per pound and so receipted for, in bags, barrels, boxes or pails, min. C. L. wt. 30,000 lbs. 4. B
Invoice value exceeding 10 cents per pound or value not stated, in bags, barrels, boxes or pails. 1

"Item No. 14 on the same page is as follows: "Poultry Food:

"Poultry Food:

"Ground Meat, dried, Ground Bone, Alfalfa Meal, Cut Clover, Grain, whole or cracked, Grain Screenings, Millet Screenings, Crushed Shells, Grit and Charcoal:

In bags, L. C. L. 4
In bags, C. L. Min. Wt. 30,000 lbs. B

"If either of these items are applicable to the shipment in question, then the freight charges originally collected were insufficient, and the plaintiff is entitled to recover the difference between the two rates, being the amount prayed for in plaintiff's petition."

Proof was offered and received indicating that the common packing-house product known to the trade as "meat meal" is identical with the product which Swift & Co. manufacture and sell under the name of "meat scraps." Meat meal and meat scraps are used to feed hogs and poultry, and there are coarse and fine grades of each. There was no evidence to the contrary, and the court directed the verdict.

[1] On one side it is said that bulk, weight, value, risk, and like factors, furnish the true basis for freight classifications; that a mere difference in trade-name of the same commodity does not authorize a difference in freight rates; and that, because the commodity known as meat scraps is in fact identical with the commodity known as meat meal, both are governed by the meat meal item of the schedule. On the other side, it is said that a tariff schedule, duly filed and published, has the force of a statute. If ambiguous, the court may interpret it; but when its meaning is ascertained it operates as law, which the court must apply as any other law. Meat meal is indexed by name. Animal and poultry foods not otherwise indexed by name are governed by a different rate. Meat scraps are nowhere mentioned, and consequently fall within the provisions relating to animal and poultry foods not indexed by name.

The plaintiff is right in its contention that a tariff has the force of a statute, binding alike on shipper and carrier. Penna. R. Co. v. International Coal Co., 230 U. S. 184, 197, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315. There is no ambiguity in the tariff under consideration. When the name "meat scraps" originated does not appear. It cannot be assumed that the commodity meat scraps was not listed by that name because it was already listed under a different name, "meat meal." In the case of Andrews Soap Co. v. P., C. & St. L. Ry. Co., 4 Interst. Com. Com'n, 41, it was said:

"A manufacturer's description of an article to induce its purchase by the public also describes it for transportation, and carriers may accept his description for purposes of classification and rates. Carriers are not required to analyze freight to ascertain whether it is in fact inferior to the description or public representations under which it is sold, in order to give it a lower rate corresponding to its actual value." Par. 1.

[2] Conceding that the defendants are right about what constitutes the proper basis for freight classifications, and that the identity of meat meal and meat scraps may afford good ground for modification of the tariff, the facts warranting modification must be ascertained, and the modification made by the only tribunal having jurisdiction of the subject, the interstate commerce commission. Tariffs must be uniform, and cannot be enforced in terms, or not enforced in terms, according to the divergent views of different juries, based on testimony more or less illuminating, of witnesses more or less interested and informed. It is true that in this instance the testimony was all one way, but the court was not authorized to receive it. So long as the tariff stands, with the approval of the only body competent to change it, the courts can do nothing but enforce it.

The judgment of the district court is reversed, and the cause is remanded, with direction to enter judgment for the plaintiff. All the Justices concurring.

(102 Kan. 871)

BUXTON v. COLVER. (No. 21466.)

(Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

1. **BROKERS** \S 7, 88(2) — **CONTRACT—CORRESPONDENCE—QUESTION FOR JURY.**

Correspondence between a landowner and a broker by letters and telegrams relating to finding a purchaser for land and to the commission to be paid is held to constitute a binding contract between them, and the interpretation of such a contract is a question of law for the court.

2. **EVIDENCE** \S 442(4) — **PAROL EVIDENCE—BROKER'S CONTRACT.**

The contract, being complete and unambiguous, and having provided for the payment of a specified commission if a purchaser of land was procured by the broker on stipulated terms without any limitations as to the person to whom the sale might be made, must be regarded as a complete expression of the entire agreement as to commission, and it cannot be contradicted, added to, or modified by parol evidence of a prior oral agreement to the effect that no commission was to be paid if a sale was made to a particular person.

Appeal from District Court, Edwards County.

Action by A. E. Buxton against C. B. D. Colver. Judgment for plaintiff, and defendant appeals. Affirmed.

M. A. Merten and W. E. Broadie, both of Kinsley, for appellant. A. L. Moffat, of Kinsley, for appellee.

JOHNSTON, C. J. This was an action to recover a real estate agent's commission. Plaintiff alleged that the defendant made a written contract authorizing the plaintiff to sell certain real estate owned by defendant, and the following letter from the defendant to the plaintiff under date of October 6,

1916, was set forth as constituting that contract:

"In reply to yours of the 5th asking if I would sell the W. $\frac{1}{2}$ of Sec. 4 25 21 for \$47.50 per acre. $\frac{1}{2}$ cash, balance five years at 7 per cent and allow you the regular commission. I cannot let this land go for less than \$50.00 per acre and this price is subject to prior sale or change without notice. * * * P. S. This \$50.00 price is of course subject to the regular commission of 5 per cent on the first \$1000.00 and 2 $\frac{1}{2}$ on the balance."

Plaintiff alleged that by this contract defendant agreed that if plaintiff should be in any manner instrumental in selling the property or producing a buyer at the price named; defendant would pay plaintiff the commission mentioned. Plaintiff further alleged that he accepted the proposition of defendant, and that in pursuance of the contract so made he sold the land on October 27, 1916, to Jacob Konradi at \$50 per acre, and immediately sent defendant the following telegram:

"Have sold your west half section 4 25 21 Ford county. * * * you to furnish abstract showing good merchantable title and pay me regular commission as stated in your correspondence. Wire acceptance immediately."

The defendant then sent the following telegram on October 27th:

"Your offer accepted send me contract for execution."

A contract of sale was prepared by plaintiff, signed by Konradi, and sent to defendant, who, together with his wife, signed it and returned it to the plaintiff for delivery to the purchaser, who is and always has been ready and willing to pay for the land according to the contract. Plaintiff asked a recovery of \$425 claimed as commission, with interest.

In the answer of the defendant, as finally amended, he admitted the correspondence and the execution of the contract already mentioned, but he alleged that the land had been listed with plaintiff at \$50 per acre some time in 1915, and that before the correspondence was had and about July, 1916, the parties made an oral agreement that plaintiff was to receive no commission if the land was sold to Jacob Konradi, as the latter had been dealing directly with the defendant, and that the letters and telegrams mentioned "were only for the purpose of inducing the defendant to sell for a less price, of reiterating the terms of the original listing, and of clearing up any possible uncertainties and misunderstandings." The court upon motion of the plaintiff struck out the averments as to a prior oral agreement, and upon a stipulation between the parties to the effect that the written correspondence was correctly set out in the plaintiff's petition, that the contract executed between defendant and Konradi attached to the petition had been procured through the efforts of plaintiff, and, further, that no commission had

ever been paid, the court excluded testimony of prior negotiations, and gave judgment for plaintiff, from which defendant appeals.

[1, 2] The contention of the defendant is that the writings constituted but a part of the contract between them, and were not conclusive upon him, and therefore he should have been allowed to show the earlier oral negotiations and agreements. A binding contract may be made by the interchange of letters and telegrams, and the interpretation of such contract is a question of law for the court. *Shear Co. v. Thompson*, 80 Kan. 467, 102 Pac. 848. The contract involved here is complete and unambiguous, and there being no claim that it was induced by deceit, it is as conclusive upon the parties as if it had been reduced to a single writing in the most solemn form. It must be regarded as a complete expression of the entire agreement and as embodying all prior agreements and understandings only. To allow it to be altered, added to, or modified would be to substitute a new contract for the one deliberately made by the parties. *Rose v. Lanyon*, 68 Kan. 126, 74 Pac. 625; *Shear Co. v. Thompson*, 80 Kan. 467, 102 Pac. 848; *Mill & Elevator Co. v. Saunders*, 96 Kan. 459, 152 Pac. 622. The subject of procuring a purchaser and the commission to be paid if one was found was included in and became a part of the written agreement, and all prior negotiations and understandings relating to the commission must be deemed to be merged in that agreement. According to the agreement the commission was to be paid when a purchaser was procured, regardless of the person procured. By its terms the only limitation upon the plaintiff was to find a purchaser for the land at the price fixed, namely, \$50 per acre, and when a purchaser was found ready to take the land at that price the commission was earned. No limitation was made as to the field or class from which a purchaser might be taken, and to add an exception that a commission should not be paid if the land was sold to a particular person would directly conflict with a written stipulation. The defendant insists that the written contract is evidently only a part of the agreement of the parties, and he complains that he was not permitted to show that the writing was only a partial statement of the prior parol agreements. The writings import on their face to be a complete expression of the whole agreement. It has been said that:

"The writing cannot be proved to be incomplete by going outside and proving that there was an oral stipulation entered into and not contained in the written agreement, nor can parol evidence be admitted to prove a contemporaneous agreement that a written instrument which appears upon its face to be duly executed, intelligible, unambiguous, reasonable, and complete, should be considered only as the basis or outline of a contract to be subsequently filled out with stipulations other than those contained in the writing." 17 Cyc. 716, 717.

Defendant appears to have proceeded for a time upon the theory that he was bound by the written agreement. When defendant was informed that a purchaser had been found, and that he was to pay a stipulated commission, he signed a contract in which Konradi was named as the purchaser. He closed the transaction, knowing to whom the sale had been made, and knowing also that the regular commission was required of him. In a way he recognized his liability to pay a commission by executing a contract of sale after he had discovered that Konradi was the purchaser, and that a commission was demanded.

However, he was clearly bound by the terms of the written contract, and therefore the judgment is affirmed. All the Justices concurring.

(102 Kan. 868)

LYON COUNTY STATE BANK v. SCHAEFER. (No. 21465.)

(Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

1. EVIDENCE \S 426, 441(15) — PAROL EVIDENCE — NATURE AND CONDITION OF DEPOSIT.

Between the original parties—the nominal drawer of a dishonored sight draft, the party for whose benefit the draft was drawn and deposited in a bank for collection, and the bank which honored the checks of such depositor drawn in anticipation of the draft being collected—parol evidence was competent in an action by the bank against the depositor to show the relationship of the parties and the nature and conditions of the deposit.

2. BANKS AND BANKING \S 126—DEPOSITS—CHARGE AGAINST DEPOSITOR—RECOVERY.

Ordinarily, when a bank gives credit to a depositor on the faith of a sight draft deposited to his account and when such sight draft is dishonored, the bank may charge back to the depositor the amount of the dishonored draft; and, if his bona fide deposit account is insufficient to meet it and he refuses to reimburse the bank, the latter may recover judgment against him for the sum involved in the transaction.

Appeal from District Court, Lyon County.

Action by the Lyon County State Bank against George Schaefer. Judgment for plaintiff, and defendant appeals. Affirmed.

S. S. Spencer & Richardson, both of Emporia, for appellant. Samuel & Hartley, of Emporia, for appellee.

DAWSON, J. This lawsuit is to determine a liability on a sight draft which was not paid.

The Lyon County Farmers' Produce Association is a voluntary organization designed to bring together the producers and consumers of agricultural products, for which service the association charges a small commission. Anton Ptacek is its manager. The defendant, George Schaefer, is a producer of hay. Through arrangements made by the association, Schaefer shipped a consignment of

hay to a man in Iowa. He gave the bill of lading to Ptacek, who drew a sight draft on the consignee payable to the plaintiff bank, and the bank forwarded the bill of lading with the draft attached for collection. The bank placed the face amount of the draft (less the association's commission) to the credit of Schaefer, and he checked it out. The draft was dishonored, and Schaefer declined to reimburse the bank.

The trial court made findings of fact and rendered judgment for the bank. The findings read:

"First. On or about April 4, 1915, one Anton Ptacek left with the plaintiff for collection four sight drafts with bill of lading attached, representing separate shipments of hay the proceeds to be credited to defendant by said bank, except a small commission to be credited to Ptacek.

"Second. One of said drafts was for \$139.57. This draft was sent to the Kansas City, Mo., correspondent of plaintiff, and on April 7th it received notice from its correspondent that it had been credited with said amount, subject to collection, and said amount was credited by plaintiff, subject to collections as follows: \$136.22 to defendant's account, and \$2.35 as commission to the account of Ptacek.

"Third. Said draft was drawn on one Huddleson, of Fontanelle, Iowa.

"Fourth. Before a report was had by plaintiff on the collection of said draft, defendant came to plaintiff bank and asked that he be permitted to check against the proceeds as he was in need of funds, and was given such permission on agreement between defendant and bank that, in case said draft was not honored, defendant's account was to be charged with the amount and that defendant would reimburse plaintiff. The exact date of this transaction is not ascertainable from the evidence.

"Fifth. At a later date and about April 20, 1915, defendant came to said bank with a postal card advising defendant that said hay had been rejected, and asked Dr. Price, president of the plaintiff bank, what he should do about the matter, and said Price informed defendant that plaintiff had not been advised whether said draft had been paid, but if same were dishonored the amount would be charged to defendant's account in case collection was not made, and defendant agreed that this should be done.

"Sixth. All of said drafts were collected and passed to defendant's account on the books of said bank, except the Huddleson draft, which was dishonored, and plaintiff was unable to make collection of any part thereof.

"Seventh. Defendant overdraw his account with said bank in the sum of \$136.22, under the arrangement as hereinbefore set out in these findings. Afterward in another transaction said account of defendant was credited with \$2.29, leaving a balance due and owing plaintiff from defendant of \$133.93."

[1, 2] Defendant's principal contention on appeal is that there was no competent evidence to support the second finding. The court discerns no difficulty on that point. Ptacek, the man who delivered the draft to the bank, was defendant's agent in so doing; and he told the bank what disposition to make of it. This evidence was competent. *McWhirt v. McKee*, 6 Kan. 412, Syl. ¶ 1; *Lovejoy v. Citizens' Bank*, 23 Kan. 331, Syl. ¶ 2; *Ellicott, Assignee, v. Barnes*, 31 Kan. 170, Syl. ¶ 2, 1 Pac. 767; *Talcott v. National Bank*, 53 Kan. 480, 36 Pac. 1066, 24 L. R. A.

737; *Hough v. First Nat. Bank*, 173 Iowa, 48, 155 N. W. 163; *Branch v. Dawson*, 36 Minn. 193, 30 N. W. 545; 7 *Corpus Juris*, 639.

Furthermore, there was competent evidence showing that Schaefer asked and received permission from the bank to check against the draft deposit before the bank had received the returns on it, and this was upon Schaefer's agreement that if the draft was dishonored he would "make it all right." While Schaefer denies this, this court cannot do otherwise than to accept as true the trial court's determination of that disputed fact. *Brulington v. Wagoner*, 100 Kan. 439, 164 Pac. 1057. Even if there was no literal agreement between the bank and Schaefer to "make it all right," the law would infer such an agreement and impose such a liability on Schaefer. The general rule appears to be that, where the interests of innocent third parties are not affected, a bank has the right to charge back a dishonored draft which has been credited to a depositor's account as cash. Credit extended to a depositor in anticipation of collection of a draft is ordinarily deemed provisional, and the bank may cancel the credit or charge back the paper to the depositor's account, if it is not paid. *Prescott v. Leonard*, 32 Kan. 142, 4 Pac. 172; *Noble v. Doughten*, 72 Kan. 336, 345, 346, 83 Pac. 1048, 3 L. R. A. (N. S.) 1167; *City of Philadelphia v. Eckels (C. C.)* 98 Fed. 485; *First National Bank v. McMillan*, 15 Ga. App. 319, 83 S. E. 149; *Ayres v. Farmers' & Merchants' Bank*, 79 Mo. 421, 49 Am. Rep. 235; *Hendley v. Globe Refinery Co.*, 106 Mo. App. 20, 79 S. W. 1163; *Jacob v. First National Bank*, 5 Ohio Dec. 572; *Rapp v. National Bank*, 136 Pa. 426, 20 Atl. 508; 7 *Corpus Juris*, 633.

Counsel presents a line of argument based on the assumption that the obligation to reimburse the bank was on Ptacek, and not on Schaefer, and that Schaefer's promise to "make it all right" was an unenforceable oral promise to answer for Ptacek's debt. But between the original parties, Schaefer, Ptacek, and the bank, there was no debt, no liability, on the part of Ptacek. The mere form of the draft was not important. The true relationship of the parties was a proper subject of judicial inquiry. 3 R. C. L. 1122, 1123. Ptacek, or Ptacek's produce association, was only the nominal drawer of the draft; it was drawn in Schaefer's behalf, and he received the benefits of it from the bank. Gen. Stat. 1915, § 6588; 3 R. C. L. 1140. It was to "make it all right" on a transaction of his own, not Ptacek's, that Schaefer made the promise.

Aside from the brief of his counsel, the defendant addresses a personal letter to the court urging matters which a Supreme Court has no right to consider. Doubtless, the defendant did not understand that the case we have to review is the one which was tried by the district court, and that we have no

authority to make an independent investigation of the matter. But we can only examine the record which the appellant has brought to this court. It is only with alleged errors made in the trial court that the Supreme Court has to deal, and no error made by the trial court in this case is shown in the record.

Consequently, the judgment must be affirmed, and it is so ordered. All the Justices concurring.

(102 Kan. 757)

CONROY v. GRAND LODGE OF BROTHERHOOD OF RAILROAD TRAINMEN. (No. 21355.)

(Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

1. INSURANCE §805(1) — MUTUAL BENEFIT ASSOCIATION — SUBMISSION OF CLAIM TO TRIBUNAL.

It is competent for a mutual benefit association to require that claims against it upon its certificates shall be submitted in the first instance to a tribunal designated by it, and that the remedy so provided shall be exhausted before recourse is had to the courts.

2. INSURANCE §817(2) — MUTUAL BENEFIT ASSOCIATION—DELINQUENCY IN PAYMENTS—OFFER OF PAYMENT.

In order for a member of a mutual benefit association, who, according to the terms of his certificate, has lost his rights thereunder by a failure to make a payment of dues at the time specified, to avoid such forfeiture by reason of a reliance upon an established practice of accepting delinquent payments within a definite period after the default, he must show an offer to make payment within the limit as so extended.

3. INSURANCE §755(4) — MUTUAL BENEFIT ASSOCIATION—DELINQUENCY—OFFER TO PAY DUES.

Where, notwithstanding a written rule that a loss of membership in a mutual benefit association results automatically from the failure to pay dues before the 1st of the month, a practice has been established of accepting them if offered before the 6th, the entry on the records that the expulsion of a member has resulted from his failure to make payment, followed by a notice given him to that effect, between the 2d and the 5th, does not excuse an omission on his part to offer the money before the 6th, if he is to rely upon the extension of time growing out of the practice.

4. INSURANCE §755(1) — MUTUAL BENEFIT ASSOCIATION—ACTION ON CERTIFICATE—DEFENSE.

Where the expulsion of a member of a mutual benefit association has resulted from his failure to pay his December dues within the prescribed time, and proper entries of the fact have been made upon the records, the association is not precluded from relying upon such expulsion as a defense to a claim made by him, by the unintentional error of a general officer in referring to the expulsion as having taken place in October, in a letter denying liability on account thereof.

Appeal from District Court, Crawford County.

Action by Richard J. Conroy against the Grand Lodge of the Brotherhood of Railroad Trainmen. Judgment for defendant, and plaintiff appeals. Affirmed.

John P. Curran, C. S. Denison, and J. L. Kirkpatrick, all of Pittsburg, for appellant. B. S. Gaitskill, of Girard, for appellee.

MASON, J. Richard J. Conroy brought an action against the Grand Lodge of the Brotherhood of Railroad Trainmen, alleging that on January 24, 1915, while a member of that organization, he received an injury which entitled him to the payment of \$1,500, according to the terms of a beneficiary certificate held by him. A trial was had without a jury. Judgment was rendered for the defendant, and the plaintiff appeals.

No special findings were made or asked. The language of the judgment shows that special reliance was placed upon the fact that the claim was based upon injuries of a character that made the defendant's obligation qualified rather than absolute, but because of the general finding against the plaintiff any conflicts in the evidence must be resolved in favor of the defendant. There is little controversy, however, over the facts.

The rights of the holder of a certificate issued by the defendant are defined by its Constitution. It provides that upon proof being furnished that a member has received an injury of a certain kind, described as constituting total and permanent disability, such as the loss of a hand or foot, or of both eyes, he shall be paid the amount named in his certificate. Such an injury as that suffered by the plaintiff, however, is provided for in what is designated as section 70, reading as follows:

"All claims for disability not coming within the provision of section 68 shall be held to be addressed to the systematic benevolence of the Brotherhood, and shall in no case be made the basis of any legal liability on the part of the Brotherhood. Every such claim shall be referred to the beneficiary board, composed of the president, assistant to the president and general secretary and treasurer, who shall prescribe the character and decide as to the sufficiency of the proofs to be furnished by the claimant, and if approved by said board, the claimant shall be paid an amount equal to the full amount of the certificate held by him, and such payment shall be considered a surrender and cancellation of such certificate, provided that the approval of said board shall be required as a condition precedent to the right of any such claimant to benefits hereunder and it is agreed that this section may be pleaded in bar of any suit or action at law, or in equity, which may be commenced in any court to enforce the payment of any such claims. No appeal shall be allowed from the action of said board in any case; but the general secretary and treasurer shall report all disapproved claims under this section to the board of insurance at its next annual meeting for such disposition as such board of insurance shall deem just and proper."

The Constitution also contains these provisions, which may have some bearing on the case:

"All right of action upon beneficiary certificates shall be absolutely barred, unless proofs of death or total and permanent disability shall be forwarded to general secretary and treasurer,

as hereinafter required, within 6 months after such death or disability occurs."

"A member desiring to present a claim under section 70 shall petition his lodge in writing upon the form provided by the general secretary and treasurer; said form must be properly executed by the claimant, and a regular practicing physician or surgeon, showing the condition of the brother and the basis of his claim. If approved by the lodge, the secretary shall forthwith forward them with notice of such approval to the general secretary and treasurer, who will at once forward to the lodge the necessary blanks and instructions for presenting a claim."

"No suit or action at law or equity shall ever be commenced upon any beneficiary certificate by any claimant until after such claimant by appeal has exhausted all remedies provided for in this Constitution, within the time allowed by this Constitution."

"Payment of death and total and permanent disability claims and claims addressed to the systematic benevolence of the Brotherhood, shall be made from the proceeds of the beneficiary assessments on which such claims appear."

[1] 1. Assuming that the allowance and payment of meritorious claims under section 70 is obligatory and not merely optional, it is clear that the intention is to require the claimant to submit his demand in the first instance at least, to the tribunal there provided. Whether or not any part of the rules quoted may be objectionable as an effort to oust courts of their jurisdiction, it is competent for the association to compel its members to exhaust the remedies which it has provided before having recourse to litigation. 19 R. C. L. 1226-1228; Supreme Lodge v. Raymond, 57 Kan. 647, 47 Pac. 533, 49 L. R. A. 373. The defendant asserts that the plaintiff is precluded from recovery by the fact that he never presented his claim as required by the rules quoted. To this he responds that on November 6, 1915, his attorneys wrote a letter, demanding payment of his claim, to the defendant's general secretary and treasurer, who sent an answer saying:

"I find that Mr. Conroy was formerly a member of our organization, belonging to Lodge No. 41 at Clinton, Ill.; however, he was expelled by that lodge on October 1, 1914, consequently as he is no longer a member of the Brotherhood, the organization would not be liable for any injury sustained by him."

The plaintiff contends that this answer excuses his omission to comply with the rules, and amounts to a waiver of all defenses excepting that specifically referred to. The defendant responds that the officer who wrote the letter had no authority to waive its rights—that such is the law of Ohio, and that the contract by its terms is to be interpreted according to the laws of that state. Out of the rather extensive field of issues thus presented we select for consideration the one most closely related to the substantial rights of the parties—the question whether the plaintiff was a member of the order at the time of his injury.

[2] 2. Dues were required to be paid monthly in advance, before the 1st day of each month. The failure to make payment

within the time stated automatically effected an expulsion. The plaintiff joined the order in April, 1914. His dues for the following December were not paid. A meeting of the local lodge to which he belonged was held on the evening of December 2d, and at that time an entry was made in the record of the proceedings reading: "Treasurer's report of expelled members. The following members were reported expelled: R. J. Conroy." Obviously the purpose of this was not to show the plaintiff's expulsion by action of the lodge, but to make a formal record of the fact that his membership had been terminated by his failure to pay his dues. On December 4th he received a notice, dated December 2d, stating that he had been expelled. On December 14th his sister, who had been attending to his payments, sent the amount of his December dues to the lodge treasurer, but it was refused. No application for his reinstatement was made. As already mentioned, the injury occurred January 24, 1915. On July 13, 1915, the plaintiff, according to his testimony, mailed a letter to the general secretary and treasurer, stating that his attorney had told him he had not been expelled, and that he was entitled to his money for his disability, and asking for blanks to use in making out his claim. The defendant's evidence is that no such letter was received. The only other correspondence on the subject was that already referred to—the letter of November 6th and its answer.

The plaintiff's failure to pay his dues for December, within the time prescribed, worked a forfeiture of his membership, according to the terms of his contract. To avoid this effect he relies upon the establishment of a practice on the part of the defendant of accepting payments after the expiration of the period fixed by the Constitution. The scope of the general rule in that regard, and its limitations, are indicated in the following statement of it, a clause having especial bearing upon the present situation being here italicized:

"Where a mutual benefit association has, in repeated instances, received from a member the payment of overdue assessments, so as to establish a custom or course of dealing between the parties and lead the member to believe that a strict observance of a requirement as to the time of payment is not required, it is held that the certificate of insurance is not forfeited by failure to pay an assessment at the time when the by-laws of the society or a stipulation in the certificate requires it to be paid, *provided it is paid within the customary period of extension of the time of payment*, for the association is estopped by its course of conduct from claiming a forfeiture according to the strict letter of its contract."

"But to invoke the doctrine of estoppel under such circumstances, the course of conduct must amount to an actual custom and not consist of occasional acts of indulgence on the part of the association. And it must be shown that the delinquent member had notice of the practice and relied thereon." 19 R. C. L. 1274, 1275.

There was evidence that the collector of the local lodge was in the habit of receiving dues

after the time fixed, but only within a definite period. He testified:

"Our pay day falls on the 1st, but the dues are supposed to be paid before, but I always accept money between the 1st and the 5th, because I have five days of grace to send this money away."

There is no evidence of any practice of receiving dues after the 5th. Another witness gave this testimony:

"I worked with the financier three or four years, I expect, and have taken as many as a dozen or fifteen dues between the 1st and the 5th."

The plaintiff's sister, who had made all the payments in his behalf, testified:

"I always paid the dues for my brother about the 1st of each month. I never paid them after the 2d or 3d of the month."

A practice of the collecting officer to accept past-due payments, which are offered before the making up and transmission of his report, cannot be regarded as affecting an indefinite extension of the time of payment. Here no tender of the plaintiff's December dues was made before the 15th. No practice of receiving dues at that date was shown to exist, whether known to the plaintiff or not, and we hold that the belated offer was not sufficient to continue his membership in force.

[3] 3. If action by the lodge had been necessary to bring about the expulsion of the plaintiff, and had been taken on the 2d, it might be regarded as ineffective because contrary to the custom which had been established. But no such action was necessary or was in fact taken. If the local officers had been offered the money necessary to keep the plaintiff in good standing before they had made a report—while the record was still within their control—they might have accepted it "nunc pro tunc," and amended the entries accordingly. The mere making of an entry showing such a noncompliance with the rules as in itself by the written law worked a forfeiture, although it may have been tentative and subject to recall if compliance should be made within the period of grace allowed by usage, is not tantamount to affirmative action attempting an expulsion in violation of an established custom. No connection whatever is shown between the notification to the plaintiff that he had been expelled, and the delay on the part of his sister in sending the money for his December dues.

[4] 4. Assuming that the duties of the general secretary and treasurer were of a character to make the defendant fully responsible for his letter above quoted, and that its statements are such as to cut off all defenses except that based upon the plaintiff's loss of membership, we think it would be extending the principle of waiver too far to hold that because the letter stated that the plaintiff had been expelled on October 1st, the association could not rely upon an expulsion which took place December 1st. The situation is quite different from that presented in *Mayes v. Knights and Ladies of Security*, 92 Kan. 841, 142 Pac.

290. There dues were required to be paid before the last of each month. No payments were made in June or July, 1909, but the dues for June, July, and August were all offered at once, and accepted. In the litigation which followed the association asserted that this payment was not made until September 4th, but the claimant contended and the court found that it was made on August 31st. The death of the member occurred September 8th. In response to a claim against the association its president wrote a letter denying liability on grounds which were thus stated:

"The assessment and dues of Mrs. Mayes, which were due on the 1st day of August, and which she had until midnight of the last day of August to pay, were not paid to the financier of Free Silver Council No. 198 until September 4th. Consequently, the deceased was suspended for nonpayment of the August assessment and dues from midnight of August 31st until September 4, 1909. * * * We are in possession of evidence that cannot be questioned showing that the deceased was seriously ill on September 4, 1909. * * * Consequently, no reinstatement could possibly have been had on the date that payment was made by the sister of the deceased, which was September 4, 1909, owing to the physical condition of the deceased when the attempt was made to reinstate her." 92 Kan. 843, 844, 142 Pac. 291.

It was held that the defense was limited to the controversy over the August dues; the court saying:

"With the knowledge of the facts, as we must presume, and as implied in his letter, the president of the association placed its refusal to pay the certificate distinctly upon the alleged failure to make the August payment, without making any objection or claim because the other payments were made without producing a health certificate, thereby apparently adopting the act of the financier in receiving the June and July payments." 92 Kan. 845, 142 Pac. 292.

"When the demand for the allowance of the claim was made upon the association it could insist upon, or waive, any forfeiture or forfeitures claimed. It elected to rely only upon the forfeiture claimed by reason of the delay in the August payment, thereby waiving any others it might have claimed." 92 Kan. 846, 142 Pac. 292.

In the present case the writer of the letter testified that the word "October" was used in place of "December" through a mere clerical error, the records showing the latter date. The plaintiff knew that his expulsion was for the nonpayment of dues; that he had paid his October dues, and had not paid those for December; the records of his lodge showed the grounds of his expulsion, and doubtless the notice sent him did also, although it was not produced in evidence. The defendant's secretary did not elect to rely upon the effect of one of several delayed payments. There was no controversy or question with respect to any dues other than those for December. The mere unintentional error in indicating the month of the plaintiff's default is not a just basis for imposing upon the defendant a liability to one who had ceased to be a member of the order.

The judgment is affirmed. All the Justices concurring.

(102 Kan. 447, 844)

STAHL v. STEVENSON et al. (No. 21236.)

(Supreme Court of Kansas. Feb. 9, 1918. On Petition for Rehearing, April 6, 1918.)

*(Syllabus by the Court.)***1. FRAUDS, STATUTE OF §75 — "CONTRACT FOR SALE OF INTEREST IN LANDS"—PROMISE TO DEVISE LAND.**

A promise of an ancestor that he will at his death leave to an heir presumptive the share of his estate to which such heir, in the event of his then dying intestate, would be entitled under the statutes of descents and distributions, is not a contract for the sale of an interest in lands within the meaning of the statute of frauds, notwithstanding the ownership of real estate by the ancestor when the promise was made and at the time of his death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contract of Sale.]

2. FRAUDS, STATUTE OF §44(1) — "AGREEMENT NOT TO BE PERFORMED WITHIN A YEAR"—PROMISE TO DEVISE LAND.

Such a contract is not one that is not to be performed within a year, within the meaning of the statute of frauds.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Perform.]

3. SPECIFIC PERFORMANCE §49(2) — WILLS §59 — CONTRACT TO DEVISE — CONSIDERATION—ENFORCEMENT.

The holder of a life insurance policy in which his wife, who had since died, was named as beneficiary, desired to collect its surrender value, and for this purpose was required by the insurance company to obtain a release from her heirs. To induce the daughter of a deceased son to sign such release he promised that, if she would do so, she should receive at his death one-third of his estate, which was the share she would have inherited had he then died intestate. She accepted the proposition and signed the release. He died leaving a will, which had been executed before the transactions referred to, giving the entire estate to others. *Held*, in an action by the granddaughter of the testator against the beneficiaries under the will to recover a third of the estate, that whether or not the plaintiff's signature was necessary to give her grandfather a valid claim against the company for the whole value of the policy, her affixing it to the release at his request was a sufficient consideration to support a contract, and notwithstanding that any possible interest she had in the insurance policy was trivial in comparison with the value of the property she claimed, it cannot be said (in view of the fact that what her grandfather promised her was what she would have received had he made no will, and that her controversy is not with him, but with those whose claims are based on her disinheritance) that a court of equity should refuse to enforce the contract as against good conscience.

4. APPEAL AND ERROR §1050(1)—EXCLUSION OF EVIDENCE—REVERSAL.

Rejected evidence *held* not to have been of sufficient importance to warrant a reversal, assuming that it should have been admitted.

*On Petition for Rehearing.***5. FRAUDS, STATUTE OF §71—CONTRACT FOR SALE OF LANDS—APPLICATION.**

The provision of the statute of frauds (Gen. St. 1915, § 4889) requiring written evidence of a contract "for the sale of lands * * * or any interest in or concerning them" does not apply to all contracts which in any way concern lands.

6. ADHERENCE TO FORMER RULING.

The former ruling refusing to reverse the judgment on account of the admission of evidence adhered to.

7. TRUSTS §63½, 63¾—STATUTE OF FRAUDS — CONSTRUCTIVE TRUST — TRUSTS IN REAL PROPERTY.

Where an ancestor for a valuable consideration orally promises that a descendant shall at his death receive the share of his estate indicated by the statute of descents and distributions, but dies leaving all his property to others by will, a court of equity may grant relief by impressing a trust upon the property in the hands of the beneficiaries of the will, which trust must be regarded as arising by implication of law, and therefore as not within the operation of the statute forbidding the creation of express trusts in real property otherwise than by writing.

8. WILLS §88(5)—CONTRACT TO MAKE WILL — EXECUTION—VALIDITY.

A contract by which the obligor undertakes to make provision at his death for the obligee, although no present title to any property passes is not required in order to be valid to be executed in accordance with the statute relating to wills.

Appeal from District Court, Reno County.

Action by Gladys Price Stahl against James Henry Stevenson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

F. L. Martin, Van M. Martin, and C. M. Williams, all of Hutchinson, and L. S. Ferry, T. F. Doran, and M. F. Cosgrove, all of Topeka, for appellants. A. C. Malloy and F. Dumont Smith, both of Hutchinson, for appellee.

MASON, J. John R. Price died on February 24, 1913, at the age of 82, leaving a will dated July 21, 1910, by which a life interest in all his property was given to his two daughters, Jane Price Stevenson and Cordelia Price Stevenson, and the fee to the children of one of them. Gladys Price Stahl, the only surviving child of a deceased son of the testator, brought an action against the beneficiaries to recover one-third of the estate, on the ground that in 1912 her grandfather had promised that she should have it; the promise being founded upon a valuable and sufficient consideration. She recovered a judgment, from which the defendants appeal.

[1] 1. The promise referred to was not in writing, and the defendants urge that it is rendered unenforceable by the clause of the statute of frauds requiring written evidence of contracts for the sale of lands, or any interest therein. Gen. Stat. 1915, § 4889. A contract to devise specific real estate, or to leave by will specific property, a part of which is real estate, is within this provision of the statute. *Nelson v. Schoonover*, 89 Kan. 388, 391, 131 Pac. 147, and notes therein referred to; *Brownie on Statute of Frauds*, § 263; 20 Cyc. 235. The text last cited concludes with the statement:

"However, an oral agreement that part of one's property shall go to the promisee, which does not specify what property or its nature, will support an action."

Five cases are appended in a note, but in none of them is a decision reached which is directly in point. In the first one the contract involved was that of a father to give to a daughter (at once, and not by will) such a sum as would place her on equal footing with his other children; it was held to be too indefinite for enforcement, but a dictum was added to the effect that the agreement was not one for the conveyance of real estate. *Adams v. Adams*, 26 Ala. 272. The second case (*Lee v. Carter*, 52 Ind. 342) involved a promise to devise a tract of land. It turned upon part performance; the statute of frauds discussed was that relating to contracts not to be performed within a year; and the opinion was qualified by a later decision. *Wallace v. Long*, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222. In the third case the agreement was in writing, but was said to have been enforceable if it had been oral. *Sutton v. Hayden*, 62 Mo. 101. In the fourth an oral contract for mutual wills was upheld on the ground that the promisor sought to be charged had only personal property, no real estate, at the time of her death. *Turnipseed v. Sirrine*, 57 S. C. 559, 35 S. E. 757, 76 Am. St. Rep. 580. In the fifth case it was said that the question whether the parol contract involved was one for a sale of land did not arise. *Quinn v. Quinn*, 5 S. D. 328, 334, 58 N. W. 808, 810 (49 Am. St. Rep. 875). The plaintiff was the adopted son of a testator, and claimed a share of the estate under an agreement that he was to inherit a just and full part of it. The court used this language, which shows a situation quite analogous to that here presented: .

"The plaintiff does not seek to establish his right to inherit the estate of said Quinn, or his portion thereof, by a parol contract, but to show that Quinn had agreed not to deprive him of his rights as heir under the order of the court; not that Quinn should convey or will property to him, but that he would not deprive the plaintiff of his right as heir under the legal proceedings. The contract therefore set out in plaintiff's complaint is not one relating to the sale of land, or of an interest therein, in the sense that such a contract is used in the statute."

Two additional cases are cited in the Permanent Volume Annotations to Cyc. for 1901-1913. But in one of them the promisor had no real estate either when he made the agreement or at the time of his death (*Hull v. Thoms*, 82 Conn. 647, 74 Atl. 925), and in the other the decision turned upon part performance (*Dalby v. Maxfield*, 244 Ill. 214, 91 N. E. 420, 135 Am. St. Rep. 312).

It seems to this court that there is just ground for a distinction, with respect to the applicability of the statute of frauds, between an agreement by the owner of real estate to devise it to a particular person, and an agreement that at his death he will leave to such person a certain proportion of his estate, of whatever it may happen to consist. The former necessarily has to do with the transfer of realty; the latter has no necessary connection with any specific property.

The circumstance that when the promise is made the promisor happens to own some real estate, to which no reference is made, does not seem a suitable test of the enforceability of the contract; and the question whether or not his assets, which may have been continually shifted from one form to another, chance to include some realty at the time of his death, appears to furnish even a less satisfactory criterion. But perhaps that matter in its general aspect need not be determined, because of the special features of this particular case. At the time John R. Price is found to have made the agreement sued upon his sole heirs presumptive were his two daughters and the plaintiff, each of whom would have received in the event of his death intestate one-third of his estate. The agreement of the plaintiff's grandfather was essentially negative. His promise was not necessarily that he would make a will in her favor, but that he would not disinherit her, or reduce the proportion of the estate to which she would be entitled as an heir; that her interest to that extent should be protected in any will he might make. We do not regard this as a contract for the sale of an interest in lands within the meaning of the statute of frauds, notwithstanding the ownership of real estate by the grandfather both at the time of making the promise and at the time of his death. No specific property was within the contemplation of the parties. The agreement was quite analogous, so far as relates to the statute of frauds, to a promise to include in a will a legacy for a fixed sum, or for an amount equal to a fixed proportion of the estate. If her grandfather had made a will ordering the sale of the property and the payment to the plaintiff of one-third of the proceeds in excess of his indebtedness and the expenses of administration, that might have been regarded a substantial compliance with the contract. While the action is for the recovery of a third of the specific property left by the plaintiff's grandfather, that results from an incidental, and not an essential, feature of the arrangement. Upon these considerations we conclude that the agreement relied upon was not one for the sale of an interest in lands, and was not within the part of the statute of frauds relating thereto.

[2] 2. A contract of the character here involved is not an "agreement that is not to be performed within the space of one year from the making thereof," within the meaning of that phrase as used in the statute of frauds. 20 Cyc. 201; note 4 Ann. Cases, 174. By the death of the plaintiff's grandfather within a year it might have been fully performed within that time; there was no stipulation to the contrary; and that clause of the statute does not apply. *A. T. & S. F. R. Co. v. English*, 38 Kan. 110, 117, 16 Pac. 82.

3. The defendants assert that the evidence does not support the finding that the contract relied upon was made. There was evidence

tending to show these facts: John R. Price had a life insurance policy issued in 1873, in which his wife, Margaret J. Price, was named as beneficiary. The policy appears to have been lost. The wife of the insured having died, he wished to obtain the surrender value, \$2,142.40. The insurance company was not willing to make payment without the authorization of all the heirs of Margaret J. Price. A release was prepared, acknowledging the receipt of the amount, and authorizing it to be paid to John R. Price. The signing of this instrument by the plaintiff is the consideration relied upon by her for the promise sued upon. Her mother testified that John R. Price said to her:

"You tell her [the plaintiff] to sign this paper; it isn't very much. You tell her to sign it, and she will have her third of everything I have, just the same as if her father was living. She will get her father's share; you tell her so."

The witness added that he said this over and over; that "it was on condition that she would sign the paper." The plaintiff testified that this was communicated to her, and that she signed the paper because of her grandfather's promise. There was other evidence bearing on the matter, but we regard this as sufficient to uphold the finding that the contract was made.

[3] 4. The defendants urge that the consideration was insufficient. We regard it as legally capable of forming the basis of a contract. The plaintiff was under no obligation to sign the instrument, and whatever the actual rights of the insured may have been as against the company, and whether or not the plaintiff had any interest whatever in the policy or its proceeds, her signature enabled him to realize upon it without controversy or litigation, and an agreement to pay for the accommodation was not rendered nonenforceable by the want of a valid consideration. The situation in this regard is analogous to that presented where an act which one is under a legal obligation to perform is made a sufficient consideration for an agreement by the existence of a controversy on the subject. *Odrowski v. Swift & Co.*, 99 Kan. 163, 162 Pac. 268. The defendants question the existence of any evidence that a claim was made by the insurance company that John R. Price was not entitled to the money. There was evidence that he asserted that the policy was payable to him when he attained the age of 80 years, and the company conceded that this would be true when he was 85; that the policy was lost, and the company had no copy of it or other evidence of its contents, and refused to pay it without the execution of the release. We think this sufficiently shows the existence of a dispute as to the rights of the parties under the policy. The trial court, in a statement of the reasons for the decision, referred to the requirement of the company as calling for a release by the heirs of the insured. This is criticized on the ground that the requirement was for a release by the heirs of the

person named as beneficiary. The inaccuracy does not appear to be important. The same persons were indicated, whichever phrase was used. It was admitted that John R. Price conceded that it would be easier to get a release from them than to have any further controversy about it. The exact contents of the policy are not established, and the actual legal rights of the parties are therefore uncertain.

A more serious attack upon the consideration, however, concerns its adequacy to support an action in the nature of one for the specific performance of the contract. The defendants invoke the rule that the granting of specific performance lies to a considerable extent in the discretion of the court, and argue that it would be inequitable to allow a recovery here, because thereby the plaintiff would obtain a third interest in an estate said to be worth \$50,000, in consideration of her having signed a relinquishment to a claim amounting in all to but little over \$2,000, in which she had no more than a one-sixth interest, if she had any. Stated in this way, the disproportion between what the plaintiff parted with and what she seeks to recover in return for it seems very striking. But against this several considerations are to be noted. The act of the plaintiff in signing the release presumably gave her grandfather the immediate possession of the entire amount, which may have been a matter of great importance to him. And what he promised her in return was not to give her any part of the property which he then possessed, but to see that at his death she should receive one-third of his then estate, which might be of equal or greater value, but which also might be very much less. Moreover, the share promised her was just what the law would have given her had he then died intestate, and what in all probability she would some time receive unless he should see fit to disinherit her or diminish by will the share which would come to her, in case of his intestacy. The evidence indicated that there had previously been something of an estrangement between the plaintiff and her grandfather, and the arrangement entered into between them had something of the aspect of a reconciliation. In view of the circumstances and the relations of the parties, we do not think it can be said that the agreement between them was unconscionable, and that a court of equity on that account should refuse to enforce it.

Nor can the contract be regarded as an unjust infringement on the rights of the defendants. Until the death of John R. Price they had no interest in the property. Anything they should collectively receive in excess of two-thirds of the estate would be in virtue of his favoritism towards them. There was no inequity towards them in his agreeing that the plaintiff should receive the part of the estate which would come to her by operation of law unless he should prevent it by affirm-

ative action, however insignificant may have been the personal benefit which he received in return for such agreement.

In the Kansas case most strongly relied upon as authority for refusing the enforcement of this contract it is said:

"While inadequacy of price is not sufficient of itself to avoid a decree for performance, it is a circumstance which will be taken into consideration with all the facts in determining whether a court of equity is called upon to afford relief. * * * The doctrine is well established that before a court of equity will enforce performance of a contract of this kind it must appear to have been fairly entered into without any sort of advantage or imposition—must, in other words, appeal to the conscience of the court and compel its discretion." *Shoop v. Burnside*, 78 Kan. 871, 876, 877, 98 Pac. 202, 204.

We do not discover anything in the facts of the present case that suggests overreaching or imposition. The proposition on which the contract was based according to the evidence came from the plaintiff's grandfather, and was urged upon her somewhat strongly. She appears to have been entirely ignorant as to what rights she might have in the policy, and so far as the record shows may have been equally ignorant as to what the value of her grandfather's estate might be. She had no previous connection with the matter, and was under no obligation with respect to it. In these respects the situation is obviously very different from that presented in *Kelley v. Caplice*, 23 Kan. 474, 33 Am. Rep. 179, and *Caplice v. Kelley*, 27 Kan. 359, where one who has sold an insurance policy was denied the benefit of an unconscionable bargain she had driven by refusing to sign a release necessary to the effectiveness of the sale, until she had been promised a large part of the proceeds of the policy for so doing. We approve the ruling of the trial court allowing the enforcement of the plaintiff's contract.

[4] 4. Several of the defendants offered to testify that John R. Price had made statements to him to the effect that he had given the plaintiff's father so much financial aid that he felt under no obligation to provide for her in his will. The offer was rejected by reason of the statute relating to testimony concerning transactions with persons since deceased. Gen. Stat. 1915, § 7222. Complaint is made of the ruling on the ground that the plaintiff by introducing portions of depositions of the witnesses had waived the objection. We do not discover that the evidence introduced by the plaintiff bore upon the transactions covered by the rejected testimony. In a subsequent brief it is suggested that the evidence of one of the witnesses covered statements made to another person, and should have been admitted on this ground. That feature of the matter does not appear to have been presented to the trial court, and therefore is not available here. It is contended that as to one of the witnesses the statutory rule did not apply, because, although made a defendant, his only interest

in the matter arose from his being the husband of one of the devisees. That in itself, is not a disqualification. *Cadwalader v. Pyle*, 96 Kan. 337, 148 Pac. 655. However, the court stated that the testimony would be admitted if the witness would disclaim interest, and he declined to do so, saying that the offer was made in behalf of the other defendants, not of himself. Assuming that the evidence should have been received, we do not think it of sufficient importance to justify a reversal. The affidavit of the witness which was presented at the new trial contained a statement that John R. Price had promised his daughters to leave all his property to them in consideration of services they had rendered in caring for him. It is contended that this should have been received as showing a contractual right to the property. That was not an issue in the case, not having been pleaded. The daughters of the testator after his death obtained a decree to certain real estate, on the ground that he had promised it to them, but the claim that they had been promised the entire property was not made in the answer. The affidavit also set out that John R. Price had complained of ill treatment by the plaintiff and her mother, and stated that he had lost money through her father, and for this reason, and because her mother had plenty of money and would naturally provide for her, he was going to leave what little he had left to his two daughters and the children of one of them. This may have had some bearing on the attitude of her grandfather toward the plaintiff. But the fact that he had said that he had lost money through her father was brought out by other witnesses, and his will recited that on account of what he had done for her theretofore he did not consider that she had any further claim upon his bounty. In view of this, the rejected evidence does not appear sufficiently vital to require the setting aside of the judgment.

The judgment is affirmed. All the Justices concurring.

On Petition for Rehearing.

In this case it was decided that an agreement by the plaintiff's grandfather, based upon a valuable consideration, that she should receive at his death the share of his estate which she would inherit should he die intestate, is not brought within the statute of frauds by the circumstance that he died owning real property. In a petition for a rehearing various matters are urged which we regard as warranting further discussion.

[5] 1. Counsel for the petitioners contend that this court has erred in its construction of the provision of the statute of frauds which forbids the enforcement, without a writing signed by the party to be charged, of "any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them." Gen. Stat. 1915, § 4880.

Their contention is that this should be interpreted as though it read:

"No action shall be brought whereby to charge a party upon any contract for the sale of lands, tenements, or hereditaments, upon any contract for any interest in lands, tenements or hereditaments or upon any contract concerning lands, tenements or hereditaments."

We do not accept this view, although language is used in *Becker v. Mason*, 30 Kan. 697, 2 Pac. 850, tending to support it. The statute does not apply to all contracts which in any way concern real estate. For instance, it does not apply to certain boundary agreements, although they concern lands. *Steinhilber v. Holmes*, 68 Kan. 607, 75 Pac. 1019. It does not apply to contracts employing an agent to buy or sell realty. 29 A. & E. Encyc. of Law, 892. The distinction is discussed in *Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145, and the rule announced in that case is applied in *Robinson v. Smalley*, 171 Pac. 1155, decided by this court at the present session. However, this question is not controlling here. The word "sale" is doubtless broad enough to cover any agreement by which the passing of any interest in real estate is to be accomplished. A promise to devise a specific tract of land is within the statute. This case was decided upon the theory that the contract involved did not necessarily concern real estate; that at the time it was made it was possible that it might be fully carried out without the passing of title to any realty whatever. Our judgment was and is that that view is in accordance with reason, and not out of harmony with the effect generally given to the statute of frauds, although expressions and decisions to the contrary may be found. In *Renz v. Drury*, 57 Kan. 84, 45 Pac. 71, the enforcement of a contract to make a foster child an heir was denied upon the ground that it was within the statute, but the point that the acquisition of no specific property was involved was not touched upon in the briefs or opinion, the court merely following *Baldwin v. Squier*, 31 Kan. 283, 1 Pac. 591, where the agreement was to devise a specific tract of land.

[8] 2. In the original opinion one reason given for not reversing the judgment on account of the exclusion of certain evidence was that it was not within the pleadings. It is now suggested that in ejectment any defense may be made under a general denial. The action was not ejectment. Comment is made upon the statement in the opinion that "the action is for the recovery of a third of the specific property." This was not intended to mean that the action was a possessory one—for the recovery of the possession of specific property, and we do not regard it as fairly open to that interpretation. Moreover, even in ejectment, where a defendant elects to set out specifically the facts on which he relies, his pleading is governed by the same rules as in other actions. *Wicks v. Smith*, 18 Kan. 508. Another reason why

a reversal should not be ordered by reason of the rejection of evidence of a claim by the defendants based upon a contract with the grandfather is that the questions asked of the witness did not suggest any inquiry into that subject, and during the trial no offer of proof appears to have been made relating thereto. Time was taken to put in writing what was intended to be proved by the witness, but neither the abstract nor the transcript shows that any such statement was presented to the court until the motion for a new trial was heard. The rule requiring the presentation of excluded evidence at the hearing of that motion does not excuse the offer of proof at the trial. *Jones v. City of Kingman*, 101 Kan. 625, 168 Pac. 1099. We should be reluctant to allow the final disposition of the case to turn upon any technical rule of practice, but we are impressed with the belief that the evidence in question was not vital. As mentioned in the original opinion, the court offered to permit the witness to testify if he would disclaim interest. But, while it was stated that he had no interest and claimed none, no disclaimer was made. This course does not indicate that the defendants themselves attached great importance to the testimony.

[7] 3. The defendants assert that upon the theory adopted by the court the plaintiff's remedy lay in an action for damages for breach of the contract. There is a well-recognized power in a court of equity to give relief in such cases. The equitable proceeding is sometimes spoken of as one for specific performance, but, where verbal accuracy is aimed at, it is described as one for relief analogous to specific performance, "by fastening a trust on the property in the hands of heirs" and others. 36 Cyc. 735, 736. The defendants insist that, regarded in this light, the action must fail because the plaintiff is compelled to rely upon an express trust in real estate created without a writing, which is rendered void by the statute (Gen. Stat. 1915, § 11674), and a case is cited which seems to adopt that view. *Dicken v. McKinley*, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471. It is our judgment, however, that the trust relied upon by the plaintiff arises by implication of law. No interest in the property then owned by the plaintiff's grandfather was created by their agreement, and no trust then arose with respect to any of that property. He might have given away or lost all the property he then had without a violation of his contract. But when he died leaving a will giving to others everything he owned at the time of his death, equity was empowered to impress a trust upon it for her benefit, as a means of giving her relief to which she is entitled in good conscience—a trust which we regard as resulting by implication of law from the conduct of the testator and the relation of the other claimants to the property.

"Express trusts are those which are created by the direct and positive acts of the parties, by some writing, or deed, or will, or by words either expressly or impliedly evincing an intention to create a trust."

"Implied trusts are those which, without being expressed, are deducible from the nature of the transaction as matters of intent, or which are superinduced upon the transaction by operation of law as matters of equity, independently of the particular intention of the parties. Express and implied trusts therefore differ chiefly in that express trusts are created by the acts of the parties, while implied trusts are raised by operation of law, either to carry out a presumed intention of the parties or to satisfy the demands of justice or protect against fraud." 39 Cyc. 24, 25.

[§] 4. A final contention of the appellants is that a contract of the plaintiff with her grandfather that she was to receive a third of the property he owned at his death would be testamentary in character and unenforceable, because not executed in accordance with the statute in relation to wills. In support of this are cited *Hazleton v. Reed*, 46 Kan. 73, 26 Pac. 450, 26 Am. St. Rep. 86, and other like cases, holding that an instrument undertaking to become effective as a conveyance of title at the death of the grantor is testamentary, and not contractual, and therefore is revocable. We do not regard that principle as applicable here. If a will were formally executed devising property in accordance with a contract between the testator and the devisee, the will would be revocable as a will, but the contractual rights of the beneficiary would not thereby be abrogated. Here there was no attempt to vest title to specific property in the plaintiff at the time of her grandfather's death, but an undertaking on his part so to adjust his affairs that she should receive a third of his estate. The title which it was contemplated the plaintiff should receive was not to be created directly by the contract, but by her grandfather's will, or by the statute of descents and distributions in case of his intestacy. The contract in this aspect does not appear to be substantially different from others by which the obliger undertakes that provision shall be made at his death for the obligee. Such agreements are not required to be executed as wills. *Winne v. Winne*, 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647; *In re McIntosh's Estate*, 159 N. W. (Iowa) 223; *White v. Winchester*, 124 Md. 518, 92 Atl. 1057, Ann. Cas. 1916D, 1156.

The petition for a rehearing is denied. All the Justices concurring.

(88 Or. 322)

PALMER v. WILLAMETTE VALLEY SOUTHERN RY. CO.

(Supreme Court of Oregon. April 9, 1918.)

1. CARRIERS ⇌ 247(2) — PASSENGERS — "INTENDING PASSENGER."

A person places himself in the position of an intending passenger when he goes upon the

carrier's premises with the bona fide intention of becoming a passenger, and awaits the train at a proper place, in a proper manner, within a reasonable time before the arrival of such train.

2. CARRIERS ⇌ 265 — PASSENGERS — DUTIES.

Among the duties owing from the carrier to intending passengers is the duty to stop all trains, scheduled to stop, at designated places.

3. CARRIERS ⇌ 265 — PASSENGERS — ENTERING TRAIN.

Where a carrier has stopped its train at a regular station, it is incumbent upon it to keep the cars standing for such time as was reasonably necessary to enable intending passengers, acting with reasonable diligence, to board the train, but the carrier need not wait for any belated person.

4. CARRIERS ⇌ 265 — PASSENGERS — ENTERING TRAIN.

While waiting at the depot a standing train serves as an invitation to all intending passengers to board it, and the invitation carries with it an assurance that the passenger may board the train in safety, but starting the train ordinarily operates as a withdrawal of the invitation.

5. CARRIERS ⇌ 247(1) — PASSENGERS — LEAVING GROUNDS.

It is not the rule that once a passenger always a passenger, but a passenger who leaves the carrier's grounds, even temporarily, loses his status as such.

6. CARRIERS ⇌ 247(1) — PASSENGERS — LEAVING GROUNDS.

Where an intending passenger, having reached the station, left it to talk to a person on a county road near by, his status as an intending passenger was at least suspended.

7. CARRIERS ⇌ 265 — STOPPING TRAINS — UNUSUAL STOPS.

The mere fact that the carrier had occasionally stopped its train at a road crossing 135 feet from the regular station did not make such crossing a stopping place.

8. CARRIERS ⇌ 265 — RECEIVING PASSENGERS — PLACES.

A carrier is not bound to receive passengers otherwise than at places provided for that purpose.

9. CARRIERS ⇌ 247(3) — "PASSENGERS" — SIGNALING CAR TO STOP.

The mere act of an intending passenger in signaling the motorman on an electric train at a road crossing 135 feet from the regular stop did not make him a passenger.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Passenger.]

10. CARRIERS ⇌ 247(3) — "PASSENGERS" — SIGNALING CAR TO STOP.

Where plaintiff, intending to board a train, went to the station, and, when the train came in, desiring to speak to some one 100 feet away, asked the conductor to wait a minute, which the conductor conditionally agreed to do, and the train started, and plaintiff signaled the motorman, the mere fact that the motorman nodded his head did not make plaintiff a passenger, so as to warrant recovery for injuries in attempting to board the moving cars.

Department 1. Appeal from Circuit Court, Clackamas County; J. U. Campbell, Judge.

Action by Lionel C. Palmer, a minor, by Charles Palmer, as guardian ad litem, against the Willamette Valley Southern Railway Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Acting through his guardian ad litem, Lionel C. Palmer, a minor about 16 years of age, sued the defendant for damages resulting from a serious injury received by him on July 11, 1916, while attempting to board a moving train. The plaintiff was non-suited, and then appealed.

The Willamette Valley Southern Railway Company owns and operates an electric railway line between Oregon City and Mt. Angel. The line runs through the town of Molalla, where a depot is maintained, and continues in a southwesterly direction to and past a station called Ogle, located about 2½ miles from Molalla. The plaintiff lived with his parents near Ogle, but he attended high school in Molalla, and when school closed he worked in a garage conducted by O. K. Cole in Molalla. He generally traveled on the electric train when going from his home to Molalla or when returning to his home after school was out or at the end of his day's work. He had boarded the train "half a dozen times or more" at Ogle while the train was in motion, and he had alighted from the train "many times without it stopping." On these occasions, when he boarded or alighted from a moving car, the train was going between 2 and 4 miles an hour. He "felt it was all right to get on the cars when they were moving * * * when the conductor told me it was all right." However, the plaintiff had boarded the train while in motion "once or twice" before the conductor told him "it was all right." On one occasion when the train was approaching Ogle the conductor asked the plaintiff whether he could "get off without stopping." The plaintiff answered, "I guess so;" and the conductor said, "All right then;" and so the plaintiff "stepped off." However, before the plaintiff stepped off the conductor said: "When you step off be sure to step with the train. It is safe to step off the train if you step the way the train is going, but if you step away from it, and step out, you are more apt to get hurt. Step with it and it is all right." The plaintiff stated that he thought on the different occasions when he boarded or alighted from the train while in motion "it was going between 2 and 4 miles an hour"; and he also testified that on each of such occasions the train was in charge of the same motorman who had charge of it on July 11th, and that, although he never knew the name of the motorman, he "was acquainted with him by sight." The motorman had seen the plaintiff going to and from school, when he walked, and the motorman "always waved his hand when he passed."

The railway track proceeds in a southerly direction past the depot in Molalla, and crosses a county road which runs east and west. As it leaves the depot, the track describes a slight curve, and does not again straighten out into a tangent until after crossing the county road. The travel along

the county road follows the center line, and a sidewalk about 5 feet in width is laid along the north line of the right of way of the highway. The sidewalk crosses a ditch or trench which adjoins and parallels the track for a distance of probably 20 or 30 feet. It is 135 feet from the depot to the sidewalk, and 20 feet from the sidewalk to the center of the highway. Edwin Woodworth testified that on one occasion a south-bound train stopped at the road crossing to permit him and a companion to board the train. The plaintiff's father said that he had seen the train stop two different times "for people to get off and on." The plaintiff testified that he had seen the train stop at the crossing "not less than three times" and take on passengers.

A few minutes after 8 p. m. on June 11, 1916, the plaintiff went to the depot at Molalla with the intention of riding as a passenger on the train to Ogle. The south-bound train was about half an hour late. The plaintiff did not purchase a ticket because there was no agent at the depot, but he had money with which to pay his fare. He had been in charge of the garage that day during the absence of Cole, his employer, and had taken in about \$10. The plaintiff wanted to deliver this money to his employer, and after arriving at the depot the plaintiff went to the county road and watched for Cole. He saw Cole coming in an automobile along the road from the west toward the railroad crossing, and upon looking north "down the track" saw the train approaching the depot. The plaintiff testified that Cole and the train—"were both coming at the same rate of speed and about the same distance from the station, and so I waved to him. I waited until he got close, and signaled to him to stop. * * * He just came over the track when the car came, and I went back and the car was just coming in. The brakeman had not stepped down yet, but when the car stopped he stepped down, and I went up to him and tapped him on the shoulder, and * * * he looked around, and I said, 'Will you wait for me just a minute?' 'Yes,' he said, 'If you don't make your minute too long.' So I went back to the county road * * * ran there. I had the money in my hand, and handed it to Mr. Cole, and told him I would keep ten cents to pay my way, and then I whirled, and * * * when I turned and started back they (the cars) were moving and coming towards me."

When he turned around the train was "over half way" to the sidewalk, and he stated that he "went fast" back to the sidewalk, waved his hand at the motorman as a signal that he intended to board, and when he reached the sidewalk he saw that the front of the train was "eight, ten, or probably fifteen feet" from him, and so he stopped on the sidewalk. Referring to the motorman, the plaintiff testified: "I saw him when he came up close by me. He nodded at me as though he knew me." When the plaintiff stopped on the sidewalk the train was "going three, four, or probably five miles an

hour at the fastest." The plaintiff had a small dinner pail on one arm, and when the rear of the first car came to him the plaintiff "took hold of the upright handles" on each side of the door, and just as he "took hold" the train gave "an awful jerk, twice as hard as it had ever jerked before," breaking his hold and throwing him between the cars. He explained that he did not get his feet on the steps when he "took hold, * * * because it was going faster than I expected it to be going, and it threw me under." Referring to the speed of the train, the plaintiff said as the front end of the first car passed him the train was "going the same rate as it was coming" when he stopped on the sidewalk; that he did not detect any "slowing up of the speed" when the front end of the first car passed him; and that it did not appear to be gaining in speed until, as he expressed it, "Just as soon as I took hold it took a jerk and I knew it was gaining speed." When speaking of the speed at which the train was usually run from the depot to the county road, two witnesses said it was "comparatively slow," another witness described it as "rather slow," and the plaintiff estimated it at "four or five miles per hour." The plaintiff says that when the front end of the first car passed him the train was going at the rate of 4 or 5 miles per hour; he alleges in his complaint that at and immediately prior to the time he attempted to board the train the speed of the train was suddenly increased, "so that said cars were moving at a dangerous rate of speed, of 8 or 10 miles per hour"; and he testified that at the time he attempted to board the car it was "then running from 8 to 10 miles per hour," although he thought when he "took hold" that the train was going at the same rate of speed as it was when the "front end passed him."

Leroy Lomax, of Portland, for appellant. O. D. Eby, of Oregon City, Frank J. Loneragan, of Portland, on the brief, for respondent.

HARRIS, J. (after stating the facts as above). The plaintiff must necessarily fail unless the defendant violated some duty owing to him and thus caused the injury. The plaintiff insists that he occupied the position of a passenger, and that it was a question for the jury to determine whether his attempt to board the train was an act of negligence causing or contributing to the injury. The defendant contends that the plaintiff was properly nonsuited because (1) he did not possess the rights of a passenger when he attempted to board the train; and (2) even though he be treated as a passenger, nevertheless his attempt to board a moving train was negligence per se.

[1-3] Stating the rule in general terms, it may be said that a person places himself in the position of an intending passenger when

he enters upon a carrier's premises with the bona fide intention of becoming a passenger, and awaits the arrival of his train at a proper place, in a proper manner, and within a reasonable time, before the arrival of such train. *Du Bose v. Atlantic Coast Line R. R. Co.*, 81 S. C. 271, 62 S. E. 255; *Abbot v. Railroad Co.*, 46 Or. 549, 561, 80 Pac. 1012, 1 L. R. A. (N. S.) 851, 114 Am. St. Rep. 885, 7 Ann. Cas. 961; 10 C. J. 613. It may be assumed, therefore, that the plaintiff acquired the rights of an intending passenger when he went to the depot for the purpose of taking the train to Ogle. The carrier had provided a depot and grounds beside the track where intending passengers could await the arrival of trains or board them upon their arrival; and so long as the plaintiff was at or in the depot, or on the grounds which the carrier had provided for passengers, he was entitled to the care due to intending passengers. Among the duties owing from the carrier to intending passengers is the duty to stop all trains, scheduled to stop, at designated places, and therefore it became the duty of defendant to stop its train at the usual stopping place in Molalla; and having stopped its train it was incumbent upon the carrier to keep the cars standing for such time as was reasonably necessary to enable intending passengers, in the exercise of reasonable diligence on their part, to board the train. However, after having waited a reasonable time for intending passengers to board the train, a carrier is not, as a general rule, obliged to wait longer for any belated person. *Mitchell v. Augusta & A. R. Co.*, 87 S. C. 375, 69 S. E. 664, 31 L. R. A. (N. S.) 442. The plaintiff does not claim the train was not stopped sufficiently long to enable intending passengers who were at the depot to board the train, and consequently it must be assumed that the carrier stopped the train at the depot long enough to permit intending passengers, in the exercise of reasonable diligence, to get aboard.

The plaintiff argues that the carrier agreed to wait for him "a minute" if he did not make the minute "too long." According to the testimony of the plaintiff, he could have delivered the money to Cole and returned to the depot, where the train was standing, within 18 or 20 seconds from the time he spoke to the brakeman, and hence it will be assumed that the carrier did not wait as long as the brakeman said he would wait. It must be remembered that there is no evidence to show that the brakeman or any member of the crew knew why the plaintiff wished the brakeman to wait, or what he wished to do, or where he wished to go, or that he had gone anywhere. It will be recalled, too, that the track leaves the depot on a curve, and while there is no evidence to show the degree of the curve, or whether a person standing on the depot platform could have seen the plaintiff when at the county

road, it does appear from the evidence that, although the plaintiff was on the same side of the track as the depot, he was on the outer, and not on the inner, side of the curve.

[4] While waiting at the depot a standing train serves as an invitation to all intending passengers to board it, and the invitation carries with it an assurance that the passenger may board the train in safety. *Jones v. New York Central & H. R. R. Co.*, 156 N. Y. 187, 50 N. E. 858, 41 L. R. A. 490. But starting the train ordinarily operates as a withdrawal of the invitation. *Tompkins v. Portland Ry. L. & P. Co.*, 77 Or. 174, 179, 150 Pac. 758; *Chaffee v. Old Colony R. R. Co.*, 17 R. I. 658, 24 Atl. 141; 2 *White on Personal Injuries on Railroads*, § 783. When therefore defendant started its train from the depot it withdrew its invitation to board the train. There is an irreconcilable conflict between the authorities upon the question as to whether it is negligence as a matter of law for an intending passenger to board a moving train. In some jurisdictions it is held that it is negligence per se to attempt to board a moving train, while in other jurisdictions it is a question for the jury, unless the speed was so great as to make the attempt obviously dangerous. The presence or absence of an invitation or direction given by a member of the train crew to the intending passenger to board a moving train, and the presence or absence of knowledge or consent upon the part of the carrier, are frequently important, and sometimes controlling, factors, and oftentimes the failure of the train to stop a reasonable time is a material element. 5 R. C. L. 36; *Hunter v. Cooperstown & S. V. R. Co.*, 112 N. Y. 371, 19 N. E. 820, 2 L. R. A. 832, 8 Am. St. Rep. 752; *K. & G. S. L. Ry. Co. v. Dorough*, 72 Tex. 108, 10 S. W. 711; *Distler v. Long Island R. Co.*, 151 N. Y. 424, 45 N. E. 937, 35 L. R. A. 762; *Hoylman v. Kanawha & M. R. Co.*, 65 W. Va. 264, 64 S. E. 536, 22 L. R. A. (N. S.) 741, 17 Ann. Cas. 1149; *Atchison, T. & S. F. Ry. Co. v. Holloway*, 71 Kan. 1, 80 Pac. 31, 114 Am. St. Rep. 462; *Carr v. Eel River & E. R. Co.*, 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354; *Browne v. Raleigh & G. R. R. Co.*, 108 N. C. 34, 12 S. E. 958; *Gannon v. Chicago, R. I. & P. Ry. Co.*, 141 Iowa, 37, 117 N. W. 966, 23 L. R. A. (N. S.) 1061. However, in the instant case it will not be necessary to determine whether it would have been negligence per se for the plaintiff to have attempted to board a moving train when in front of the depot and at a place provided for passengers.

[5, 6] Although the plaintiff became an intending passenger when he entered upon the depot grounds for the purpose of taking the train to Ogle, yet it does not follow that he was necessarily entitled to the rights of a passenger at all times afterwards. It is not the rule that once a passenger always a passenger. *Du Bose v. Atlantic Coast Line R. R. Co.*, 81 S. C. 271, 62 S. E. 255; 10 C. J. 612.

The plaintiff went upon the county road, and while there his status as a passenger was at least suspended. When he stood upon the sidewalk he was not in a place provided by the carrier for the use of intending passengers, and while he stood there he was not in a place where he could claim the rights of an intending passenger, and consequently the carrier was not under any obligation to stop or to slow the train at the crossing, even though it be conceded that the carrier violated its contract when it refused to wait "a minute" at the depot. If the rights of an intending passenger, which were acquired by the plaintiff when he entered upon the depot premises, did not follow him when he left those premises, and did not remain with him while standing upon the sidewalk, then he cannot successfully claim the rights of an intending passenger, unless waving his arm to the motorman and the nod of the latter reclothed him with those rights.

With the single exception of the motorman, no member of the train crew either saw the defendant while he was in the county road or on the sidewalk, or even knew that he was there, and hence the status of passenger was not again resumed unless it was created by the act of the plaintiff and the motorman. Although it was using electric power, the defendant was operating a train with scheduled stops, and was governed by the rules applicable to steam trains. 10 C. J. 945; 2 *Shearman & Redfield on Neg.* (6th Ed.) 1441.

[7-9] The county road was not a regular stopping place nor even a flag station. It is true that the carrier had stopped the train at the road as many as six times to permit passengers to board or alight from the train, but those acts of accommodation did not make the highway a stopping place when a depot was maintained 135 feet from the crossing. A carrier is not bound to receive passengers otherwise than at places provided for that purpose. *Haase v. O. R. & N. Co.*, 19 Or. 354, 361, 24 Pac. 238. The plaintiff could not, by the mere giving of a signal, convert the county road into a passenger station. The act of signaling to the motorman did not confer the rights of a passenger upon the plaintiff. The plaintiff admits that the train did not slacken its speed, and that from the time he first saw it, when he turned around in the road, it was traveling between 8 and 5 miles an hour, and he also admits that he did not expect the train to stop.

[10] The plaintiff contends that he became entitled to the rights of a passenger when the motorman acknowledged his signal. But there is no evidence that the motorman acknowledged his signal or in any way indicated an intention to accept the plaintiff as a passenger. The most the motorman did was to indicate that he knew the plaintiff, just as he had done on half a dozen previous occasions when the train passed the plaintiff; for, in the language of the plaintiff himself, the motorman "nodded at me as though he

knew me." The plaintiff was not invited to board the train at the crossing. The carrier did not, expressly or impliedly, contract to receive him as a passenger at the crossing. There is no evidence to show that any member of the train crew saw the plaintiff attempt to board the train, or knew that he intended to board the train, or by word or act indicated an intention to accept him as a passenger at the county road; and therefore the defendant is not liable for the injury suffered by the plaintiff. *Baltimore Traction Co. v. State*, 78 Md. 409, 28 Atl. 397; *Garvey v. Rhode Island Co.*, 26 R. I. 80, 58 Atl. 456; *Georgia & F. R. Co. v. Tapley*, 144 Ga. 453, 87 S. E. 473, L. R. A. 1916C, 1020; *Mitchell v. Augusta & A. R. Co.*, 87 S. C. 375, 69 S. E. 664, 31 L. R. A. (N. S.) 442; 10 C. J. 617.

The judgment of the circuit court is correct and it is affirmed.

MCBRIDE, C. J., and BENSON and BURNETT, JJ., concur.

(88 Or. 416)

In re DUNN'S WILL.

(Supreme Court of Oregon. April 16, 1918.)

WILLS §355—CONTEST—INCOMPETENCY AND UNDUE INFLUENCE.

In a proceeding to vacate an order admitting a will to probate on the ground that at the time of execution testatrix was mentally incompetent and unduly influenced, contestants have the burden to establish by a preponderance of the evidence that testatrix was mentally incompetent or that undue influence was exercised to bring about execution of the will.

Department 1. Appeal from Circuit Court, Yamhill County; H. H. Belt, Judge.

Proceeding to vacate an order admitting to probate the last will and testament of Susanna Dunn, deceased. The probate court decreed that the petition be dismissed. Appeal was taken to the circuit court, where such decree was affirmed, and contestants appeal. Affirmed.

This proceeding was begun in the probate court for Yamhill county to vacate and set aside an order admitting to probate the last will and testament of Susanna Dunn, deceased, for the reason that at the time of the execution of the instrument the testator was mentally incompetent to make a will, and was unduly and wrongfully influenced therein by Florence Cole, a daughter, since deceased, and Albert Dunn, one of the proponents of the will. The heirs at law of the deceased, who are her sons and daughters and grandchildren, are all named in the instrument, to five of whom there is a bequest of \$1 each; a bequest of \$500 to one son, and these are followed by a residuary clause whereby the residue of her estate is left to Hattie Dunn, a granddaughter, Bertram Cole, a grandson, and Albert Dunn, a son, in equal shares. S. S. Duncan is named as executor. The estate was appraised at \$6,857.81. The

executor and the residuary legatees joined in an answer to the petition of the contestants wherein they deny the material allegations of the petition and plead various matters by way of affirmative defense.

After a trial of the issues, the probate court found that the testatrix was at the time of making the will of sound and disposing mind and memory and not under the undue influence of any person, and decreed that the petition be dismissed. An appeal was then taken to the circuit court, where, upon a de novo trial, such decree was affirmed, and contestants have perfected an appeal to this court.

Alfred P. Dobson, of Portland, for appellants. James E. Burdette and W. T. Vinton, both of McMinnville (F. W. Fenton, of McMinnville, on the brief), for respondents.

BENSON, J. (after stating the facts as above). We have carefully read the entire record in this case, which is very voluminous, and, without going into a detailed analysis of the evidence which would be altogether unprofitable, we have arrived at the same conclusion as that reached by the trial court. The contestants have not established by a preponderance of the evidence that the testatrix was mentally incompetent or that any undue influence was exerted to bring about the execution of the will in controversy.

It follows that the decree of the trial court must be affirmed, and it is so ordered.

MCBRIDE, C. J., and MOORE and HARRIS, JJ., concur.

(88 Or. 334)

STATE ex rel. LONG v. BEVERIDGE, County Clerk.

(Supreme Court of Oregon. April 9, 1918.)

1. OFFICERS §55(2)—TOLLING FROM OFFICE—POWER OF LEGISLATURE.

While the legislative assembly could not forcibly oust an incumbent from the office of justice of the peace, it could toll him out of such office by giving him a better office, which he accepts, as was done in the city of Portland by Act Feb. 28, 1913 (Laws 1913, p. 732), creating district courts therein and appointing justices of the peace to be judges thereof.

2. OFFICERS §55(2)—RESIGNATION—ACCEPTANCE OF OTHER OFFICE.

Acceptance of the office of judge by a justice of the peace works a resignation of his office.

3. OFFICERS §55(2)—VACATION OF OFFICE—ACCEPTANCE OF OTHER OFFICE.

Since Const. art. 2, § 10, declares no person shall hold more than one lucrative office at the same time, a justice of the peace vacated his office by accepting a judgeship under Act Feb. 28, 1913 (Laws 1913, p. 732), creating district courts in certain cities.

4. JUDGES §4—APPOINTMENT—LEGISLATIVE POWER.

It was competent for the legislative assembly to appoint a justice of the peace in a city to a newly created office of judge of a district court, as was done by Act Feb. 28, 1913 (Laws 1913, p. 732), creating district courts in certain cities.

5. JUDGES ~~8~~—TERM OF OFFICE—VACANCY—ELECTION.

By Act Feb. 28, 1913 (Laws 1913, p. 732), creating district courts in certain cities, appointing justices of the peace to the new offices, and repealing all acts and parts of acts providing for justice's courts therein, and all acts and parts of acts in conflict therewith, a justice, whose term expired in 1918, was appointed a judge of the district court, and at the next ensuing election in 1914 he was chosen for the regular constitutional term of six years. *Held*, that there was no vacancy in the office of district judge to be filled at the election in 1918, authorizing placing name of a candidate on the primary ballot.

Department 1. Mandamus by the State, on the relation of P. M. Long, against Jos. W. Beveridge, as County Clerk of Multnomah County. Writ dismissed.

The defendant Beveridge is county clerk of Multnomah county. The relator desired to become a candidate for the office of district judge in that county and presented to the county clerk his declaration of candidacy, which the officer refused to file. Thereupon the relator commenced in this court an original proceeding in mandamus to compel the clerk to receive his declaration and put his name on the primary ballot as a candidate for the judicial office in question. The defendant demurs to the writ.

Oliver M. Hickey, of Portland (Paul M. Long, of Portland, on the brief), for plaintiff. F. E. Swope and C. C. Hindman, both of Portland (W. H. Evans, Dist. Atty., of Portland, on the brief), for defendant.

BURNETT, J. Prior to the act of February 28, 1913 (Laws 1913, p. 732), there were in the city of Portland two justices of the peace, elected under the terms of section 3165 et seq., L. O. L., providing for justices of the peace in cities of the state having 100,000 or more inhabitants. At the November election in 1912, J. W. Bell was elected as one of such justices of the peace. His term of office, by virtue of article 7 of the Constitution as amended in 1910, automatically became the period of six years from and after the first Monday of January next following his election. By virtue of the act of February 28, 1913, entitled "An act to create district courts in cities of 100,000 population or more, defining their jurisdiction, providing districts over which their jurisdiction shall extend, providing a system of practice and procedure therefor, providing for appointment and election of judges therefor, and their salary, providing for a clerk and deputies therefor, and their salaries, and providing for the abolishment of justice's courts in such cities, and repealing sections 3164, 3165, 3166, 3167, 3168, 3169, 3170, 3172, 3173, 3174, 3175, 3176, 3177 and 3178 of Lord's Oregon Laws, and amending section 3164 of Lord's Oregon Laws, and repealing all acts and parts of acts in conflict herewith," the district court,

composed of three judges, was created in cities of 100,000 population or more. The act appointed the two justices of the peace in such cities to be judges of the new court, and provided for the appointment of a third judge by the judges of the local circuit court. J. W. Bell accepted the new appointment and officiated therein until the November election of 1914, when he became a candidate and was elected to succeed himself as judge of the district court.

[1-3] The relator claims that the legislative department could not abolish the office of justice of the peace to the detriment of the then incumbent, and that such legislation would be ineffective until the end of the term of the then holder of the office. This contention might be granted, if applicable; but, while the legislative assembly could not forcibly oust Judge Bell from the office of justice of the peace, yet it could, and, as the circumstances disclose, did, toll him out of that office by giving him a better one, which he accepted. This worked a resignation of the former office. 29 Cyc. 1382. Besides this, it is said in our Constitution that no person shall hold more than one lucrative office at the same time, except as in the Constitution expressly permitted. Const. art. 2, § 10. Hence the situation arose that Judge Bell, having accepted the new judgeship, thereby vacated the former judicial position.

[4, 6] It was competent for the legislative assembly to appoint him to the new office. *Biggs v. McBride*, 17 Or. 640, 21 Pac. 878, 5 L. R. A. 115. The statute under which he was appointed declared in section 35 thereof:

"That all acts and parts of acts providing for a justice's court in cities of 100,000 population or more, and all acts and parts of acts in conflict herewith are hereby repealed."

No appointment seems to have been made to fill the vacancy, if any, thus created in the office of the justice of the peace, even if we should consider that the office itself remained until the end of the then current term. Formerly the term thereof elapsed six years from the date of the election of 1912, which, except for the change in the law, would require the choice of a successor at the election of 1918; but when that time arrives there will be no such office as justice of the peace in such cities, the position having been abolished. That disposes of the office itself. The incumbent disposed of himself by the resignation resulting from his acceptance of the new office. As to the latter station, the appointment of the legislative assembly did not and could not extend his tenure beyond the next ensuing election, which was in November, 1914. He was then chosen as district judge by the people for the regular constitutional term of six years, which means that his successor will be elected at the general election of 1920, and not sooner.

There being no vacancy to be filled in the personnel of the court at the election to be held in November of the present year, 1918, the defendant was right in refusing to receive the plaintiff's declaration of candidacy.

The demurrer is sustained, and the writ dismissed.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

(88 Or. 342)

WARREN v. DINWOODIE et al.

(Supreme Court of Oregon. April 9, 1918.)

1. APPEAL AND ERROR §1008(2)—FINDINGS OF COURT—SETTING ASIDE.

Under direct provisions of L. O. L. § 159, where a case is tried by the court without a jury, the findings of fact are deemed a verdict, and may be set aside only for the same reasons.

2. APPEAL AND ERROR §1010(1)—FINDINGS—SETTING ASIDE.

Upon an appeal based upon findings of fact made in a cause tried by the court without a jury, the findings cannot be set aside if there is any competent evidence to support them.

3. APPEAL AND ERROR §995 — REVIEW — WEIGHT OF EVIDENCE.

The court on appeal will not determine the weight of the evidence.

4. APPEAL AND ERROR §931(6)—DECISION BY COURT—PRESUMPTION.

Where a cause is tried by the court without a jury, it is presumed that the case has been decided upon the material evidence.

5. PRINCIPAL AND AGENT §23(3)—AUTHORITY OF PARTIES—EVIDENCE.

Statement to plaintiff by one of defendants in the presence of the others that if they bought the place, which in fact they did, whatever P. did was all right to the rest of them, was direct and positive authority for P. to act for the other defendants.

6. APPEAL AND ERROR §1010(1) — DECREE SUPPORTED BY EVIDENCE—REVERSAL.

There being evidence in the case supporting findings of fact of trial court which are of the same force as a verdict, the determination cannot be disturbed in view of Const. art. 7, § 3, providing that no fact tried by a jury shall be re-examined unless the court can affirmatively say there is no evidence to support the verdict.

Department 2. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Action by Theodore Warren against John Dinwoodie and others. Judgment for plaintiff, and defendant named and N. A. Hoffard and David Clark appeal. Affirmed.

The defendants John Dinwoodie, N. A. Hoffard, and David Clark appeal from a judgment against them and defendant C. A. Parvin for the sum of \$677.50 for labor performed and personal property sold and delivered to defendants by plaintiff. C. A. Parvin did not appeal. The cause was tried by the court without the intervention of a jury. Findings of fact and conclusions of law were made and the judgment was based thereon.

It appears that in March, 1914, one Harris was in possession of a ranch in Gilliam county, Or., known as the "French Charley Place"

under a lease for the year 1914 and extending until March 1, 1915. The plaintiff, his son-in-law, was living on the place. The defendants Parvin, Hoffard, and Dinwoodie, with a view of buying the ranch, inspected the same in March, 1914. The plaintiff asked about working for them in case they should purchase the premises, and one of them, Mr. Hoffard, said in the presence of the other appellants that if they bought the place they would perhaps hire help to run it; that Mr. Parvin would be the man in charge; and that "whatever he done was all right with the rest of them." They also looked at some personal property with a view of buying it. The place was purchased by the appellants and Mrs. Grace Parvin, and the title was taken in the name of Mr. Hoffard for convenience. In June, Mr. Parvin went to the ranch and wanted a lot of harrowing and disking on the summer fallow, which work plaintiff did. In August he hired the plaintiff and his son with a team to work on the place, prepare the land, and put in grain for the crop of 1915.

B. G. Skulason, of Portland (Clark, Skulason & Clark, of Portland, on the brief), for appellants. W. L. McFarling and D. P. Price, both of Portland, for respondent Warren. Pearce & Maloney, of Portland, for respondent Parvin.

BEAN, J. (after stating the facts as above). It is claimed upon the part of the appealing defendants that after the purchase they made a contract with C. A. Parvin for the sale of their interest in the ranch to him, and that he alone was responsible to plaintiff. This deal, however, was never fully consummated. They also claim that there was no testimony showing that Parvin was authorized to act for the other defendants.

[1, 2] Where a cause is tried by the court without the intervention of a jury, the findings of fact made by the court are deemed a verdict, and may be set aside only for the same reasons. L. O. L. § 159; U. S. Fidelity Co. v. Martin, 77 Or. 369, 392, 149 Pac. 1023; Doolittle v. Pac. Coast, etc., Wks., 79 Or. 498, 503, 154 Pac. 753. Upon an appeal based upon findings of fact made in such a case this court has repeatedly held that such findings made by the trial court cannot be set aside on appeal if there is any competent evidence to support them. Flegel v. Koss, 47 Or. 366, 83 Pac. 847; Astoria R. R. Co. v. Kern, 44 Or. 538, 76 Pac. 14; Norman v. Ellis, 74 Or. 168, 143 Pac. 1112; Clackamas So. Ry. Co. v. Vick, 72 Or. 580, 144 Pac. 84.

[3-5] Considerable attention is devoted in the briefs of the learned counsel for the appealing defendants to the introduction of what is claimed to be incompetent evidence, and it would seem that the argument verges upon the weight of the evidence which we cannot consider. It is a well-recognized rule

that where a cause is tried by the court without a jury it is presumed that the case has been decided upon the material evidence; therefore the question recurs as to whether there was any evidence to support the findings. The authority of Mr. Parvin to act for the other parties as indicated by the conversation they had with the plaintiff in March, 1915, was certainly direct and positive authority for him to act for them. There is no claim made that such power was ever canceled or withdrawn. It appears that in January, 1915, defendant Clark went to the ranch, and the evidence tends to show that he acknowledged the debt due to plaintiff. In his testimony in regard to this conversation with Mr. Clark, Theodore Warren stated:

"Well, he said he had come up there to pay me this account. They wanted me to give possession to this man Bottemiller, and he come up to settle with me for this account."

They did not settle for the lease with Harris or with plaintiff, and Mr. Clark requested them to go to Woodburn the next week "and they would settle this all there." Plaintiff and Mr. Harris went to Woodburn where they settled with Mr. Harris for the lease and "they said they would ask me to wait." Obviously the tentative arrangement made between the appealing defendants and Mr. Parvin would affect only their own interests as between themselves, being coadventurers in the undertaking. It would not be expected or required that the farm laborer employed to do work on the wheat ranch would look after the title to the land. The fact that a settlement of the lease was not made until January, 1915, which is claimed by counsel for the defendants who have appealed as a condition precedent to the hiring of plaintiff, would not materially change the matter. According to the ordinary course of such farming the labor appears largely to have been done for the purpose of raising a crop in 1915, and the lease on the place up to March 1, 1915, would not affect the same in any manner.

[8] There was evidence in the case supporting the findings of fact which are of the same force as the verdict of a jury. Under article 7, § 3, of the Constitution of this state, the determination cannot be disturbed.

Finding no error in the record, the judgment of the lower court is affirmed.

McBRIDE, C. J., and MOORE and McCAMANT, JJ., concur.

(88 Or. 338)

ROLFE v. DIXON et al.

(Supreme Court of Oregon. April 9, 1918.)

1. MORTGAGES — 460 — MORTGAGEE AS BONA FIDE PURCHASER — BURDEN OF PROOF.

In action to foreclose purchase-money mortgage, where junior mortgagee defended on ground his mortgage was first recorded and he had no notice of plaintiff's mortgage, he had the burden of proving his bona fides as purchaser.

2. DEEDS — 194(3) — DELIVERY — PRESUMPTION.

The presumption that a deed was delivered on the date it bears must fail when the evidence discloses that it was placed in escrow and acknowledged some days later.

3. ESCROWS — 8(1) — DELIVERY IN ESCROW.

The rule that an unrecorded deed is valid between the parties does not apply where the deed has not been delivered, but is held in escrow.

Department 2. Appeal from Circuit Court, Lane County; G. F. Skipworth, Judge.

Suit by Bertha A. Rolfe against John M. P. Dixon and others. Judgment for plaintiff, and defendant C. W. Young appeals. Affirmed.

Plaintiff commenced this suit to foreclose a real estate mortgage executed by the defendants Dixon. As alleged in the complaint, C. W. Young was joined as a defendant for the reason that he was a junior mortgagee. The defendants Dixon made default. Defendant Young filed an answer, the substance of which is that he loaned the Dixons \$500 in cash upon their representation that they were the owners in fee of the lands described in the mortgage, and that they were free from any other incumbrances; that plaintiff's mortgage, while dated and executed December 20, 1911, was not filed for record until January 19, 1912; that defendant's mortgage was executed on January 3, 1912, and filed for record January 4, 1912, and defendant had no knowledge or notice of plaintiff's mortgage or that the Dixons were indebted to the Rolfes or either of them. The reply being filed, there was a trial resulting in a decree for plaintiff, from which defendant Young appeals.

A. E. Wheeler, of Eugene, for appellant. F. E. Smith, of Eugene (Smith & Calkins, of Eugene, on the brief), for respondent.

BENSON, J. (after stating the facts as above). So far as there is any evidence at all upon the vital question in this case there is no conflict, and there is but one issue of law, which is to determine whether under the facts the Young mortgage is prior to that of Rolfe.

As gleaned from the transcript of evidence, the history of the various transactions is about as follows: Rolfe, being the owner of 85 acres of farming land, listed it with a real estate broker for sale at the price of \$4,000. The broker thereafter notified him that a customer had been secured who would buy the place, giving in exchange therefor a piece of property in Eugene valued at \$2,000, and promissory notes for the remaining \$2,000 secured by a mortgage on the 85-acre tract. This being satisfactory to Rolfe, he prepared a deed conveying the farm to the customer, Dixon, which was signed and acknowledged by himself and wife on December 20, 1911, and at the same time prepared a mortgage and promissory note to be executed by the

Dixons. These papers were left with the broker by Rolfe to be held in escrow, the deed to be delivered to Dixon when he should deliver a deed to the city property clear of incumbrance and with his wife execute the mortgage. The record is absolutely silent as to when Dixon delivered the mortgage and the deed to the city property, the only evidence which might throw any light upon the subject being the certificate of the notary public that both instruments were acknowledged before him on December 26, 1911. Neither the Dixons nor the broker were called as witnesses, and no explanation is given of their absence. On January 3, 1912, Dixon applied to defendant Young for a loan of \$500, offering the farm land as security. There is no evidence as to whether he claimed to be the owner of the land which he offered as security. Young directed his attorney to examine the record to learn whether the land was otherwise incumbered, and he did so, but did not inspect the deed records to find out who held the record title. Thereafter, on the same day, the loan was made, and the Dixons executed a mortgage, covering 80 acres of the farm tract, which was filed for record the next day, January 4th. The Rolfe mortgage was not filed for record until January 19, 1912, and the deed from Rolfe to Dixon was not filed for record until February 6, 1912.

[1] Defendant urges that the burden of proof is upon the plaintiff to impeach the bona fides of defendant as a purchaser, and cites the case of *Jackson v. Reid*, 30 Kan. 11, 1 Pac. 308, in support of this doctrine. We have been unable to find any support for this authority, and, in any event, in this state the converse is the settled rule. *Jennings v. Lentz*, 50 Or. 488, 93 Pac. 327, 29 L. R. A. (N. S.) 584, and cases there cited.

[2] In his effort to establish the fact that the deed had been delivered prior to the execution of his mortgage on January 3d, defendant invokes the presumption that a conveyance was delivered on the date that it bears, which in this instance was December 19, 1911; but the evidence discloses that the deed was placed in escrow on that day to be delivered upon the execution of the deed and mortgage to be given by the Dixons, and these instruments were not acknowledged until December 26, 1911, and so the presumption relied upon must fall, and defendant has not established the important fact that his grantor had any interest in the land at the date of the execution of his mortgage.

[3] It is urged that an unrecorded deed is valid between the parties and overcomes the notice imputed by the fact that on that date the record title was in Rolfe, and the case of *Davis v. Lutkiewicz*, 72 Iowa, 254, 33 N. W. 670, is cited in support of this contention. This case is of no assistance to

defendant for the reason that in the opinion therein the court says: "This deed the mortgagor had and held when Davis & Sons took their mortgage." In the instant case there is not a shadow of evidence that Dixon had or held the deed from Rolfe on January 3d, and, since the burden is upon the defendant, the conclusion must be against him.

The decree of the trial court is affirmed.

McBRIDE, C. J., and BEAN and McCAM-
ANT, JJ., concur.

(88 Or. 418)

DIETRICH v. GIEBISCH et al.

(Supreme Court of Oregon. April 16, 1918.)

1. APPEAL AND ERROR §1053(1)—CURE OF ERRORS—WITHDRAWAL OF EVIDENCE.

Error, if any, in action for injuries to workman, in admitting testimony of his friends that he was sober and industrious, was cured by the court's emphatic withdrawal of such testimony.

2. DAMAGES §169—INJURIES TO SERVANT—EVIDENCE—ADMISSIBILITY.

In action for injuries to servant, testimony that he was sober and industrious was admissible as bearing on the amount of damages to which he was entitled.

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Fritz Dietrich against Anton Giebisch and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Plaintiff brings this action to recover compensation for personal injuries received while in the employ of the defendants. The complaint describes the nature of the employment, the fact that plaintiff, in company with others, was engaged in the construction of a "muck-stand," and that owing to defendants' negligence he was compelled to jump from the top of the muck-stand to the ground, a distance of eight or ten feet, to escape being crushed by a timber suspended from the boom of a derrick. The nature of the injuries received is described, and, after appropriate and necessary allegations of the details, there is the usual prayer for judgment. The answer consists of general denials. A trial resulted in a verdict and judgment for plaintiff, from which defendants appeal.

Bert W. Henry, of Portland (T. S. Robinson and Griffith, Lelter & Allen, all of Portland, on the brief), for appellants. J. N. Hart, of Portland (James J. Crossley, of Portland, on the brief), for respondent.

BENSON, J. (after stating the facts as above). [1] The briefs and argument of appellants present but one question for our consideration. During the trial a witness for plaintiff was permitted, over the objection of defendants, to testify that he had known plaintiff between three and four

years; that plaintiff had worked under him for about a year, and during that time was sober and industrious. Subsequently another witness was called, and plaintiff's counsel sought to elicit from him similar testimony, but the court sustained an objection to the question, and at that time very emphatically withdrew the testimony of the former witness from the consideration of the jury. Defendants insist that the evidence offered was inadmissible, and that the withdrawal of its consideration from the jury was not potent enough to protect them from its influence upon the minds of the jury, and they are therefore entitled to a reversal and a new trial.

If the evidence were in fact inadmissible, nevertheless it was seasonably and emphatically withdrawn from the consideration of the jury, and, according to the uniform decisions of this court, the error was cured.

[2] But was there error in its admission? Counsel for appellant calls our attention to two authorities in support of his contention: 1 Wigmore on Evidence, § 64, which lays down the general rule (subject to exceptions) that in civil cases character evidence is inadmissible; and *McCarty v. Leary*, 118 Mass. 509, a case of action for assault and battery, wherein the defendant contended that the plaintiff, who testified as a witness, was drunk at the time of the alleged assault, and did not know what happened, and upon cross-examination plaintiff admitted that he had been convicted of drunkenness a few days before the trial, and it was held to be error to admit evidence of his reputation for sobriety. Regarding the citation of Wigmore on Evidence, *supra*, it may be said that it is not applicable to the problem before us. There is a decided difference between the words "character" and "habits" as used in the books, a distinction which is observed by Mr. Wigmore at section 66 of the volume above cited. As regards the case of *McCarty v. Leary*, the facts therein are so different from those of the case at bar as to render it inapplicable.

It is to be noted that a man's habits of industry and sobriety are important elements in determining the amount of the damages he is entitled to recover for a personal injury. An eminent authority expresses it thus:

"The amount of damages must, of course, depend upon the calling in which the plaintiff was engaged, the amount of money which he was able to earn, the steadiness, regularity, etc., of his employment, and evidence of these facts is pertinent and admissible. And testimony to the effect that plaintiff's time was not spent in a useful occupation, but squandered in pleasure-seeking and dissipation, is admissible in mitigation of damages." 6 Thompson on Negligence, § 7287.

In 8 R. C. L. p. 478, § 41, the following rule is announced:

"In estimating such damages the jury should take into consideration the profession or busi-

ness of the plaintiff; the effect of the injuries upon his ability comfortably to pursue such profession or business; the extent and seriousness of the injury; his previous earning capacity, or the fair value of services such as he was able to render; the probable duration of such capacity; his ability and disposition to labor; his skill and ability in his occupation or profession; his age; position in life; state of health; business and other habits; and his expenditures."

It is difficult to see how evidence of a man's habits and disposition to labor could be presented to a jury other than by the testimony of witnesses who have known him and can bear witness to his sobriety and industry. We therefore conclude that the judgment should be affirmed, and it is so ordered.

MCBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

(88 Or. 421)

DANIELS v. NORTHERN PAC. RY. CO.
(Supreme Court of Oregon. April 16, 1918.)

1. EVIDENCE §472(2)—OPINION EVIDENCE—AMOUNT OF DAMAGES.

In an action by the consignee against a carrier for damages to butter alleged to have become putrid through the carrier's negligence, it was error to permit a witness for the consignee to testify to the amount of damage to the butter from foul odors to which he stated it was susceptible, as the witness thereby invaded the province of the jury in declaring the amount of the damages.

2. CARRIERS §120 — PERISHABLE GOODS—MEASURE OF CARRIER'S DUTY.

A carrier of perishable goods is not liable as insurer, but the measure of its duty is to use reasonable care and diligence, considering the nature of the goods.

3. TRIAL §251(3) — INSTRUCTIONS—PERISHABLE GOODS—ACTION FOR DAMAGES.

In an action against the carrier for damage to perishable goods in a refrigerator car, where in issue was joined on the averment that it failed to re-ice the car and otherwise properly care for the goods in transit, and it was not directly alleged that the property was delivered to it in good order by the initial carrier, and instructions tendered by the carrier embraced its contention, as disclosed by the pleadings, that the goods were in bad order when received by it, it was entitled to have that theory presented to the jury, there being testimony on that point supporting such instructions, and it was error for this reason to refuse them.

4. TRIAL §252(1)—INSTRUCTIONS—REFUSAL.

There is no error in refusing an instruction when it is without a basis in the evidence authorizing the jury to consider it.

5. TRIAL §251(3)—INSTRUCTIONS—PERISHABLE GOODS—ACTION FOR DAMAGES.

In an action against a carrier for damage to perishable goods in a refrigerator car, where in issue was joined on the averment that it failed to re-ice the car and otherwise properly care for the goods in transit, and it was not alleged that the goods were delivered to it in good order by the initial carrier, and plaintiff did not point out anything defendant ought to have done, but did not, which would have kept the articles wholesome and merchantable, a charge not allowing defendant to exonerate itself by showing that it did in fact thoroughly re-ice the car and properly care for the property while in its

custody, but imposing on it the additional burden, not included in the pleadings, of proving the damaged condition was due to some cause over which it had no control, was reversible error, as going beyond and expanding the issue tendered.

6. CARRIERS §117(1)—PERISHABLE GOODS—DUTY OF CONNECTING CARRIER.

If goods in a refrigerator car are sound when a carrier takes them from an initial carrier, its whole duty is fulfilled if and when it thoroughly re-ices the car as reasonably necessary, and with fair diligence takes proper care of it over its line.

7. PLEADING §11—CARRIAGE OF GOODS—ACTION FOR DAMAGES.

It is not enough to plead evidence that might tend to prove the condition of property when a defendant carrier, sued for damages, took charge thereof.

8. TRIAL §251(1)—INSTRUCTIONS—APPLICATION TO ISSUES.

Instructions must present the contention of each party to the jury, and they must correspond to the issues presented.

Department 1. Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by W. N. Daniels, doing business as the La Grande Creamery Company, against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The defendant is a railway common carrier of goods. The plaintiff alleges in substance that he purchased in Concordia, Kan., 330 boxes of butter and 37 boxes of poultry, and caused them to be shipped in good order by another railroad company connecting with the line of the defendant consigned to himself at Portland, Or. He says:

"That when the said poultry was delivered to the said railroad company by the said John Stewart, consignor, for shipment as aforesaid, the same was in first-class condition, the poultry having been solidly frozen in the boxes and thoroughly iced by the consignor after being packed in said car, but by reason of the negligence and carelessness of the defendant, its agents and servants in charge and control of said car containing said goods in failing to thoroughly re-ice the same and otherwise properly care for the said poultry in boxes in transit," the same became putrid, so that it was utterly valueless when it arrived at its destination in Portland.

Substantially the same averment is made concerning the butter which is said to have become tainted by the odor of the decaying fowls. The defendant denies all the allegations in the complaint. The answer says in effect that the defendant received the car at Billings, Mont., but that at the time the poultry was in a putrid condition because it had not been properly frozen and prepared before loading, and goes on to say that the company transported the shipment to Portland with all possible speed and all the ordinary care and caution required, delivering the articles at their destination in the same condition in which they were when received by the defendant at Billings; that at once it notified the plaintiff of the arrival of the car, but that he did not begin to unload it

until two days afterward. The answer further charges negligence upon the plaintiff in failing to remove the goods from the car immediately on its arrival. The new matter of the defendant's pleading was traversed by the reply. The judgment went for the plaintiff, and the defendant appeals.

Omar C. Spencer, of Portland (Carey & Kerr, of Portland, on the brief), for appellant. Ralph A. Coan, of Portland (Pearce & Meloney, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1] One error complained of by the defendant is that a witness who testified that he had been in the business of dealing in butter, eggs, and poultry since 1902, and that butter was very susceptible to foul odors, which would damage it, was allowed to answer this question, "What would be the amount of such damage?" by saying, "Well, the amount of such damage would run as high as seven to eight cents a pound." That this was error was decided in *Burton v. Severance*, 22 Or. 91, 29 Pac. 200; *Pac. Live Stock Co. v. Murray*, 45 Or. 103, 76 Pac. 1079; *Montgomery v. Somers*, 50 Or. 259, 90 Pac. 674; *Pac. Ry. & Nav. Co. v. Elmore Packing Co.*, 60 Or. 534, 120 Pac. 389, Ann. Cas. 1914A, 371, and other cases. The reason of this rule is that a witness is not allowed to invade the ultimate province or function of the jury to declare the amount which will compensate the plaintiff for the injury suffered. If good butter had a market price known to dealers generally and to the witness in particular he might have stated that price, and if he knew the butter after it became tainted and that it had a market price in that condition he might have told what it was. He might, also, have given his opinion that the quality of the butter would be depreciated a certain percentage, but he would have no right to assess the amount of damage per pound. That must be left to the jury.

The bill of exceptions discloses that there was some testimony to the effect that the shipment was delivered to the initial carrier in good condition, and that on arrival at Portland, Or., it was delivered by the defendant in bad order. From the same source we learn that the defendant offered the depositions of sundry witnesses who handled the refrigerator car in question from its arrival in Billings, Mont., to Portland; that the car was sealed with the seals of another road; that ice and salt were supplied in the ice boxes of the car whenever needed while it was in the custody of the defendant, and that it was properly handled and transported over the line of the defendant in the usual time and without unnecessary delay. It is said in the record that the plaintiff offered no evidence to rebut the testimony of the de-

defendant, and tendered nothing to prove how the car was handled from the time it left Concordia until it reached Portland. The defendant seasonably requested the three following instructions:

"If you find in this case that the defendant received the carload of poultry and butter and used reasonable diligence in re-icing the car and handling it through to its destination in Portland, and offered delivery of it in the same condition as when it was received at Billings, Mont., then the defendant has performed its full duty to the plaintiff, and there can be no recovery against it in this case."

"It is alleged in the second amended complaint that the negligence of the defendant consisted in its failure to thoroughly ice the butter and poultry and otherwise properly care for the same while in transit. I charge you that the defendant railway company did not insure against natural decay of the produce shipped except such decay as would happen because of its failure to use reasonable diligence in re-icing and salting the car. If, when this produce reached Portland, it was in a worse condition than when it left Concordia, Kan., because of its age, nature, or quality, or because it was unable to stand the summer weather under ordinary and reasonable car refrigeration, and you find that it had ordinary and reasonable car refrigeration, then there can be no recovery in the case against the defendant."

"If you find in this case that the damaged condition of the butter or poultry was caused by the failure of the shipper at Concordia, Kan., to properly prepare the same, or to properly load it in the car, or to properly ice or cool the car at the beginning of the journey, or if you find that the damaged condition of the poultry or butter was caused by the failure of the Chicago, Burlington & Quincy Railroad Company to ice or care for the car, and that the defendant Northern Pacific Railway Company used reasonable diligence in icing and handling the car from the time it received the car until it offered delivery, then there can be no recovery against the defendant Northern Pacific Railway Company in this case."

These were refused over the exception of the defendant, and the court charged the jury on that branch of the case as follows:

"Your first inquiry, gentlemen, will be what was the condition of the poultry and butter at the time it was shipped at Concordia, Kan.; and if you find from the evidence in this case that this butter and poultry was in good condition and properly packed for shipment at the initial point of shipment, which was Concordia, Kan., and that when it arrived in the city of Portland it was in a tainted and putrid condition, then the presumption of law arises that it became tainted en route, and through the failure of the transporting company. The burden would rest upon the defendant, therefore, to show that the property, if received in good condition, became tainted from some cause for which it was not responsible. And it would have to satisfy you in that case by a preponderance of the evidence that the tainted and putrid quality of those goods when they arrived in the city of Portland, if such you find it to be, was caused by something which it could not control, either by the act of the shipper or by some inherent quality of the goods themselves, which produced this putrefaction and taint. The burden of proof would likewise be upon the company to show that at the time the goods were transferred to it in the state of Montana, or at whatever point the transfer was made, that the goods were then in a putrid or tainted condition, because, as I have said, if it be found by you that the goods were in good condition when shipped, the presumption would run that

they continued in that good condition at the time of transfer to this company. The company, however, might show that at the time they received the goods they were in a tainted or putrid condition, but the burden would rest upon the company to establish that condition by a preponderance of the evidence."

[2, 3] The essence of the accusation against the defendant is that it failed thoroughly to re-ice the car and otherwise properly to care for the goods in transit. The issue was joined on this averment only, and nothing further. It is not directly alleged that the property was delivered to the defendant itself in good order. The nearest approach to that is that the chattels were in that condition when delivered to the initial carrier. It is admitted that the property was perishable in its nature, and hence the company was not liable as an insurer. The measure of its duty was to use reasonable care and diligence, considering the nature of the chattels involved. This feature was discussed in *Michellod v. Ore-Wash. R. & N. Co.*, 86 Or. 329, 168 Pac. 620. These first two instructions embraced the contention of the defendant as disclosed by the pleadings, and it was entitled to have that theory presented to the jury; there being testimony on that point supporting such instructions. For this reason it was error to refuse them. *Bingham v. Lipman*, 40 Or. 363, 67 Pac. 98, *Scholl v. Belcher*, 63 Or. 310, 127 Pac. 968, and *West v. McDonald*, 64 Or. 203, 127 Pac. 784, 128 Pac. 818, are illustrative of this rule.

[4] There is no evidence disclosed by the bill of exceptions indicating that there was any failure at Concordia, Kan., properly to prepare the shipment, either in loading or cooling it at the beginning of the journey. Neither was there anything tending to show that the initial carrier was remiss in its duty; hence the third instruction is without a basis authorizing the jury to consider it. It was properly refused.

[5-7] The charge given by the court does not allow the defendant to exonerate itself even by showing affirmatively that it did in fact thoroughly re-ice the car and properly care for the property while in its custody, but imposes upon it the additional burden, not included in the pleadings, of proving that the damaged condition was due to some cause over which it had no control. If the goods were damaged by decay when they came into the possession of the defendant the re-icing would not have restored them. On the other hand, if they were sound when the defendant took them, its whole duty in the case, as the pleadings state the issue, was fulfilled if and when it thoroughly re-iced the car as reasonably necessary and with fair diligence took proper care of it over its line. Further than this the plaintiff does not point out anything which the defendant ought to have done, but did not, which would have kept the articles wholesome and merchantable. As they were admittedly perishable in their nature, the defendant was not an insurer.

er that the goods would arrive in good condition. If it had been alleged, but it was not, that the poultry and butter were sound when the defendant took charge of them, the plaintiff to prove the averment, if denied, could have used in evidence the presumption spoken of in the excerpt quoted by plaintiff from 4 R. C. L. § 383, to the effect that if it were shown that the articles were sound when delivered to the initial transporting road the supposition is that they remained so even to the ultimate carrier who must defend himself by overcoming the effect of the presumption if he delivers them in bad order. It would seem to be quite as important to aver that the shipment was in good order when the defendant received it as to allege it was in bad order when delivered at Portland, for the company is not responsible for injury to the goods not occurring while they are in its custody. 10 C. J. § 897. It is not enough to plead evidence that might tend to prove the condition of the property when the defendant took charge of it. The complaint contains no statement that the goods were delivered to the defendant in good order; hence the direction given by the court goes beyond and expands the issue tendered.

[8] The standard rules relating to instructions to a jury require that the contention of each party must be presented to the jury, and that they must correspond to the issues presented.

For the reasons indicated, the judgment is reversed, and the cause remanded for further proceedings.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

(88 Or. 346)

PORTLAND & O. C. RY. CO. v. McGRATH
et al.

(Supreme Court of Oregon. April 9, 1918.)

1. EMINENT DOMAIN ⇨246(2) — REQUISITES AND ENTRY OF JUDGMENT.

Under L. O. L. § 6866, providing upon the payment into court of the damages assessed by the jury in proceedings for condemnation of land the court shall give judgment appropriating the lands to plaintiff, the plaintiff, after verdict, may elect whether it will pay for and take the property.

2. EMINENT DOMAIN ⇨246(2) — ENFORCEMENT OF AWARD AND JUDGMENT.

Where, after verdict for plaintiff in proceedings for condemnation of land, plaintiff took possession of premises, and made no offer to surrender possession, it elected to accept the benefits of the verdict, and a judgment entered on the verdict against plaintiff for the award was proper.

3. EMINENT DOMAIN ⇨241—DUE PROCESS OF LAW—CONSTITUTIONAL PROVISIONS.

Under Const. art. 1, § 10, providing that every man shall have remedy by due process of law for injury done him and his property, where, after verdict for plaintiff in proceeding to condemn land, plaintiff has taken possession of such land, the defendant has the right to

have judgment entered for amount of verdict and execution allowed.

4. EMINENT DOMAIN ⇨263—CONDEMNATION PROCEEDINGS—REVIEW.

Under the provision of Const. art. 7, § 3, that if the judgment appealed from is such as should have been rendered in the case it should be affirmed, where the record upon appeal by plaintiff in a proceeding for the condemnation of land does not disclose any benefit to plaintiff by requiring defendants to submit to another trial, the case will be affirmed.

Department 2. Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by the Portland & Oregon City Railway Company, a corporation, against E. A. McGrath and wife, for condemnation of land. From judgment on the verdict for amount of award, plaintiff appeals. Affirmed.

This is an action brought in 1916 for the condemnation of a right of way over the land of defendants. Issues were joined and a trial had on October 25th of that year. A verdict was returned finding that it was necessary for the plaintiff to acquire the land for railroad purposes, and assessing defendants' damages at \$958.33. Formal order on the verdict was entered November 14, 1916. After the action was brought plaintiff, by virtue of some understanding that there would be no trouble, entered upon and appropriated the right of way and constructed and commenced the operation of its railroad across the land. In December, 1916, defendants moved the court for judgment against the plaintiff upon the verdict for the amount thereof. This motion was supported by affidavits showing the facts of possession and appropriation above stated. The matters were not controverted. In opposition to the motion an affidavit was filed showing that the plaintiff was dissatisfied with the amount fixed as damages, and that it was attempting to secure a different route for its road; that if this could be done for a satisfactory price it was plaintiff's intention to abandon the course of its line across defendants' land. There was no surrender of the premises or offer to surrender, nor any declaration of intention to do so. Upon the hearing on December 23d, the court entered a judgment against the plaintiff for the amount of the verdict, of which plaintiff complains.

J. N. Hart and J. Harold Hart, both of Portland, for appellant. M. H. Clark, of Portland (Clark, Skulason & Clark, of Portland, on the brief), for respondents.

BEAN, J. [1, 2] The statute provides that upon payment into court of the damages assessed by the jury, the court shall give judgment appropriating the lands, property, rights, easements, crossing, or connection in question, as the case may be, to the corporation. Lord's Oregon Laws, § 6866. In a proceeding of this kind, after a verdict assessing the damages has been obtained, it is for the

plaintiff to elect whether it will pay for and take the property for a right of way. *Oregon Railway Co. v. Hill*, 9 Or. 377. The proper judgment was entered on the verdict after the trial, as prescribed in the opinion in *O. R. & N. Co. v. Taffe*, 67 Or. 102, 134 Pac. 1024, 135 Pac. 332, 515. If the plaintiff elects to take the land, can it complain by reason of the order being reversed and instead of "paying and taking" it "takes and then pays" for the property? Concededly, the taking possession of the desired premises, the construction of a line of railroad thereon, the retention of the same, and the operation of the road without any offer to surrender the possession of the land so taken must be considered as the exercise of an option to accept the benefits of the award made by the jury.

[3] The Constitution of this state (article 1, § 10) provides that every man shall have remedy by due course of law for injury done him in his property. The amount of the injury to defendants' land has been fixed by a verdict. No evidence is contained in the record, and we cannot assume that the amount is excessive. There is no dispute that the right of way has been utilized. There then remained nothing to be done in the ordinary course of procedure, except to enter judgment for the amount and allow execution. *Petoria, etc., Ry. Co. v. Mitchell*, 74 Ill. 394, 398; *Bellingham Bay, etc., Co. v. Strand*, 14 Wash. 144, 44 Pac. 140; *Witt v. St. Paul & N. P. Ry. Co.*, 35 Minn. 404, 29 N. W. 161; *Wilcox v. St. Paul, etc., Ry. Co.*, 35 Minn. 439, 29 N. W. 148; *Wood v. Hospital*, 164 Pa. 159, 30 Atl. 237; *Roberts v. N. P. R. R. Co.*, 158 U. S. 1, 15 Sup. Ct. 758, 39 L. Ed. 873.

The judgment of the lower court recites, among other things:

"That at the conclusion of the argument upon said motion, upon being informed by the court that judgment would be entered against the plaintiff pursuant to said motion, unless the plaintiff tendered surrender of possession of said property to the defendants, counsel for plaintiff thereupon stated in open court that plaintiff was not willing or prepared to do so at this time, and that he was not prepared to state that plaintiff would at any time surrender possession."

The judgment of the court on condemnation of property for public use is conditional, depending on the payment of the damages found, and the party seeking condemnation acquires no vested right until such payment is made or the sum deposited, and the rights of the parties are reciprocal, so that the property owner has no vested right in the damages found by the jury until the same is paid or deposited. If the property, however, is taken or damaged by the owner's consent before compensation is made, the owner will then have a vested right in the compensation when ascertained. *City of Chicago v. Joseph Barblan*, 80 Ill. 482. It is said in 19 Cyc. p. 937 (b):

"The condemnation proceedings may be dismissed or abandoned at any time prior to final judgment, or final confirmation of the report of the commissioners or appraisers appointed to assess damages or compensation, or before the compensation has been paid or deposited in the manner provided by law, or the right of the property owner to compensation has otherwise become vested. The proceeding may be abandoned even after the damages are assessed, and a reasonable opportunity should be given, after the price of the land is fixed, for the petitioner to reject the award and abandon the proceeding."

[4] The record before us does not disclose that any benefit would be obtained by requiring defendants to submit to another trial for the purpose of obtaining the damages to their land, except the advantage that might be gained by plaintiff of having the defendants' compensation reassessed or a retrial of the identical question passed upon by the jury. Substance should not be sacrificed for form.

Under article 7, § 3, of our Constitution, if the judgment of the court appealed from is such as should have been rendered in the case, it should be affirmed. No error appearing in the record, the judgment of the lower court is affirmed.

McBRIDE, C. J., and MOORE and McCAMANT, JJ., concur.

(19 Ariz. 455)

SPARKS v. STATE. (No. 435.)

(Supreme Court of Arizona. April 18, 1918.)

1. HOMICIDE — 158(2) — EVIDENCE — MALICE — REMOTENESS OF PREVIOUS THREATS.

In a prosecution for murder threats made by defendant against deceased previous to crime are admissible to show malice; the remoteness in time of the threats not affecting the admissibility of such evidence, but its weight only.

2. HOMICIDE — 204 — EVIDENCE — "DYING DECLARATIONS."

Where deceased had received five bullet wounds through the body, and physicians told him that he was about to die, advised him to make his will, and gave him morphine to ease his pain, statements then made by him while his mind was clear and rational as to the cause of his death were admissible as dying declarations; he having died a few minutes thereafter.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dying Declaration.]

3. HOMICIDE — 207 — EVIDENCE — DYING DECLARATIONS.

Statements made by deceased immediately before death, although in response to questions, and even in reply to leading questions, may be admissible as dying declarations.

Appeal from Superior Court, Gila County; Frank O. Smith, Judge.

William Sparks was convicted of murder, and he appeals. Affirmed.

Benton Dick, of Phoenix, Thomas E. Flannigan, of Globe, and Clifford C. Fairles, of Miami, for appellant. Wiley E. Jones, Atty. Gen., W. P. Geary, George Harben, and L. B. Whitney, Asst. Attys. Gen., Norman J.

Johnson, Co. Atty., of Globe, Kirby D. Little, Asst. Co. Atty., of Miami, and F. C. Jacobs, of Globe, for the State.

FRANKLIN, C. J. Appellant was charged with the crime of murder, and convicted of murder in the second degree.

[1] It is urged that the trial court committed error in allowing the state to prove by several witnesses certain threats that appellant had made against the deceased some considerable time previous to the commission of the homicide. Where malice is an ingredient of the offense charged, it is always proper to introduce evidence of threats and previous troubles as tending to show malice. *Leonard v. State*, 17 Ariz. 293, 151 Pac. 947. Courts will not exclude threats because of their remoteness. The length of time which may elapse between the threat and the homicide may be considered by the jury in connection with all the facts and circumstances of the case to determine its weight as evidence, but the admissibility of such testimony is not to be measured by mere remoteness in point of time. *Wharton's Criminal Evidence* (10th Ed.) vol. 2, § 882; *Cyc.* vol. 21, p. 892; *State v. Quinn*, 56 Wash. 295, 105 Pac. 818.

[2] Mr. Thompson, the deceased, who was the victim of this homicide, was asked if he had been in a quarrel or fight with appellant Sparks that day, to which he replied, "No; not that day." Thompson was then asked this question, "Did he (Sparks) just come up and shoot you?" Thompson replied, "Yes." Dying declarations are always admissible to show who killed the deceased, and the *res gestæ* of the killing, and such statements make one of the exceptions to the hearsay rule. It is objected that the court erred in admitting these questions and answers as a dying declaration. The admission of this testimony, under the circumstances, is free from error. When a surgeon first examined the deceased upon the ground at the scene of the killing, he was in a dangerously wounded condition with five bullet holes

through his body. The deceased was told that he would probably not live until he reached the hospital. At the hospital he was attended by two surgeons, and was again informed of his grave condition and the slight chance for his recovery. The deceased had been given some morphine to ease his pain, and the surgeons began to administer ether preparatory to an operation; but they found the physical condition of the patient such that they at once desisted. The deceased was told to make his will, and did indicate what disposition he wished made of his property, and then he was asked the questions and made the answers that have been quoted. The surgeons testified that at the time he was perfectly conscious and rational, and five or ten minutes afterwards he died. The circumstances clearly indicate that the statements made by him were by one about to die, who was in fear of impending death, and who subsequently died; that they were freely and voluntarily made as to a relevant and material fact, and with sufficient consciousness to comprehend the situation and the questions asked and answered. This, we think, places the matter squarely within the rule pertaining to the admissibility of a dying declaration.

[3] The fact that the declarations were made in response to questions asked the declarant, in the absence of statute, does not affect the admissibility; nor the fact that they consisted of direct answers to leading questions. *Wharton, Crim. Ev.* (10th Ed.) vol. 1, par. 293. It affects only the value of the evidence which is exclusively for the jury, and not its admissibility. 21 *Cyc.* pp. 979-986; *State v. Foot You*, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537.

In addition to the assignments of error made, we have carefully examined the record and are convinced that substantial justice has been done.

There is no reversible error. The judgment is affirmed.

ROSS and CUNNINGHAM, JJ., concur.

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